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# Criminal Conspiracy: The State of Mind Crime - Intent, Proving Intent, Anti-Federal Intent

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# CRIMINAL CONSPIRACY: THE STATE OF MIND CRIME—INTENT, PROVING INTENT, AND ANTI-FEDERAL INTENT†

Paul Marcus\*

## I. INTRODUCTION

The crime of conspiracy, unlike other substantive or inchoate crimes, deals almost exclusively with the state of mind of the defendant. Although a person may simply contemplate committing a crime without violating the law, the contemplation becomes unlawful if the same criminal thought is incorporated in an agreement. The state of mind element of conspiracy, however, is not concerned entirely with this agreement. As Dean Harno properly remarked 35 years ago, "The conspiracy consists not merely in the agreement of two or more but in their intention."<sup>1</sup> That is, in their agreement the parties not only must understand that they are uniting to commit a crime, but they also must desire to complete that crime as the result of their combination.

Criminal conspiracy, therefore, involves two distinct states of mind. The first state of mind prompts the conspirators to reach an agreement; the second relates to the crime that is the object of the agreement. Because the crime of conspiracy is "so predominately mental in composition,"<sup>2</sup> many of the significant issues which arise in conspiracy cases revolve around this dual state of mind requirement. These issues include defining the states of mind, establishing the existence of the states of mind from certain sorts of conduct, and identifying the particular states of mind required for federal convictions. This article will discuss these issues in detail providing an analysis which draws heavily from prosecutions in which the problem arose. The approach here is theoretical and pragmatic, for conspiracy, with its contradictory and

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† The author currently is pursuing a broad study of the crime of conspiracy under a grant from the National Science Foundation and a supplemental grant from the University of Illinois Program in Law and Society. This study, to be published later this year, deals in detail with the basic concept of conspiratorial agreement and current prosecutorial practices.

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1. Harno, *Intent in Criminal Conspiracy*, 89 PENN. L. REV. 624, 630 (1941) [hereinafter cited as Harno].

2. *Id.* at 632.

confusing doctrines, continues to raise fundamental questions both in theory and in practice.

## II. INTENT TO AGREE

To constitute criminal conspiracy the parties must understand in a wholly serious fashion that they are jointly reaching an agreement. A mistaken understanding of the other "conspirator's" intent will eliminate the state of mind otherwise present. Usually, however, the state of mind for the agreement is less important than the mental state for the object crime, as the prosecution will have difficulty pursuing a conspiracy prosecution unless there is substantial evidence (though typically circumstantial)<sup>3</sup> indicating that the parties did combine with some criminal objective in mind.

Traditionally, courts analyzed the state of mind of *both* conspirators (the conspiracy requirement referred to two or more conspirators) to determine if more than one defendant intended to agree. If only one of the two conspirators meant to agree, and the other "conspirator" only feigned agreement or had actually contacted the police, the state of mind necessary for a conspiracy would not exist; at least two parties must intend to enter into the conspiratorial relationship.<sup>4</sup> More recently, however, the trend has been away from requiring proof of an agreement by more than one defendant.<sup>5</sup> The focus now is on the state of mind of the defendant on trial. This so-called "unilateral approach" allows for the conviction of the defendant even if his "co-conspirator" never intended at any time to enter into an agreement with the defendant. Typically, the unilateral approach statutes require that a court only focus on the intent of the accused to enter an agreement. The mental state of the defendant's co-conspirator is largely irrelevant.<sup>6</sup>

Specifically, the drafters of the Model Penal Code have argued that the unilateral approach makes sense because the law should be directed toward the culpable state of mind of the defendant rather than being distracted by a vague concept of the defendant's relationship with

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3. Unless there has been a wire tap or an informer, direct evidence of the agreement virtually is never offered.

4. *People v. Atley*, 392 Mich. 298, 310, 220 N.W.2d 465, 471 (1971) ("there can be no conspiracy without a combination of two or more persons").

5. Model Penal Code § 5.03 (Tent. Draft No. 10, 1960) [hereinafter cited as M.P.C.].

6. *E.g.* ILL. REV. STAT. ch. 38, § 8.2 (1975).

A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense . . . .

It shall not be a defense to conspiracy that the person or persons with whom the accused is alleged to have conspired:

- (1) Has not been prosecuted or convicted, or
- (2) Has been acquitted, or
- (3) Lacked the capacity to commit an offense.

others.<sup>7</sup> In one sense the American Law Institute's defense of the unilateral position is a telling one. In criminal prosecutions the emphasis should be on the culpability of the individual defendant rather than on the sort of relationship he had with others. The problem with the unilateral approach, however, is that it is not consistent with the purpose of a conspiracy law. The basic purpose of a conspiracy law is to deal with the danger of joint criminal activity. The crime of conspiracy allows the state to intercept dangerous criminal relationships at a stage earlier than under any other offense. These illicit relationships are the sole object and rationale for the crime. Therefore, the deemphasis of the relationship between the conspirators, even in the state of mind area, is difficult to justify.<sup>8</sup>

Nevertheless, prosecutors generally have little difficulty conclusively establishing a genuine agreement or a unilateral type arrangement; at least they can establish enough to send the case to the jury.<sup>9</sup> The true state of mind issue in conspiracy cases most often is not the agreement phase of the parties' conduct, but rather the object or objects of that agreement.

### III. STATE OF MIND CONCERNING THE OBJECT OF THE AGREEMENT

A defendant may be convicted under the traditional doctrine of criminal conspiracy if he and another have agreed to commit a crime, or under the unilateral approach if he has agreed with another person to commit a crime.<sup>10</sup> Although the courts inconsistently have applied the precise language or statutory standards as to the state of mind necessary for the object offense, the *mens rea* requirement may be simply stated. First, the defendants in the combination must intend to commit the ob-

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7. When the person with whom the defendant conspired secretly intends not to go through with the plan, it is generally held that neither party can be convicted because there was no "agreement" between two persons. Under the unilateral approach of the Code, the culpable party's guilt would not be affected by the fact that the other party's agreement was feigned. He has conspired, within the meaning of the definition, in the belief that the other party was with him; apart from the issue of entrapment often presented in such cases his culpability is not decreased by the other's secret intention. True, the project's chances of success have not been increased by the agreement; indeed, its doom may have been sealed by this turn of events. But the major basis of conspiratorial liability, the unequivocal evidence of a firm purpose to commit a crime, remains the same.

Wechsler, Jones, and Korn; *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy, Part Two*, 61 COLUM. L. REV. 957, 966 (1961).

8. For a recent and important defense of the unilateral approach, however, see, *State v. St. Christopher*, — Minn. —, 232 N.W.2d 798 (1975). But see, R. PERKINS, PERKINS CRIMINAL LAW 636 (1969), in which the author refers to the unilateral approach as "somewhat astounding."

9. The jury must find an agreement or an intent to agree. See W. LAFAVE & A. SCOTT, CRIMINAL LAW 464 n.128 [hereinafter cited as LA FAVE].

10. There are statutes in a number of states which allow for conspiracy convictions when there is an agreement to commit an act which may not be a crime, but which is

ject offense. Second, they must understand that committing the crime is a consequence of their agreement. Finally, they must desire that particular offense as the outcome of their agreement. Because of this particularized desire as to the outcome, the state of mind requirement properly has been labeled "specific intent."<sup>11</sup>

In practice the courts can scrutinize carefully the specific intent requirement for the object crime. A recent example of this strict scrutiny is *People v. McChristian*.<sup>12</sup> The defendants in *McChristian* were convicted at trial of conspiring to murder five persons. The state first established that the defendants had observed five rival gang members driving in the neighborhood. The state then proved that the defendants fired upon that car. The victims barely escaped the assault. The evidence, however, did not show that the defendants intended or planned to kill all five passengers. On the contrary, the evidence indicated that they were only concerned with possibly killing one of the five, the rival gang leader Barksdale. The court of appeals reversed the convictions holding that the state had not introduced evidence of a conspiracy to murder five persons.<sup>13</sup> The court further noted that "heinous as was their conduct, the evidence in this record did not prove a conspiracy to murder five persons, as was charged by the State."<sup>14</sup> The *McChristian* court reasoned that unless the parties intended or desired the death of the others they could not be convicted of conspiring to murder them because conspiracy is "a specific intent crime."<sup>15</sup> This is a legitimate result because the basis of any conspiracy charge is the agreement; if the defendants did not agree to kill the other four in the car, they should not be convicted of such an agreement.<sup>16</sup> The

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"injurious to the public morals." Serious doubt has been cast on the constitutionality of such statutes. See *State v. Musser*, 118 Utah 537, 223 P.2d 193 (1950) striking down just such a statute, U.C.A. 1943, § 103-11-1, on due process grounds after remand from the United States Supreme Court, 333 U.S. 95 (1948). See also, *State v. Bowling*, 5 Ariz. App. 436, 427 P.2d 928 (1967). But see, *Calhoun v. Superior Court*, 46 Cal. 2d 18, 291 P.2d 474 (1955).

11. The label is proper in a theoretical sense. Because, as we shall see, a defendant in a conspiracy may be convicted of substantive crimes of which he never dreamed, the "intent" in practice is not always "specific."

12. 18 Ill. App. 3d 87, 309 N.E.2d 388 (1974), *aff'd* *People v. Bailey*, 60 Ill. 2d 37, 309 N.E.2d 804 (1975).

13. "There is no evidence that defendant, at any time, agreed . . . to discharge firearms in the direction of [intended victim's] automobile with intent to murder the persons who were objects of the conspiracy." 18 Ill. App. 3d at 91, 309 N.E.2d at 391.

14. *Id.* at 93, 309 N.E.2d at 393.

15. *Id.* at 90, 309 N.E.2d at 391.

16. Interestingly, in *McChristian* the defendants were acquitted of charges relating to attempting to murder the five passengers in the car, yet the attempt charge also required "specific intent to take human life." With the same state-of-mind requirement they were found guilty of conspiracy to murder the same five persons! The Illinois Supreme Court, in affirming the court of appeals judgment, was not willing to go even as far as that court had gone in finding any agreement by the defendants. Over a vigorous dissent the Supreme Court refused to accept the prosecution argument that the "concert-

*McChristian* court's analysis of conspiracy as a specific intent crime is also the approach of the Model Penal Code (MPC).<sup>17</sup> The MPC formulation of the conspiracy state of mind is in terms of a "purpose of promoting or facilitating [a crime's] commission."<sup>18</sup> The MPC is designed carefully to isolate a true desire to accomplish an attempted end, not just a belief that such an end may occur or be attempted.<sup>19</sup>

The MPC's and *McChristian* court's discussion of specific intent refers to a desire that a crime or type of crime be committed pursuant to an agreement.<sup>20</sup> This desire or intent, however, should be distinguished from intent questions presented when the defendants contend, usually unsuccessfully, that they did not know fully the nature of the conspiratorial combination or the total number of participants. In these cases the issue is not whether the conspirators intended the commission of the object crime, but whether they knew *who* would commit the crime, or *how* it would be committed. As Learned Hand explained in *United States v. Andolschek*:

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ed efforts" of the defendants would be sufficient to permit a jury to find the charged conspiracy. The Court stated:

The evidence does not establish beyond a reasonable doubt that Bailey, McChristian and others had agreed to murder Barksdale or any one else. Rather it clearly appears that Barksdale drove to the Ellis Avenue location in a car known to defendants and others, stopped and then raced the motor. The obvious purpose was to incite a rival and hostile street gang knowing that the police were a short distance behind in an unmarked squad car. Almost simultaneously with Barksdale's unexpected appearance and his recognition, gunfire erupted from both sides of the street.

While it might be argued that the defendants were members of a rival street gang, this mere relationship does not establish an intent to agree to kill Barksdale. *People v. Bailey*, 60 Ill. 2d 37, 45, 309 N.E.2d 804, 809 (1975).

17. M.P.C. § 5.03(1) provides:

(1) *Definition of Conspiracy.* A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

(a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

18. *Id.*

19. Thus, it would not be sufficient, as it is under the attempt provisions of the Code, if the actor only believed that the result would be produced but did not consciously plan or desire to produce it. For example, if two persons plan to destroy a building by detonating a bomb, though they know and believe that there are inhabitants in the building who will be killed by the explosion, they are nevertheless guilty only of a conspiracy to destroy the building and not a conspiracy to kill the inhabitants. While this result may seem unduly restrictive from the viewpoint of the completed crime, it is necessitated by the extremely preparatory behavior that may be involved in conspiracy. Had the crime been completed or had the preparation progressed even to the stage of an attempt, the result would be otherwise. As to the attempt, knowledge or belief that the inhabitants would be killed would suffice.

WECHSLER, JONES, AND KORN, *supra* note 7, at 971.

20. Cf. *Anderson v. United States*, 417 U.S. 211 (1974); *United States v. Bradberry*, 517 F.2d 498 (7th Cir. 1975) (both cases dealing with the "specific intent to interfere with a protected federal right").

It is true that a party to a conspiracy need not know the identity, or even the number, of his confederates; when he embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them. Nevertheless, he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others may do in execution of them.<sup>21</sup>

The specific intent rule in the MPC and in *McChristian* basically states that the defendants in agreeing not only must understand that a crime will be committed, but also desire that it be committed.<sup>22</sup> This rule is acceptable. The parties are not charged with committing a crime, nor are they charged with attempting to commit a crime. They are charged with planning and agreeing to commit a crime. They cannot be guilty of *planning* and *agreeing* to commit a crime that they did not intend to commit. The analysis works well in theory. Practical application, however, is another matter entirely, as the state may charge the conspirators with a substantive offense or an attempt count in addition to the conspiracy charge if the criminal operation went beyond the planning stage. The Supreme Court, utilizing an expanded complicity principle, has held that *all* crimes committed pursuant to an agreement may be properly charged to the conspirators. The conspirators may be charged even if some of them did not specifically discuss the crimes, nor intend that they be committed. Justice Douglas in *Pinkerton v. United States*<sup>23</sup> addressed the test as one of foreseeability, not specific intent.

A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan *which*

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21. *United States v. Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944). See also *Weniger v. United States*, 47 F.2d 692 (9th Cir. 1931).

22. The intent here also is to be distinguished from the situation present in *United States v. Micciche*, 525 F.2d 544 (8th Cir. 1975). *Micciche* was convicted under 18 U.S.C. § 152 (1970) of conspiring to knowingly and fraudulently transfer and conceal assets in contemplation of a bankruptcy proceeding and with intent to defeat the bankruptcy law. The evidence showed that *Micciche* was a salesman working for a furniture store. When the store began to have severe financial troubles, some of the employees concealed assets recognizing that bankruptcy proceedings would be initiated soon. Two other store employees clearly understood the nature of the concealment and fully intended to profit from it. *Id.* at 546. The court found that *Micciche* may well have known of the illegal conspiracy and in fact had aided the conspirators by purchasing cashiers checks, renting storage space, etc. *Id.* at 547. This evidence alone, however, did not show his intent to become part of the conspiracy because as an employee of the store he might have known of the conspiracy but he never became a party to it. The crucial element missing in *Micciche* was the culpable state of mind as to the agreement, not the object. "There is not evidence in this record from which a jury could find beyond a reasonable doubt that . . . *Micciche* knowingly and intentionally entered the conspiracy with the specific intent to defeat the bankruptcy proceedings." *Id.*

23. 328 U.S. 640 (1946).

*could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.* (emphasis added).<sup>24</sup>

Partners in crime come and go, and one conspirator does not necessarily know or appreciate at any given time what all other conspirators are doing "in furtherance of the conspiracy." The conspirator's ignorance plus the *Pinkerton* complicity doctrine has led one commentator to write that while the state of mind as to the object of the offense is denominated specific intent, "[i]t is difficult, in fact, to conceive of any crime in which the intent is less specific."<sup>25</sup> The state of mind requirement in complicity matters is one of foreseeability. That is, wholly apart from the defendant's intent, did the defendant foresee, or should he have foreseen the crimes actually attempted or committed? If this foreseeability is present, *Pinkerton* says that a conspirator can be accused of the completed or attempted crime. This result is justified only if foreseeability is considered in the sense that the parties intended a certain course of action, and because the actual crime was foreseeable to them, they also must have intended that crime. Without such a gloss on the *Pinkerton* complicity principle, however, the courts are convicting parties on a conspiracy theory for a crime they never intended to commit.<sup>26</sup> The Supreme Court has not resolved this dilemma. Nevertheless, the foreseeability language is quite striking. If we assume that the *Pinkerton* Court meant what it said, we also may assume that the Court hopefully intended that the foreseeability test applies only within the context of the complicity rule. Specific intent still is necessary for a conspiracy conviction, although not for the substantive offense. The accused could not be convicted of conspiring to commit a crime unless the crime was intended, even if that crime was foreseeable. This is the *McChristian* holding. The defendants in *McChristian* may have foreseen that others would be present with the victim. The court, however,

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24. *Id.* at 647-48.

25. *Developments in the Law of Criminal Conspiracy*, 72 HARV. L. REV. 920, 935 (1959).

26. This criticism is echoed by the Criminal Justice Section of the American Bar Association in its analysis of the *Proposed Revised Federal Criminal Code*:

[T]he rule of *Pinkerton v. United States* . . . is that a conspirator is liable for substantive offenses committed by another conspirator, if the offense was committed in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiracy.

The *Pinkerton* rule represents a form of vicarious criminal liability that, in essence, imposes liability for negligence. In the form of the rule adopted by § 401(b) of S. 1, a person is liable for a co-conspirator's crime which was "reasonably foreseeable"; or, stated another way, the person is criminally liable if he should have known, when he agreed to become a part of the conspiracy, that there was a risk that the collateral offense would be committed. This is clearly negligence liability, and should be imposed only if there is strong justification.

We do not support the *Pinkerton* rule, which is needed only to punish a conspirator who never agreed to, aided, or participated in, the commission of the collateral offense. It goes too far, and does not easily admit of rational application.

Criminal Justice Section, A.B.A. Policy at 5 (adopted Aug. 1975) regarding S.1, THE PROPOSED FEDERAL CRIMINAL CODE (94th Cong.).



properly reversed the conspiracy conviction because the defendants had no specific intent to harm the victim's companions.

Perhaps the most shocking example (although only one of many) of the ridiculous consequences that can result from applying the complicity principle of foreseeability in a conspiracy case is the California decision that discusses conspiracy to commit abortions. In *Anderson v. Superior Court*<sup>27</sup> the petitioner moved for a writ of prohibition to prevent the state from prosecuting her on an indictment charging that she was part of a large conspiracy to procure and commit abortions. The indictment alleged that Anderson had conspired with Stern to commit abortions on sixteen women. The petitioner agreed that the state had evidence to support the conspiracy charge against her as to two of the abortions.<sup>28</sup> She protested, however, about being indicted for the other fourteen abortions because the state had no evidence to prove her involvement. Her argument was that "if the evidence shows a conspiracy at all, it shows no more than a separate conspiracy between herself and Stern, and is not sufficient to show that she was a party to the general conspiracy. . . ."<sup>29</sup> Even if she knew of the larger conspiracy, she argued, she did not intend that Stern perform other abortions in addition to those that she had personally arranged.<sup>30</sup> The court not only rejected this argument, but wholly avoided the specific intent rationale and focused on the extent of Anderson's knowledge. The court found that the evidence "almost compelled" the inference that Anderson knew of the larger conspiracy. This knowledge coupled with the petitioner's intent to conspire with Stern established the petitioner's culpability in the entire abortion conspiracy.<sup>31</sup>

#### IV. CORRUPT MOTIVES

If two persons enter into an agreement to accomplish a specific end and fully intend to accomplish that end, should they be convicted of conspiracy if they can show that they did not know that the object of their agreement was a crime? Many early cases considered this issue and concluded that because the crime of conspiracy was a specific intent offense, insufficient *mens rea* would exist unless the parties not only

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27. 78 Cal. App. 2d 22, 177 P.2d 315 (1947).

28. She would be guilty of the substantive crime of performing the abortions under the complicity doctrine set forth by Mr. Justice Douglas in *Pinkerton*, *supra*.

29. 78 Cal. App. 2d at 23, 177 P.2d at 316.

30. *Id.*

31. *Id.* at 24-25, 177 P.2d at 317:

The interference is almost compelled, if the evidence is believed, that this petitioner knew that Stern was engaged in the commission of abortions not casually but as a regular business and that others, like herself, had conspired with him to further his operations. If the grand jury concluded that, with this knowledge, she saw fit to join with him and those others, even though unknown to her, in furthering the unlawful activities of the group we cannot say that the grand jury did not have substantial evidence upon which to find the indictment.

intended to agree and intended to accomplish the same end, but also knowingly intended to break the law. *People v. Powell*<sup>32</sup> was the first case to establish this "corrupt motive" doctrine. In *Powell* the conspiracy alleged was an agreement not to advertise bids for the purchase of supplies. As municipal officers the defendants were required by statute to advertise. The defendants contended in their defense to the conspiracy allegation that they had acted in good faith because they did not know of the statute prior to their actions. The court accepted this argument stating that the act of agreeing was innocent in itself, unless the intent was "corrupt." The parties, in agreeing, must intend an evil act, not just "the act prohibited in ignorance of the prohibition. This is implied in the meaning of the word 'conspiracy'."<sup>33</sup>

The broad language in *Powell* allowed later courts to differ considerably over the meaning of a corrupt or evil motive. Some court emphasized the difference between object crimes that are *malum in se* and those that are *malum prohibitum*.<sup>34</sup> Others viewed the difference in terms of a general or broad type of corrupt intent.<sup>35</sup> Although the reasoning in *Powell* has been adopted in many cases,<sup>36</sup> the impact on conspiracy prosecutions is marginal.<sup>37</sup> Most conspiracy prosecutions are directed to certain serious types of criminal endeavors: trafficking in narcotics, extortion, kidnapping, and other serious crimes.<sup>38</sup> In these cases the motive unquestionably is corrupt.

Many courts, however, have refused to adopt the *Powell* rationale and have focused on the parties' intent to enter an agreement to commit the object act. A recent application of the approach in *United States v. Sloan*<sup>39</sup> involved a conspiracy to violate the Securities Exchange Act of 1934. The general federal conspiracy statute provides that a conspiracy to commit a felony is a felony, and a conspiracy to commit a misdemeanor is a misdemeanor.<sup>40</sup> The applicable section of the 1934 Act, however, provides that a violation of the section is a felony, but only if the defendant had knowledge of the appropriate regulation.<sup>41</sup> The de-

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32. 63 N.Y. 88 (1875).

33. *Id.* at 92.

34. LAFAYE, *supra* note 9, at 469.

35. *Id.*

36. *Id.*

37. See note 1 *supra*.

38. *Id.*

39. 399 F. Supp. 982 (S.D.N.Y. 1975).

40. 18 U.S.C. § 371 (1970):

... If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

41. 15 U.S.C. § 78ff(a) (1970) provides:

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who

fendant claimed that he did not know of the regulation in question and hence could not be sentenced as a felon under either the general conspiracy statute or the Securities Exchange Act. The court rejected this contention. Although the defendant was unaware of the regulation, the court found that he was not innocent in this matter, but had a "deliberate intent to further an unlawful objective."<sup>42</sup> Not only did the court note the congressional intent to eliminate the "no knowledge" defense from the 1934 Act, but it also broadly observed that application of the knowledge requirement would, at least within the context of *Sloan*, "be wholly inconsistent with the substantive law of conspiracy, which makes one co-conspirator liable for acts done in furtherance of the conspiracy."<sup>43</sup>

The corrupt motives doctrine, therefore, presents some interesting policy and theoretical problems that accompany the basic intent issue of conspiracy law. These problems do not plague to any real degree either the prosecution or the defense of criminal conspiracy cases. Proving the intent element, however, is a problem confronted daily in conspiracy decisions, and these proof-of-intent problems provide a crucial issue for general criminal conspiracy law.

## V. PROOF OF INTENT

### A. Association with Other Conspirators as Proof of Intent

Two problems frequently arise in conspiracy prosecutions concerning proof of the state-of-mind requirement. The first involves the conspirator contending that he may well have been a member of the conspiracy, but that he never contemplated that other members of the combination would commit a given crime. The second involves the problem of attempting to infer from a single act or series of acts that one defendant not only intended to join the conspiracy but also intended to complete the object offense.

A recent Second Circuit decision exemplifies the first of these problems. In *United States v. Gallishaw*<sup>44</sup> testimony at trial indicated that two of the defendant's friends visited him and asked him for a

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willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 780 of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than \$10,000, or imprisoned not more than 2 years, or both, except that when such person is an exchange, fine not exceeding \$500,000 may be imposed; *but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.* [Emphasis added.]

42. 399 F. Supp. at 984.

43. *Id.* at 985, citing *Pinkerton v. United States*, 328 U.S. 640, 647 (1946). See also *United States v. Hobson*, 519 F.2d 765 (9th Cir. 1975); note 143 *infra*.

44. 428 F.2d 760 (2d Cir. 1970).

machine gun. The defendant's friends told him the gun was to be used for a bank job or something else to get money.<sup>45</sup> After the defendant gave the machine gun to his friends, they used the weapon in a bank robbery. The two friends were convicted of the robbery,<sup>46</sup> and the defendant was convicted of conspiring with his friends to rob the bank. The defendant argued that he did not have the specific intent to rob the bank because his friends had told him that the gun would be used for the bank *or* for something else. The defendant must have swayed the jury with the argument, because after deliberating the case the jury sent the judge the following note: "Does the supplying or renting of a gun which is subsequently used in a bank robbery, constitute grounds for a conspiracy if the person who rents the gun doesn't know how or where the gun will be used?"<sup>47</sup> The judge then responded with the charge:

. . . [T]hat it isn't necessary for the Government to prove that the one who rented the gun knew precisely what was intended or all the objectives of the conspiracy, or how the gun was to be used. But if you find that the defendant rented the gun and understood and knew that there was a conspiracy to do something wrong and to use the gun to violate the law, you may find that he willfully entered the conspiracy.<sup>48</sup>

The above exchange bothered the court of appeals. After receiving the response to the note, the jury may have believed that the defendant could be guilty of a conspiracy to rob the bank as long as he "knew in a general way that a machine gun was to be used to 'pull something'."<sup>49</sup> The judge's answer created this problem by informing the jury that they could convict the defendant of conspiracy to rob the bank if, at the time he gave his friend the gun, he knew "that there was a conspiracy to do something wrong and to use the gun to violate the law." The court of appeals reversed the conviction on the conspiracy count finding that at a minimum the Government had to prove that the defendant knew the gun was to be used in a bank robbery.<sup>50</sup> The reasoning of the court was sound: although the law may hold a defendant who joins a conspiracy responsible for acts of conspirators whom he did not know, his culpability for these acts or the acts of known conspirators arises only when the *acts* are known to him and intended by him.<sup>51</sup>

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45. *Id.* at 761.

46. 18 U.S.C. § 2113(a), (d) (1970).

47. 428 F.2d at 762.

48. *Id.*

49. *Id.*

50. Quoting *Ingram v. United States*, 360 U.S. 672, 678 (1959), the court noted: [C]onspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself.

On this record, to convict Gallishaw for the substantive crime of aiding and abetting . . . the Government would have had to show at a minimum that he knew that a bank was to be robbed. To convict him of conspiracy, at the very least no less was required. 428 F.2d at 763.

51. This conspiracy situation is distinguishable from the situation in *Pinkerton*. The

Without such knowledge the conspirator could not possess the required intent that the ultimate crime be committed. Although the defendant in *Gallishaw* clearly knew that the gun was to be used in an illegal operation, he could not be guilty of conspiring to rob the bank unless he knew and intended that the object of the combination was the bank robbery and not "something else."

In many conspiracy prosecutions the only proof of a person's involvement with a conspiracy is that on one occasion he promoted the goals of a large conspiracy. In this situation the accused's single act must demonstrate beyond a reasonable doubt that he intended to join the larger conspiracy. The state argues that the defendant's participation in the single wrongful activity is sufficient evidence of his intent to promote the goals of the conspiracy beyond that one occasion. Courts faced with prosecutions utilizing this line of argument often have sent the issue to the jurors to determine whether they can infer from the single act the requisite intent to join the larger conspiracy. The difficulty with this approach is that the jury often finds, from the single transaction, not only the defendant's intent to join the larger agreement, but also the intent to foster the broad goals of that agreement. This finding, however, is made on the basis of a single act, and although the act is criminal in itself, it offers little evidence as to the state of mind of the defendant in relation to the other defendants and the larger conspiracy.

Recently some courts have become reluctant to sustain convictions in these single-act cases. Although the courts recognize that in many cases prosecutors can convict true conspirators only through such evidence, the courts are genuinely and justifiably reluctant to allow convictions in the one transaction situation to stand. In *United States v. Sperling*<sup>52</sup> the defendant, Garcia, violated the narcotics laws on a single occasion by delivering illegal drugs to a member of a larger ongoing conspiracy. Garcia argued that "there was insufficient evidence from which the jury could have concluded that [he was] aware that the scope of the conspiracy was larger than [his] participation. . . ."<sup>53</sup> Noting that the delivery of cocaine, by itself, on one occasion, was "not the kind of single transaction which itself supports an inference of knowledge of a broader conspiracy on the part of [Garcia],"<sup>54</sup> the court recognized the possibility that some single acts might be sufficient evidence of participation in a conspiracy.

For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the federal narcotics laws, there must be

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*Pinkerton* Court held that one could be liable for substantive crimes if the crimes were committed in furtherance of the agreement as understood by the parties and if the crimes were reasonably foreseeable to the parties.

52. 506 F.2d 1323 (2d Cir. 1974).

53. *Id.* at 1342.

54. *Id.*

independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act itself must be one from which such knowledge may be inferred.<sup>55</sup>

The type of single act that the court in *Sperling* said could be the basis for the necessary inference is not entirely clear. If the delivery of cocaine is not a sufficient act for the inference, what is?<sup>56</sup> The drug is illegal, and anyone buying or selling cocaine must know that there are importers, wholesalers, retailers, and others. The purchaser or peddler of cocaine is aiding the larger conspiracy. If the delivery of cocaine is inadequate evidence after *Sperling*, situations in which a single act would be sufficient proof to tie the actor to the larger conspiracy are difficult to imagine.<sup>57</sup> This result, however, is proper. The single act may show understanding of criminal conduct and may even show awareness of a larger conspiracy, but it does not—absent unusual circumstances—show the requisite intent. One transaction does not show the defendant intended to become a part of the larger conspiracy and to pursue goals other than the one pursued on the single occasion.

#### *B. Providing Lawful Services or Goods as Proof of Intent*

To convict a defendant of conspiracy the state must show that the defendant knew of the illegal joint enterprise and intended to join and promote that activity. If the defendant, having knowledge of the conspiracy, is shown only to have supplied the enterprise with lawful products or services, will a conspiracy conviction stand? Learned Hand's answer was no. The Supreme Court's answer, however, is less certain.

In *United States v. Falcone*<sup>58</sup> a large number of defendants were convicted of conspiring to operate illicit stills in violation of federal revenue laws. The evidence against the defendant, Falcone, was that he sold tremendous quantities of sugar to grocers in New York. The evidence also indicated, according to Judge Hand, that the sugar was being utilized for the stills and that Falcone was on "notice that his customers were supplying the distillers."<sup>59</sup> The sale of the sugar was lawful. Nevertheless, the Government charged Falcone with conspiracy on the theory that he not only knew of the existence of the conspiracy

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55. *Id.*

56. The delivery of drugs on a single occasion consistently has been held to be, by itself, insufficient to constitute proof of involvement with the larger conspiracy. See *United States v. Aviles*, 274 F.2d 179, 189-90 (2d Cir. 1960); *United States v. Koch*, 113 F.2d 982, 983 (2d Cir. 1940). See also, *United States v. Torres*, 503 F.2d 1120 (2d Cir. 1974).

57. Absent proof as to either a more involved relationship or prior dealings apart from the conspiracy.

58. 109 F.2d 579 (2d Cir. 1940).

59. *Id.* at 580.

and was aiding it, but he also fully intended to participate because he profited from his association with the conspiracy. Although Judge Hand conceded Falcone's knowledge of the illegal use of the sugar, he rejected the Government's argument. Judge Hand recognized that criminal liability may result simply because an actor fails to forbear from activity that ultimately aids wrongful conduct. He emphasized, however, that in conspiracy cases the accused's

[A]ttitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in the outcome.<sup>60</sup>

Judge Hand believed the distinction was vital because of the tendency of many prosecutors to bring within the ambit of the conspiracy law all those associated to any degree with the principal participants. He noted that the "opportunities of great oppression in such a doctrine is [sic] very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided."<sup>61</sup>

The convictions of Falcone and his co-defendants were reversed because the knowledge, actual aid, and profit were not enough to demonstrate "a purpose to do what the law in fact forbade."<sup>62</sup> When the case went to the Supreme Court,<sup>63</sup> Justice Stone, for a unanimous Court, dealt differently with the key issue of intent. The Court disregarded the Government's argument that knowledge and aid of the conspiracy was the equivalent of membership in the combination. The Court simply believed that the Government had not established sufficiently Falcone's participation in the conspiracy. The Government's evidence, at the most, showed that the defendant knew the sugar was used for illicit distilling, and not that he knew of the conspiracy.<sup>64</sup> This conclusion is questionable. The Government did show that Falcone knew his sugar was being sold to distributors who then supplied the illicit distillers. Falcone also knew that the distilling process was illegal.

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60. *Id.* at 581.

61. *Id.*

62. *Id.* at 582.

63. 311 U.S. 205 (1940).

64. The argument, the merits of which we do not consider, overlooks the fact that the opinion below proceeded on the assumption that the evidence showed only that respondents or some of them knew that the materials sold would be used in the distillation of illicit spirits, and fell short of showing respondents' participation in the conspiracy or that they knew of it. We did not bring the case here to review the evidence, but we are satisfied that the evidence on which the Government relies does not do more than show knowledge by respondents that the materials would be used for illicit distilling if it does as much in the case of some.

*Id.* at 208 (footnote omitted). Interestingly enough, on review before the Supreme Court the Government shifted its argument and stated that in addition to Falcone being a member of a conspiracy, the fact of aid and knowledge constituted aiding and abetting and thus made him a principal in the conspiracy. The Court rejected this, utilizing the same analysis as the conspiracy argument. *Id.*

With this evidence in the record what more could the Government possibly prove? The evidence conclusively established that Falcone knew of an illegal venture involving two or more parties, and this knowledge meant, by definition, that he knew of the existence of the conspiracy. The Government had a persuasive argument, but the Court did not accept the argument until 3 years later.

In *Direct Sales Co. v. United States*<sup>65</sup> the Supreme Court was receptive to the Government's contention that knowledge of the illegal acts plus aid equals participation in the conspiracy. The defendant was a corporation convicted of conspiring to violate the federal narcotics law. The corporation was a registered drug manufacturer and wholesaler conducting a nationwide mail order business from Buffalo, New York. Dr. Tate, who practiced in a South Carolina community of 2,000 persons, purchased drugs from Direct Sales. The Government established that Dr. Tate illegally distributed morphine while he was purchasing drugs from the corporation. The evidence not only indicated the huge quantity of drugs Dr. Tate ordered, but also Direct Sales' knowledge of the use of the drugs. The average doctor at that time would have used about 400 one-quarter grain morphine sulphate tablets per year. In one period Dr. Tate's orders from Direct Sales averaged "5,000 to 6,000 half-grain tablets a month, enough, as the Government points out to enable him to give 400 average doses every day."<sup>66</sup>

Officers of Direct Sales knew all these facts. Indeed the Bureau of Narcotics warned the defendant during this period that "it was being used as a source of supply by convicted physicians."<sup>67</sup> Direct Sales, however, continued to supply Dr. Tate, and more importantly, continued to encourage large orders of drugs through a discount purchase arrangement. The Government tried the case on the theory that Direct Sales "and Tate conspired together to subvert the [Narcotics] Act."<sup>68</sup> Direct Sales countered strenuously that their case was analogous to *Falcone*. They knew that the purchaser was using their goods illegally but the sale was lawful, even if the doctor purchased abnormally large quantities.<sup>69</sup>

On the surface the defendant's argument was appealing because the facts were strikingly similar to *Falcone*. The Court, however, was more concerned with the dissimilarities. In *Falcone* the goods supplied were "articles of free commerce. . .not restricted as to sale. . . ."<sup>70</sup> In *Direct Sales*, however, the drugs were "incapable of further legal use except by compliance with rigid regulations. . . ."<sup>71</sup> The Court found

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65. 319 U.S. 703 (1943).

66. *Id.* at 706.

67. *Id.* at 707.

68. *Id.* at 708.

69. *Id.*

70. *Id.* at 710.

71. *Id.*



this dissimilarity crucial for two reasons. First, the restrictive nature of the drugs made certain the seller's knowledge of the buyer's intended illegal use of the drugs. Second, this restrictive quality of the drugs indicated that by selling the drugs the defendant intended "to further, promote and cooperate in [the distribution of the drugs]."<sup>72</sup> The Court concluded that, if the defendant was distributing excessive amounts of restricted goods, the jury was justified in inferring Direct Sales' "unlawful intent to further the buyer's project."<sup>73</sup> The evidence of the Government's extensive control over the distribution of morphine coupled with the defendant's willingness to supply Dr. Tate's large orders of the drug convinced the Court that the defendant fully intended to assist the doctor in his illegal activity. The evidence indicated not only Direct Sales' "fully informed and interested cooperation" with Dr. Tate, but also the petitioner's "stake in venture" which, even if it may not be essential, is not irrelevant to the question of conspiracy."<sup>74</sup>

The views expressed in *Direct Sales* and *Falcone* raise fundamental questions about the state-of-mind requirement for the crime of conspiracy. The Supreme Court, however, has not reconsidered its position on inferring intent from knowledge plus material support. If the state-of-mind requirement is intent or purpose to commit the object crime, then the fundamental question is why was intent found in *Direct Sales*. The petitioner in *Direct Sales* conceded that it knew of the illegal distribution system, but it only intended to conduct a lawful and profitable business. Moreover, if the intent could be inferred in *Direct Sales*, why could it not be inferred in *Falcone*? Surely Falcone knew that illegal actions were occurring involving the joint activity of two or more persons. The fact that the goods were lawful and in an unrestricted form should not have any bearing on the supplier's state of mind, and the defendant's state of mind was the only significant issue in both *Direct Sales* and *Falcone*. Finally, if *Direct Sales* means that knowledge and actual support can equal conspiracy, does the grocer who sells food to conspiring bank robbers (with knowledge of their plans) become a conspira-

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72. *Id.* at 711.

73. *Id.* at 715.

74. *Id.* at 713 (footnote deleted). The Court in reaching its holding in *Direct Sales* sought to distinguish *Falcone* above and beyond simply referring to the nature of the goods involved.

[Falcone] comes down merely to this, that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally. The government did not contend, in those circumstances, as the opinion points out, that there was a conspiracy between the buyer and seller alone. It conceded that on the evidence neither the act of supplying itself nor the other proof was of such character as imported an agreement or concert of action between the buyer and seller amounting to conspiracy. This was true, notwithstanding some of the respondents could be taken to know their customers would use the purchased goods in illegal distillation. *Id.* at 709.

tor? Is the knowledgeable car mechanic who tunes the auto of an armed robber a member of a criminal combination?

The Supreme Court has refrained from resolving these questions, but one California court has attempted to determine who can be charged as a conspirator in an arrangement similar to the situation in *Falcone*. Although most prosecutors will avoid charging a conspiracy when confronting facts similar to *Falcone*, the court in *California v. Lauria*<sup>75</sup> reversed a conspiracy conviction of an owner of a telephone answering service. The defendant undoubtedly knew that his service was being used by prostitutes to continue their trade because he had personally used the services of at least one of the prostitutes. The state, however, offered no proof of an agreement between the defendant and the prostitutes, but sought to preserve the conspiracy conviction of Lauria by contending that his "knowledge alone of the continuing use of his telephone facilities for criminal purposes provided a sufficient basis from which his intent to participate in those criminal activities could be inferred."<sup>76</sup>

Lauria countered that he was like Falcone who provided a legitimate service with knowledge of its illegal use. The court responded to the defendant's argument with its explanation of the Supreme Court's *Direct Sales* opinion. The court believed that intent can be inferred when one of three conditions are present. First, when the provider of legitimate goods for illegal purposes has acquired a stake in the venture, the factfinder may infer the purveyor's intent. Second, the court may infer intent if the provided goods or service has no lawful use. Finally, sufficient evidence of the buyer's intent is present "when the volume of business . . . is disproportionate to any legitimate demand. . . ."<sup>77</sup> If these conditions are considered in light of the facts in *Lauria*, the conviction appears proper. Lauria knew of the illegal trade, and he also knew that the volume of business was beyond that of any legitimate business. Furthermore, the profits he received may have constituted a stake in the venture. Nevertheless, Lauria's conviction was reversed. In its opinion, however, the court did not rely upon the analysis of the *Falcone* court. The *Falcone* reasoning was that knowledge indicates only awareness whereas intent means purpose, and the two states of mind are not necessarily the same. The reasoning of the *Lauria* court, on the other hand, was that because the object crime of the "conspiracy" was only a misdemeanor, the factfinder could not infer the defendant's intent from his knowledge of the criminal use of his answering service. The object crime must be a felony before the court will allow the inference.<sup>78</sup> The conclusion of the *Lauria* court is remarkable. Why can a

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75. 251 Cal. App. 2d 471, 59 Cal. Rptr. 628 (1967).

76. *Id.* at 477-78, 59 Cal. Rptr. at 632.

77. *Id.* at 478-79, 59 Cal. Rptr. at 632-33.

78. *Id.* at 481, 59 Cal. Rptr. at 634.

factfinder infer intent if the object crime is a felony, but cannot if the crime is a misdemeanor? The distinction is difficult to understand. The nature of the defendant's conduct and state of mind rather than the category of the ultimate or object crime should determine if a court may infer intent.<sup>79</sup> Whether the object crime is a felony or a misdemeanor is irrelevant in deciding if a defendant is a criminal conspirator.

The opinion in *Lauria*, however, serves a useful purpose. The decision demonstrates the difficulty in attempting to explain when intent properly can be inferred, if the accused both knows of an illegal venture and provides otherwise lawful goods or services to that venture. The Supreme Court in *Direct Sales* confronted an egregious situation in which the defendant not only had been put on notice by the Government as to the illegalities involved, but encouraged large purchases for illegal purposes while ignoring the Government's warning. The courts have affirmed convictions in situations similar to *Direct Sales* only in a few cases. The one lesson learned from an analysis of these cases is that the Government must continue to prove beyond a reasonable doubt that the defendant intended to enter into an agreement and that his goal was to accomplish the agreed upon crime. In some cases, intent properly may be inferred from knowledge that otherwise lawful goods are being used in a criminal fashion. *Direct Sales* is an example. *Direct Sales*, however, involved unique facts, and therefore, has limited significance as precedent.

## VI. SPECIFIC INTENT AND FEDERAL CRIMES

The state-of-mind requirements discussed so far are applicable to either federal or state criminal conspiracy cases because the basis of conspiracy, joint criminal activity through agreement, is common to both state and federal jurisdictions. An issue of increasing importance, however, often arises in federal conspiracy cases that is unique to federal conspiracy law.<sup>80</sup> The issue is analogous in part to that involved in the corrupt motives area. The conspirators typically will concede, at least for purposes of argument, that they had the intent both to enter into an agreement and to complete an unlawful activity. The conspirators argue, however, that they did not intend to violate federal law either by utilizing interstate facilities or by victimizing a federal officer. The federal courts of appeals reacted differently when confronted with the argument and split over the question of what state of mind was required. The Supreme Court, however, broadly resolved the problem

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79. But see discussion of *Lauria*, notes 75-79 and accompanying text *supra*.

80. It is increasingly important due to the apparent increase in the number of federal prosecutions which utilize the crime of conspiracy. See note 1 *supra*. See also Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122 n.2 and accompanying text (1975).

in *United States v. Feola*.<sup>81</sup> To better understand the scope of this decision, a brief review of the case law preceding *Feola* is necessary.

*A. Case Law Prior to Feola*

If the crime at issue involves the use of interstate facilities, the intent questions are: (1) did the defendants know they were violating federal law; or (2) did they know they were utilizing interstate facilities. The cases discussing these intent issues most often involve persons charged with violating the general federal conspiracy statute.<sup>82</sup> The object crimes of the conspiracy frequently are alleged violations of the following substantive statutes: transportation of obscene matter;<sup>83</sup> fraud;<sup>84</sup> theft or conversion of goods shipped in interstate commerce;<sup>85</sup> transporting stolen cars in interstate commerce;<sup>86</sup> transporting or selling stolen securities in interstate commerce;<sup>87</sup> interfering with commerce by use of extortion (Hobbs Act),<sup>88</sup> or aiding this interference.<sup>89</sup>

All of the federal statutes have the common requirement that the crime either must be done in interstate commerce or, at least, must affect interstate commerce. The argument of a defendant who is charged with conspiring to violate one of these statutes is obvious. He contends that the government must show that he intended to violate the substance of the statute. In particular the government must demonstrate that he intended either to use interstate facilities or to commit the crime in the federal jurisdiction. The defendant makes this contention even if the substantive violation of the statute does not require knowledge about interstate facilities or an intent to use them. The defense argument is that the substantive violation and the conspiracy violation do not have the same state-of-mind requirements; to prove a conspiracy the government must establish the defendant's specific intent to violate federal law.

Most courts of appeals, however, have rejected this position in the interstate facilities area. The Fourth Circuit decision in *United States v. LeFaivre* is typical.<sup>90</sup> Convicted of conspiring to violate the Travel Act,<sup>91</sup> the defendant argued on appeal that the Government failed to prove "actual knowledge of the use of interstate facilities."<sup>92</sup> The court answered that the interstate commerce provision of the Travel Act only

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81. 420 U.S. 671 (1975).

82. 18 U.S.C. § 371 (1970).

83. 18 U.S.C. § 1465 (1970).

84. 18 U.S.C. § 1343 (1970).

85. 18 U.S.C. § 659 (1970).

86. 18 U.S.C. § 2312 (1970).

87. 18 U.S.C. §§ 2314, 2315 (1970).

88. 18 U.S.C. § 1951 (1970).

89. 18 U.S.C. § 1952 (1970).

90. 507 F.2d 1288 (4th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975).

91. 18 U.S.C. § 1952 (1970).

92. 507 F.2d at 1298.

pertains to jurisdiction, and therefore, simply imposes limits on the jurisdictional reach of congressional intent. In short, the interstate commerce provision of the Travel Act serves "as a jurisdictional peg on which to hang the federal prosecution."<sup>93</sup> The court believed that the conspirators' plan to use interstate facilities was irrelevant and that a court should concentrate primarily on the dangers conspiracies create.<sup>94</sup>

Although most of the circuits in comparable situations have adopted the reasoning in *LeFaivre*,<sup>95</sup> the Second Circuit has consistently rejected it. In *United States v. Cangiano*<sup>96</sup> a conviction for transporting obscene materials in interstate commerce was challenged on the ground that the trial judge improperly overruled a defense objection to a jury instruction. The instruction allowed the jury to convict if it found that the defendant "knew or could reasonably foresee that the business would use interstate facilities."<sup>97</sup> On appeal the court reversed the conviction because it decided that, if a jury must find specific intent, the proper instruction requires the jury to find that the accused had actual knowledge of the use of interstate facilities.<sup>98</sup> In a specific intent crime like conspiracy a finding of reasonable foreseeability is insufficient.<sup>99</sup>

The issue that prompted the differing viewpoints between the

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93. *Id.* at 1299.

94. Whether or not certain conspirators actually anticipate the use of facilities in interstate commerce when they plan their unlawful activity of gambling, bribery, etc., adds absolutely nothing to the dangerousness of their scheme to the public weal. And it is the danger posed by a conspiracy that justifies prosecution of the inchoate "crime" of conspiracy even before any substantive offense has been committed.

*Id.*

95. See, e.g., *United States v. Battaglia*, 394 F.2d 304 (7th Cir. 1968); *Nassif v. United States*, 370 F.2d 147 (8th Cir. 1966); *United States v. Roselli*, 432 F.2d 879 (9th Cir. 1970) (the famous Friar's Club fraud).

96. 491 F.2d 906 (2d Cir. 1974).

97. *Id.* at 910.

98. *Id.* Although the jury was instructed that it need not find such knowledge, Cangiano's conviction was not reversed.

While the charge here was erroneous, it by no means follows that reversible error was committed. There is a technical difference between defendants who know that the material they were transporting was actually going to cross state lines and those who "could reasonably foresee" that this was about to occur, but the distinction has no significance in the factual setting presented. The defendants here, if they were engaged in any conspiracy at all, had to actually know that interstate commerce was involved. . . . This is not a case in which the defendants would just have reason to believe that interstate transportation was foreseeable; this was the precise business they were engaged in. This is not a case in which the interstate jurisdictional basis depends upon an isolated phone call or a casual trip across state lines. An examination of the records made available to the jury discloses a huge volume of sales of pornographic materials totalling hundreds of thousands of dollars to customers identified as living in Massachusetts, Connecticut, Rhode Island, New Jersey, Pennsylvania, Maryland, Georgia, Nevada, California, Michigan and Ohio. Neither Cangiano, who was the principal figure in the conspiracy, nor Isola, who had custody of the bulk of the records of the business, could have been unaware of the destination of the obscene material.

*Id.* at 910-11.

99. *Id.* at 909. Since *Feola*, the Second Circuit has, of course, revised its ruling. See *United States v. Green*, 523 F.2d 229 (2d Cir. 1975).

Second Circuit and the other circuits<sup>100</sup> often arises in federal conspiracy prosecutions. In many cases the United States Attorney initiates the prosecution precisely because the nature of the criminal endeavor transcends particular state boundaries and is national in scope. In these situations "lesser" defendants often claim that although they may have understood that a large conspiracy was in operation, they did not know the conspiracy extended beyond state boundaries. This presents a difficult question.<sup>101</sup> If the interpretation of the interstate nature of the statute is the key, then the Second Circuit was wrong because the provision is only a jurisdictional element; if however, the traditional view of conspiracy is accepted, a defendant should not be convicted of conspiracy if he did not know the conspiracy involved interstate commerce. The traditional view requires specific intent, and, if the defendant was not aware of the interstate nature of the conspiracy, he could not intend to commit an interstate crime.

The problem was exacerbated in cases which involved conspiracies to assault federal officers. Under federal statute a person may be guilty of a substantive violation if he assaults a federal officer even if he did not know and had no reason to know that the victim of the assault was a federal officer.<sup>102</sup> Particularly if a federal narcotics officer infiltrates a

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100. The reader should not infer from this statement that *only* the Second Circuit took the broad view as to the interstate nature of the federal charges. There are cases in which other circuits concurred with the Second Circuit, but it was usually due to a fairly narrow reading of a particular statute. *See, e.g.,* *United States v. Barnes*, 383 F.2d 287 (6th Cir. 1967), *cert. denied*, 389 U.S. 1040 (1968). The decision in that case, governed by the Travel Act, (compare with *LeFaivre*, text accompanying note 90 *supra*) was characterized recently as holding:

[T]hat one who is shown to have violated a local law may not be convicted of violating the Travel Act, or conspiring to do so, without proof of direct agreement to illegal interstate transportation or proof of an indirect agreement evidenced by substantial participation in an unlawful scheme with actual knowledge of illegal interstate transportation.

It was so characterized by the appellant (and seemingly adopted by the court) in *United States v. Prince*, 529 F.2d 1108, 1111 (6th Cir. 1976). *See* note 143 *infra*.

101. Such a situation is to be distinguished from that in which the defendant claims that he did not know about the interstate nature of the conspiracy, but in which the court does not reach the issue involved in the pure federal intent cases because it holds that there was sufficient evidence for a jury to find that the defendant, in fact knew, or must have known of the interstate nature of the operation. *See, e.g.,* *United States v. Colacurcio*, 499 F.2d 1401, 1406 (9th Cir. 1974). *See also* note 95 *supra*.

102. 18 U.S.C. § 111 (1970) provides as follows:

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

*See generally* *United States v. Feola*, 420 U.S. 671 (1975).

The rule with regard to lack of knowledge for the substantive offense under § 111 was explained in *United States v. Lombardozzi*, 335 F.2d 414, 416 (2d Cir. 1964), *cert. denied*, 379 U.S. 914 (1964).

Many statutes creating crimes contain such requirements as "knowingly," "with

narcotics ring, the conspirators may plan to assault the officer without having any idea that the officer works for the government.<sup>103</sup> In many cases assaults arose after the defendants planned to remove the victim from the operation, either because of greed on their part or because of fear that the victim might leak information to the authorities.<sup>104</sup> In these cases the conspirators claimed that they could not have intended to violate federal law because they did not intend to assault a federal officer. On the contrary, the strong possibility exists that if the defendant knew the federal agent's true identity, they would not have contemplated assaulting him.<sup>105</sup>

Courts that have rejected this defense argument on the intent issue have done so reluctantly. These courts definitely had "misgivings about substantive offenses involving the status of the victim where scienter is not an element."<sup>106</sup> Nevertheless, these courts rejected the defense position, relying strongly on the perceived intent of Congress in enacting the statute that protects federal agents. The Ninth Circuit's analysis of the reason for the rejection especially is effective. In *United States v. Fernandez*<sup>107</sup> the court recognized that the underlying purpose of Section 111 was to protect federal officers from harm. The court decided

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knowledge," "intentionally" and "with intent." No such prerequisite has been written by Congress into section 111 although it could easily have made knowledge an essential ingredient. The meager legislative history suggests that in section 111 Congress merely sought to provide a federal forum for the trial of cases involving various offenses against federal officers in the performance of official duties. See *Ladner v. United States*, 358 U.S. 169, 174-177, 79 S. Ct. 209, 212, 213, 3 L.Ed.2d 199 (1958). The court should not by judicial legislation change the statute by adding, in effect, the words "with knowledge that such person is a federal officer."

Specific knowledge of factual elements conferring federal jurisdiction is not required in analogous situations, see *United States v. Tannuzzo*, 174 F.2d 177 (2d Cir. 1948), *cert. denied*, 338 U.S. 815 (1949) (knowledge of interstate transportation of stolen property); *United States v. Jennings*, 471 F.2d 1310 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973) (knowledge of the federal capacity of officials to whom a bribe is proffered).

103. *United States v. Fernandez*, 497 F.2d 730, 738 (9th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975).

104. In other situations there is a clear intent to assault an individual, and perhaps even an intent to assault an officer, but the defendants claim there was no intent to assault a federal officer. Such a claim was made and rejected in *United States v. James*, 528 F.2d 999 (5th Cir. 1976). Indeed, the defendants there claimed that prior to a shoot-out the conspirators "were instructed to avoid shooting at federal officers." *Id.* at 1011. The court rejected this notion by stating:

The jury did not have to believe their claim; but even if it was true, inferences that such instructions were later abandoned or superseded could be drawn from the facts already detailed.

*Id.* It is interesting to consider what the result would have been had the jury believed the claim and had there been evidence to show that these instructions were *not* abandoned or superseded. Even in such a case it would seem, after *Feola*, that the convictions would stand.

105. 497 F.2d at 738; note 103 *supra*.

106. *Id.*

107. *United States v. Fernandez*, 497 F.2d 730 (9th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975).

that imposing strict liability on the defendant was the best way to achieve the purpose.

In retrospect, we cannot conclude that the mere intent of the legislation was only to provide a federal forum. While it is true that the Department of Justice sought the legislation so that "[t]he Federal Government should not be compelled to rely upon the courts of the States, however respectable and well disposed, for the protection of its investigative and law-enforcement personnel," nevertheless, the underlying purpose of the legislation as originally conceded by the government was "to protect the individual officers, as 'wards' of the federal government, from personal harm." Indeed, the *raison d'être* for the statute is the protection of the government officer. The essential question is how may the statute serve to protect the particular agent in the particular circumstances here before us.<sup>108</sup>

Relying heavily on the rationale ultimately rejected by the Supreme Court in *Feola*,<sup>109</sup> the Second Circuit took a contrary position and reversed a conviction because of an erroneous jury instruction.<sup>110</sup> The trial judge instructed the jury that a conspiracy to violate federal law could be found if the government proved that the defendants "agreed and conspired to commit an assault" even without knowing the true identity of the federal agent.<sup>111</sup> The court considered the jurisdictional arguments that had been made by the government in the interstate commerce cases, and again refused to accept them. The court reasoned that in these conspiracy cases the government must prove specific intent as to every element of the offense, including the intent to assault a federal officer. This analysis, coming after considerable criticism of the Second Circuit's earlier rulings in the interstate commerce cases,<sup>112</sup> laid the foundation for the Supreme Court's ultimate resolution of the conflict between the circuits. The Court granted certiorari, heard arguments, and changed the name of the Second Circuit case from *United States v. Alsondo* to *United States v. Feola*.<sup>113</sup>

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*Id.* at 737-38.

109. See Judge Learned Hand's analysis in *United States v. Crimmins*, 123 F.2d 271 (2d Cir. 1941); notes 128-29 and accompanying text *infra*.

110. *United States v. Alsondo*, 486 F.2d 1339 (2d Cir. 1973).

111. *Id.* at 1342.

112. See, e.g., M.P.C. § 5.03, Comments 111-12.

113. 420 U.S. 671 (1975).



*B. United States v. Feola*

Criticism of the Second Circuit's federal intent holdings on conspiracy increased during the 1960's and 1970's.<sup>114</sup> Although the Second Circuit *Alsondo* panel recently had reaffirmed its traditional position on the statute that protects federal officers, the panel noted the criticism of the specific intent rationale and offered no argument in support of it, but reluctantly accepted the controlling precedents.<sup>115</sup> The Supreme Court's rejection of the Second Circuit rule in *Feola*, therefore, is not surprising.

The Court established a broad rule that applies to both cases involving crimes in interstate commerce and cases involving federal assault. In *Feola* the four co-defendants were convicted of assaulting and of conspiring to assault a federal officer. As noted by Justice Blackmun in his majority opinion, the facts revealed "a classic narcotics 'rip-off'."<sup>116</sup> The defendants sold heroin. Some of the buyers were undercover agents for the Bureau of Narcotics and Dangerous Drugs. The plan of the defendants involved either cheating the buyers (substituting sugar in place of heroin) or taking the money from them. "Instead of enjoying the rich benefits of successful swindle,"<sup>117</sup> *Feola* and his partners were arrested when one of the agents alertly drew his gun and prevented the assault upon another agent. The Court began the discussion of the intent issue by recognizing that the Government's argument was a "plea for symmetry." The government assumed that knowledge of the official position of the victim was not a requirement for a substantive violation of the statute, hence a knowledge requirement should not exist for the conspiracy conviction either. Agreeing with "the practical unanimity of the courts of appeals,"<sup>118</sup> the Court found that Congress, in enacting the provision, fully intended not to require knowledge of the victim's status for a substantive conviction. The limitation of the statute to assaults on federal officers was only a jurisdictional restriction.<sup>119</sup> The Supreme Court reasoned that the ultimate objective of the measure was to protect federal officers. Adopting a position similar to the *Fernandez* court, Justice Blackmun concluded that the federal provision only required

[A]n intent to assault, not an intent to assault a federal officer. A contrary conclusion would give insufficient protection to the agent enforcing an unpopular law, and none to the agent acting under cover.<sup>120</sup>

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114. See note 112 *supra*.

115. 420 U.S. at 676.

116. *Id.* at 674.

117. *Id.* at 675.

118. *Id.* at 677.

119. *Id.* at 677 n.12 and cases cited therein.

120. *Id.* at 684.

The only limitation the Court made on the intent holding pertained to the usual defense in any intent crime. A defendant could argue that through mistake he simply did not possess the necessary state of mind and did not intend to assault anyone. The mistake typically concerns the nature or quality of the force directed at the defendant or his property.<sup>121</sup> The Court emphasized that the statute requires an unlawful objective and "an honest mistake of fact would not be consistent with criminal intent."<sup>122</sup>

Justice Stewart and Justice Douglas dissented from the broad holding as to section 111. They disputed the claim that Congress intended not to have knowledge as a requirement for a substantive violation of the statute.<sup>123</sup> Justice Stewart's conclusion, after noting the "scant" legislative history, was that the statute was one "requiring proof of scienter."<sup>124</sup> In any event, if some doubt existed about the intent of Congress, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."<sup>125</sup> Because the dissenters would require evidence of the defendant's knowledge about the victim's position before sustaining a conviction on the substantive crime, they believed "a fortiori that there can be no criminal conspiracy to violate the statute in the absence of at least equivalent knowledge."<sup>126</sup>

Feola had little precedent in his favor in arguing against his substantive conviction; he even had less supportive authority for his argument against the conspiracy conviction. Few cases outside the Second Circuit supported his contention, and the best Supreme Court precedent available was the notation that the state-of-mind requirement for the conspiracy conviction could not be less than that required for the substantive offense.<sup>127</sup> The chief argument the defense utilized was that the reasoning that prompted the Second Circuit to adopt its "anti-

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121. *Id.* at 686.

122. *Id.*

123. In addition to the legislative intent problem, Justice Stewart was most concerned that this issue, clearly basic to the holding of the case was

not . . . addressed in either the brief or oral arguments. The parties have merely assumed the answer to the question, and directed their attention to the separate question whether scienter is an element of *conspiring* to violate § 111. . . . [T]his conspicuous disregard of the most basic principle of our adversary system of justice seems to me indefensible.

*Id.* at 697.

124. *Id.* at 699. See also *id.* at 705.

125. *Id.* at 712, quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971).

126. *Id.* at 713.

127. *Ingram v. United States*, 360 U.S. 672, 678 (1959). In fact, there were some Supreme Court cases which seem to cut against Feola's position, cases which Justice Blackmun cited. See, e.g., *United States v. Freed*, 401 U.S. 601, 614-16 (1971), where the Court held that actual knowledge that hand grenades were unregistered was not an element of the substantive offense of possession of, and conspiracy to possess, hand grenades under 26 U.S.C. § 5861(d) (Supp. V, 1964). As stated in *Feola*, "we declined [in *Freed*] to require a greater degree of intent for conspiratorial responsibility than for responsibility for the underlying substantive offense." 420 U.S. at 688.

federal" intent rule in conspiracy cases was sound, and that the Supreme Court should adopt the rationale as a matter of policy. In formulating this argument the defense based its case almost entirely on Learned Hand's famous opinion in *United States v. Crimmins*.<sup>128</sup>

In *Crimmins* Judge Hand, in essence, decided that although the federal statute did not require knowledge about the use of interstate facilities for a substantive conviction under the provision, knowledge became a necessary element of proof for a conviction for conspiracy to violate the statute.<sup>129</sup> In considering state-of-mind requirements Judge Hand attempted to isolate the difference between a substantive crime and a conspiracy to commit that crime. He attempted to highlight the distinction with his oft-quoted hypothetical of a traffic light violation:

While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past.<sup>130</sup>

The Supreme Court in *Feola* did not accept Learned Hand's reasoning. The Court initially noted that few courts outside the Second Circuit had adopted the approach of requiring a "higher" *mens rea* for the conspiracy charge than for the substantive offense.<sup>131</sup> The Court described the Hand analogy in *Crimmins* as closely analogous to the doctrine first presented in the early New York case of *People v. Powell* "to the effect that a conspiracy, to be criminal, must be animated by a corrupt motive or a motive to do wrong."<sup>132</sup> Assuming, *arguendo*, that the *Powell* doctrine made sense, the Court emphasized that it did not apply in a *Crimmins* situation in which the defendant certainly intended to steal securities.<sup>133</sup> If the doctrine did not apply in *Crimmins*, it certainly was not appropriate for *Feola*. The Court held that the defendant could not have commenced his criminal conduct without intending the forbidden result. The traffic light analogy, the Court believed, was inapt because "[o]ne may run a traffic light 'of whose existence one is ignorant,' but assaulting another 'of whose existence one is ignorant,' probably would require unearthly intervention."<sup>134</sup> As long as the object federal crime requires a *mens rea*, the federal conspiracy provision will require the same state of mind but no more. In this case the defendant intended the assault and that intent was sufficient to supply the required *mens rea* element for the conspiracy.

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128. 123 F.2d 271 (2d Cir. 1941).

129. *United States v. Alsondo*, 486 F.2d 1339, 1342 (2d Cir. 1973), stating the holding in *Crimmins*.

130. 123 F.2d at 273.

131. 420 U.S. at 689.

132. *Id.* at 691. See text accompanying notes 32-43 *supra*.

133. 420 U.S. at 691.

134. *Id.* at 692.

The Court further noted that *Crimmins* could only apply if something distinct existed in conspiracy law, as opposed to general criminal law, that necessitated a stricter state-of-mind requirement.<sup>135</sup> The Court identified "two independent values served by the law of conspiracy."<sup>136</sup> The first was "protection of society from the dangers of concerted criminal activity."<sup>137</sup> As to this purpose of conspiracy law, the Court concluded that the issue of whether the defendants understood that their actions violated federal law was irrelevant. Because the defendant could not present justifications for the imposition of an anti-federal knowledge requirement that would contribute to the first recognized value of conspiracy law, the Court would not impose the requirement. Moreover, the Court observed that imposing an anti-federal requirement "would serve only to make it more difficult to obtain convictions on charges of conspiracy, a policy with no apparent purpose."<sup>138</sup> The second independent value served by a conspiracy law is that as an inchoate crime, it permits society to terminate criminal activity in its nascent stage. The Court, therefore, could not appreciate a need for creating a stricter state-of-mind requirement for conspiracy than that needed for the substantive offense. In the Court's view the conspiracy does not become less blameworthy or less dangerous if the participants are unaware of the substantive laws they are violating.<sup>139</sup> Imposing an anti-federal scienter requirement would only present the Government with additional difficulties in establishing a conspiracy, but without serving any useful social purpose.<sup>140</sup>

The inapplicability of the *Crimmins* rationale to a conspiracy to assault a federal officer<sup>141</sup> and the lack of any policy served by requiring a stricter *mens rea* for the conspiracy conviction caused the Court to reverse the *Alsondo* holding. Moreover, the Court applied a broad

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135. The Court was not moved at all by Judge Hand's analogy in *Crimmins*. Indeed, in one footnote the Court adopted the government's refutation of the *Crimmins* rationale.

The Government rather effectively exposes the fallacy of the *Crimmins* traffic light analogy by recasting it in terms of a jurisdictional element. The suggested example is a traffic light on an Indian reservation. Surely, one may conspire with others to disobey the light but be ignorant of the fact that it is on the reservation. As applied to a jurisdictional element of this kind the formulation makes little sense.

*Id.* at 690 n.24. See also *Nassif v. United States*, 370 F.2d 147, 153 n.9 (8th Cir. 1966), in which the court added an "explanatory hypotheses" to the Hand analogy:

If one agrees to drive through a downtown section of a city at 60 mph without stopping, one could be guilty of conspiring to run past a traffic light, even though ignorant of such light, because one could reasonably suppose that there is such a light to run past.

136. 420 U.S. at 693.

137. *Id.*

138. *Id.* at 693-94.

139. *Id.* at 694.

140. *Id.*

141. That is, a violation of 18 U.S.C. § 371 (1970) (general conspiracy statute) with the object of that conspiracy being a violation of 18 U.S.C. § 111 (1970).

ruling to those cases where the anti-federal intent issue might arise. Justice Blackmun concluded his opinion by holding that

[W]here knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense.<sup>142</sup>

The holding does not apply to those infrequent occasions in which the extent of the conspirator's knowledge is crucial to establish federal jurisdiction.<sup>143</sup> The plain meaning of this conclusion, however, is that if at *any* time a substantive statute has as an element of proof a federal jurisdictional factor,<sup>144</sup> and the substantive statute does not require the

142. 420 U.S. at 696.

143. This situation, as Justice Blackmun pointed out, *id.* at 695, relates to the kinds of cases where the "knowledge of the parties is relevant to the same issue and to the same extent as it may be for the conviction of the substantive offense." Presumably he was referring to a case such as *Ingram v. United States*, 360 U.S. 672 (1959), where the defendants were "accused of conspiring to commit . . . the willful evasion of federal taxes, an offense which, even presuming knowledge of the tax law, obviously cannot be committed in the absence of knowledge of [sic] willfulness." *Id.* at 678. Thus, where the substantive offense requires knowledge and willfulness, obviously the conspiracy must also require such a state of mind.

The Ninth Circuit recently had occasion to apply *Feola* to a conspiracy situation in which the underlying offense did seemingly require some knowledge. 18 U.S.C. § 3 (1970) provides:

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact. . . . The defendants assisted in the escape of a federal prisoner. They argued that they could not be guilty of either the substantive offense or the conspiracy offense because they believed the escapee was a state and not a federal prisoner. Even though the statute speaks in terms of "knowing that an offense against the United States has been committed," the court rejected this argument in *United States v. Hobson*, 519 F.2d 765 (9th Cir. 1975). Adopting the position that the federal aspect of the crime was jurisdictional only, the court found that one who intends to aid escape from the authorities cannot escape punishment because of a mistake concerning the nature of the pursuers. Paraphrasing *Feola*, the court said "[i]n a case of this kind the [defendants take their escapee] as [they find him]." *Id.* at 770.

144. An example is the presence of a federal officer or the use of interstate commerce. The only caveat that should be listed to the "any time" language results from a recent case raising the knowledge requirement under the Travel Act, 18 U.S.C. § 1952(b) (1970). In *United States v. Prince*, 529 F.2d 1108 (6th Cir. 1976), the Sixth Circuit refused to reverse its earlier holding that the requirement of interstate activity for conviction under the Travel Act was not merely a "jurisdictional peg," even after *Feola*. The Court reasoned as follows:

. . . We are not persuaded, however, that *Feola* requires us to overrule *Barnes*. The Travel Act does not make it a federal offense to engage in prostitution, an activity which is illegal under State law. It provides an additional string to the law enforcement bow, however, by providing that "[w]hoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce . . . with intent . . ." to engage in enumerated types of unlawful activity including prostitution may be punished thereunder. 18 U.S.C. § 1952(a) (emphasis added). In dealing with this Act we stated in *United States v. Gebhart*, 441 F.2d 1261 (6th Cir.), *cert. denied*, 404 U.S. 855, 92 S. Ct. 97, 30 L.Ed. 2d 96 (1971) that—

To successfully prosecute one under the above statutory provision, the United States must prove the following elements: (1) that the accused voluntarily traveled in interstate commerce or used the facilities of interstate com-

defendants' awareness of this fact, the conspiracy statute will not require it either.<sup>145</sup>

Although the Court's decision about the state-of-mind requirement for the substantive crime is troublesome—and Justice Stewart underscores the problems with this portion of the opinion—the holding concerning the state of mind for the conspiracy is sound. *Crimmins*—contrary to Justice Blackmun's view—is also sound, but only if the defendants did not intend anything unlawful. In other cases, however, the Court is correct because the Second Circuit appeared to be applying the corrupt motives doctrine to Judge Hand's innocuous traffic light analogy. If the parties clearly have demonstrated an intent to violate the law, the issue is not, for purposes of the conspiracy charge, whether they believe they were violating state or federal law. If they intended to violate *some* law, as in both *Crimmins* and *Feola*, the conspirators' knowledge about which law they were breaking is irrelevant.<sup>146</sup>

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merce; (2) that he attempted to or did in fact promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of any one of certain statutorily defined activities; and (3) that the accused formed a specific intent to promote, manage, establish, carry on or facilitate one of the prohibited activities. 441 F.2d at 1263.

We believe the language of Section 1952 compels this conclusion. In *Feola* the Supreme Court was construing a statute which made the performance of an act a federal offense without any requirement of intent separate from that which led to the act itself (the assault of another person). Its federal character depended upon the identity of the victim, whether known or unknown to the assailant. On the other hand, the Travel Act only reaches those who engage in interstate activities *with intent* to perform other illegal acts. Thus there is a requirement of a separate intent related to the use of interstate facilities which is different from the intent required to commit the underlying State offense. So far as this record shows the defendant Prince was nothing more than the madam of a house of prostitution in West Virginia. The Travel Act is not written so broadly as to subject such a person to federal prosecution.

*Id.* at 1111-12. This reasoning as to the Travel Act makes sense and, moreover, may be proper even after the Supreme Court's holding in *Feola*. Unlike the other statutes discussed previously, see notes 82-89 *supra*, the Travel Act does refer to violation of state law and also refers to use of interstate facilities to achieve that violation. With this particular language perhaps the *Prince* court was well advised to create an "exception" to the broad *Feola* rationale. *Cf.* *United States v. LeFaivre*, 507 F.2d 1288 (4th Cir.), *cert. denied*, 420 U.S. 1004 (1974), discussed in text accompanying note 90 *supra*.

145. At a recent conference on criminal conspiracy in Chicago sponsored by the Illinois Institute for Continuing Legal Education a number of lecturers on criminal conspiracy were asked whether *Feola* effectively eliminates the anti-federal intent claim in every major area where it previously had been raised or could be raised. The answer was unanimous: the claim had been eliminated by the Supreme Court.

146. *Cf.* *United States v. Muncy*, 526 F.2d 1261 (5th Cir. 1976). The defendant there was charged with a violation of 18 U.S.C. § 2315 (1970), receiving or selling goods "which are a part of, or which constitute interstate . . . commerce, knowing the same to have been stolen. . . ." He conceded that he knew the goods were stolen, but the Government had not proved that he had "knowledge that the stolen property had moved in interstate commerce." *Id.* at 1263-64. Citing *Feola* and *Ingram*, the court refused to consider the argument. The court stated that "[i]nterstate transportation is a jurisdictional element of the statute . . . the only knowledge required is that the property was stolen." *Id.* at 1264. See the similar holding in *United States v. Newsom*, 531 F.2d 979 (10th Cir. 1976). The court there noted:

Although the Supreme Court was dealing (in *Feola*) with a conspiracy to violate section 111 as opposed to section 2314 we feel that reasoning of the Court

## VII. CONCLUSION

The very heart of the crime of conspiracy is the agreement. To reach an agreement that constitutes criminal behavior, the parties must intend to agree and intend to achieve the same object. This article has explored the problems, both practical and theoretical, that result when applying this seemingly simple truism of criminal law. Proving intent is not easy, particularly if: (1) the defendant denies he had the intent; (2) the defendant is an otherwise honest business person; or (3) the courts require a different sort of intent than that required for the substantive offense.<sup>147</sup> The intent issue of conspiracy law is so very crucial that even this brief treatment of the subject may aid those who study the crime, and more importantly, assist those who prosecute or defend persons charged with criminal conspiracy.

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is applicable to this case as well. In both statutes the federal element of the offense is jurisdictional and the criminal intent, whether it be to assault someone or to pass forged securities, exists independently. We therefore hold that knowledge of the use of interstate facilities is not required for a conviction of conspiracy to violate section 2314.

*Id.* at 982.

147. As in the early anti-federal cases. See notes 127-29 and accompanying text *supra*.