

## St. John's Law Review

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Volume 66  
Number 2 *Volume 66, Spring 1992, Number 2*

Article 8

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April 2012

### Crossing the Border Line: Interpreting Federal Drug Trafficking Statutes in *United States v. Londono-Villa*

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#### Recommended Citation

Raiola, Jennifer E. (1992) "Crossing the Border Line: Interpreting Federal Drug Trafficking Statutes in *United States v. Londono-Villa*," *St. John's Law Review*: Vol. 66 : No. 2 , Article 8.  
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# COMMENT

## CROSSING THE BORDER LINE: INTERPRETING FEDERAL DRUG TRAFFICKING STATUTES IN *UNITED STATES v. LONDONO-VILLA*

In an effort to combat the "growing menace of drug abuse"<sup>1</sup> in the United States and to eradicate illegal drug trafficking, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("the Act").<sup>2</sup> Since the enactment of this legisla-

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<sup>1</sup> H.R. REP. No. 1444, 91st Cong., 2d Sess. 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4567.

<sup>2</sup> Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801-971 (1988)). The Act consolidated more than 50 drug control laws into a comprehensive regulatory scheme. *Id.* It was enacted in the late 1960s in response to a growing concern about drug abuse and drug trafficking. See H.R. REP. No. 1444, *supra* note 1, at 4567-71; *Legislation To Regulate Controlled Dangerous Substances and Amend Narcotics and Drug Laws, 1970: Hearings on H.R. 1444 Before the Subcomm. on House Ways and Means, 91st Cong., 2d Sess. 196* (1970) (statement of President Richard Nixon); see also Michael J. Gardner, *Maritime Drug Smuggling Conspiracies: Criminal Liability for Importation and Distribution*, 27 WM. & MARY L. REV. 217, 218 (1985) (title III, enacted in response to widespread drug abuse in 1960s, modified and consolidated drug laws).

"The United States government has been conducting a campaign against drug abuse and narcotics trafficking since 1914." Joseph R. Brendel, Note, *The Marijuana on the High Seas Act and Jurisdiction Over Stateless Vessels*, 25 WM. & MARY L. REV. 313, 313 (1983); see also Harrison Narcotics Act, Pub. L. No. 63-223, 38 Stat. 785 (1914) (repealed 1970) (requiring individuals authorized to manufacture or handle certain drugs to register with Collector of Internal Revenue and maintain records of sales and purchases). For a historical overview of federal narcotics laws, see SAMUEL M. LEVINE, NARCOTICS AND DRUG ABUSE §§ 4.8-4.42, at 101-26 (1973). Prior to the enactment of the Harrison Narcotics Act, it was "unlawful to import narcotic drugs into the United States or to buy, sell, transport, or conceal them knowing that they have been illegally imported." *United States v. Masullo*, 489 F.2d 217, 220 n.1 (2d Cir. 1973).

The principal purpose of the Act was to "deal in a comprehensive fashion with the growing menace of drug abuse" by "strengthen[ing] existing law enforcement authority in the field of drug abuse" and increasing research and prevention efforts. H.R. REP. No. 1444, *supra* note 1, at 4566-67. The House Report set out the primary purpose of title III (now

tion, the United States has focused its drug control efforts on illicit importation,<sup>3</sup> a response to the international dimensions of the narcotics control problem.<sup>4</sup> Major offenses involving the illegal im-

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codified at 21 U.S.C. §§ 951-966 (1988)), which pertains to the regulation of importation and exportation of controlled substances. *Id.* It states in part that "[t]he changes providing for stricter supervision of the importation and exportation of depressant and stimulant drugs are intended to prevent the diversion of these substances into illicit channels, a problem which the present statutory requirements have proven insufficient to meet." *Id.* at 4637-38; see also *United States v. Palella*, 846 F.2d 977, 980 (5th Cir.) (Act represents scheme "to suppress and, hopefully, ultimately terminate the illegal distribution of drugs from whatever source, foreign or domestic"), *cert. denied*, 488 U.S. 863 (1988); *United States v. Baker*, 609 F.2d 134, 137 (5th Cir. 1980) (Act represents congressional effort to eliminate all illegal drug trafficking); *United States v. Woods*, 568 F.2d 509, 513 (6th Cir.) (in enacting chapter, Congress was intent on strengthening enforcement of existing drug laws), *cert. denied*, 435 U.S. 972 (1978).

<sup>3</sup> See Clifford Krauss, *U.S. Reports Gains in Drug War, but the Battles Keep on Shifting*, N.Y. TIMES, July 14, 1991, at A6. Since President Bush announced his national strategy for drug control in January 1990, federal spending to combat drug trafficking and abuse has jumped from \$6.3 billion in 1989 to \$9.5 billion in 1990 to an estimated \$10.4 billion in 1991. *Id.*

<sup>4</sup> See Kevin Fisher, Note, *Trends in Extraterritorial Narcotics Control: Slamming the Stable Door After the Horse Has Bolted*, 16 N.Y.U. J. INT'L L. & POL. 353, 353 n.5 (1984) ("All of the opiate derivatives and an estimated 90 to 95% of the marijuana on the U.S. market come from foreign countries."). "[T]he United States has long possessed the ability to attach criminal consequences to acts occurring outside this country which produce effects within the United States." *United States v. Noriega*, 746 F. Supp. 1506, 1512 (S.D. Fla. 1990) (citing *Strassheim v. Daily*, 221 U.S. 280, 285 (1911)). In *Strassheim*, Justice Holmes stated that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power." *Strassheim*, 221 U.S. at 285. This is known as the "objective territorial theory" of jurisdiction. See *Noriega*, 746 F. Supp. at 1513. In addition, even if a defendant never performed any act within the United States, he may still be reached if he participated in a conspiracy in which some co-conspirator's actions occurred within the United States. See *Baker*, 609 F.2d at 138. For cases upholding jurisdiction over foreigners who conspired to import narcotics into the United States but never entered the country, see *United States v. Postal*, 589 F.2d 862, 885-86 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *United States v. Cadena*, 585 F.2d 1252, 1259 (5th Cir. 1978); *United States v. Winter*, 509 F.2d 975, 981 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975).

Statutes may be given extraterritorial effect if the nature of the law permits it and Congress intends it. See *Baker*, 609 F.2d at 136 ("Absent an express intention on the face of the statutes . . . the exercise of that power may be inferred from the nature of the offenses and Congress' other legislative efforts to eliminate the type of crime involved."). Furthermore, the Second Circuit has long recognized that Congress may legislate with respect to conduct outside the United States, in excess of the limits of international law. See, e.g., *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) (discussing power of State to punish conduct outside its borders). "As long as Congress has expressly indicated its intent to reach such conduct, 'a United States Court would be bound to follow the Congressional direction unless this would violate the due process clause of the Fifth Amendment.'" *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1984), *modified by* 728 F.2d 142 (2d Cir. 1984) (quoting *Leasco Data Processing Equip. Corp. v. Maxwell*, 468

portation<sup>5</sup> and exportation of controlled substances<sup>6</sup> are governed by sections 951 through 966 of the Act.<sup>7</sup> Section 952(a) makes it unlawful "to import into the United States from any place outside thereof, any controlled substance."<sup>8</sup> Section 963 targets conspiracies to import drugs,<sup>9</sup> and section 960 sets forth the penalties for importing or conspiring to import narcotics in violation of sections 952 and 963.<sup>10</sup>

Some courts have construed the phrase "into the United States" in section 952(a) to relate to the mens rea of the crime.<sup>11</sup> With respect to extraterritorial seizures, these courts have ruled that the statute permits prosecutions of individuals acting outside U.S. borders only if they specifically intended to import contraband into the United States.<sup>12</sup> Recently, in *United States v.*

F.2d 1326, 1134 (2d Cir. 1972)).

<sup>5</sup> See 21 U.S.C. § 951(a)(1) (1988). The Act defines "import" as "any bringing in or introduction of [a controlled substance] into any area . . ." *Id.* In addition, the term "importation" is defined in *Black's Law Dictionary* as "[t]he act of bringing goods and merchandise into a country from a foreign country." BLACK'S LAW DICTIONARY 755 (6th ed. 1990).

<sup>6</sup> See 21 U.S.C. § 812 (1988). The Act categorizes controlled substances into a five-schedule system which ranks drugs according to their potential for danger. *Id.* Drugs are classified with respect to their potential for abuse, current medical use (if any), and potential for harm (with Schedule I drugs being the most dangerous). *Id.*

<sup>7</sup> See *id.* §§ 951-966.

<sup>8</sup> *Id.* § 952(a).

<sup>9</sup> See 21 U.S.C.A. § 963 (West 1981 & Supp. 1991) ("Any person who attempts or conspires to commit any offense . . . in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

<sup>10</sup> *Id.* § 960(a) ("Any person who . . . knowingly or intentionally imports or exports a controlled substance . . . shall be punished as provided in subsection (b) of this section."). The penalties for the offenses are designed to correspond with the seriousness, nature, and quantity of the substances. See *id.* § 960(b).

<sup>11</sup> See, e.g., *United States v. Bollinger*, 796 F.2d 1394, 1405 (11th Cir. 1986) (knowledge that cocaine was ultimately bound for United States held necessary to sustain conviction for conspiracy to import), *modified on other grounds*, 837 F.2d 436, *cert. denied*, 486 U.S. 1009 (1988); *United States v. Marsh*, 747 F.2d 7, 13 (1st Cir. 1984) (knowing and intentional conspiracy to import into United States was necessary element to be proved beyond a reasonable doubt). *But see United States v. Franchi-Forlano*, 838 F.2d 585, 587 (1st Cir. 1988) (specific intent to import narcotics into United States did not need to be proved where drugs were discovered in airline passenger's suitcase during scheduled stopover in United States); *United States v. Mejia-Lozano*, 829 F.2d 268, 271 (1st Cir. 1987) ("Nothing in § 952(a) makes the accused's knowledge that she was landing on American soil, or her intent to do so, an element of the offense."); *United States v. Friedman*, 501 F.2d 1352, 1354 (9th Cir.) (section 952(a) makes it illegal to import controlled substances into United States "without requirement for any particular specific intent"), *cert. denied*, 419 U.S. 1054 (1974).

<sup>12</sup> See *United States v. Wright-Barker*, 784 F.2d 161, 170 (3d Cir. 1986) (individual intent to import and distribute marijuana into United States required for conspiracy to

*Londono-Villa*,<sup>13</sup> the United States Court of Appeals for the Second Circuit extended this specific intent requirement to seizures of contraband within U.S. borders and held that in order to establish violations of sections 952, 960, and 963, the government must prove that the defendant knew or intended the destination of the narcotics to be the United States.<sup>14</sup>

*Londono-Villa* involved the activities of various individuals who met in Panama on several occasions to discuss a plan to transport a quantity of cocaine from Colombia to the United States through Panama.<sup>15</sup> Although the defendant, Mauricio Londono-Villa, did not participate in the negotiations, he accompanied one of the central conspirators to Panama for the last of these meetings.<sup>16</sup> Londono-Villa's role was to aid in the navigation of a small plane from Panama City to an airstrip in Colombia,<sup>17</sup> where the shipment of cocaine was to be waiting.<sup>18</sup> When the plane reached Colombia, Londono-Villa examined the cocaine and assisted in loading it onto the plane.<sup>19</sup> He then gave the pilot directions out of

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violate § 952(a)); *United States v. Conroy*, 589 F.2d 1258, 1269 (5th Cir.) (government must meet burden of showing that conspiracy to import marijuana was directed at United States), *cert. denied*, 444 U.S. 831 (1979); *United States v. Bright*, 550 F.2d 240, 241 (5th Cir. 1977) (agreement to commit offense against United States is essential element of criminal conspiracy to import marijuana).

<sup>13</sup> 930 F.2d 994 (2d Cir. 1991).

<sup>14</sup> *Id.* at 998. 18 U.S.C. § 2(a) provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." The *Londono-Villa* court failed to address this charge in its holding or to discuss the mens rea requirement for the separate charge of aiding and abetting as distinguished from the conspiracy charge. See *Londono-Villa*, 930 F.2d at 997-1001. The significance of this treatment by the court is discussed *infra* at note 71 and accompanying text.

<sup>15</sup> *United States v. Londono-Villa*, 735 F. Supp. 543, 545 (S.D.N.Y. 1990), *rev'd*, 930 F.2d 994 (2d Cir. 1991). Cocaine is Colombia's most successful export commodity. See James Brooke, *Cali, the 'Quiet' Drug Cartel, Profits by Accommodation*, N.Y. TIMES, July 14, 1991, at A1. ("According to a recent study by Salomon Kalmanovitz, a Bogota economist, traffickers in 1990 brought back as much as \$3.5 billion—roughly triple the amount earned from the sale of coffee, the country's largest legal export."). The Cali cartel, Colombia's newest cocaine cartel which "has devised endless ways to hide contraband in commercial cargo and launder it through third countries," produces 70% of the cocaine in the United States today. See Elaine Shannon, *New Kings of Coke*, TIME, July 1, 1991, at 28, 29-31.

<sup>16</sup> *Londono-Villa*, 930 F.2d at 995.

<sup>17</sup> *Id.* Londono-Villa was familiar with the airstrip since he had flown to it many times. *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 996.

Colombia and helped refuel the plane.<sup>20</sup> Londono-Villa remained in Colombia while the cocaine was transported to Panama and eventually to the United States.<sup>21</sup> The defendant was charged with conspiring to import cocaine into the United States in violation of sections 952, 960, and 963 and of aiding and abetting the importation of cocaine in violation of section 2 of title 18.<sup>22</sup> At the trial, the jury was charged that “the defendant need not have specific knowledge that the cocaine was to be imported into the United States.”<sup>23</sup> Londono-Villa was convicted of both charges and subsequently moved for an arrest of judgment and a new trial.<sup>24</sup> The district court denied both motions.<sup>25</sup>

On appeal, the Second Circuit Court of Appeals reversed the judgment of conviction,<sup>26</sup> finding that “[t]he ‘knowingly or intentionally imports’ language chosen by Congress implies that, to be guilty of a criminal offense under sections 952 and 960, the defendant must have known or intended the area into which the goods

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<sup>20</sup> Appellant’s Brief at 7, *United States v. Londono-Villa*, 930 F.2d 994 (2d Cir. 1991) (No. 90-1339).

<sup>21</sup> *Londono-Villa*, 930 F.2d at 996. “Central America’s primary role in the narcotics trade is as a transshipment point for cocaine coming from South America and intended for sale in the United States.” Shirley Christian, *Central America a New Drug Focus*, N.Y. TIMES, Dec. 16, 1991, at A10. “Panama, technically not part of Central America though closely linked, has long been considered an important part of the drug network . . .” *Id.*

<sup>22</sup> *United States v. Londono-Villa*, 735 F. Supp. 543, 544 (S.D.N.Y. 1990), *rev’d*, 930 F.2d 994 (2d Cir. 1991).

<sup>23</sup> *Londono-Villa*, 930 F.2d at 996 (quoting supplemental jury instructions). At the trial, no evidence was presented indicating that the United States had been mentioned in the defendant’s presence. *Id.* at 996-97. At the close of the evidence Londono-Villa asked the district court to instruct the jury that the government was required to prove beyond a reasonable doubt that he knew or intended the destination of the cocaine to be the United States. *Id.* at 996. The district court declined to do so, finding the “into the United States” language of 21 U.S.C. § 952(a) to be jurisdictional in nature. *Londono-Villa*, 735 F. Supp. at 546-47. In response to the jury’s requests for clarification, the district court gave a supplemental instruction that specific intent was not an element of the crime. *Londono-Villa*, 930 F.2d at 996.

No testimony was adduced at the trial indicating that Londono-Villa participated in the negotiations for the cocaine transaction or that he knew that the drugs were destined for the United States. *Id.* at 995-96. The only testimony offered on this issue was that of a Drug Enforcement Administration (D.E.A.) agent who testified that Panama is commonly used as a transshipment point for narcotics from Columbia to the United States as well as to other countries. *Id.*

<sup>24</sup> *Londono-Villa*, 735 F. Supp. at 544.

<sup>25</sup> *Id.* at 549. The district court sentenced Londono-Villa to ten years’ imprisonment on the aiding and abetting count but suspended the imposition of sentence on the conspiracy count and instead imposed a five-year term of probation. See *Londono-Villa*, 930 F.2d at 995.

<sup>26</sup> *Londono-Villa*, 930 F.2d at 995.

were to enter."<sup>27</sup> Writing for the court, Circuit Judge Kearse reasoned that Congress failed to use a statutory formulation that would reach those acting outside of the United States who contribute to the trafficking of drugs regardless of their knowledge or intent as to destination.<sup>28</sup> Relying on *United States v. Conroy*<sup>29</sup> and *United States v. Bollinger*,<sup>30</sup> the *Londono-Villa* court concluded that to find a defendant guilty of conspiring to import narcotics in

<sup>27</sup> *Id.* at 998. Deriving a specific intent requirement from reading §§ 952 and 960 in conjunction with one another, the *Londono-Villa* court stated that the word "import" connotes "not just . . . movement of goods but of their entry into a given area." *Id.* Because § 952(a) itself contains no penalty provision and § 960(a) and (b) outline the penalties for a violation of § 952, the court determined that the "knowingly or intentionally imports" language found in § 960 relates back to and modifies the phrase "into the United States." *Id.*

<sup>28</sup> *Id.* at 998. The court acknowledged that in § 801(3) of the Act, Congress recognized that "[a] major portion of the traffic in controlled substances flows through interstate and foreign commerce," 21 U.S.C. § 801(3), and that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." *Id.* at 999. However, the court concluded that

the threat to the "health and general welfare of the American people" is imminent as soon as the forbidden substances arrive in this country, even if the drug trafficker meant them to go elsewhere. . . . The fact remains that, as it structured the sections of the Act, Congress made a violation of § 952 punishable only if the "import[ation]" was knowing or intentional.

*Id.* at 999.

Moreover, the court stated that "if there were a lacuna in the law . . . it would be the prerogative of Congress to decide whether to enact legislation to fill it." *Id.* at 1001.

<sup>29</sup> 589 F.2d 1258 (5th Cir.), *cert. denied*, 444 U.S. 831 (1979). In *Conroy*, the defendants, whose ship was intercepted outside U.S. waters, were charged with conspiring to import marijuana into the United States. *Id.* at 1262. One of the defendants, whose relevant actions occurred outside the United States, maintained that he thought the ship was bound for Canada. *Id.* at 1273. Fearful that it would overstep federal authority and interests by inserting itself into "a conspiracy entered into abroad directed . . . at another foreign country," the *Conroy* court stated that the government was required to show "that the conspiracy to import was directed at the United States." *Id.* at 1270. Significantly, all of the cases cited by the *Londono-Villa* majority to support its main contention that specific intent is required for the substantive offense of importation involved conspiracy convictions, not aiding and abetting convictions. See *Londono-Villa*, 930 F.2d at 999; see also *supra* note 14 and accompanying text (noting court did not address mens rea requirement); *infra* note 71 and accompanying text (discussing court's failure to distinguish between mens rea required for conspiracy conviction and aiding and abetting conviction).

<sup>30</sup> 796 F.2d 1394 (11th Cir. 1986), *modified on other grounds*, 837 F.2d 436, *cert. denied*, 486 U.S. 1009 (1988). In *Bollinger*, the defendant was charged with conspiring to import cocaine into the United States. *Id.* at 1404. Relying on its decision in *United States v. Boldin*, 779 F.2d 618 (11th Cir. 1986), *cert. denied*, 475 U.S. 1098 (1986), in which the Eleventh Circuit determined that § 963 requires a showing of knowledge that a controlled substance would be imported into the United States, the court in *Bollinger* required the government to show that the defendant knew that the cocaine he flew from Bolivia to Honduras was to be imported into the United States. *Id.* at 1404-05.

violation of sections 952 and 963, the government must prove that the defendant knew or intended the drugs to be destined for the United States.<sup>31</sup>

In a strong dissent, Circuit Judge McLaughlin argued that from a linguistic standpoint, and in light of the clear congressional purpose behind the Act, the majority's construction of the statute was "inappropriate."<sup>32</sup> Judge McLaughlin urged that "[s]ection 952(a) makes no mention of a specific intent"<sup>33</sup> and that "the majority's interpretation ignores the express definition of the term 'import.'"<sup>34</sup> In addition, Judge McLaughlin concluded that in furtherance of congressional intent "to exert all means at its disposal to combat drug trafficking,"<sup>35</sup> the phrase "into the United States"

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<sup>31</sup> *Londono-Villa*, 930 F.2d at 1000-01. The *Londono-Villa* court was unpersuaded by the government's contention that the First Circuit's rulings in *United States v. Franchi-Forlano*, 838 F.2d 585 (1st Cir. 1988), and *United States v. Mejia-Lozano*, 829 F.2d 268 (1st Cir. 1987), warranted the conclusion that § 952 does not contain an element of specific intent. *Londono-Villa*, 930 F.2d at 1000; see also *supra* note 11 (discussing *Franchi-Forlano* and *Mejia-Lozano* cases). Instead, the *Londono-Villa* court distinguished both cases on the ground that they involved airline passengers carrying narcotics who voluntarily boarded planes scheduled to stop in the United States before heading for their ultimate destinations. See *Londono-Villa*, 930 F.2d at 100. "Thus, in both cases, there was in fact adequate proof of intent, for it is generally permissible to infer that a person intends the ordinarily foreseeable consequences of his or her actions." *Id.*

In addition, in rejecting the government's contention that the creation of a specific mens rea requirement would permit a drug trafficker to escape liability simply by claiming ignorance of the shipment's destination, the *Londono-Villa* court stated that "[w]e see no reason why such a person could not be tried on a conscious-avoidance theory." *Id.* at 1000-01.

"Conscious-avoidance" or "willful-blindness" theories are often employed by courts where a particular defendant claims to lack "some specific aspect of knowledge necessary [for] conviction but where the evidence may be construed as deliberate ignorance." *United States v. Lanza*, 790 F.2d 1015, 1022 (2d Cir.), *cert. denied*, 479 U.S. 861 (1986); see also *United States v. Jewell*, 532 F.2d 697, 699-700 (9th Cir.) (defendant deliberately refrained from knowing whether drugs were inside secret compartment of truck he was paid to drive into United States from Mexico), *cert. denied*, 426 U.S. 951 (1976); Rollin M. Perkins, "Knowledge" as a Mental State Requirement, 29 HASTINGS L.J. 953 (1978) (describing "conscious-avoidance" theory).

<sup>32</sup> *Londono-Villa*, 930 F.2d at 1001 (McLaughlin, J., dissenting). Circuit Judge McLaughlin argued that the knowledge requirement in § 960(a) was designed merely to exclude "the innocent traveller" who inadvertently picks up another's luggage containing narcotics. *Id.* at 1002 (McLaughlin, J., dissenting). Conceding that "the statutory scheme embodied in 21 U.S.C. §§ 952(a) and 960(a) is not a paragon of clarity," Judge McLaughlin believed that "pervasive and persuasive evidence of congressional purpose resolves the ambiguity in the statutory scheme." *Id.* 1001-03 (McLaughlin, J., dissenting).

<sup>33</sup> *Id.* at 1002 (McLaughlin, J., dissenting).

<sup>34</sup> *Id.*; see also *supra* note 5 (setting forth Act's definition of "import").

<sup>35</sup> *Londono-Villa*, 930 F.2d at 1002 (McLaughlin, J., dissenting). Judge McLaughlin also noted that "American treaty obligations require the United States to cooperate with



found in section 952(a) "is for jurisdictional purposes only" and "does not constitute any part of the mens rea of the crime."<sup>36</sup>

It is submitted that the *Londono-Villa* court erroneously interpreted sections 952 and 960 of the Act by applying the mens rea element found in section 960 to the substantive offense of illegally importing narcotics into the United States as defined in section 952. It is suggested that the dissent's interpretation of the statutory language in the Act is correct because it gives effect to both the fair import of the words and the congressional purpose of the statutes. This Comment will examine the express language of sections 952 and 960 and the legislative purpose underlying those statutes. It will then discuss current case law interpreting related federal drug trafficking statutes. Furthermore, this Comment will suggest that both the majority and the dissent in *Londono-Villa* failed to make a vital distinction between the mens rea requirements for the offense of conspiracy and for the offense of aiding and abetting, thereby erroneously vacating the defendant's conviction for the latter. Finally, this Comment will conclude that the majority's reading of the statutes frustrates the fundamental purpose of the Act—"to deal in a comprehensive fashion with the growing menace of drug abuse in the United States . . . through providing more effective means for law enforcement."<sup>37</sup>

## I. STATUTORY CONSTRUCTION AND INTERPRETATION

### A. *Literal Analysis*

Section 952 of the Act states that "[i]t shall be unlawful to import into the . . . United States from any place outside thereof, . . . any controlled substance."<sup>38</sup> The section defines the substantive offense and, in language devoid of any reference to specific

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other signatories in suppressing international drug trafficking." *Id.* at 1003 (McLaughlin, J., dissenting) (citing Single Convention on Narcotic Drugs, March 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, ratified by U.S. in 1967); see also *United States v. Feld*, 514 F. Supp. 283, 288 (E.D.N.Y. 1981) (section 952(a) is "among the penal provisions that the United States has adopted to effectuate its treaty obligations under the Single Convention").

<sup>36</sup> *Londono-Villa*, 930 F.2d at 1002 (McLaughlin, J., dissenting); see also *Londono-Villa*, 735 F. Supp. at 547 ("[T]he 'into the United States' language was inserted . . . to insure that § 952 be applied only against those individuals engaged in conduct which has effects inside the United States.").

<sup>37</sup> H.R. REP. NO. 1444, *supra* note 1, at 4567.

<sup>38</sup> 21 U.S.C. § 952(a) (1988).

intent, targets the importation of narcotics into the United States.<sup>39</sup> Section 960(a)(1), however, introduces a knowledge/intent requirement by providing that a defendant violates section 952 when he "knowingly or intentionally imports . . . a controlled substance."<sup>40</sup> The statute thus creates a dilemma with respect to the elements necessary to prove a violation of section 952.<sup>41</sup>

Examination of the plain meaning<sup>42</sup> of these two sections does not resolve the ambiguity created by the legislature's injection of a specific intent requirement into section 960(a), which requirement is lacking in section 952's definition of the criminal conduct that section 960 purports to penalize. The *Londono-Villa* majority dealt with this issue by construing section 960(a) as if it were part of the definition of the criminal offense set forth in section 952.<sup>43</sup> In particular, the court combined the "into the United States" language in section 952 and the "knowingly and intentionally imports" language in section 960(a) and concluded that to be guilty of a criminal offense under sections 952 and 960, the defendant must know or intend that the drugs are destined for the United States.<sup>44</sup> Such

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* § 960(a).

<sup>41</sup> *See id.*; *supra* note 10.

<sup>42</sup> *See* WILLIAM P. STATSKY, *LEGISLATIVE ANALYSIS AND DRAFTING* 75-82 (2d ed. 1984). "The meaning of a statute must . . . be sought in the language in which . . . [it] is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Id.* at 75 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1916)); *see also* *Caminetti v. United States*, 242 U.S. 470, 485 (1916) ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise . . ."); *United States v. Payden*, 759 F.2d 202, 204 (2d Cir. 1985) ("Where statutory language is clear and unambiguous we are not at liberty to adopt an interpretation different from that directed by the language.").

<sup>43</sup> *See Londono-Villa*, 930 F.2d at 1002 (McLaughlin, J., dissenting). The *Londono-Villa* majority found it "plain that § 960(a) is part of the definition of the criminal offense of importation into the United States." *Id.* at 997. However, as Kenneth Abraham observes,

A statute without a purpose would be meaningless. . . . [T]o speak of the literal meaning of a statute . . . is already to have read it in the light of some purpose, to have engaged in an interpretation.

In other words, any reading that is plain and obvious in the light of some assumed purpose (and it is impossible not to assume one) is a literal reading; but no reading is *the* literal reading in the sense that it is available apart from any purpose whatsoever.

Stanley E. Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases*, 4 *CRITICAL INQUIRY* 625, 633 (Summer 1978). "A sentence that seems to need no interpretation is already the product of one." *Id.* at 637.

<sup>44</sup> *See id.*

an interpretation frustrates the fundamental purpose of the Act and "create[s] an unnecessary obstacle to the enforcement of the drug laws."<sup>45</sup> While section 960(a) describes the knowledge that a defendant must possess in order to be subject to penalties,<sup>46</sup> it is submitted that the section does not impliedly contain the words "into the United States" because Congress did not intend to require that a defendant know the destination of the drugs in order to be criminally liable for importing a controlled substance.<sup>47</sup>

From a semantic standpoint,<sup>48</sup> the *Londono-Villa* court's interpretation of sections 952(a) and 960(a) distorts the overall statutory scheme of the Act.<sup>49</sup> The *Londono-Villa* court's misinterpretation apparently stems from an attempt to decipher the meaning of the constituent structure<sup>50</sup> "knowingly or intentionally imports" as it appears in section 960 without regard for the syntactical structure of the individual section.<sup>51</sup> In so doing, the majority cre-

<sup>45</sup> *Id.* at 1004 (McLaughlin, J., dissenting).

<sup>46</sup> *See, e.g., id.* (McLaughlin, J., dissenting) (disagreeing with majority view that "prosecutor [must] prove that the defendant knew that the controlled substance was to enter the United States"); *United States v. Seni*, 662 F.2d 277, 280 (4th Cir. 1981) (prosecutor in case involving importation of marijuana had to establish three elements: "(1) the marijuana was in fact imported, (2) the importation was done knowingly and willfully, and (3) the defendant willfully associated himself with the venture"), *cert. denied*, 455 U.S. 950 (1982).

<sup>47</sup> *See* 21 U.S.C. § 959(a) (1988) ("It shall be unlawful . . . to manufacture or distribute a controlled substance . . . intending that such substance will be unlawfully imported *into the United States* . . . or knowing that such substance will be unlawfully imported *into the United States*.") (emphasis added). Thus, "when [Congress] intended that a defendant had to know the destination of the controlled substance, [it] knew how to communicate that idea." *Londono-Villa*, 930 F.2d at 1003 (McLaughlin, J., dissenting).

<sup>48</sup> *See* LANGUAGE FILES (Dep't of Linguistics, Ohio State Univ., 3d ed. 1985). "Semantics, the study of meaning in language, is concerned with the relationships between the meanings of words, with the way units of meaning are combined, and with the relationship of linguistic meaning to nonlinguistic reality." *Id.* at 179. "[I]ndividual words in a sentence are organized into . . . semantically coherent groupings," known as constituents. *Id.* at 151. "Often, an expression is ambiguous because it has more than one possible constituent structure." *Id.* at 154.

<sup>49</sup> *See Londono-Villa*, 930 F.2d at 1002-04 (McLaughlin, J., dissenting).

<sup>50</sup> *See supra* note 48.

<sup>51</sup> It is the syntactic structure (grammatical structure) of a sentence that determines its meaning, together with the word senses. *See* LANGUAGE FILES, *supra* note 48, at 180. "This relationship between meaning and syntactic form is often described as The Principle of Compositionality [also known as Frege's Principle, after the philosopher Gottlob Frege, who first stated it]: the meaning of a sentence is determined by the meaning of its words and by the syntactic structure in which they are combined." *Id.* at 180. Therefore, because the lexical meaning of the individual word "import" is distorted by the majority to imply "into the United States," this in turn leads to a misinterpretation of the entire phrase in which it appears. If in fact the words "into the United States" were to follow the phrase "knowingly or intentionally imports" this would effectively alter the ideas conveyed in the constituent.

ated its own definition of the verb "import"<sup>52</sup> and made the adverbial phrase "knowingly or intentionally" modify the prepositional phrase "into the United States"—which does not even appear in section 960.<sup>53</sup> It is further asserted that the term "into the United States" as it appears in section 952 refers to the required jurisdictional nexus *only*<sup>54</sup> in that it specifies the geographic limits within which the statute may be applied.

The plain meaning of the words contained in sections 952 and 960 does not lead to a conclusive answer regarding Congress' intent

However, these words are noticeably absent from § 960 and common sense dictates that words should be interpreted with regard to the order in which they appear and not out of context; nor should they be extracted from one sentence and interpolated into another. See generally Frank Heny, *Sentence Structure*, in *LANGUAGE* 284 (Virginia P. Clark et. al eds., 4th ed. 1985) ("A sentence is not just a string of words; it is a string of words in a certain order, a string that has structure."). While it is indeed true that "words are notoriously imperfect symbols for the communication of ideas," Harry W. Jones, *Some Causes of Uncertainty in Statutes*, 36 A.B.A. J. 321, 321 (1950),

we are constrained . . . to leave a considerable part of our meaning to be found out by interpretation, which, in many cases must necessarily cause greater or less obscurity with regard to the exact meaning, which our words were intended to convey . . . However minutely we may define, somewhere, we . . . must trust at last to common sense. . . .

FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* 19-20 (3d ed. 1880).

<sup>52</sup> See *Londono-Villa*, 930 F.2d at 1002 (McLaughlin, J., dissenting). "As a matter of statutory construction, the majority's interpretation ignores the express definition of the term 'import', which requires only a 'bringing in or introduction of [the controlled substance] into any area . . .'" *Id.*

<sup>53</sup> See *id.* at 998. Therefore, the *Londono-Villa* majority construed § 960 as if it read that a defendant violates § 952 if he "knowingly or intentionally imports a controlled substance into the United States." See *id.* at 1002 (McLaughlin, J., dissenting).

<sup>54</sup> See 21 U.S.C. § 952 (1988). The phrase is "jurisdictional" in that it refers to the limitation on the ability and authority of American courts to convict and punish individuals acting outside the United States whose actions have no effect in this country. See *United States v. Feola*, 420 U.S. 671, 676-77 n.9 (1975).

The *Londono-Villa* court agreed that §§ 952 and 960 apply to extraterritorial acts; but it also believed that those acts must be accompanied by a specific intent to cause harm within the United States. See *Londono-Villa*, 930 F.2d at 999-1000. However, "[t]he concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum." *Feola*, 420 U.S. at 685. In *Feola*, the Court stated:

[l]abelling a requirement "jurisdictional" does not necessarily mean . . . the requirement is not an element of the offense Congress intended to describe and to punish. . . . The significance of labelling a statutory requirement as "jurisdictional" is not that the requirement is viewed as outside the scope of the evil Congress intended to forestall, but merely that the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute. The question, then, is not whether the requirement is jurisdictional, but whether it is jurisdictional *only*.

*Id.* at 676-77 n.9 (emphasis added).

with respect to a defendant's state of knowledge, however. Thus, it is necessary to examine the legislative purpose behind the Act.<sup>55</sup> Other drug control statutes enacted by Congress also shed light on the issue.

### B. Legislative Purpose

The principal purpose of the Act is to combat drug abuse by strengthening existing law enforcement authority in the area of illegal substance control.<sup>56</sup> In addition, congressional findings pertaining to drug trafficking and abuse, embodied in section 801 of the Act, evidence that Congress was aware that "illegal importation, . . . distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people."<sup>57</sup> Thus, because a significant amount of narcotics flows through foreign commerce, Congress emphasized that "[i]t is . . . essential that the United States cooperate with other nations in establishing effective controls over international traffic in such substances."<sup>58</sup>

It is submitted that in order to effectuate the sweeping congressional purpose of full-scale drug interdiction, a specific intent

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<sup>55</sup> See *Hamilton v. Rathbone*, 175 U.S. 414 (1899). "[W]here a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into . . . the reasons which induced the act in question, the mischiefs intended to be remedied, . . . and the purpose intended to be accomplished by it, to determine its proper construction." *Id.* at 419.

<sup>56</sup> See H.R. REP. No. 1444, *supra* note 1, at 4567. Although the legislative history underlying the Act does not expressly state that § 952 should be applied to peripheral extraterritorial narcotics traffickers, the Supreme Court has indicated that "[t]his court has never required that every permissible application of a statute be expressly referred to in its legislative history." *Moskal v. United States*, 111 S. Ct. 461, 462 (1990). "[A]lthough 'criminal statutes are to be construed strictly . . . this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature.'" *Id.* at 467-68. (quoting *United States v. Bramblett*, 348 U.S. 503, 509-10 (1955)).

<sup>57</sup> 21 U.S.C. § 801a(2) (1988). Because widespread "[a]buse of psychotropic substances has become a phenomenon common to many countries . . . and is not confined to national borders, *id.* §801a(1), [i]t is the intent of the Congress that the amendments . . . together with existing law, will enable the United States to meet all of its obligations" under the international treaty entitled the Convention on Psychotropic Substances (T.I.A.S. No. 9725, signed at Vienna, Austria, on Feb. 21, 1971, and entered into force in the United States on July 15, 1980) and that "no further legislation will be necessary for that purpose," *id.* § 801a(2); see also *United States v. Mejia-Lozano*, 829 F.2d 268, 272 (1st Cir. 1987) ("To construe the importation statute in such a stilted manner [as requiring proof of foreknowledge of intended destination] would run at cross purposes with the discernible intent of the enacting Congress . . .").

<sup>58</sup> 21 U.S.C. § 801a(1) (1988).

requirement should not be read into the language of sections 952 and 960. It is unlikely that Congress intended to create such an obstacle to the enforcement of narcotics laws given the United States' "strong interest in halting the flow of illicit drugs across its borders."<sup>59</sup>

### C. Related Sections

In an attempt to ascertain the meaning of section 952, it is helpful to examine related sections of the Act and cases construing them.<sup>60</sup> For example, courts interpreting section 959 of the Act, which proscribes the manufacture and distribution of controlled substances,<sup>61</sup> have required the government to prove that the defendant knew the destination of the manufactured drugs.<sup>62</sup> Such an interpretation is consistent with the language of section 959 because it explicitly sets forth the requirement of knowledge or intent that the narcotics enter the United States.<sup>63</sup> The government in *Londono-Villa*, focusing on the different conduct targeted by the two sections, thus urged that "[s]ection 959 requires knowledge proof because the provision proscribes a much broader range of conduct than [s]ection 952, conduct that without that proof of specific intent, might well have no effect in the United States."<sup>64</sup> Section 952, on the other hand, specifically prohibits "conduct that will, by definition, have an effect on the United States."<sup>65</sup>

Similarly, section 841(a)(1) of the Act makes it an offense knowingly and intentionally to possess a controlled substance "with intent to . . . distribute."<sup>66</sup> Courts have refused to limit the application of section 841 to only those defendants whose intended

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<sup>59</sup> *United States v. Noriega*, 746 F. Supp. 1506, 1515 (S.D. Fla. 1990).

<sup>60</sup> *See, e.g., United States v. Muench*, 694 F.2d 28, 32 (2d Cir. 1982) (cases decided under one section of title 21 are instructive in prosecutions under another section of same Act), *cert. denied*, 461 U.S. 908 (1983).

<sup>61</sup> 21 U.S.C. § 959 (1988).

<sup>62</sup> *See, e.g., Chua Han Mow v. United States*, 730 F.2d 1308, 1312 (9th Cir. 1984) (defendant may be prosecuted for acts committed outside United States if detrimental effect occurred within United States), *cert. denied*, 470 U.S. 1031 (1985).

<sup>63</sup> *See supra* note 47.

<sup>64</sup> Brief for the United States of America at 19-20, *United States v. Londono-Villa*, 930 F.2d 944 (2d Cir. 1991) (No. 90-1339).

<sup>65</sup> *Id.* at 20.

<sup>66</sup> 21 U.S.C. § 841(a)(1) (1988). The language of § 841 offers no guidance regarding the scope of the statute and whether it reaches distribution of drugs destined for the United States only. *Id.* § 841.

distribution point was the United States.<sup>67</sup> In *United States v. Muench*,<sup>68</sup> the Second Circuit indicated that, under section 841, proof of intent to distribute within the United States is unnecessary where actual, knowing possession occurs within the United States because such possession "supplies the jurisdictional nexus and obviates the need for proof of intent to distribute within the United States."<sup>69</sup> Although a showing of specific intent as to the destination of the narcotics is necessary in illegal importation cases involving extraterritorial seizures as a means of establishing jurisdiction, it is submitted that such proof should not be required when the narcotics involved ultimately reach the United States.<sup>70</sup>

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<sup>67</sup> See, e.g., *United States v. McKenzie*, 818 F.2d 115, 118 (1st Cir. 1987) ("Although [defendant] did not, apparently, intend to distribute the narcotics in the United States, the place of intended distribution is not important so long as such intent is established together with the fact of possession within the United States."); *United States v. Gomez-Tostado*, 597 F.2d 170, 172 (9th Cir. 1979) ("[N]othing in the legislative history or language of section 841(a)(1) . . . suggests any congressional intent to limit the applicability of the statute to defendants whose intended distribution point is in this country.").

<sup>68</sup> 694 F.2d 28 (2d Cir. 1982), cert. denied, 461 U.S. 908 (1983). In *Muench*, D.E.A. agents learned of a scheme by which airline passengers intended to smuggle drugs into West Germany from South America. *Id.* at 30. When the flight made a scheduled stop in New York, customs inspectors removed the luggage from the cargo compartment of the plane and discovered cocaine in the defendants' suitcases. *Id.* at 30-31. The defendants were convicted of possession of cocaine with intent to distribute under § 841(a)(1). *Id.* at 31. On appeal, the defendants argued that their indictments should have been dismissed because § 841 requires a showing that the defendant intended to distribute the controlled substance in the United States. *Id.* at 32. Rejecting this argument, the Second Circuit explained that proof of intent to distribute within the United States is necessary only to supply a needed jurisdictional nexus where drugs are seized outside United States territory. *Id.* at 33.

<sup>69</sup> *Id.* at 33; see also *United States v. Londono-Villa*, 735 F. Supp. 543, 547 (S.D.N.Y. 1990) (specific intent of person acting outside United States is sufficient jurisdictional nexus, while proof of such intent is not required where such "nexus is established in other ways"); *United States v. Hayes*, 653 F.2d 8, 16 n.7 (1st Cir. 1981) (while possession of narcotics on high seas with intent to distribute in United States is crime, where possession occurs within United States, it is "immaterial whether the offender intended to distribute it elsewhere").

<sup>70</sup> Compare *United States v. Marsh*, 747 F.2d 7, 12-13 (1st Cir. 1984) (where drugs are seized outside United States waters, government must prove defendant knew contraband was destined for United States to convict for conspiring to import) with *United States v. Mejia-Lozano*, 829 F.2d 268, 271-72 (1st Cir. 1987) (for conviction for importation where cocaine was seized within United States territory, government not required to prove defendant airline passenger knew plane was scheduled to stop in United States en route from Colombia to Switzerland).

In *Londono-Villa*, the defendant "plainly knew the drugs were being imported somewhere when he loaded the drugs onto the plane and gave the pilot directions out of the country." Brief for the United States of America at 26, *United States v. Londono-Villa*, 930 F.2d 994 (2d Cir. 1991) (No. 90-1339). Therefore, he "cannot be heard to complain that the sovereign which prosecutes him is not the one he expected." *Id.*

## II. MENS REA: DISTINGUISHING BETWEEN CONSPIRACY AND AIDING AND ABETTING

In *Londono-Villa*, both the majority and the dissent failed to distinguish between the mens rea required for a conspiracy violation and that required for the separate and distinct offense of aiding and abetting.<sup>71</sup> Essential to a conviction for a drug conspiracy is proof that two or more people agreed to commit a drug-related offense, that the defendant knew of this conspiracy and had some knowledge of its unlawful aims, and that he intended and agreed to join or associate himself with the objectives of the conspiracy.<sup>72</sup>

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<sup>71</sup> See *Londono-Villa*, 930 F.2d at 997-1000; *id.* at 1001-04 (McLaughlin, J., dissenting); see also *supra* note 14 (discussing failure of *Londono-Villa* court to distinguish mens rea requirement for two different charges). Both the majority and the dissent in *Londono-Villa* addressed only the substantive offense of importation and conspiracy to import in violation of §§ 952 and 963, respectively, and the mens rea necessary for conviction under those two statutes. See *Londono-Villa*, 930 F.2d at 997-1001, 1001-04 (McLaughlin, J., dissenting). No attention was given to the mens rea required for conviction for aiding and abetting. The offense of aiding and abetting importation does not "presuppose the existence of an agreement" and is a separate and distinct offense from conspiracy to import. *United States v. Valencia*, 492 F.2d 1071, 1074 (9th Cir. 1974); see also *Pereira v. United States*, 347 U.S. 1, 12 (1954) (substantive offense and crime of conspiracy not identical); *United States v. Madalone*, 492 F. Supp. 916, 920-21 (S.D. Fla. 1980). In *Madalone*, the defendant was found not guilty of conspiracy to import heroin, but guilty of importation of heroin and possession of heroin with intent to distribute. *Id.* at 920. The defendant argued that the jury verdict was inconsistent and he did not have specific intent to distribute the heroin found in his typewriter case because he intended to distribute it in Montreal. *Id.* at 918. The court rejected these arguments and held that the crime of conspiracy to import is distinct from the crimes of importation and possession with intent to distribute and that the latter crimes did not require a showing of specific intent to distribute the heroin within the jurisdictional confines of the United States. *Id.*

<sup>72</sup> See *United States v. Lanza*, 790 F.2d 1015, 1022-23 (2d Cir.), *cert. denied*, 479 U.S. 861 (1986); *United States v. Boldin*, 779 F.2d 618, 619 (11th Cir.), *cert. denied*, 475 U.S. 1098 (1986); *United States v. Carrascal-Olivera*, 755 F.2d 1446, 1450 (11th Cir. 1985); *United States v. Bascaro*, 742 F.2d 1335, 1359 (11th Cir. 1984). The Supreme Court has determined that "[i]n order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself." *United States v. Feola*, 420 U.S. 671, 686 (1975) (citing *Ingram v. United States*, 360 U.S. 672, 678 (1959)). Generally, federal conspiracy statutes have been construed to require proof of an agreement to commit an offense *against the United States*. See *Ingram v. United States* 360 U.S. 672, 678 (1959); *Pereira v. United States*, 347 U.S. 1, 12 (1954); *United States v. Bright*, 550 F.2d 240, 241 (5th Cir. 1977).

*Black's Law Dictionary* defines conspiracy, in part, as "[a] combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act . . ." BLACK'S LAW DICTIONARY 309 (6th ed. 1990).

The criminal law has traditionally defined intent to include "knowledge." See WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 216 (2d ed. 1986). The modern view, however, is to distinguish between intent and knowledge. *Id.* While the failure to make such a distinction may be of little consequence in many areas of criminal law, certain areas, such as



Thus, conspiracy concerns itself almost exclusively with the state of mind of the defendant<sup>73</sup> and, in fact, is predicated on the defendant's specific intent to engage in the criminal act marked by the conspiracy.<sup>74</sup>

In contrast to conspiracy, the charge of aiding and abetting focuses on the *conduct* of the defendant rather than his specific intent.<sup>75</sup> In *United States v. Peoni*,<sup>76</sup> the Second Circuit held that to be convicted of aiding and abetting, a defendant must in some way "associate himself with the venture, . . . participate in it as in something that he wishes to bring about, [and] . . . seek by his action to make it succeed."<sup>77</sup> Proof of the defendant's participation in every stage of the criminal venture is not required.<sup>78</sup> Thus, because the conspiracy doctrine usually applies to individuals who are significantly involved in the planning of the substantive of-

attempts and conspiracy, provide "good reason for distinguishing between one's objectives and knowledge." *Id.* at 218.

<sup>73</sup> See Paul Marcus, *Criminal Conspiracy: The State of Mind Crime—Intent, Proving Intent and Anti-Federal Intent*, 1976 U. ILL. L.F. 627, 628-29 (in order to be liable, defendant must have intended the conspiratorial relations).

<sup>74</sup> See Appellant's Brief at 31, *United States v. Londono-Villa*, 930 F.2d 994 (2d Cir. 1991) (No. 90-1339). "The second circuit has repeatedly held that a defendant cannot be convicted of conspiring to violate a particular statute unless it is found that he had the 'specific intent' to violate the statute." *Id.* (citing *United States v. Durham*, 825 F.2d 716, 719 (2d Cir. 1987); *United States v. DiTommasso*, 817 F.2d 201, 218 (2d Cir. 1987); *United States v. Gaviria*, 740 F.2d 174, 183 (2d Cir. 1984); *United States v. Soto*, 716 F.2d 989, 993 (2d Cir. 1983)).

<sup>75</sup> See Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 98 (1985) (secondary parties accountable for acts of primary party); see also *supra* note 14 (setting forth text of aiding and abetting statute).

The term "aid and abet" is defined in *Black's Law Dictionary* as conduct motivated to "[h]elp, assist, or facilitate the commission of a crime, promote the accomplishment thereof, [or to] help in advancing or bringing it about." BLACK'S LAW DICTIONARY 68 (6th ed. 1990).

<sup>76</sup> 100 F.2d 401 (2d Cir. 1938).

<sup>77</sup> *Id.* at 402 (L. Hand, J.); see also *United States v. Hathaway*, 534 F.2d 386, 399 (1st Cir.) (adopting *Peoni* language), *cert. denied*, 429 U.S. 819 (1976); *United States v. Nusraty*, 867 F.2d 759, 766 (2d Cir. 1989) (aiding and abetting requires that defendant knowingly involve himself in a criminal act).

The federal aiding and abetting statute can be analogized to the New York criminal facilitation statute. See N.Y. PENAL LAW §§ 115.00-15 (McKinney 1975 & Supp. 1991). The tenor of the criminal facilitation concept is that assisting in or encouraging the commission of a crime with knowledge is less culpable than assisting in or encouraging the commission of a crime with specific intent. See Louis Westerfield, *The Mens Rea Requirement of Accomplice Liability in American Criminal Law—Knowledge or Intent*, 51 MISS. L.J. 155, 184 (1980).

<sup>78</sup> See *Peoni*, 100 F.2d at 402 (L. Hand, J.); see also *United States v. Gramlich*, 551 F.2d 1359, 1364 (5th Cir.) (direct involvement in transportation of contraband not required), *cert. denied*, 434 U.S. 866 (1977).

fense<sup>79</sup> while accomplice liability generally attaches with a minimal showing of assistance to the principal,<sup>80</sup> it seems more appropriate to require proof of specific intent in the conspiracy offense than in the aiding and abetting violation.

It is asserted that the *Londono-Villa* court, in relying on case law involving only conspiracy convictions,<sup>81</sup> erroneously read a specific intent requirement into the aiding and abetting statute as well and failed to distinguish between the requisite elements for each separate and distinct offense. Thus, it struck down the defendant's conviction for aiding and abetting as well as conspiracy. Because of the different mens rea requirements, however, the defendant's conviction on the aiding and abetting charge should have been sustained, notwithstanding the majority's characterization of the mens rea for the conspiracy count.

### CONCLUSION

In narrowly interpreting the federal drug trafficking statutes in *Londono-Villa*, the Second Circuit has lost sight of both the compelling public policy underlying the Comprehensive Drug Abuse Prevention and Control Act of 1970 and the clear congressional intent to place a high priority on halting illegal drug trafficking. The court has semantically distorted the meaning of the Act by reading section 952(a) together with section 960 and, in the process, injected a specific intent requirement into the substantive offense of importation. Consequently, the government must now carry a heavier burden of proof, proving not only that the defendant intended to import drugs into another country, but also that he specifically knew or intended the destination of the drugs to be the United States.

Furthermore, both the majority and the dissent erroneously blurred the distinction between the mens rea that courts have traditionally required for conspiracy and that required for aiding and abetting, thereby erroneously striking down a conviction that should have been sustained. The severity of the drug problem currently afflicting our society mandates that sections 952, 960, and

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<sup>79</sup> See *United States v. Rosado-Fernandez*, 614 F.2d 50 (5th Cir. 1980); D.W. Elliott, *Mens Rea in Statutory Conspiracy, a Comment*, 1978 CRIM. L. REV. 202.

<sup>80</sup> See generally Grace E. Mueller, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169 (1988) (discussing accomplice liability).

<sup>81</sup> See *Londono-Villa*, 930 F.2d at 999; *supra* note 29.

963 of title 21 and section 2 of title 18 be interpreted so as to afford courts the ability to achieve the Act's objectives in adjudicating cases involving extraterritorial actors who participate—to any degree—in international drug trafficking.

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