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Conspiracy and Federal Jurisdiction: From Crimmins to Feola

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CONSPIRACY AND FEDERAL JURISDICTION: FROM *CRIMMINS* TO *FEOLA*

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I. INTRODUCTION

BY THE LAST QUARTER OF THE TWENTIETH CENTURY, AMERICANS have accustomed themselves to wide-ranging federal authority over the enforcement of criminal laws.[1] Federal law enforcement power today is exercised not only in jurisdictions directly administered by the national government,[2] but in all geographical areas of the United States and over a wide range of conduct.[3] Indeed, federal criminal legislation has so proliferated that Congress has felt compelled to give serious consideration to a comprehensive reform and consolidation of the federal criminal code.[4] Along with the expansion of federal criminal law has come growth in the federal investigatory apparatus assigned to enforce it. Included in this development has been the establishment and enlargement of such agencies as the Federal Bureau of Investigation,[5] the Drug Enforcement Administration,[6] and the Bureau of Alcohol, Tobacco and Firearms.[7] The federal enforcement machinery

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1. The bulk of federal criminal legislation is contained in 18 U.S.C. §§ 1–2520 (1970), but there are many criminal penalties provided for elsewhere in the United States Code. *E.g.*, 26 U.S.C. § 5601 (1970) (liquor tax criminal penalties). In referring to the expanded scope of federal criminal jurisdiction into areas previously unregulated by the national government, the working papers of the National Commission on Reform of the Federal Criminal Laws (Brown Commission) observe that "[t]hese offenses have been on the books for too long a period to permit a return of the status of Federal criminal law to what it was in the 19th century." NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 35 (1970) [hereinafter cited as WORKING PAPERS].

2. *See* 18 U.S.C. § 7 (1970).

3. *See Id.* §§ 3231–3243 (1970). If the conduct meets the statutory jurisdictional criteria, it may be the basis of a federal prosecution wherever it has occurred in the United States. *E.g., Id.* § 111 (1970) (assaulting a federal officer). In limited circumstances, offenses committed outside of the territorial United States may be subject to federal prosecution. *E.G., Id.* § 2381 (1970) (treason).

4. *See* NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT (1971) [hereinafter cited as BROWN REPORT]. Hearings have been held on the Commission's report. *Hearings on Reform of the Federal Criminal Laws before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973). A number of alternative federal criminal code reform bills have also been introduced. *E.g.*, S.1, 94th Cong., 1st Sess. (1975).

5. 28 U.S.C. §§ 531–537 (1970).

6. *See Id.* § 509 (Supp. V 1976).

7. *E.g.*, 18 U.S.C. § 2117 (§ 3(2)) (Supp. V 1975). (bureau's role in Transportation Cargo Security Program as stated in Executive Order No. 11836).

and the laws it safeguards now constitute an important segment of the American system of criminal justice.[8]

Undoubtedly, the current status of the federal role in law enforcement would have come as quite a surprise to the framers of the Constitution. The structure of the Constitution suggests that they envisioned a national government of limited powers, one of the most severely limited of which was the authority to enforce the criminal law. Instead, that function was to be performed by the states. Where the Constitution did recognize special national interests, federal use of the criminal sanction to protect those interests was seemingly approved;[9] however, a more general authority for a national criminal code was not granted.[10] In line with this philosophy, the earliest federal criminal legislation avoided duplicating or supplementing state restrictions, focusing instead upon distinctly national concerns.[11]

American society today, of course, is far different from what it was in 1789. Its growth, in both size and complexity, has significantly increased the need for a federal role in criminal law enforcement. The result has been the expansion of federal criminal legislation beyond the early confines of the protection of distinctly national interests. The newer breed of federal criminal statutes are aimed to a greater extent at supplementing existing state law. The logic behind this development lies partly in the greater mobility of offenders and complexity of offenses which do not respect state lines.[12] In addition, the laxity of state enforcement may have contributed to the need for federal intervention in some areas.[13]

8. Approximately 52,525 criminal defendants were handled by the federal district courts in fiscal year 1972. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL OFFENDERS IN UNITED STATES DISTRICT COURTS 1972, at 3 (1975). Beyond numbers, the federal justice system has a major role as a model and standard and has been referred to by the Supreme Court in reaching decisions controlling state practice. *E.g.*, Miranda v. Arizona, 384 U.S. 436, 483–87 (1966).

9. *See* U.S. CONST. art. I, § 8(6) (punishment of counterfeiting); *id.* art. I, § 8(10) (piracy and maritime offenses); *id.* art. IV, § 3(2) (power over property and territories belonging to the United States).

10. The Constitution, in providing for extradition, minimized the need for a federal criminal code. *See id.* art. IV, § 2(2). Conduct criminal in the state of commission would not escape punishment if the actor fled to another state due to the power to extradite. No federal substantive criminal law would be needed to handle this problem.

11. *See, e.g.*, 1 Stat. 46 (1789) (revenue frauds); 1 Stat. 112–19 (1790) (interference with federal justice and general penal code for federal territories).

12. Federal law punishing the interstate transportation of stolen motor vehicles is illustrative of federal criminal provisions responding to the interstate mobility of defendants. *See* 18 U.S.C. § 2312 (1970). The comprehensive federal narcotics regulations and criminal penalties respond to the need for uniform standards covering the illicit interstate trade in narcotic drugs. *See* 21 U.S.C. §§ 801–966 (1970).

13. The Mann Act and the criminal provisions of the Civil Rights Acts are of this variety. *See, e.g.*, 18 U.S.C. § 2421 (1970) (Mann Act); *id.* § 241 (criminal provisions of the Civil Rights Act).

Nevertheless, neither the character of American society nor the Constitution dictates that state law enforcement responsibilities be overwhelmed by the federal government. Thoughtful planning is needed to ensure a proper balance between the states and the federal government in allocating criminal law authority.

The application of federal jurisdiction to the enforcement of conspiracy laws is a particularly troublesome area in which to balance state and federal interests. On the one hand, conspiracy can be viewed simply as an inchoate crime, the prohibition of an agreement to commit an illegal act.[14] As such, it becomes entirely proper for federal jurisdiction to be asserted as vigorously in the suppression of conspiracies as in their substantive illegal objects. Yet, there are strong arguments that conspiracy jurisdiction ought to be more restrictively exerted. For example, the fact that conspiracy allows for extremely early legal intervention — at the point of an agreement which can substantially precede the conduct constituting an attempt — suggests that whatever danger or threat to federal interests may exist can be far less than the concern which motivated criminalizing the conspiracy's object.[15] This lesser threat may warrant more restrictive jurisdiction.

It is also true that conspiracy itself is a severely criticized doctrine.[16] Efforts to expand federal use of the conspiracy tool, therefore, should be carefully guarded, particularly where federal enforcement can upset the delicate balance between state and federal

14. Federal law defines conspiracy as occurring when "two or more persons conspire either to commit any offense against the United States, or to defraud the United States." *Id.* § 371. The agreement is the essence of the prohibited conduct. *See* Braverman v. United States, 317 U.S. 49, 53–54 (1942). However, the object of the agreement need not itself be a criminal act if it constitutes fraud against the United States. *See generally* Goldstein, *Conspiracy to Defraud the United States,* 68 YALE L.J. 405 (1959).

15. While there is no general federal attempt statute, many federal criminal statutes cover attempts to commit the acts prohibited. *See, e.g.,* 18 U.S.C. § 1509 (1970) (interference with court orders). However, since there is no indication of how close one must be to commission of the act before an attempt has been completed, confusion has resulted. *Compare* United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), *cert. denied,* 342 U.S. 920 (1952), *with* United States v. Robles, 185 F. Supp. 82 (N.D. Cal. 1960). The conspiracy statute requires merely that one of the conspirators "do any act to effect the object of the conspiracy." The purpose of the overt act requirement "is simply to manifest 'that the conspiracy is at work.'" Yates v. United States, 354 U.S. 298, 334 (1957), *quoting* Carlson v. United States, 187 F.2d 366, 370 (10th Cir. 1951). As in *Yates,* this requirement may be satisfied by a showing of innocent conduct.

16. The literature critical of conspiracy doctrine is extensive. *See, e.g.,* Krulewitch v. United States, 336 U.S. 440, 445–58 (1949) (Jackson, J., concurring); Johnson, *The Unnecessary Crime of Conspiracy,* 61 CAL. L. REV. 1137 (1973); *Developments in the Law — Criminal Conspiracy,* 72 HARV. L. REV. 920 (1959); Note, *The Conspiracy Dilemma: Prosecution of Group Crimes or Protection of Individual Defendants,* 62 HARV. L. REV. 276, 285–86 (1948); Note, *Conspiracy and the First Amendment,* 79 YALE L.J. 872 (1970).

responsibilities[17] and where federal prosecution does not preclude parallel efforts by the states.[18] Congress' lack of attention to the problem, coupled with the Supreme Court's recent ruling in *United States v. Feola*[19] expanding the jurisdictional base of federal conspiracy law to its virtual limit, suggest the need for a reevaluation of what has resulted.

II. SOURCES OF FEDERAL JURISDICTION

The Constitution itself is very sparing in granting explicit criminal law authority to the federal government. Piracy and felonies on the high seas,[20] treason against the United States,[21] and counterfeiting of United States currency[22] illustrate the limited scope of constitutional language delegating unambiguous criminal enforcement power to national authorities. Legislation implementing these grants of authority,[23] therefore, derives its jurisdictional basis directly from specific delegations of criminal law enforcement powers.

The power to utilize the criminal law, however, need not be explicitly delegated in order to be employed. In particular, by virtue of the "necessary and proper" clause[24] and the very extensive scope of the national government's power,[25] criminal sanctions are appropriate as a vehicle to implement other grants of authority. Thus, where the Constitution grants the federal government authority to establish a United States system of courts and mails, for example, Congress can ensure the integrity of those institutions through criminal legislation, such being a necessary and proper technique.[26] Similarly, areas within the territorial jurisdiction of the

17. Even with the extensive federal criminal jurisdiction conferred by Congress under existing law, it remains true that federal authorities frequently decline to act in favor of state prosecution. In addition to the mere existence of federal jurisdiction, at least one of the following factors are usually required before federal action will be taken: the impracticality of local investigation of a complex interstate crime, greater federal expertise or effectiveness in the investigation of the crime in question, and local corruption or incompetence. *See* WORKING PAPERS, *supra* note 1, at 52–57.

18. *See* Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1959).

19. 420 U.S. 671 (1975).

20. U.S. CONST. art. I, § 8(10).

21. *Id.* art. III, § 3(1).

22. *Id.* art. I, § 8(6).

23. 18 U.S.C. § 331 (1970) (falsification of coins); *id.* § 1651 (piracy); *id.* § 2381 (treason).

24. U.S. CONST. art. I, § 8(18).

25. *See, e.g.,* Katzenbach v. Morgan, 384 U.S. 641 (1966) (equal protection clause); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (commerce clause).

26. The judicial power is authorized in article III of the Constitution and enforced through criminal penalties contained in 18 U.S.C. §§ 401, 402 (1970). Similarly, the postal authority granted to the federal government in article I, section 8(7) of the Constitution is supported by criminal legislation in *id.* §§ 1691–1737 (1970).

United States government are appropriately regulated by federal criminal law.[27]

Common to the jurisdictional bases of these kinds of federal criminal statutes are direct infringements of national interests, whether territorial, property, institutional, or functional.[28] Counterfeiting United States currency, bribing a federal judge, or committing an assault in a territory administered by the federal government all directly interfere with federal responsibilities. Any impact that the underlying conduct might have on the states is only incidental and ancillary to its challenge to the exercise of federal authority. Thus, since the harm in this area most directly affects the federal government, primary or exclusive control by federal authorities is in order.[29]

Federal criminal legislation, however, has moved far beyond the narrow strictures of controlling conduct directly or primarily threatening national interests. And with such movement has come an exacerbation of policy conflicts between state and federal authorities. For example, a suspect accused of stealing an article from a postal employee faces the possibility of both state and federal charges.[30] Yet, differences in prosecution, sentencing, and parole patterns may exist between the federal and state systems, and the exercise of jurisdiction by one may serve to undercut the policy interests of the other.[31] Such tensions may have to be tolerated where federal interests are of sufficient importance, as is arguably the case for statutes protecting the integrity of the postal system. However, where there is no significant federal interest, there is less justification in creating the potential for conflict.

The broadest expansion of federal jurisdiction has occurred in areas where federal interests are not directly threatened or where the threat to state concerns is clearly primary. Offenses which have traditionally been matters of state concern, such as prostitution and

27. *See* U.S. CONST. art. IV, § 3(2); 18 U.S.C. §§ 5, 7 (1970).

28. Professor Louis Schwartz has called this area "federal self-defensive criminal jurisdiction." Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion*, 13 LAW & CONTEMP. PROB. 64, 66–70 (1948).

29. The Brown Commission has recommended a provision establishing the nonpreemptive character of federal jurisdiction. BROWN REPORT, *supra* note 4, § 206. Thus, it calls for concurrent jurisdiction; but action by a state or the federal government may bar the other from proceeding. *Id.* §§ 707, 708. Existing case law is to the contrary. *See, e.g.*, Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1959).

30. Theft of mail from a mail carrier is punishable pursuant to 18 U.S.C. § 1708 (1970). State jurisdiction would arise by virtue of the crime occurring within the physical confines of the state.

31. It is conceivable that a postal theft might qualify for a diversion program in the state system but not in the federal one, thereby reflecting divergent prosecution policies. The possibilities of differing sentences and parole decisions are readily apparent.

gambling, are now subject to federal control if a state line is crossed or an interstate facility, such as the mails or telephone, used.[32] Federal authority has entered these arenas not to protect its own interests, but rather to aid state efforts or undercut state laxity. Oddly enough, the social changes that have made federal assistance necessary have also made it difficult to avoid running afoul of federal power.[33]

Federal criminal statutes that are, as labeled by Professor Louis Schwartz, "auxiliary to state law enforcement"[34] efforts require restraint in their creation. While they may serve an important function, they bring with them these possible disadvantages:

> To enlist the federal power in the battle against obscenity, lotteries, theft, alcoholism, and prostitution is not to protect federal prestige but to hazard it; it does not solve federal administrative problems but creates new ones; it does not vindicate federal authority in matters of distinctively national concern against possible local obstruction, but steps into local issues. Federal intervention also has a tendency to weaken the enforcement efforts of state authorities.[35]

Moreover, given the fact that the states and the federal government are separate sovereigns, such statutes create the risk of multiple prosecutions, convictions, and sentences for what is essentially a single underlying crime.[36]

Although some of these risks are present in nonauxiliary federal criminal statutes, the importance of the federal interests involved requires that the risks be assumed. Where, however, the federal criminal interest is only auxiliary, the decision to undertake enforcement and risk the disadvantages requires more thoughtful consideration. How much is to be gained through federal assistance? How lax or inefficient are the state enforcement mechanisms? What

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32. *See* 18 U.S.C. § 1952 (1970). This section prohibits travel in interstate or foreign commerce or use of an interstate facility to, among other things, "facilitate" unlawful activity, defined to include an extensive array of offenses. It has been said to almost reach "the logical limit of the use of such traditional jurisdictional bases as travel, transportation or communication in commerce." WORKING PAPERS, *supra* note 1, at 37. The Brown Commission's "piggyback" jurisdiction proposal would add a new twist to allow further federal enforcement of traditionally state controlled conduct. BROWN REPORT, *supra* note 4, § 201(b).

33. It is difficult to avoid use of the mails or telephones in many kinds of activities covered by 18 U.S.C. § 1952 (1970). Even if one does, it is still no guarantee, for federal jurisdiction may nevertheless arise because the conduct still "affects commerce" within the meaning of 18 U.S.C. § 1951 (1970).

34. Schwartz, *supra* note 28, at 70–83.

35. *Id.* at 70.

36. Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1959).

costs are likely to ensue? These are among the general factors to be weighed.[37]

Presumably, as the disadvantages of auxiliary federal enforcement exceed the advantages, the enactment of such legislation becomes less likely. Yet, the existence of a large number of commerce-related federal offenses[38] suggests that Congress has seen the need for broad federal criminal authority to supplement state enforcement. Nevertheless, through judicial efforts, some limitation on the scope of federal authority arose in the prosecution of conspiracy offenses. Two reasons for limited federal involvement can be present. First, if the offense is an auxiliary one and the federal interest is simply to supplement state enforcement, there is less reason to involve federal prestige. Second, where the charge is a conspiracy and the conspiratorial object has not been achieved, the result is an inchoate crime and an even more distant threat to federal interests.

The substantive means by which federal involvement was limited was the *Crimmins* doctrine, developed by Judge Learned Hand.[39] In essence, it required that the prosecution prove at least knowledge by the defendants of the federal jurisdictional elements of a conspiracy in order to secure a conviction. Recently, however, the Supreme Court[40] rejected the doctrine and substantially broadened the opportunities for federal conspiracy prosecutions. Both the scope and implications of the Court's approach, however, have raised troublesome problems of law and policy.

III. *Crimmins* AND *Feola*

United States v. Crimmins[41] involved a prosecution for conspiracy to transport stolen securities in interstate commerce. The defendant, an attorney from Syracuse, was offered and purchased stolen securities. He did so under circumstances which justified a conclusion that he knew at the sale that the securities were stolen, but no evidence was presented as to his awareness that the securities were stolen in another state.[42]

The facts of the *Crimmins* case gave rise to two possible federal prosecutions. First, the defendant could have been charged with the

37. *See* WORKING PAPERS, *supra* note 1, at 51–57; Schwartz, *supra* note 28, at 73–77.

38. *E.g.*, 18 U.S.C. § 224 (1970) (bribery in sports); *id.* § 1084 (transmission of wagering information); *id.* § 1951 (interference with commerce by threats or violence).

39. United States v. Crimmins, 123 F.2d 271 (2d Cir. 1941).

40. United States v. Feola, 420 U.S. 671 (1975).

41. 123 F.2d 271 (2d Cir. 1941). The interstate transportation of stolen goods statute is now codified at 18 U.S.C. § 2314 (1970).

42. 123 F.2d at 272.

substantive offense of transporting stolen securities in interstate commerce as an aider and abettor. The court theorized that by providing a market for the stolen securities, Crimmins would have "caused" them to be transported in interstate commerce.[43] Second, upon proof of an agreement to purchase the stolen securities, the elements of a conspiracy charge were satisfied.[44] Potentially critical to both charges, however, was the absence of the defendant's awareness of the interstate character of the securities he knew were stolen.

Clearly, had the defendant been prosecuted in the courts of the state of New York, conviction upon substantive and conspiracy charges for receipt of stolen securities would have withstood attack on appeal. However, prosecution in a federal court requires some basis for the assertion of federal authority. The "jurisdictional peg" in *Crimmins* was the interstate character of the stolen securities, but it was a feature of the transaction about which Crimmins was unaware.

Judge Hand was willing to assume, without deciding, that proof of the defendant's knowledge of the interstate character of the stolen securities was unnecessary for a conviction on a substantive charge of causing the interstate transportation of stolen securities.[45] Nevertheless, he felt that such proof was essential to support a conspiracy conviction. In Judge Hand's view, the prosecution could have met its burden by demonstrating, directly or circumstantially, that Crimmins was aware that some of the bonds he purchased were stolen out of state. Alternatively, proof that an implied term of the conspiracy agreement was a willingness to purchase securities from any source would have sufficed "for such an agreement would have dealt with the place of the theft."[46]

Judge Hand's basis for reaching his conclusion that the defendant must be shown to have been aware of the interstate element in an interstate conspiracy was succinctly stated:

> [E]ach conspirator is chargeable with the acts of his fellows done in furtherance of the joint venture; but into that must be read the condition that acts so imputed must be in execution of the venture as all understand it; not indeed in its details, but so far as concerns those terms which constitute the substantive crime.[47]

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43. *Id.* at 273.
44. *See* note 14 *supra.*
45. 123 F.2d at 273. The assumption was made, however, in the face of precedent to the contrary involving a similar statute. *See* Davidson v. United States, 61 F.2d 250 (8th Cir. 1932).
46. 123 F.2d at 273.
47. *Id.*

The underlying offense in *Crimmins* was causing the interstate transportation of stolen securities. In Judge Hand's view, each of the elements of the offense must be shown to have been part of the understanding of the conspirators. Thus, since the interstate transportation feature of the stolen securities was defined as part of the offense, this must be shown to have been part of the understanding of the group.[48] Without an awareness of the securities' interstate character, the conspirators' agreement obviously could not have embraced that element. Thus, there was at most a conspiracy to deal in stolen securities, not a conspiracy involving interstate stolen securities.

Although awareness of the interstate aspects of the scheme was found necessary to support a conspiracy charge, the *Crimmins* court was willing to assume that such evidence was unnecessary to support a conviction for the underlying offense. The seeming inconsistency presented was that one could be guilty of causing stolen securities to be transported in interstate commerce without being aware of the interstate character of the securities but could not be convicted of a conspiracy to achieve that object under the same circumstances. Judge Hand's answer to this analytical difficulty was the traffic light analogy: "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."[49] Regardless of the basis of liability for the object offense, a conspiracy agreement must embrace every element of the offense to support a conspiracy conviction.

The *Crimmins* doctrine can be analyzed in terms of both its theoretical and its practical impact. Central to criminal law theory is the concept of mens rea — the guilty mind which must accompany the forbidden conduct before criminal liability will attach.[50] With the

48. *See* 18 U.S.C. § 2314 (1970). This section provides in relevant part: "Whoever transports in interstate . . . commerce any . . . securities . . . of the value of $5,000 or more, knowing the same to have been stolen . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both." The statute calls for an awareness that the securities were stolen. Judge Hand's view apparently was that awareness of every element would be necessary in a conspiracy prosecution, including the knowledge that the items were securities, of a value greater than $5,000, were stolen, and had an interstate character.

49. 123 F.2d at 273.

50. Judge Hand stated:

> Ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. That awareness is all that is meant by the mens rea, the "criminal intent," necessary to guilt, as distinct from the additional specific intent required in certain circumstances.

Id. at 272 (citation omitted). Criminal code revisions following the Model Penal Code accept the notion that negligence can be the basis of criminal culpability, defined as

exception of strict liability crimes,[51] mens rea is an essential component of every offense. However, the application of mens rea theory to criminal conduct is more complex than simply looking for a generalized evil disposition on the part of a defendant. Rather, the structure of criminal offenses requires that they be broken down into their constituent elements — the forbidden act, surrounding circumstances, and result.[52] The defendant must be shown to have had the requisite mens rea for each constituent element of the crime.

In the *Crimmins* fact situation, the court was willing to concede the possibility that no mens rea was necessary as to the interstate feature of the substantive crime — that the offense was one of strict liability as to that element.[53] But, in a conspiracy to achieve the same object, the court apparently reasoned that the analysis must change: a conspiracy, being an agreement to achieve all of the elements of the underlying substantive crime, requires some mens rea as to each element even if the substantive crime does not. Thus, while substantive offenses may have strict liability elements, conspiracy charges cannot contain such elements.

The *Crimmins* analysis, of course, arose in the context of a particular underlying substantive crime which was the object of the conspiracy. But the approach was equally applicable to any federal conspiracy charge, in particular to the element of the offense conveying federal jurisdiction. Federal conspiracy prosecutions involving interstate commerce or the use of interstate facilities could be limited through the application of the *Crimmins* rationale and indeed were so limited in those courts adhering to Judge Hand's opinion.[54] Thus, the *Crimmins* theory brought with it a practical consequence involving a restriction on the growth of federal criminal power in the conspiracy field.

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occurring when the defendant "should be aware" that a material element of an offense exists. MODEL PENAL CODE § 2.02(2)(d) (Proposed Official Draft 1962) [hereinafter cited as MODEL PENAL CODE]. The Code's other standards of culpability are premised upon the defendant's awareness of the facts constituting the crime. *Id.* § 2.02(2)(a)–(c).

51. *See* United States v. Balint, 258 U.S. 250 (1922).

52. The Code defines elements of an offense to include conduct, attendant circumstances, or result. MODEL PENAL CODE, *supra* note 50, § 1.13(9); *see* W. LAFAVE & A. SCOTT, CRIMINAL LAW 194–95 (1972).

53. 123 F.2d at 273. The court also noted other statutes with strict liability elements such as statutory rape and adultery, *citing* Commonwealth v. Murphy, 165 Mass. 66, 42 N.E. 504 (1896), *and* State v. Audette, 81 Vt. 400, 70 A. 833 (1908).

54. *See, e.g.*, United States v. Alsondo, 486 F.2d 1339 (2d Cir. 1973), *rev'd sub. nom.*, United States v. Feola, 420 U.S. 671 (1975); United States v. Garafola, 471 F.2d 291 (6th Cir. 1972); United States v. Vilhotti, 452 F.2d 1186 (2d Cir. 1971), *cert. denied*, 406 U.S. 947 (1972); United States v. Cimini, 427 F.2d 129 (6th Cir.), *cert. denied*, 400 U.S. 911 (1970); United States v. Sherman, 171 F.2d 619 (2d Cir. 1948).

The *Crimmins* doctrine received a mixed reception in the federal courts[55] until the Supreme Court's decision to tackle the problem in *United States v. Feola.*[56] In contrast to *Crimmins,* which involved an interstate commerce conspiracy, *Feola* was concerned with a conspiracy to assault a federal officer.[57] However, the basic analytical problem was the same. In each case the element of the substantive offense conveying federal jurisdiction required no proof of mens rea. This proposition was assumed by Judge Hand in *Crimmins*[58] and decided directly by the Supreme Court in *Feola* when it ruled that lack of awareness that the victim of an assault is a federal officer is no defense to a charge of assaulting a federal officer.[59] While the *Crimmins* court had ruled that the defendant must be shown to have been aware of the interstate character of the stolen bonds when charged with conspiracy, the Supreme Court held that no awareness of the federal status of the victim need be proven under a charge of conspiracy to assault a federal officer.

The Supreme Court, in order to refute Judge Hand, had to discredit the appealing logic of *Crimmins.* After all, a charge of conspiracy does not exist in the abstract, but rather, the essence of a conspiracy is to agree to perform an act which is forbidden. Insofar as the forbidden conduct in *Feola* involved assaulting a federal officer, how can a defendant have agreed to such an act if he did not know his victim was a federal officer?

In essence, the Supreme Court chose to adopt the Government's plea for symmetry in the treatment of substantive and conspiracy charges.[60] The mens rea requirements for the offense that the conspiracy sought to achieve were simply carried over to the conspiracy charge, including strict liability elements. The Court could find no support for the *Crimmins* theory in the general conspiracy statute and therefore concluded that where "the substantive statute does not require that an assailant know the official status of his victim, there is nothing on the face of the conspiracy

55. The Third, Seventh, and Ninth Circuits rejected the *Crimmins* rule. United States v. Iannelli, 477 F.2d 999, 1002 (3d Cir. 1973), *aff'd mem.,* 420 U.S. 770 (1975); United States v. Thompson, 476 F.2d 1196 (7th Cir. 1973), *cert. denied,* 414 U.S. 918 (1973); United States v. Roselli, 432 F.2d 879 (9th Cir. 1970), *cert. denied,* 401 U.S. 924 (1971). Other courts, as noted in *Feola,* were able to find sufficient evidence of anti-federal intent from the record. United States v. Feola, 420 U.S. 671, 689–90 (1975); United States v. Iacovetti, 466 F.2d 1147 (5th Cir. 1972), *cert. denied,* 410 U.S. 908 (1973); United States v. McGann, 431 F.2d 1104 (5th Cir. 1970), *cert. denied,* 401 U.S. 919 (1971); Nassif v. United States, 370 F.2d 147 (8th Cir. 1966); Clark v. United States, 213 F.2d 63 (5th Cir. 1954).

56. 420 U.S. 671 (1975); *see* 7 SETON HALL L. REV. 126 (1975).

57. 420 U.S. at 673; *see* 18 U.S.C. §§ 111, 371, 372 (1970).

58. *See* note 45 and accompanying text *supra.*

59. 420 U.S. at 677–86.

60. *Id.* at 676.

statute that would seem to require that those agreeing to the assault have a greater degree of knowledge."[61]

The Court then rejected the traffic light analogy as inapposite and observed that the question of whether it is fair to punish parties to an agreement to engage intentionally in innocent conduct which results in violation of a statute was not presented to the court in either *Feola* or *Crimmins*.[62] If an actor is unaware of the existence of a traffic light, that actor is clearly contemplating legitimate conduct. However, a plan to purchase stolen securities or commit an assault involves clearly wrongful conduct whether or not the interstate character of the securities or the official status of the victim is known to the parties. The traffic light analogy was thus confined to the realm of regulatory offenses in which proof of the act alone is sufficient for ciminal liability and thus may retain some validity.[63]

The substance of the *Crimmins* decision, however, was Judge Hand's view that a conspirator's liability extends only as far as those terms reasonably within the scope of his agreement. The Court rephrased the issue in the context of *Feola* as "not merely whether the official status of an assaulted victim was known to the parties at the time of their agreement, but whether the acts contemplated by the conspirators are to be deemed legally different from those actually performed solely because of the official identity of the victim."[64] In short, symmetry requires equal treatment in terms of the mens rea for both substantive and conspiracy charges, a conclusion reached by the Court without directly tackling Judge Hand's view that conspiracy liability should extend no further than the terms of the agreement as understood by the parties.[65]

The *Feola* and *Crimmins* rationales, while leading to opposite conclusions, do not directly take issue with each other. Instead they pose interesting questions that are left unanswered. *Crimmins* does not explain why awareness of an element can be irrelevant to liability for acts performed but not for acts planned; *Feola* does not articulate how a defendant can become party to an agreement when some of its terms are unknown to him. Perhaps a proper resolution of the problem lies not so much in criminal law theory, but in an

61. *Id.* at 687.
62. *Id.* at 690–91.
63. The Court noted the closeness of the position to the *Powell* doctrine, People v. Powell, 63 N.Y. 88 (1875) (requiring proof of a corrupt motive in conspiracy), but declined to rule on the issue. 420 U.S. at 691.
64. 420 U.S. at 692–93.
65. The Court noted that conspirators may be liable "for acts the precise details of which one does not know at the time of the agreement." *Id.* at 692, *citing* Blumenthal v. United States, 332 U.S. 539, 557 (1947). This is not the same as lack of awareness of an element of the offense as defined by the statute.

accommodation of conspiracy doctrine and the unique attributes of federal jurisdiction.

IV. CONSPIRACY REFORM AND ANTI-FEDERAL INTENT

Feola and *Crimmins* share in common the fact that each was a federal conspiracy prosecution for acts which could also have been prosecuted under state law. Crimmins had clearly been in receipt of stolen goods while Feola's conduct amounted to a traditional assault.[66] In each case, however, federal prosecution was possible because of the existence of federal legislation converting traditional state crimes into federal ones by merely adding an additional element to convey the necessary jurisdiction. In *Crimmins,* the requisite jurisdiction was accomplished by requiring that the stolen securities have an interstate character,[67] while the statute in *Feola* established federal jurisdiction by requiring a federal victim of the assault.[68]

Is there, then, something unique about the element of a federal offense which serves to confer jurisdiction upon the federal courts for these violations of statutory prohibitions? In one sense the answer must be no. Whether or not the element in question is jurisdictional, the element must still be proven beyond a reasonable doubt to satisfy due process requirements, a conclusion which the *Feola* Court conceded.[69] However, proving that the jurisdictional element exists beyond a reasonable doubt may in another sense be different from the proof required for other elements. Certainly, the jurisdictional element must exist. In *Crimmins,* this rule imposed a requirement that the stolen securities have an interstate character, and in *Feola,* it meant that the intended victim of the assault in fact had to have the necessary official federal status. But there is a difference between proving the existence of the jurisdictional facts and proving the defendant's awareness of their existence. For the *Feola* Court that distinction was critical, for while it accepted the need to prove the existence of the jurisdictional element, the Court refused to require any further inquiry on the point.[70] In this manner, the Court

66. *See* United States v. Feola, 420 U.S. 671, 696–713 (1975) (Stewart, J., dissenting).

67. *See* 18 U.S.C. § 2314 (1970).

68. *See id.* § 111.

69. *See* 420 U.S. at 676–77 n.9.

70. *Id.* The Court observed:

> The significance of labeling 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.

Id.

placed jurisdictional elements in a class apart from other material elements of federal criminal offenses. In contrast, the *Crimmins* Court chose to treat the federal jurisdictional element as any other element of a conspirator's object crime and thus required that it be part of the agreement as the conspirators understood it.

As a matter of theory and practice, is it appropriate to treat the jurisdictional element in a federal conspiracy in the manner suggested by *Feola*? Because the only significance of the element is to confer federal jurisdiction, there may be no showing of the mens rea required for substantive liability.[71] If prosecuted as a conspiracy, then, as the Government argued in *Feola,* symmetry should mean no differing treatment for the mens rea of the jurisdictional element.[72] On the other hand, the nonjurisdictional elements of the offense will have a mens rea component which will be carried into the conspiracy charge. This leaves the jurisdictional element as the only one for which there may be strict liability,[73] a result which appears unsymmetrical. However, the nature of conspiracy doctrine and the need to balance federal and state law enforcement authority may help to reconcile the theoretical dilemma of *Crimmins* and *Feola.* Moreover, these factors may be relevant to the manner in which the courts flesh out the scope and implications of the *Feola* decision.

Conspiracy is unique in the arsenal of criminal law weapons in the degree to which it permits early intervention for the suppression of crime. The agreement to commit an act within the scope of the conspiracy law net is itself sufficient to support a conspiracy conviction, a point that can substantially precede conduct constituting an attempt to commit an offense.[74] The doctrine is aimed at the special dangers posed by group criminal activity, including the supposed greater likelihood of success, increased organization and heightened opportunity for future crime, as well as the decreased chance of abandonment posed by conspiratorial groupings, all factors which purport to justify the extremely early criminal law intervention.[75]

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71. *Id.* at 677–86. Similarly, the Model Penal Code excludes such jurisdictional elements from its definition of material offense elements. MODEL PENAL CODE, *supra* note 50, § 1.13(10). The Code's culpability provisions, moreover, relate only to material elements of the offense. *Id.* § 2.02.

72. *See* 420 U.S. at 676.

73. Regulatory offenses are the one possible exception subject to the Court's view on the *Powell* doctrine issue. *Id.* at 690–91.

74. W. LAFAVE & A. SCOTT, *supra* note 52, at 460–61. In jurisdictions requiring substantial proximity to completion of the crime for attempt liability, conspiracy permits much earlier intervention since the agreement does not have to be sufficiently proximate. *See, e.g.,* People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (1927).

75. *See Developments in the Law — Criminal Conspiracy,* 72 HARV. L. REV. 920, 923–24 (1959).

The logic that supports the conspiracy concept has not allowed the doctrine to escape severe criticism. There are inherent weaknesses in group criminal conduct that may increase the chances of abandonment or detection,[76] thereby undercutting the justification for early intervention. Beyond the theoretical conflict over conspiracy, however, lies substantial concern over the doctrine's potential for abuse in terms of the conduct to which it may be applied and the procedural consequences of its application. Vagueness of the conspiracy concept,[77] special rules of evidence utilized in conspiracy prosecutions,[78] and the undermining of venue protections[79] are among the attributes of conspiracy doctrine which are cause for concern. Moreover, conduct which is not criminal in itself may be converted into an offense through the conspiracy route,[80] and because conspiracy and the criminal object do not merge, the prosecution may convert the entire episode into multiple convictions and punishments.[81] Since the essence of the offense circumvents so many traditional safeguards and since the application can be easily abused, the scope of the conspiracy offense must be kept within bounds.[82] Such an effort lies at the heart of *Crimmins* but was abandoned by *Feola*.

The Supreme Court in *Feola* correctly asserted that the *Crimmins* rule had become one of the features of conspiracy doctrine

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76. A number of recent conspiracy prosecutions indicate that more participants in a criminal scheme may make it that much easier to infiltrate the group. *E.g.*, United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). *See also* Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 413–14 (1959).

77. Mr. Justice Jackson stated that "[t]he modern crime of conspiracy is so vague that it almost defies definition." Krulewitch v. United States, 336 U.S. 440, 446 (1949) (Jackson, J., concurring) (footnote omitted). *See also* MODEL PENAL CODE § 5.03, Comment at 106–07 (Tent. Draft No. 10, 1960) [hereinafter cited as Tent. Draft No. 10]; Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1129–35 (1975).

78. The co-conspirator exception to the hearsay rule allows the admission of statements made by a conspirator during and in furtherance of the conspiracy to be admitted against all conspirators. *See generally* Comment, *The Hearsay Exception for Co-Conspirators' Declarations*, 25 U. CHI. L. REV. 530 (1958). Although such statements are supposed to be admitted only upon proof of the conspiracy, the "conspiracy often is proved by evidence that is admissible only upon the assumption that conspiracy existed." Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

79. Venue may be in the place of agreement or at any location where an overt act was committed by any conspirator. *See* W. LAFAVE & A. SCOTT, *supra* note 52, at 456–57; *Developments in the Law — Criminal Conspiracy*, 72 HARV. L. REV. 920, 975–78 (1959).

80. *See generally* Goldstein, *supra* note 76, at 405; Note, *supra* note 77, at 1122, 1129–35.

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

82. It has also been forcefully argued that control of the doctrine is the wrong solution; rather, conspiracy ought to be abolished. *E.g.*, Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137–39 (1973).

subjected to criticism.[83] In particular, the Model Penal Code[84] and the National Commission on Reform of Federal Criminal Laws[85] had rejected the broad sweep of *Crimmins* in their recommendations. However, a closer look at their views is in order.

The Model Penal Code commentary on its conspiracy provisions urged that jurisdictional elements in federal conspiracy prosecutions be recognized frankly as such rather than as elements of the substantive offense.[86] The question would then become whether or not federal jurisdiction exists rather than the knowledge of the parties. If the crime had in fact been committed, jurisdiction would exist; jurisdiction would also exist if the parties contemplated the jurisdictional element. The commentary proceeds to state that "in situations where the jurisdictional circumstance neither exists nor was in contemplation of the parties, it would be clear that jurisdiction simply cannot be affirmed."[87]

Under the Model Penal Code reasoning, it would be possible to distinguish between different jurisdictional sources in the handling of federal conspiracy charges. First, if the conspiracy had achieved its object, jurisdiction would be deemed to exist. If it had failed, the need to determine whether the jurisdictional circumstance was in the contemplation of the parties would depend upon the basis upon which jurisdiction is established. If it is a preexisting factor, even though commission of the criminal object lies in the future, then jurisdiction would in fact be established. This would have been the case in *Feola* if the victim of the conspiracy to assault had been identified in advance and was in fact a federal official.[88] The same reasoning would apply to the facts in *Crimmins,* a conspiracy to receive stolen interstate securities, if the conspiracy arose or took place after the securities had acquired their interstate character.[89] If the conspiracy had not achieved its federally prohibited object nor did the jurisdictional element arise before or during the conspiracy, awareness of the jurisdictional requirement would seem to be necessary under the Model Penal Code formulation. In other words,

83. 420 U.S. at 690 n.23.

84. Tent. Draft No. 10, *supra* note 77, § 5.03, Comment at 110–13.

85. WORKING PAPERS, *supra* note 1, at 388–89. *See also Developments in the Law — Criminal Conspiracy,* 72 HARV. L. REV. 920, 937–40 (1959).

86. The commentary states: "[T]he problem might be greatly simplified if Congress were to view these circumstances not as an element of the respective crimes but frankly as a basis for establishing federal jurisdiction." Tent. Draft No. 10, *supra* note 77, § 5.03, Comment at 112 (footnotes omitted).

87. *Id.*

88. *See* 420 U.S. at 674–76. The circumstances are developed more fully in the court of appeals decision. *See* United States v. Alsondo, 486 F.2d 1339 (2d Cir. 1973), *rev'd sub nom.* United States v. Feola, 420 U.S. 671 (1975).

89. Crimmins seemed to have entered the picture after the stolen securities had crossed state lines. United States v. Crimmins, 123 F.2d 271, 272 (2d Cir. 1941).

where the jurisdictional element does not exist in fact, the Code would require that the conspirators be shown to be aware of its likely existence in the future.

The Model Penal Code's qualified rejection of *Crimmins* is consistent with the Supreme Court's ruling in *Feola* since the facts, namely that the criminal object had been achieved, fall within the category of situations in which awareness of the jurisdictional element need not be proved. However, there is a danger that *Feola* will not be read in this manner and that future courts will dispense with an inquiry into the conspirators' mental attitudes towards the jurisdictional element in *all* situations.[90] The Supreme Court's reference to the Model Penal Code's rejection of the *Crimmins* rule, therefore, must be read in light of the Code's own qualification of its position.

Additionally, the Model Penal Code position on the *Crimmins* rule was part of an overall reform of conspiracy doctrine, not an isolated position. Among the Code's major contributions are a requirement that the object of the conspiracy be itself a criminal offense;[91] rejection of automatic liability for the substantive crimes of the conspiracy based solely upon the defendant's status as a co-conspirator;[92] a demand that the defendant have specifically intended to achieve the illegal result of the conspiracy;[93] and the imposition of an overt act requirement.[94] Moreover, the Code rejects the prevailing view that a defendant may always be convicted and sentenced for both conspiracy *and* the object offense,[95] and offers criteria to solve conspiracy joinder and venue problems.[96] Needless to say, *Feola* offers none of these reforms in return for its rejection of *Crimmins*. Such changes must await legislative action,[97] a delay the Supreme Court was apparently unwilling to accept in ruling on the *Crimmins* problem. The result, however, was the adoption of a very small part of the Model Penal Code's comprehensive conspiracy reform package. One can only speculate whether the American Law

90. *But see* 420 U.S. at 695–96.

91. Tent. Draft No. 10, *supra* note 77, § 5.03, Comment at 102–04. The progress of statutory reform based on the Model Penal Code's conspiracy provisions is surveyed in Note, *supra* note 77, at 1122.

92. *See* Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy* (pt. 2), 61 COLUM. L. REV. 957, 1004 (1961).

93. Tent. Draft No. 10, *supra* note 77, § 5.03, Comment at 107–10.

94. *Id.* at 140–42; *see* 18 U.S.C. § 371 (1970) (imposing an overt act requirement in the federal conspiracy statute).

95. Tent. Draft No. 10, *supra* note 77, § 5.03, Comment at 98–99.

96. *Id.* at 135–39.

97. Ironically, the lower court in *Feola* implied that revision of the *Crimmins* rule should await legislative change. United States v. Alsondo, 486 F.2d 1339, 1343–44 (2d Cir. 1973), *rev'd sub nom.* United States v. Feola, 420 U.S. 671 (1975).

Institute would have proposed its approach to *Crimmins* apart from its other recommendations and whether, standing alone, that single change furthers or retards the Code's overall criminal law objectives.

Similarly, as observed by the Court in *Feola,* the National Commission on Reform of Federal Criminal Laws (Commission) appears to reject the *Crimmins* doctrine.[98] While its treatment of the problem is not as thorough as that of the Model Penal Code, the fact that the Commission cites both the Code's conspiracy provisions and commentary[99] suggests the likelihood that it would accept the Code's overall approach, including the necessity to demonstrate awareness of the jurisdictional element in a limited class of cases. Moreover, the Commission, like the Code, offers substantial reform of conspiracy doctrine of which the rejection of the *Crimmins* rule is only a small part.[100] Again, the Supreme Court may well have taken a single Commission recommendation out of context.

If the conspiracy doctrine is indeed an area of the law in need of substantial internal reform as well as being a charge easily abused in its application,[101] it might be well to keep the doctrine in check until reforms have been implemented. Such is the result accomplished by *Crimmins* and abandoned by *Feola.* The Supreme Court has given wider application to the unreformed law of conspiracy, a specific result nowhere recommended. The Court did not even consider this consequence in reaching its conclusion in *Feola,* although the theoretical impasse inherent in the problem suggests the need to consider other factors in arriving at a solution.

The jurisdictional implications of the *Crimmins-Feola* controversy offer another set of variables to assist in reaching a solution. The substantive federal crimes to which conspiracy charges may be attached present the full range of possible jurisdictional sources for federal prosecutions.[102] Some may focus upon direct threats to federal interests,[103] while others may rest upon the broad federal

98. 420 U.S. at 690 n.23; BROWN REPORT, *supra* note 4, § 204; WORKING PAPERS, *supra* note 1, at 388-89.

99. WORKING PAPERS, *supra* note 1, at 389 n.25.

100. *See generally* BROWN REPORT, *supra* note 4, § 1004; WORKING PAPERS, *supra* note 1, at 381-402. For a comparison of the Brown Commission and Model Penal Code conspiracy formulas, *see generally* Note, *supra* note 77, at 1122.

101. Mr. Justice Jackson noted: "[I]t is for prosecutors rather than courts to determine when to use a scatter-gun to bring down the defendent. . . ." Krulewitch v. United States, 336 U.S. 440, 452 (1949) (Jackson, J., concurring). The ease of abuse arises from the total lack of criteria governing the prosecutor's determination.

102. There is no jurisdictional base for the general conspiracy statute, 18 U.S.C. § 371 (1970). Federal jurisdiction arises from the fact that a federal offense is the object, thereby picking up the jurisdictional base of the object offense; jurisdiction also arises if the United States is the fraud target.

103. *Id.* § 471 (counterfeiting United States securities).

power over interstate commerce.[104] The latter are more likely to reflect auxiliary federal criminal legislation which is supplementary to state law enforcement. The more active the federal government is in this area, the more it duplicates and perhaps infringes upon state activities.

Nevertheless, if the broad exercise of federal jurisdiction is both intended by Congress and constitutional in character, the courts are bound to enforce it. The task of determining the intent behind and propriety of an assertion of federal jurisdiction for each substantive offense is a difficult one, but the specific jurisdictional problem in *Feola* and *Crimmins* is the even more complex question of resolving these questions in the context of a conspiracy prosecution.

The *Feola* Court's analysis of the jurisdictional problem is reflected in its conclusion that "[t]he general conspiracy statute, 18 U.S.C. § 371, offers no textual support for the proposition that to be guilty of conspiracy a defendant in effect must have known that his conduct violated federal law."[105] In other words, once the Court concluded that Congress had intended a broad assertion of federal jurisdiction in the offense of assaulting a federal officer by eliminating the need for a showing of the defendant's awareness of the jurisdictional element,[106] the conspiracy statute's language provided no basis for finding that any different jurisdictional scope was intended for a conspiracy to assault a federal officer.

While the language of the conspiracy statute may not resolve the problem, it is not necessarily true that Congress sought to sweep many state criminal offenses into federal courts. It is possible to classify the underlying statutes in making the jurisdictional judgment. First would come an assessment of the character of federal jurisdiction in the substantive crime. Is such jurisdiction based upon a direct threat to a national interest or is the basis of jurisdiction auxiliary in character? If the latter is the source of federal authority, federal interests suffer less, if at all, if the jurisdictional power is less forcefully exercised, a result accomplished by requiring demonstration of the anti-federal intent of the defendant. Where, in contrast, the logic behind the exercise of federal jurisdiction is to protect an exclusive or primary national interest, there is more reason to assume the desirability of utilizing federal authority as extensively in the suppression of inchoate conspiracies to threaten that interest as in the control of the substantive conduct itself.

104. *Id.* § 2312 (transporting stolen vehicles interstate).

105. 420 U.S. at 687 (footnote omitted).

106. *Id.* at 677–86.

The facts of the *Feola* case can be classified as representing a direct threat to federal interests. The fact that an assault on a federal officer is also a crime under state law does not alter the legitimacy and primacy of the federal goal of protecting its own personnel.[107] Although the Court did not so suggest, other statutes representing the auxiliary federal jurisdiction mold might be distinguished on that basis and treated under the *Crimmins* doctrine.

Much in the *Feola* opinion suggests that the Court would not accept retention of the *Crimmins* rule for auxiliary jurisdiction statutes. The Court in *Feola* recognized two independent values of the conspiracy doctrine: protecting society from concerted criminal groupings and allowing social intervention prior to commission of the prohibited act.[108] From these values, the Court concluded that "imposition of a requirement of knowledge of those facts that serve only to establish federal jurisdiction would render it more difficult to serve the policy behind the law of conspiracy without serving any other apparent social policy."[109] Quite clearly, the Court did not view as confining the exercise of federal auxiliary jurisdiction in the treatment of the controversial doctrine of conspiracy as a countervailing social policy.

Much of the ease with which the Court arrived at its conclusion can be attributed to the absence of any clear policy behind the conspiracy statute and its jurisdictional attributes. Although Congress enacted the conspiracy statute, the features of the doctrine have been fleshed out by the courts.[110] Moreover, conspiracy is an inchoate offense which is tacked on to a substantive charge.[111] A Congress that does not deal with all the internal features of such an offense can hardly be expected to have thought through the implications of tying conspiracy to each and every other federal crime. The same lack of thought can be expected as new federal offenses are enacted. The Court has simply assumed that the widest possible scope is appropriate, and policies of restricting the scope of a severely criticized doctrine such as conspiracy and controlling a

107. The Court observed: "If the primary purpose is to protect federal law enforcement personnel, that purpose could well be frustrated by the imposition of a strict scienter requirement." *Id.* at 678.

108. *Id.* at 693–94.

109. *Id.* at 694.

110. The Brown Commission, in contrast, seeks more statutory control of the doctrine. BROWN REPORT, *supra* note 4, § 1004.

111. The conspiracy must have a forbidden, though not necessarily illegal, object. *See* 18 U.S.C. §371 (1970).

burgeoning body of federal criminal law do not enter into the equation.[112]

One final consideration in the analysis of *Feola* deserves mention. Under existing law, the fact of prosecution or conviction in a state or federal court does not preclude further action by the other for the same underlying conduct.[113] The state and federal governments are separate sovereigns, each of which is entitled to enforce its criminal prohibitions.[114] In some instances, a single act will be prosecuted differently by federal authorities because of the extra-jurisdictional element which must be proven.[115] Thus, double prosecution, conviction, and sentencing are possible. Little formal legal progress has been made in controlling the opportunity for abusive serial prosecutions by separate sovereigns. The Proposed New Federal Criminal Code of the Brown Commission offers some tentative suggestions for curtailing the practice, but they contain substantial loopholes and at this stage are merely recommendations.[116] Internal policy may offer some help,[117] but the task of developing consistent policy among all the states and the federal government is enormous,[118] and it is not clear what legal force such policy would have.[119] Federal auxiliary statutes are replete with opportunities for multiple prosecutions, and a tactic that reduces the potential for abuse, unlike *Feola,* serves a worthwhile purpose.

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112. The dispute over the jurisdictional reach of the substantive federal officer assault statute is illustrative of the problem encountered. 420 U.S. at 696–713 (Stewart, J., dissenting). If one is not certain how far Congress sought to reach when the act is committed, it is less clear how far Congress would want to reach to deal with agreements to commit the act if Congress bothered to consider the problem.

113. Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1959).

114. Abbate v. United States, 359 U.S. 187, 194 (1959), *quoting* United States v. Lanza, 260 U.S. 377, 382 (1922). *See generally* Fisher, *Double Jeopardy and Federalism,* 50 MINN. L. REV. 607 (1966).

115. *See generally* Abbate v. United States, 359 U.S. 187, 197 (1959) (Brennan, J., concurring).

116. BROWN REPORT, *supra* note 4, §§ 707, 708. Perhaps the major loophole allows for successive prosecutions when the two statutes are "intended to prevent a substantially different harm or evil," even if the same underlying conduct is involved. *Id.* §§ 707(a), 708(a). *See also* WORKING PAPERS, *supra* note 1, at 347–48.

117. *See* WORKING PAPERS, *supra* note 1, at 58–60; Schwartz, *supra* note 28, at 83–87.

118. It has been suggested that "the possibilities under such an approach do not present practicable alternatives." WORKING PAPERS, *supra* note 1, at 61.

119. The Supreme Court has vacated judgments upon motion of the Solicitor General when prosecutions have violated Justice Department policy. Redmond v. United States, 355 F.2d 446 (6th Cir.), *vacated,* 384 U.S. 264 (1966); Petite v. United States, 262 F.2d 788 (4th Cir.), *vacated,* 361 U.S. 529 (1960). The same result has occurred upon request of the Court for Justice Department reconsideration. Cox v. United States, 370 F.2d 563 (9th Cir. 1967). *But see* Orlando v. United States, 387 F.2d 348, 349 (9th Cir. 1967) (Pope, J., dissenting). Defendants, however, have not been permitted to raise and litigate violations of internal policy. *See* Heath v. United States, 375 F.2d 521 (8th Cir. 1967).

V. SCOPE AND IMPLICATIONS

Feola will not necessarily be the last decision to address the treatment of jurisdictional elements of federal conspiracy prosecutions. Aspects of the opinion itself and issues not dealt with by the decision leave room for carving out exceptions. We know that a conspiracy to assault a federal officer does not require a showing that the defendant was aware of the official status of his victim. Lower courts more sensitive to the potential abuses of conspiracy law and multiple prosecutions, and more concerned about the balance between the federal and state law enforcement power, may view other federal conspiracy charges differently.

There is the risk, however, that lower courts will read *Feola* more broadly than is justified by the opinion. If the issue is raised, the courts should consider whether the substantive charge involved is sufficiently similar to the assault offense in *Feola* to warrant comparable treatment. A conclusion that "the Supreme Court has put this issue to rest"[120] without analysis should be considered inadequate.

Two post-*Feola* decisions in the courts of appeals illustrate that a citation to *Feola* alone is insufficient to determine the treatment of jurisdictional elements in federal conspiracy prosecutions. The Tenth Circuit, in *United States v. Newson,*[121] was confronted with a charge of conspiracy to transport forged securities in interstate commerce.[122] The defendants had obtained stolen money orders which, on their face, showed that they had been drawn on an out-of-state institution. However, the substantive offense required no showing of awareness of the interstate character of the stolen money orders, and the court reached the same conclusion for conspiracy prosecution. Rather than merely asserting the controlling force of *Feola,* however, the court undertook a reasoned comparison, noting that "in both statutes the federal element of the offense is jurisdictional and the criminal intent, whether it be to assault someone or pass forged securities, exists independently."[123]

The Sixth Circuit, also looking more deeply at the *Feola* logic, has developed a limitation on the principle's scope. The defendants in *United States v. Prince*[124] were charged with a Travel Act[125]

120. United States v. Fairfield, 526 F.2d 8, 11 (8th Cir. 1975). *See also* United States v. Muncy, 526 F.2d 1261, 1262–64 (5th Cir. 1976).

121. 531 F.2d 979 (10th Cir. 1976).

122. The substantive object offense is the same as in *Crimmins. See* 18 U.S.C. § 2314 (1970).

123. 531 F.2d at 982. *See also* United States v. Viruet, 539 F.2d 295 (2d Cir. 1976).

124. 529 F.2d 1108 (6th Cir. 1976).

125. 18 U.S.C. § 1952 (1970); *see* note 32 *supra.*

conspiracy, Prince being a West Virginia madam of a house of prostitution earning money from the prostitution activities of a woman who had crossed state lines for that purpose. Although the Government had argued that, as in *Feola,* awareness of the jurisdictional element was unnecessary, the court disagreed.

As in *Newson,* the *Prince* court sought to determine the general similarity of the underlying substantive charges, concluding that the Travel Act did not fit the *Feola* mold. The statute in *Prince* criminalized travel in interstate commerce "with intent" to engage in certain illegal activities including prostitution. Unlike the statute in *Feola,* which required only the general intent to assault, the *Prince* court felt the Travel Act imposed "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."[126] Had the defendant actually traveled in interstate commerce, jurisdictional requirements would have been met, but without such travel, awareness of the jurisdictional element was demanded. As the court noted, the underlying statute was not simply a tool to convert a state crime into a federal one.[127]

The *Feola* Court itself suggested that in some circumstances a conspiracy charge would require proof of the defendant's awareness of the element of the offense conveying federal jurisdiction.[128] In the specific context of a conspiracy to assault a federal officer, jurisdiction would be established by the completion of the assault or identification of an intended victim who in fact has the necessary official status. Absent these factors, the Court concluded that "it is impossible to assert that the mere act of agreement to assault poses a sufficient threat to federal personnel and functions so as to give rise to federal jurisdiction."[129] The same principle would seemingly apply to other conspiracies which have not obtained their illegal objectives. For these conspiracies, some federal threat must be present for juridiction to be established, a form of anti-federal intent which the Court rejected for completed conspiracies.

In one way or another, it is essential that the *Feola* doctrine be brought within reasonable bounds by the courts for several reasons. First, the doctrine can easily become a tool for a broad and unwarranted expansion of federal jurisdiction. As stated by the Ninth Circuit: "It is not the business of federal prosecutors to prosecute for state offenses, or of federal courts to entertain such prosecutions. And we think that federal courts must be on guard against attempts

126. 529 F.2d at 1112.
127. *Id.* at 1111–12.
128. 420 U.S. at 695–96.
129. *Id.* at 696.

to convert what are essentially offenses against state laws into federal crimes via the conspiracy route."[130] Second, the expansion of federal jurisdiction reflected in *Feola* comes in the field of conspiracy law, a much criticized doctrine which is badly in need of reform. Finally, the expanded federal power in no way limits the states from exercising their concurrent power with the result that multiple prosecutions and convictions for the same underlying conduct may result.

Control of the serious side effects of *Feola* might make the decision itself more palatable. Extensive criticism of the displaced *Crimmins* rule suggests some change may have been called for in the treatment of federal conspiracy prosecutions.[131] However, the change has preceded other more pressing reforms and indeed may have made the overall situation worse. Had the Court weighed the pragmatic outcome of *Feola* instead of analyzing the problem exclusively from a theoretical perspective, the result might have been different. Hopefully, lower courts, in applying the rule, will be more conscious of the consequences of their decisions.

130. Twitchell v. United States, 313 F.2d 425, 428 (9th Cir. 1963) (citations omitted).
131. *See* notes 84 & 85 *supra*.