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CRIMINAL LAW

OVERVIEW

During the survey period, the Tenth Circuit Court of Appeals upheld most trial court convictions, reading the federal criminal statutes broadly to expand federal jurisdiction over various forms of criminal conduct. Conspirators' claims of guilt by association, allegedly a result of their multiple-defendant trials, continued to fail. The court approved the use of the Mail Fraud Act and the Hobbs Act as federal tools to combat local political corruption. Many of the political corruption cases resulted from a cooperative investigation, by United States and Oklahoma law enforcement officials, undertaken to discover and eliminate the wide-spread corruption among Oklahoma County Commissioners.

A large number of appeals arose out of the anti-nuclear protests which occurred in April of 1979 at the Rocky Flats Nuclear Plant in Colorado. The issues raised in these appeals, however, were controlled by Tenth Circuit decisions handed down during the previous survey period. Therefore, this survey will focus on the Tenth Circuit's significant decisions concerning drug distribution conspiracies and those decisions which expanded federal jurisdiction under various federal criminal statutes included in Title 18 of the United States Code.

I. CONSPIRACY

> *For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime.*
>
> Justice Mahlon Pitney[1]
>
> *If there are still any citizens interested in protecting human liberty, let them study the conspiracy law, of the United States.*
>
> Clarence Darrow[2]

In criminal conspiracy trials, as in all trials with multiple defendants, the need for efficient prosecution must be weighed against each defendant's right to have his guilt individually determined.[3] Defendants frequently charge that juries allow the guilt of alleged co-conspirators to "spill over" on to themselves. Federal courts have been accused of ignoring these sometimes legitimate claims by mechanically applying in-

1. United States v. Rabinowich, 238 U.S. 78, 88 (1915).

2. C. DARROW, THE STORY OF MY LIFE, 64 (1932).

3. Prosecutors argue that only by trying all members of a conspiracy together can a jury get a clear picture of the whole operation. *See* Note, *Connecting Defendants to Conspiracies: The Slight Evidence Rule and the Federal Courts*, 64 VA. L. REV. 881, 884 (1978); Note, *Application of Conspiracy Statute to Prosecution for Sale of Counterfeit Money*, 48 YALE L.J. 1447, 1450 (1939).

adequate standards and methods of inquiry.[4]

The Tenth Circuit recently reaffirmed its tests for determining the existence of a conspiracy as well as its tests for determining an individual defendant's involvement in a conspiracy. The most detailed treatment of these issues occurred in *United States v. Dickey*[5] and *United States v. Pilling*.[6] Both cases arose out of wide-ranging drug ventures involving numerous actors and transactions.

This portion of the criminal law survey will, through an analysis of the *Dickey* and *Pilling* decisions, criticize the Tenth Circuit's treatment of criminal conspiracy law. In particular, this analysis questions whether the Tenth Circuit's treatment is consistent with the nature and elements of the crime of conspiracy, and with the ideal of guilt beyond a reasonable doubt.

A. *An Overview of Criminal Conspiracy*

The crime of conspiracy consists of an agreement to accomplish an unlawful purpose.[7] Conspiracy is punishable separately from the substantive offense contemplated or committed. The rationale for this treatment is that the law of criminal conspiracy serves purposes distinct from those involved in the punishment of substantive crimes. Accordingly, the criminalization of conspiracy prevents criminal activity before it occurs and protects society from the dangers inherent in partnerships in crime.[8] Group criminality is said to increase the likelihood that crime will be committed. Furthermore, a group of conspirators, through an efficient division of labor, may be able to achieve more sophisticated and harmful objects than an individual could otherwise achieve.[9] Group activity may also prepare individuals to commit crimes on a regular basis.[10] Critics have argued that these justifications are either overstated or can be adequately served by the law of attempt.[11]

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4. Note, *"Single vs. Multiple" Criminal Conspiracies: A Uniform Method of Inquiry for Due Process and Double Jeopardy Purposes*, 65 MINN. L. REV. 295, 304 (1980). Some judges also lament this development. *See, e.g.*, United States v. Heath, 580 F.2d 1011, 1026 (10th Cir. 1978) (McKay, J., dissenting).

5. 736 F.2d 571 (10th Cir.), *stay denied*, 105 S. Ct. 24 (1984), *cert. denied*, 105 S. Ct. 957 (1985).

6. 721 F.2d 286 (10th Cir. 1983).

7. Pettibone v. United States, 148 U.S. 197, 203 (1893). The doctrine that agreement is at the heart of conspiracy originated in The Poulterer's Case, 77 Eng. Rep. 813 (1611).

8. *See, e.g.*, W. LAFAVE, MODERN CRIMINAL LAW 534 (1978); Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925, 929 (1977).

9. *See* Garland & Snow, *The Co-Conspirators Exception to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements*, 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 1, 2 (1972); Note, *Conspiracy: Legitimate Instrument or Unconstitutional Weapon?*, 3 COLUM. SURV. HUM. RTS. 94, 102 (1971). *See also*, W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 459 (1972).

10. United States v. Rabinowich, 238 U.S. 78, 88 (1915).

11. *See*, Marcus, *supra* note 8, at 937-38. *See also* Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276, 285 (1948) (arguing that conspiracy should only be punished if it greatly increases the likelihood that a crime will be committed or where the crime contemplated is so serious that even a slight increase in the possibility of its successful execution should be punished).

In order to show the existence of an agreement involving each defendant, the prosecution must prove: (1) knowledge of the main object of the conspiracy;[12] (2) knowledge of the scope of the conspiracy, or at a minimum knowledge of the involvement of another; and (3) specific intent[13] to join the conspiracy and commit the object offense.[14]

Proving these elements can present substantial problems: because of the secretive nature of the crime, there is usually little documentary evidence indicating the existence of a conspiracy. However, most evidentiary problems have been resolved in favor of the prosecution. Due to the lack of documentary evidence, proof will normally be of three basic types: (1) circumstantial evidence,[15] (2) the hearsay testimony of co-conspirators,[16] and (3) evidence of out-of-court declarations or acts of a co-conspirator or the defendant himself.[17] This evidence may give rise to reasonable inferences from which a jury could find the existence of an agreement. Conspiracy convictions are routinely based solely upon such inferences and presumptions, a fact which has troubled many commentators—but few courts.[18] These commentators fear that, by piling inference upon inference, defendants may become victims of guilt by association. Furthermore, the acts of one conspirator may be imputed to a defendant with whom the conspirator has associated because of the tendency to believe that "birds of a feather flock together."[19] In response, defenders of the conspiracy laws argue that less restrictive evidentiary standards are necessary because of the secretive nature of conspiracy and because society's general interest in preventing crime is greater than its specific interest in avoiding erroneous punishment for

12. "If the parties are attempting to achieve different objects, an agreement cannot be inferred." Tarlow, *Defense of Federal Conspiracy Prosecution*, 4 NAT'L J. CRIM. DEF. 183, 187 (1978). *See also* United States v. Bastone, 526 F.2d 971, 980-81 (7th Cir. 1975), overruled as to withdrawal from a conspiracy, United States v. Read, 658 F.2d 1225, 1232-36 (7th Cir. 1981); United States v. Kates, 508 F.2d 308, 311 (3d Cir. 1975).

13. Mere knowledge of a conspiracy will normally not support an inference of active participation in the conspiracy. *See, e.g.*, United States v. Sisca, 503 F.2d 1337, 1343 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); Causey v. United States, 352 F.2d 203, 207 (5th Cir. 1965). Intent can be inferred if a defendant supplies goods or services that have no lawful use or where the quantity of goods supplied is more than is needed for any legitimate purpose. *See, e.g.*, Direct Sales Co. v. United States, 319 U.S. 703, 711-12 (1943).

14. Note, *supra* note 4, at 298.

15. United States v. Harris, 534 F.2d 207, 214 (10th Cir. 1975), *cert. denied*, 429 U.S. 941 (1976).

16. Before co-conspirator hearsay evidence can be admitted "independent non-hearsay evidence must establish the participation in the conspiracy of the person against whom" the hearsay is to be admitted. United States v. DeFillipo, 590 F.2d 1228, 1234 (2d Cir.), *cert. denied*, 442 U.S. 920 (1979). *See also* United States v. Andrews, 585 F.2d 961, 964 (10th Cir. 1978).

17. Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 983-84 (1959).

18. "[A] common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" Glasser v. United States, 315 U.S. 60, 80 (1942) (quoting United States v. Manton, 107 F.2d 834, 839 (2d Cir. 1939)). *But see* Iannelli v. United States, 420 U.S. 770, 778 n.10 (1975) ("reliance on [circumstantial evidence and inferences drawn therefrom] has tended to obscure the basic fact that the agreement is the essential evil at which the crime of conspiracy is directed.").

19. Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Jackson, J., concurring).

the substantive offense.[20]

Complicated drug distribution conspiracies magnify problems of proof. Such schemes often involve many participants, multiple objects, long periods of time and large geographical areas.[21] To confront the obvious problems of proof involved in such conspiracies, most courts, the Tenth Circuit included, look to the "nature of the enterprise"[22] rather than the existence of an agreement. Under this test, courts often characterize a venture as a "chain" conspiracy or a "hub and spoke" conspiracy. After finding one of these forms, slight evidence is sufficient to connect an individual defendant to the conspiracy. The Tenth Circuit recently used these conspiracy models in the cases of *United States v. Dickey*[23] and *United States v. Pilling*.[24]

B. United States v. Dickey: *"Chain" Conspiracy*

1. The Facts

Each of ten defendants was convicted in district court of one count of conspiracy to possess with intent to distribute, and to distribute marijuana and cocaine in violation of 21 U.S.C. §§ 841 and 846.[25] The charges arose out of dozens of transactions involving many conspirators over a period of approximately four years. Deals and meetings occurred in states from Florida to California and millions of dollars changed hands.[26] Two of the major participants pled guilty and testified as government witnesses.[27] The defendants included suppliers, distributors, and retailers; some of the defendants performed more than one function.[28] Both the quality and quantity of the evidence, however, varied greatly among the defendants.

On appeal, all ten defendants asserted that the evidence at trial established multiple conspiracies rather than the single conspiracy charged in the indictment.[29] All but two defendants also challenged the

20. *See* Note, 64 VA. L. REV., *supra* note 3, at 884-85.

21. Note, *Resolution of the Multiple Conspiracies Issue Via A "Nature of the Enterprise" Analysis: The Resurrection of Agreement*, 42 BROOKLYN L. REV. 243, 253-54 (1975).

22. P. MARCUS, THE PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES 4-20 (1984). This is particularly true in narcotics conspiracy cases where courts are quick to infer knowledge of the entire scheme based on the nature of drug distribution operations. *See infra* notes 79-82, 98-103 and accompanying text.

23. 736 F.2d 571 (10th Cir.), *stay denied*, 105 S. Ct. 240 (1984), *cert. denied*, 105 S. Ct. 957 (1985).

24. 721 F.2d 286 (10th Cir. 1983).

25. 21 U.S.C. § 846 (1982) states in pertinent part: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both . . . ." 21 U.S.C. § 841 (1982) sets forth the prohibited activities relating to controlled substances and also states the penalties for violating those prohibitions.

26. 736 F.2d at 577-81.

27. *Id.* at 578. The government witnesses were Rodney Bragg and Doc Clanton. Their testimony made up the vast majority of the evidence.

28. *Id.* at 578-81. For example, Robert Best took delivery of several hundred pounds of marijuana on more than one occasion. He also made deliveries and several individual sales of marijuana and cocaine.

29. *Id.* at 581. The importance of this distinction is discussed in note 33 *infra*.

sufficiency of the evidence linking them to the overall conspiracy.[30] These arguments are typical in conspiracy cases with multiple defendants and complicated fact patterns.[31]

2. The Majority Opinion

The Tenth Circuit, Judge Barrett writing for the majority,[32] found no merit to the appellant's contention that the evidence showed the existence of multiple conspiracies.[33] The court held that a single conspiracy exists if the evidence shows that all of the defendants had a "common, illicit goal."[34] This is known as the "common objective" test.

To determine if a common objective existed, the court examined the nature of the enterprise and characterized the entire operation as a "chain" conspiracy.[35] In a chain conspiracy, the government must prove that each defendant was dependent upon the success of each "link" in the chain.[36] Without much discussion, the court found that the evidence clearly supported the finding that each participant, even the remote members, was dependant upon the success of each transaction to ensure the continued success of the enterprise.[37] The court defined the common objective of this chain as a goal "to *possess and distribute drugs (marijuana and cocaine) for profit.*"[38]

As support for its conclusion that a common objective existed, the court relied heavily on the volume of the drugs involved. Most circuits, the Tenth Circuit included, readily presume that each *major buyer* knows he is involved in a "wide-ranging venture."[39] If large quantities are in-

30. *Id.* at 583-86.

31. P. MARCUS, *supra* note 22, at 4-10.

32. Judge Logan joined Judge Barrett. Judge Mckay filed a separate opinion concurring in part and dissenting in part, 736 F.2d at 599-601. *See infra* text accompanying notes 46-56.

33. If a defendant can show that the evidence at trial disclosed the existence of multiple conspiracies rather than the single conspiracy charged in the indictment, the conviction may be reversed because of the tendency of jurors to transfer guilt. *See* Kotteakos v. United States, 328 U.S. 750, 766-67 (1946). The variance, however, between the indictment for a single conspiracy and proof of separate conspiracies must be more than harmless error; it must be prejudicial to the rights of the defendant:

> The Supreme Court has looked to the following factors to determine whether this type of variance is prejudicial: (1) surprise to the defendant . . . , (2) possibility of subsequent prosecution for the same offense, (3) likelihood of jury confusion as measured by the number of conspirators charged and the number of separate conspiracies proven, and (4) likelihood of jury confusion in light of the instructions given the jury limiting or excluding the use of certain evidence not relating to the defendant.

United States v. Lindsey, 602 F.2d 785, 787 (7th Cir. 1979).

34. 736 F.2d at 582.

35. *Id.*

36. *Id. See also infra* notes 98-113 and accompanying text.

37. *Id.* at 582. This may be an overstatement since the facts showed that each transaction was not successful. For example, several of the participants met in Las Cruces to purchase marijuana. After testing the marijuana, they rejected it and all of the individuals left. *Id.* at 578. This failure, however, is not crucial when viewed in the context of the entire conspiracy.

38. *Id.* at 582 (emphasis in original).

39. *Id. See also* United States v. Magnano, 543 F.2d 431, 434 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977).

volved, the existence of multiple drugs or multiple transactions will not necessarily translate into the existence of multiple conspiracies.[40]

Citing *United States v. Andrews*,[41] the court reaffirmed its approval of the "slight evidence" test. Under the test, once the prosecution establishes a conspiracy it may connect a co-conspirator to it using only slight evidence.[42] The court examined the evidence against each defendant under the slight evidence standard and found sufficient evidence to connect each defendant with the chain conspiracy.[43]

Some defendants contended that the evidence showed only a buyer-seller relationship between them and other actors. While admitting that the existence of such a relationship would be insufficient to convict one as a co-conspirator, the court found in each case that the testimony and circumstantial evidence[44] gave rise to permissible inferences and presumptions that each defendant *knew* of the scope of the conspiracy.[45]

3. Judge McKay's Opinion

Judge McKay filed a separate opinion concurring in the judgment as to all of the defendants except Friedrich.[46] In his view, there was insufficient evidence to connect Friedrich to the overall conspiracy. Judge McKay expressed his concern, previously stated in *United States v. Heath*,[47] that the Tenth Circuit's analysis of conspiracy appeals is inconsistent with the very nature of the offense. By substituting proof of "knowledge" for the proof of an agreement, McKay argued that the court took an undisciplined approach.[48] In his view, the knowledge test results in the conviction of persons engaged only in a buyer-seller relationship.[49]

Judge McKay felt that the evidence against Friedrich showed only a buyer-seller relationship and no agreement to join the larger conspiracy.[50] Friedrich sold two kilograms of cocaine to a government witness, Clanton, on two separate occasions.[51] Judge McKay stated that this showed only illicit sales and that proof of illicit sales, without showing knowledge of the broader drug distribution conspiracy or its objective,

40. 736 F.2d at 582 (citing United States v. Hawkins, 661 F.2d 436, 454 (5th Cir. 1981), *cert. denied*, 456 U.S. 991, 457 U.S. 1137 (1982)).

41. 585 F.2d 961 (10th Cir. 1978).

42. *Id.* at 964. *See also infra* notes 114-29 and accompanying text.

43. 736 F.2d at 583-86. Two defendants did not challenge the sufficiency of the evidence but the court nevertheless reviewed the record as to them and found the evidence sufficient. *Id.* at 583-84.

44. The circumstantial evidence consisted entirely of evidence of phone calls, cashier's checks, and an airplane used to transport drugs and conspirators. This evidence did not relate to all of the defendants; the testimony of the government witnesses was the primary source of evidence against each defendant.

45. 736 F.2d at 583-86.

46. *Id.* at 599 (McKay, J., concurring in part and dissenting in part).

47. 580 F.2d 1011 (10th Cir.) (McKay, J., dissenting), *cert. denied*, 439 U.S. 1075 (1978).

48. 736 F.2d at 599, 601.

49. *Id.* at 600.

50. *Id.* at 600-01.

51. *Id.* at 600.

is insufficient to connect a defendant to the conspiracy.[52] Friedrich also made fifty-one telephone calls to defendant Hall.[53] Citing *United States v. Galvan*,[54] Judge McKay stated that evidence of phone calls is also insufficient to link a defendant to a conspiracy.[55]

Although Judge McKay's analytical separation of the sales from the phone calls is questionable (taken together, they present a closer question of guilt than Judge McKay admits), his main point is well taken. Many federal courts have adopted standards and tests for conspiracy cases which are inconsistent with the basic elements of, and the rationales for, the crime of conspiracy.[56]

C. United States v. Pilling: *"Hub and Spoke" Conspiracy*

1. The Facts

In *Pilling*,[57] four defendants (Pilling, Penix, Varley, and Christensen) were convicted by a jury of conspiring with three other persons[58] to import cocaine from Peru into the United States in violation of 21 U.S.C. § 952.[59] The Tenth Circuit affirmed the convictions of each defendant. Three core, or hub, conspirators made two separate visits to Peru for the purpose of obtaining cocaine to distribute in the United States. The four defendants each invested thousands of dollars in each trip. With the exception of Penix and Christensen, who were business partners, the defendants were contacted separately by the hub conspirators.[60]

The "front" (or "cover") for the first trip was the promotion of Promethean Tile of Eagle, Colorado (a financially-troubled business owned by hub conspirators Kleist and Richards), in South America.[61] For the second trip, Five Star Chemical Company, owned by defendant Pilling, was used as the front.[62] Peruvian officials spotted the second shipment of cocaine before it left the country and notified the United States Drug Enforcement Agency (DEA) which then kept the shipment under surveillance. When Kleist, Richards, and James attempted to claim the

52. *Id.* at 600-01 (citing Direct Sales Co. v. United States, 319 U.S. 703, 712 (1943)).
53. 736 F.2d at 600-01.
54. 693 F.2d 417 (5th Cir. 1982).
55. *Id.* at 419-20.
56. *See infra* notes 79-83 and accompanying text.
57. 721 F.2d 286 (10th Cir. 1983).
58. The three, James, Richards, and Kleist, did the actual smuggling. Each plead guilty to drug smuggling charges and James and Richards were government witnesses in the *Pilling* trial. *Id.* at 289-90.
59. 21 U.S.C. § 952 (1982) provides in pertinent part:
(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof but within the United States, or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter. . . .
60. 721 F.2d at 290-92.
61. *Id.* at 290.
62. *Id.* Five Star was also in desparate financial straits.

shipment, they were arrested.[63]

The defendants were implicated through the testimony of James and Richards. None of the defendants was charged with the actual possession or distribution of cocaine.[64] Furthermore, with the exception of Penix and Christensen, there was no evidence that any of the defendants had any *actual* knowledge of the participation of the other defendants.

On appeal, each defendant challenged the sufficiency of the evidence against him. Each appellant also asserted that the evidence, if it showed any conspiracy at all, showed the existence of multiple conspiracies and not the single conspiracy charged in the indictment.[65]

2. The Tenth Circuit Decision

All the defendants denied having knowledge of the scheme to import cocaine from Peru. They strenuously asserted that they believed they were investing in legitimate business ventures.[66] In an opinion written by Judge Barrett,[67] the Tenth Circuit found that the testimony of the hub conspirators, along with the circumstantial evidence presented, was sufficient to support the jury finding of guilt beyond a reasonable doubt.[68] The court attached great weight to the fact that there was no written documentation for any of the investments. In effect, the court stated that experienced businessmen, such as the defendants, record large investments in writing if the purpose is legitimate.[69]

The court found that the evidence supported the existence of one conspiracy with one "common objective"—importation of cocaine from Peru to the United States for profit.[70] In the Tenth Circuit's view, the facts revealed a "hub and spoke" conspiracy.[71] The "hub and spoke" conspiracy is not typical of drug smuggling enterprises but is used to describe conspiracies involving a common "hub" of conspirators who deal with independent investors, or "spokes."[72] After first finding that the hub conspirators formed the conspiracy, the court had no trouble finding that each of the defendants knowingly joined the conspiracy at various points in its progression.

The hub and spoke conspiracy presents conceptual problems distinct from those of the chain conspiracy in *Dickey*. But the ultimate question raised by the application of each is the same: do these models help to show the existence of an agreement or do they "obscure as much as

63. *Id.* at 291.

64. *Id.* at 288. This is because none of the defendants, with the exception of Varley, who received five ounces of cocaine, actually saw or received any cocaine. *Id.* at 290. The defendants merely invested money with the smugglers with the understanding that they would receive a substantial return on their investment. *Id.* at 293.

65. *Id.* at 292. The significance of this charge is discussed at note 33 *supra*.

66. *Id.* at 291.

67. Judges Seymour and Kerr joined Judge Barrett in the opinion.

68. 721 F.2d at 292.

69. *Id.*

70. *Id.*

71. *Id.* at 290-92.

72. *See infra* notes 85-97 and accompanying text.

[they] clarif[y]?"[73]

D. *Single v. Multiple Conspiracies: Use of the Common Objective Test*

Defendants often assert that the evidence presented at trial shows the existence of multiple conspiracies, rather than the single conspiracy most frequently charged in an indictment. The distinction between single and multiple conspiracies is crucial in practical and theoretical terms. If the evidence does indeed show multiple conspiracies, the convictions will often be reversed because of the tendency of jurors to let guilt spill over from one defendant to another.[74] A defendant could thereby be connected to a conspiracy with which he had no contact. Guilt by association is a potential problem in this context.

The prosecution will also enjoy several procedural and evidentiary advantages if defendants are lumped together under a single conspiracy charge.[75] The most significant of these advantages is that the government can introduce the acts and statements of participants in transactions both involving *and not involving* the defendant through the use of the co-conspirator exception to the hearsay rule.[76] Also, other evidentiary rules or doctrines may be loosened so that evidence that is potentially irrelevant as to a particular defendant will be admitted.[77] These advantages pose the danger that an individual will be caught up in a "dragnet" of confusing, irrelevant, and often voluminous testimony and evidence.[78]

The federal courts have adopted several tests to determine the existence of a single conspiracy.[79] Many courts concede that they will go to great lengths to find a single conspiracy, especially in cases involving drug operations.[80] The Tenth Circuit adopted the "common objec-

73. United States v. Borelli, 336 F.2d 376, 383 (2d Cir.), *cert. denied*, 379 U.S. 960 (1964).

74. *See* Kotteakos v. United States, 328 U.S. 750, 766-67 (1946).

75. The procedural advantages include the selection of venue and jurisdiction. Furthermore, a showing of multiple conspiracies can "extend a statute of limitations by allowing the imputation of acts of participants in one transaction, that occurred within the statutory period, to participants in an earlier transaction who would otherwise be protected by the statute." *See* Tarlow, *supra* note 12, at 225. *See also* Note, 65 MINN. L. REV. 295, *supra* note 4, at 298-99 nn. 15 & 16.

76. *See* FED. R. EVID. 801(d)(2)(E). *See generally* Note, 64 VA. L. REV. 881, *supra* note 3. *See also* Note, *Inconsistencies in the Federal Circuit Courts' Application of the Coconspirator Exception*, 39 WASH. & LEE L. REV. 125 (1982); Note, *Evolution of the Coconspirator Exception to the Hearsay Rule in the Federal Courts*, 16 NEW ENG. L. REV. 617 (1981).

77. "Most conspiracy convictions are based on circumstantial evidence, and this evidence is often admitted under rather loose standards of relevance." W. LAFAVE & A. SCOTT, *supra* note 9, at 457.

78. United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940). *See also* United States v. Watson, 594 F.2d 1330, 1344-45 (10th Cir.) (McKay, J., dissenting), *cert. denied*, 444 U.S. 840 (1979); United States v. Perez, 489 F.2d 51, 57 (5th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974).

79. For a detailed discussion of these various tests, see Note, *supra* note 4.

80. *See, e.g.*, United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975):

> This Circuit has gone quite far in finding single conspiracies in narcotics cases. . . . Despite the existence of multiple groups within an alleged conspiracy, we have considered them as part of one integrated loose-knit combination in instances where there existed "mutual dependence and assistance" among the

tive" test.[81] Under this test, if it can be shown that the defendants shared a common objective and that each defendant acted in furtherance of that objective, the court will infer that each defendant had knowledge of the scope of the conspiracy. From *that* knowledge it will infer that each defendant agreed upon the common goal and intended to further that goal.[82]

In drug conspiracy cases the Tenth Circuit often resorts to the use of figurative models, such as the "chain" or "hub and spoke," to help determine the existence of a common objective.[83] These models present distinct and troublesome problems in the context of proving the existence of an agreement as to each defendant.

1. The Hub and Spoke Conspiracy: A Poor Model

The "hub and spoke" or "wheel" conspiracy consists of a "hub" made up of one or several persons, and "spokes," peripheral members that have no contact with each other.[84] Each spoke deals only with the hub. This model is not as typical of drug distribution schemes as is the "chain," but it does traditionally involve situations like that in *Pilling*[85] where individual investors deal directly with a person or group who contacts investors on an individual basis.[86] Unless it can be shown that the spokes knew, or had reason to know, of each other's existence, there will be several separate conspiracies. If that knowledge is shown, the jury can infer that the spokes agreed to join the larger conspiracy.[87]

The Tenth Circuit has used the "common objective" test as a substitute for a showing of knowledge and agreement. If the jury finds that the spokes had a "common, illicit goal" (for example, importation of

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> spheres, . . . a common aim or purpose among the participants, or a permissible inference, from the nature and scope of the operation, that each actor was aware of his part in a larger organization where others performed similar roles equally important to the success of the venture.

Id. at 154.

81. *See, e.g.*, United States v. Watson, 594 F.2d 1330, 1340 (10th Cir.), *cert. denied*, 444 U.S. 840 (1979); United States v. Petersen, 611 F.2d 1313, 1326 (10th Cir. 1979) (quoting United States v. Elliott, 571 F.2d 880, 901 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978)), *cert. denied*, 447 U.S. 905 (1980).

82. *See* Note, *supra* note 4, at 315-16. The parties must each intend to cooperate in furthering the common goal. United States v. Downen, 496 F.2d 314, 319 (10th Cir.) (knowledge or acquiescence in the object of the conspiracy without agreement to cooperate does not make out a conspiracy), *cert. denied*, 419 U.S. 897 (1974). *See generally* Marcus, *Criminal Conspiracy: The State of Mind Crime—Intent, Proving Intent, and Anti-Federal Intent*, 1976 U. ILL. L.F. 627.

83. *See, e.g., Dickey*, 736 F.2d at 582; *Pilling*, 721 F.2d at 289-90; *Petersen*, 611 F.2d at 1325-27.

84. Note, *Federal Treatment of Multiple Conspiracies*, 57 COLUM. L. REV. 385, 388-89 (1957).

85. United States v. Pilling, 721 F.2d 286 (10th Cir. 1983).

86. Such a situation existed in a non-narcotics context in Kotteakos v. United States, 328 U.S. 750 (1946). Several independent conspirators hired a person to act as a broker in securing federal loans with fraudulent applications. No "rim" was shown to tie these spokes together and the convictions were reversed because the Court found that the evidence showed several small conspiracies rather than one large conspiracy. *Id.* at 772-74.

87. *See generally* Note, *supra* note 84.

cocaine from Peru for profit),[88] then the court will infer knowledge.[89] Knowledge of the other spokes is the "rim" that ties the spokes together into a single conspiracy.[90]

The problems with the common objective test, in the context of the hub and spoke conspiracy, are substantial. The test does not reveal if the spoke members reached an agreement. By inferring the element of knowledge, the courts make the mistake of treating an agreement between the hub members and individual spokes as an agreement among the spokes.[91] Since the core members have actual knowledge of the scope of the operation and are dependent upon the participation of the spokes, it follows that the hub agrees with each spoke. It does not follow that the spokes agree with each other.

A common objective is not the same as an agreement. Application of the common objective test to a "hub and spoke" conspiracy tends to bring "crimes of a similar nature" under the umbrella of a single conspiracy.[92] The common objective test shifts the focus away from the existence of an agreement among the spokes. Indeed, each spoke member may have contemplated a separate conspiracy.

The Tenth Circuit's analysis in *Pilling* falls prey to these problems. The court simply equated a common goal with a single conspiracy, a misconception common to the federal courts' application of the common objective test.[93] No attempt was made to show that the spoke defendants had any knowledge of each other's involvement. The court did state that the defendants knew about the cover-up plans,[94] but it is unclear if this knowledge included knowledge of Pilling's involvement or merely knowledge that the hub conspirators intended to falsely promote a business in Peru. If the individual spokes had no knowledge of the involvement of the other spoke members, then the spokes were attached to the single conspiracy simply because of association with the hub conspirators.[95] Without knowledge of other spokes, *Kotteakos v. United States*[96] would control. The hub and spoke conspiracy alleged in *Kotteakos* was "rimless" as the spoke defendants were not aware of the larger conspiracy; accordingly, the Supreme Court reversed the conspiracy conviction due to prejudicial variance between the evidence and the

88. *See Pilling*, 721 F.2d 286 (10th Cir. 1983).

89. *See* United States v. Watson, 594 F.2d 1330, 1337 (10th Cir.) (knowledge may be inferred from a single act, depending upon the nature of the act), *cert. denied*, 444 U.S. 840 (1979).

90. *Kotteakos*, 328 U.S. at 755. *See also* United States v. Levine, 546 F.2d 658, 663 (5th Cir. 1977).

91. Note, *supra* note 84, at 389.

92. Goldstein, *The Krulewitch Warning: Guilt by Association*, 54 GEO. L.J. 133, 147-48 (1965).

93. *See infra* note 110 and accompanying text.

94. 721 F.2d at 292.

95. *Kotteakos*, 328 U.S. at 766-67.

96. 328 U.S. 750 (1946). It is also argued that the hub conspirators, and not the spoke conspirators, represent the true danger to society. Tarlow, *supra* note 12, at 230-31. The threat to society from the crime of conspiracy is discussed in the text accompanying notes 7-11 *supra*.

indictment.[97]

2. The Chain Conspiracy

Goods tend to travel along a chain of distribution from manufacturer to supplier to ultimate purchaser. The purpose of each participant in the distribution chain is to assure that the commodity reaches its destination. That too is the common objective of chain conspirators. Each link or level in the chain is dependent upon the successful operation of each of the other links. This is the basis of the chain conspiracy model, and is typically used in cases involving large-scale narcotics operations.[98]

If the requisite element of interdependence is shown, a jury presented with evidence of each defendant's actions may infer that each link knew or had reason to know of the other links.[99] Thus, the jury can find that each knowledgeable link agreed with all other links in the chain to join the larger conspiracy.[100] Because direct proof that a defendant knew of his dependence upon the other links is seldom available, the fact finder can infer knowledge from the nature of the enterprise and the facts and circumstances surrounding each participant.[101]

The courts almost automatically apply this model to narcotics enterprises. They quickly characterize a drug conspiracy as a chain because the very nature of that form of enterprise lends itself to an inference of interdependence.[102] As a threshold requirement, the jury must find that the links were truly dependent upon each other for their individual successes. Once the jury finds dependence, a single chain conspiracy exists, and only slight evidence is needed to connect an individual defendant to that conspiracy.[103] This implies that each link knew or must have known that the venture did not begin and end with his actions.

Conspiracies, however, are usually too complex to be characterized by a simplistic structural form. The danger with the chain conspiracy model, and all structural models, is that it characterizes the conspiracy

97. 328 U.S. at 772-77. The Court noted that "as [the conspiracy charge] is broadened to include more and more, in varying degrees of attachment to the Confederation, the possibilities for miscarriage of justice to particular individuals becomes greater and greater." *Id.* at 776.

98. *See, e.g.*, United States v. Duckett, 550 F.2d 1027 (5th Cir. 1977); *See also* United States v. Agueci, 310 F.2d 959 (2d Cir. 1962); Valentine v. United States, 293 F.2d 708, 711 (8th Cir. 1961) (commenting that the law of conspiracy is somewhat broader when drug conspiracies are involved), *cert. denied*, 369 U.S. 830 (1962); United States v. Bruno, 105 F.2d 921 (2d Cir. 1939), *rev'd on other grounds*, 308 U.S. 287 (1939).

99. *See, e.g.*, United States v. Barnes, 604 F.2d 121, 154-55 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980); United States v. Kostoff, 585 F.2d 378, 380 (9th Cir. 1978).

100. *See, e.g.*, United States v. Magnano, 543 F.2d 431, 434 (2d Cir. 1976) ("nature of the enterprise determines whether this presumption or inference of knowledge of broader scope and participation in a single conspiracy is justified"), *cert. denied*, 429 U.S. 1091 (1977). *See also* P. MARCUS, *supra* note 22, at 4-13, 4-20, and 4-25.

101. Such facts often include the size and frequency of the transaction involved. *See infra* notes 106-09 and accompanying text.

102. *See generally* Note, *supra* note 21.

103. *See infra* notes 114-29 and accompanying text.

as a group of people rather than as an agreement.[104] The finding of interdependence, commonly inferred from the volume of the transactions, leads to an inference of knowledge which ultimately permits the jury to conclude that an individual defendant agreed to join the larger conspiracy.[105]

The relationship of the evidence to an agreement can become so tenuous as to be nonexistent. Although agreements may rarely be proved by direct evidence, the government should at least have to show that the participants knew, or should have known, of each other's involvement. Unfortunately, knowledge of interdependence is frequently inferred solely on the basis of the quantity of drugs involved.[106] Even though the courts have "recognized" that a buyer-seller relationship is not sufficient to connect an individual to a conspiracy,[107] many circuits continue to hold that where large quantities of drugs are involved, a buyer knows that he is part of a wide-ranging venture.[108] The rationale for this conclusion is that a purchaser of large quantities of narcotics must know that *the chain of distribution* did not begin with his seller.[109] The logical fallacy in this reasoning is subtle but nonetheless crucial. Courts use the nature of the enterprise (the chain) in combination with the transaction of a large quantity of drugs to infer interdependence. But interdependence must first be shown to prove the existence of the chain. Therefore, the courts are implicitly assuming the existence of a chain conspiracy in order to ultimately prove that one actually exists.

A common objective should be no substitute for an agreement. The fact that one actor desires to possess and distribute marijuana for profit does not mean that he *knows* of others who intend to do the same. The objective of the actors would be "common" only in the sense that they intend to commit similar crimes.[110]

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104. United States v. Borelli, 336 F.2d 376, 384 (2d Cir. 1964) (citing Note, *supra* note 17, at 923), *cert. denied*, 379 U.S. 960 (1965). *See* also Note, *supra* note 21, at 265. The requirement of agreement has been minimized, especially in narcotics cases. *See* Tarlow, *supra* note 12, at 189.

105. *See, e.g.*, United States v. Bruno, 105 F.2d 921, 922 (2d Cir. 1939), *rev'd on other grounds*, 308 U.S. 287 (1939). *See also* Note, *supra* note 86, at 390; Note, *supra* note 4, at 303.

106. *See, e.g.*, United States v. Hawkins, 661 F.2d 436, 454 (5th Cir. 1981), *cert. denied*, 456 U.S. 991, 457 U.S. 1137, 459 U.S. 832 (1982); United States v. Heath, 580 F.2d 1011, 1022 (10th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979); United States v. Leong, 536 F.2d 993, 995-96 (2d Cir.) (knowledge of scope inferred from large amount of heroin distributed), *cert. denied*, 429 U.S. 924 (1976). It has been argued that "under accepted theories of criminal intent, knowledge that actions are substantially certain to have a prohibited result has the same legal effect as intending that result." Tarlow, *Defense of a Federal Criminal Prosecution*, 4 J. CRIM. DEF. 183, 197 (1978). *See* W. LAFAVE & A. SCOTT, *supra* note 9, at 196; PERKINS, CRIMINAL LAW 746-47 (2d ed. 1969). *Contra* J. SALMOND, JURISPRUDENCE 280 (10th ed. 1947). Since a defendant should know from the purchase of a large amount of narcotics that a conspiracy will be furthered, that knowledge could then lead to an inference that he intended that result.

107. United States v. Watson, 594 F.2d 1330, 1337 (10th Cir.), *cert. denied*, 444 U.S. 840 (1979).

108. *Dickey*, 736 F.2d at 582 (citing *Heath*, 580 F.2d at 1022).

109. *See supra* note 106.

110. Goldstein, *supra* note 92, at 147-48.

As Judge McKay suggested, the approach taken by the majority in *Dickey* was undisciplined.[111] The mechanical application of the chain conspiracy model was inappropriate. Even the summary of facts set forth in the Tenth Circuit's opinion shows that participants performed various functions at various times in various combinations with other participants.[112] This elaborate set of facts does not lend itself to a simple structural characterization. Regardless of the quantity and quality of evidence against each defendant, the courts should more carefully examine each defendant's connection to the conspiracy. Automatic characterization of transactions as single rather than multiple conspiracies endangers the right of defendants to an individual determination of guilt.[113]

E. *The Slight Evidence Rule: An Inadequate Standard*

The "slight evidence rule," as originally formulated, is a standard of appellate review used to examine the sufficiency of evidence required to uphold a jury's verdict connecting a defendant to a conspiracy.[114] This rule is the accepted standard in most circuits but it is expressed and applied in a variety of ways.[115] The Tenth Circuit's version, applied in both *Dickey* and *Pilling*, reads: "In conspiracy cases, . . . the record need only show 'slight evidence of a particular defendant's connection with a conspiracy that has already been established through independent evidence.' "[116]

There are several problems with this rule. First, the rule has been

111. 736 F.2d at 601.

112. *Id.* at 578-81.

113. *See, e.g.*, Kotteakos v. United States, 328 U.S. 750, 776 (1946).

114. The rule first appeared in Tomplain v. United States, 42 F.2d 202, 203 (5th Cir. 1930) ("The conspiracy was conclusively established, and but slight evidence connecting the defendants was necessary."), *cert. denied*, 282 U.S. 886 (1930).

115. United States v. Smith, 726 F.2d 852, 866 (1st Cir. 1984) ("Once the existence of a conspiracy has been established, even slight evidence implicating a defendant may be sufficient proof of his involvement."); United States v. Xheka, 704 F.2d 974, 988 (7th Cir.) ("Once a conspiracy is shown to exist evidence that establishes a particular defendant's participation beyond a reasonable doubt, although the connection between defendant and conspiracy is slight, is sufficient to convict."), *cert. denied*, 104 S. Ct. 486 (1983); United States v. Smith, 561 F.2d 8, 12 (6th Cir.) ("Once the existence of a conspiracy has been established, only slight additional evidence is required to connect a particular defendant with it."), *cert. denied*, 434 U.S. 958, 972, 1019, 1048 (1977). United States v. Dunn, 564 F.2d 348, 357 (9th Cir. 1977) ("Once the existence of a conspiracy is established, evidence establishing beyond a reasonable doubt a connection of a defendant with a conspiracy, even though the connection is slight, is sufficient to convict him of knowing participation in the conspiracy."), followed in United States v. Laughman, 618 F.2d 1067, 1076 (4th Cir. 1980); United States v. Overshon, 494 F.2d 894, 896 (8th Cir.) ("Once the government has established the existence of a conspiracy, even slight evidence connecting a particular defendant to the conspiracy may be substantial and therefore sufficient proof of the defendant's involvement in the scheme."), *cert. denied*, 419 U.S. 853, 878 (1974). The Second Circuit has a completely different test. *See* United States v. Provenzano, 615 F.2d 37, 45 (2d Cir.) (requiring "active participation with intent to further the objectives of the conspiracy"), *cert. denied*, 446 U.S. 953 (1980).

116. *Dickey*, 736 F.2d at 583 (quoting United States v. Peterson, 611 F.2d 1313, 1317 (10th Cir. 1979)); *see Pilling*, 721 F.2d at 293 (quoting United States v. Andrews, 585 F.2d 961, 964 (10th Cir. 1978)).

applied by some circuits in such a way that proof beyond a reasonable doubt may no longer be needed to connect a defendant to a conspiracy, despite bromides to the contrary.[117] When properly applied, the word "slight" should be used to modify "connection" and not "evidence."[118] Some circuits, however, have used the test to require only slight evidence, sometimes with the rationale that the essence of the proof requirement goes to the establishment of the conspiracy and not to the connection of a defendant to the conspiracy.[119] Therefore, if an appellate court finds only slight evidence in the record to connect a defendant to a conspiracy, it need not determine if the evidence is sufficient to support a jury finding of guilt beyond a reasonable doubt.[120]

The slight evidence standard reduces the level of scrutiny given by appellate courts to jury verdicts below the standard normally required in criminal cases. Evidence of a defendant's connection to a conspiracy will not be examined in any detail and the court is much more likely to defer to a jury's findings when this standard is mechanically applied.[121] Furthermore, it is highly doubtful that slight evidence can ever support a jury finding of guilt beyond a reasonable doubt. Recognizing this problem, the Fifth Circuit (with whom the rule originated) now requires "substantial" evidence of a defendant's connection with a conspiracy.[122]

A second, less serious problem arises even when the rule is characterized as requiring "substantial" evidence of a "slight" connection.[123] A defendant may be convicted by evidence that he had any contact, however slight that contact might be, with the conspiracy. This difficulty is partially alleviated by requiring, as the Tenth Circuit does, that the defendant have knowledge of the conspiracy's general scope.[124] However, since knowledge is usually proved by inference, even this formulation of the slight evidence rule can serve to sweep a defendant into the overextended "fishnet" of a single conspiracy.[125]

Third, the rule has begun to find its way into the jury room. Confusion over the origin and proper formulation of the rule has led to its inclusion in some jury instructions.[126] This practice is condemned by most circuits, but the Ninth Circuit approved the practice in *United States*

117. *See, e.g., Pilling* at 292. The Tenth Circuit used the defendants' lack of business records to infer their connection with the conspiracy. This seems to reverse the traditional burden of proof, forcing defendants to prove their innocence.

118. *Dunn*, 564 F.2d at 357. (The word "slight" "is tied to that which is proved, not the type of evidence or the burden of proof.")

119. United States v. Schmaltz, 562 F.2d 558, 560 (8th Cir.), *cert. denied*, 434 U.S. 957 (1977).

120. Note, 68 VA. L. REV., *supra* note 3, at 888.

121. *Id.*

122. United States v. Malatesta, 590 F.2d 1379, 1382 (5th Cir.) (en banc), *cert. denied*, 440 U.S. 962 (1979). This test was adopted recently by the Eleventh Circuit in United States v. Bulman, 667 F.2d 1374 (11th Cir.), *cert. denied*, 456 U.S. 1010 (1982).

123. *See, e.g., Dunn*, 564 F.2d at 357; *Xheka*, 704 F.2d at 988.

124. *Dickey*, 736 F.2d at 583 (citing Blumenthal v. United States, 332 U.S. 539, 557 (1947)).

125. *See* United States v. Heath, 580 F.2d 1011, 1026 (10th Cir.) (McKay, J., dissenting), *cert. denied*, 439 U.S. 105 (1978).

126. Note, 68 VA. L. REV., *supra* note 3, at 895 & n.73.

v. Lustig.[127] It is possible that juries will, in some cases, let insubstantial evidence connect an individual to a conspiracy.[128] The requirement of proof beyond a reasonable doubt is replaced by guilt by association.

No formulation of this rule can be justified. As is true with much of the body of conspiracy law, confusion, inadequate appellate review, and guilt by association are all possible outcomes of any application of the slight evidence rule. Regardless of the evidence against the combined defendants in *Dickey* and *Pilling*, the individual defendants in each case deserved close scrutiny of the evidence relating to their individual guilt.[129] The Tenth Circuit should discard the slight evidence rule and replace it with a substantial evidence test. The evidence must be able to support, beyond a reasonable doubt, a finding that each defendant agreed to join the conspiracy. Mere knowledge of the general scope of the conspiracy is no substitute for proof of an agreement.

F. *Conclusion*

The Tenth Circuit's holdings in *Dickey* and *Pilling* perpetuate the mechanical application of inadequate methods of review in criminal conspiracy cases.[130] The danger of guilt by association will continue to exist unless these methods are abandoned and replaced by a conscientious and disciplined approach that speaks to the nature of the crime of conspiracy—the agreement. Structural models, the common objective test, and the slight evidence rule all cloud and confuse any attempt to find the existence of an agreement.

Prosecutors should not be allowed to ensnare multiple defendants with the net of the single conspiracy without showing defendants' *actual* knowledge of the existence of others in the conspiracy and proving that each individual defendant intended to join the conspiracy. The current tests and standards employed by the Tenth Circuit permit too may presumptions and inferences; it is impossible to predict what additional inferences a jury will make when a defendant stands trial next to a host of conspirators.

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127. 555 F.2d 737, 750 (9th Cir. 1977), *cert. denied*, 434 U.S. 926, 1045 (1978).

128. *See* United States v. Dixon, 562 F.2d 1138, 1143 (9th Cir. 1977) (Goodwin, J., dissenting), *cert. denied*, 435 U.S. 927 (1978). *See also* Krulewitch v. United States, 336 U.S. 440 (1949) (Jackson, J., concurring); United States v. Toliver, 541 F.2d 958, 962-63 (2d Cir. 1976). A jury may have difficulty distinguishing defendants, remembering each defendant's role in the conspiracy, and determining what evidence applies to each defendant. *See, e.g.*, United States v. Central Supply Ass'n, 6 F.R.D. 526, 528, 533-35 (N.D. Ohio 1947) (76 defendants tried, 1616 exhibits in evidence).

129. "The need for safeguarding defendants from misunderstanding by the jury is peculiarly acute in conspiracy trials . . . ." United States v. Liss, 137 F.2d 995, 1003 (2d Cir. 1943) (Frank, J., dissenting in part), *cert. denied*, 320 U.S. 773 (1943). Conspiracy proceedings "call for use of every safeguard to individualize each defendant in his relation to the mass." Kotteakos v. United States, 328 U.S. 750, 753 (1946).

130. United States v. Hines, 728 F.2d 421 (10th Cir.) (conspiracy to burglarize a post office), *cert. denied*, 104 S. Ct. 3523 (1984); United States v. Holt, Nos. 81-1813, 81-1814, slip op. (10th Cir. Aug. 22, 1983) (conspiracy to receive, barter, sell, and dispose of an automobile); *See also* Fitzgerald v. United States, 719 F.2d 1069 (10th Cir. 1983) (possession of controlled substances with intent to distribute).

Although some argue that conspiracy is an unnecessary part of criminal law,[131] the rationales behind the criminalization of conspiracy[132] are substantial enough to justify its use, provided that individuals are allowed every appropriate procedural safeguard to assure an individual determination of guilt.

II. MAIL FRAUD

The federal mail fraud statute[133] has been characterized as the "first line of defense" against fraud.[134] Because new types of fraud are developed faster than Congress can counteract them, the courts and Congress have treated the mail fraud statute as a stopgap measure to combat frauds before Congress acts to address them specifically.[135] Frequently, the mail fraud statute is the only means by which a defrauder can be brought to justice. In recognition of this, Congress has steadily expanded the scope of the statute and the federal courts have read it liberally to apply it to virtually any scheme to defraud.[136]

Fraudulent schemes have been divided into two general classes: those which are intended to defraud individuals of money or other tangible property, and those which operate to deprive citizens of certain "intangible rights or interests."[137] The term "fraud" also has been held to encompass activities which are contrary to notions of "moral uprightness . . . fundamental honesty, [and] fair play."[138]

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131. *See, e.g.*, Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137 (1973) (arguing that conspiracy adds only confusion to the law).

132. *See supra* notes 7-11 and accompanying text.

133. 18 U.S.C. § 1341 (1982). It provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

134. United States v. Maze, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting).

135. *See* Morano, *The Mail Fraud Statute: A Procrustean Bed*, 14 J. MAR. L. REV. 45, 47-48 (1980).

136. 18 U.S.C. § 1341 (1982) has been revised five times since its enactment in 1872. *See* Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 772 (1980). *See also* United States v. Boyd, 606 F.2d 792, 794 (8th Cir. 1979) (the statute should be read expansively to effectuate its purpose of punishing any scheme to defraud in which the mails are used).

137. Morano, *supra* note 135, at 48. The courts have interpreted 18 U.S.C. § 1341 as allowing prosecution of these two classes of fraud by treating the statutory language "scheme . . . to defraud, or for obtaining money or property" as mutually exclusive disjuncts. United States v. States, 488 F.2d 761, 763-64 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974). In recent years the "intangible rights" theory has been applied broadly to allow increased use of the mail fraud statute as a tool to combat local corruption. This effort has met with opposition among legal writers. *See, e.g.*, Comment, *Federal Criminal Jurisdiction: a Case Against Making Federal Cases*, 14 SETON HALL L. REV. 574 (1984); Comment, *The Intangible-Rights Doctrine and Political Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562 (1980).

138. Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958). *See also* Badders v. United States, 240 U.S. 391, 393 (1916) ("Whatever the limits to [Congress's] power, it

The elements of the offense of mail fraud "are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme."[139] It is the second element of the offense, use of the mails, which converts what would, in most cases, be a state crime into a federal offense.[140]

The original purpose of the mail fraud statute was to protect "the public against all . . . intentional efforts to despoil, and to prevent the post office from being used to carry [fraudulent schemes] into effect."[141] It has been argued that the legislative history of the act indicates that it was meant to reach frauds in which the use of the mails was an indispensible method for carrying out the scheme.[142] However, expansive interpretation by the federal courts now only requires that the mailing be "sufficiently closely related"[143] to the scheme or incidental to an essential part of the scheme to trigger the jurisdiction of the mail fraud statute.[144] It is not necessary that a party actually contemplate use of the mails or even that he do the mailing, as long as the defrauder "causes" the mailing to be done and acts with the "knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended."[145]

The Tenth Circuit recently dealt with both of the general types of fraudulent schemes. In *United States v. Primrose*,[146] the scheme involved a violation of the public's right to honest government, an excellent example of using 18 U.S.C. § 1341 to combat local political corruption.[147] In *United States v. Glick*,[148] the scheme was designed to deprive persons of money.

A. *Sufficiency of the Mailing*: United States v. Primrose

Primrose[149] was an unsuccessful appeal by the County Commissioner

may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not.").

139. Pereira v. United States, 347 U.S. 1, 8 (1954); United States v. Wolf, 561 F.2d 1376, 1379 (10th Cir. 1977).

140. Parr v. United States, 363 U.S. 370, 385 (1960). It has been argued that this second element is not purely jurisdictional in that it requires something akin to proximate cause ("sufficiently closely related") and foreseeability ("reasonable foreseeable"). *See* Rakoff, *supra* note 136, at 775-76 (citing United States v. Maze, 414 U.S. 395, 399, 405 (1974) and *Pereira*, 347 U.S. 1, 8-9). In these respects, 18 U.S.C. § 1341 resembles in some ways the federal conspiracy statute (18 U.S.C. § 371 (1982)). Rakoff, *supra* note 136, at 776.

141. Durland v. United States, 161 U.S. 306, 314 (1896).

142. *See* Comment, *Federal Criminal Jurisdiction*, *supra* note 137, at 580-81.

143. *Maze*, 414 U.S. at 399.

144. *Pereira*, 347 U.S. at 8.

145. *Id.* at 8-9 (citing United States v. Kenofsky, 243 U.S. 440 (1917) (superintendent, ignorant of defendant's scheme, mailed false death certificate filed by defendant)); *see also* United States v. Moss, 591 F.2d 428, 436 (8th Cir. 1979) (mails used by nondefendant to obtain insurance for target of murder scheme).

146. 718 F.2d 1484 (10th Cir. 1983).

147. *See supra* note 137.

148. 710 F.2d 639 (10th Cir. 1983). *See infra* text accompanying notes 178-220.

149. 718 F.2d 1484 (10th Cir. 1983), *cert. denied*, 104 S. Ct. 2352 (1984).

of Murray County, Oklahoma, of a federal district court conviction for thirteen counts of mail fraud in violation of 18 U.S.C. § 1341 (1976).[150] As county commissioner, Primrose was empowered to purchase materials and supplies for the purpose of maintaining the roads and bridges of the county.[151] Primrose was charged with defrauding the citizens of Murray County by purchasing the materials and supplies in return for kickbacks paid by the vendors at the time orders were placed. He was also charged with placing orders for materials which, by arrangement with the vendors, were not to be delivered. He then divided the payment for the undelivered goods with the vendors. The vendors would later bill the county for the materials by mailed invoices, and receive warrants, the county's "checks," through the mail.[152]

Primrose first argued that because the mailings occurred after the kickbacks had been paid, the mails were not a part of the scheme to defraud. In Primrose's view, the scheme had reached fruition and was fully executed before the mailings were made, rendering the mail fraud statute inapplicable.[153]

The Tenth Circuit, Judge Seymour writing, rejected this defense by applying the holdings of *United States v. Bottom*[154] and *United States v. Boyd*.[155] In those cases the Fifth and Eighth Circuits respectively had rejected the completed-scheme defense made under circumstances similar to those in *Primrose*. Both *Bottom* and *Boyd* emphasized that payments made by mail after receipt of kickbacks were necessarily a part of the fraudulent scheme because the mailings ensured that the parties making the kickbacks were paid.[156] Without the final payment by mail to the party issuing the kickback to the defendant, the plan would fail. Each payment was therefore essential to the success of the overall scheme. Furthermore, the *Bottom* court observed that the citizens were not actually defrauded until Bottom paid for the illegally obtained materials.[157] The Tenth Circuit adopted both *Bottom* and *Boyd*, and held that the mailing of the invoices and warrants were an essential part of Primrose's scheme.[158]

The court also considered the effect of the affidavits of noncollusion mailed with each invoice by the vendor to the county, as required by local law. Citing *United States v. Sampson*,[159] the court held that a mailing

150. *See supra* note 133. Primrose was originally charged with thirty-eight counts of mail fraud and three counts of extortion in violation of 18 U.S.C. § 1951 (1982). 718 F.2d at 1485.

151. 718 F.2d at 1486.

152. *Id.* at 1486-88.

153. *Id.* at 1489.

154. 638 F.2d 781 (5th Cir. 1981).

155. 606 F.2d 792 (8th Cir. 1979).

156. *Bottom*, 638 F.2d at 785-86; *Boyd*, 606 F.2d at 794. It is immaterial whether the checks could have been delivered in a way other than by the mails. United States v. Diggs, 613 F.2d 988, 999 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980); United States v. Talbott, 590 F.2d 192, 195 (6th Cir. 1978).

157. 638 F.2d at 785.

158. 718 F.2d at 1491.

159. 371 U.S. 75 (1962).

made in an effort to convince the victim that no fraud had taken place could be considered part of the overall plan.[160] The court found that the affidavits of noncollusion "helped to conceal Primrose's kickback scheme" and were therefore part of that scheme.[161] The court did not address the issue of whether Primrose "caused" these particular mailings to be made within the meaning of section 1341. Because Primrose, however, was certainly aware that the mails would be used in the normal course of business to forward the checks, invoices and noncollusion agreements, there can be no real question that he "caused" the mailings under current judicial doctrine.[162]

Primrose cited three cases, *United States v. Maze*,[163] *Kann v. United States*,[164] and *United States v. Wolf*,[165] in support of his defense that mailings done after a fraudulent scheme has reached fruition are not made "for the purpose of executing" the fraud, within the meaning of the mail fraud statute.[166] *Maze* involved the fraudulent use of a stolen credit card at various motels. The Supreme Court ruled that the motels' mailings of the credit card sales slips to the bank which issued the card were not sufficiently closely related to the scheme to bring the defrauder's conduct within the mail fraud statute.[167] Similarly, in *Kann* the defendants had fraudulently obtained checks which they subsequently cashed or deposited. The bank then mailed the checks to the banks from which the funds were to be drawn. The Supreme Court ruled that the fraud was complete when the defendants cashed the checks. The manner in which the bank collected from the drawee bank was irrelevant.[168] *Wolf* involved a scheme in which the defendant, through his corporations, sold outstanding customer accounts receivable to a financing corporation. The financing corporation then mailed invoices to the customers requesting that they make future payments directly to it. The defendant, however, continued to accept payment for the sold accounts; in some cases the accounts sold were entirely fictitious.[169] The Tenth Circuit, relying on *Kann*, held that the fraudulent transaction was complete at the time the accounts were sold and that the subsequent mailings by the assignee financing corporation were not made in furtherance of the scheme.[170]

The Tenth Circuit distinguished all of these cases on the basis of facts.[171] Quoting *United States v. Knight*,[172] the court said that the cases

160. 718 F.2d at 1490-91.
161. *Id.*
162. *See supra* note 145 and accompanying text.
163. 414 U.S. 395 (1974).
164. 323 U.S. 88 (1944).
165. 561 F.2d 1376 (10th Cir. 1977).
166. 718 F.2d at 1491.
167. 414 U.S. at 402-05.
168. 323 U.S. at 94.
169. 561 F.2d at 1378-79.
170. *Id.* at 1380.
171. 718 F.2d at 1491.
172. 607 F.2d 1172, 1175 (5th Cir. 1979). *See also* United States v. Kent, 608 F.2d 542, 546 (5th Cir. 1979) ("The dependence test is not met if use of the mails is made after the

cited by Primrose had not ruled that where a fraudulent scheme continues after the money from the scheme is received by the defrauder, subsequent mailings could never be considered as part of the fraudulent scheme. Rather, the cases held that the particular schemes involved had been completed before the mailings in question.

Alternatively, Primrose argued that since he was legally required to purchase materials and supplies as a part of his job, mailings made pursuant to his duty were not criminal under 18 U.S.C. § 1341.[173] This argument rested entirely on the case of *Parr v. United States*,[174] in which the Supreme Court held that absent a showing that contents of a mailing are "excessive, 'padded' or in any way illegal," mailings made as a result of a legally imposed duty are not actionable under the mail fraud statute.[175] The Tenth Circuit distinguished *Parr* by noting that unlike the parties in *Parr*, Primrose and the vendors were all willing participants in the scheme. While Primrose may have had a duty to buy materials and supplies, he did not have a legal duty to purchase them from vendors who offered him kickbacks. In fact, under the state's Anti-Kickback Act of 1974,[176] Primrose was legally required *not* to accept kickbacks.[177]

B. *"Deliberate Ignorance" of Fraudulent Acts*: United States v. Glick

In *United States v. Glick*,[178] the Tenth Circuit faced the task of determining whether the use and form of a jury instruction on "deliberate ignorance" were proper in light of the specific intent requirement of the federal mail fraud statute.[179] The court held that deliberate ignorance, rather than positive knowledge, can satisfy the specific intent requirement and that the form of the instruction adequately, if imperfectly, charged the jury on the concept of deliberate ignorance.[180]

Glick involved a scheme to defraud would-be financial borrowers from 1975 to 1976.[181] Reginald Chisholm, the instigator of the scheme, represented himself as a wealthy man who would, for a fee, put together loans for people seeking financing from various lending institutions. As part of the deal, Chisholm promised to tell the potential lenders that he would personally guarantee the loans.[182] As proof of his wealth,

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scheme has been fully consumated, but a fraudulent scheme may depend on a mailing even after the defrauders have received the sought-after money . . . , because 'the use of the mails after the money is obtained . . . may be for the purpose of executing the fraud . . . .' ") (quoting United States v. Ashdown, 509 F.2d 793, 799 (5th Cir. 1975)).

173. 718 F.2d at 1491.

174. 363 U.S. 370 (1960).

175. *Id.* at 387, 391.

176. OKLA. STAT. tit. 74, § 3404 (1981) provides:

> Any person who shall knowingly make or receive, either directly or indirectly, a kickback shall be guilty of a felony, and upon conviction shall be fined not more than Ten Thousand Dollars ($10,000.00) or double the amount of the financial gain or be imprisoned for not more than five (5) years, or both.

177. 718 F.2d at 1491 (emphasis added).

178. 710 F.2d 639 (10th Cir. 1983), *cert. denied*, 104 S. Ct. 995 (1984).

179. 18 U.S.C. § 1341 (1982). *See supra* note 133.

180. 710 F.2d at 642.

181. *Id.* at 641.

182. *Id.*

Chisholm showed his potential clients financial statements prepared by Steven Glick, a certified public accountant. The statements included information about Chisholm's personal finances as well as those of three corporations which he owned or controlled.[183] Included with these statements were letters by Glick in which he represented that the statements had been prepared in accord with generally accepted methods, principles, and standards and that they were accurate representations of Chisholm's financial status.[184]

Both Chisholm and Glick were indicted and Chisholm plead guilty before trial.[185] The major issues at Glick's trial centered around the value of Chisholm and his corporation's principal asset, mineral rights to limestone formations on certain national forest lands.[186] Expert witnesses for the government testified that the statements prepared by Glick greatly overestimated the value of the mineral rights and that Glick had committed "blatant violations of basic accounting principles."[187] Glick testified that four separate appraisals substantially supported his evaluation. Glick was, however, unable to produce three of these appraisals or give any details as to their contents. A fourth appraisal was prepared by someone who had interests in Chisholm's businesses.[188] Much of Glick's testimony worked against him. Most important, Glick stated that he knew that no lender would grant a loan based on the statements, that he knew that Chisholm was collecting fees in return for use of the statements, and that as early as 1975 he personally believed the mineral rights evaluations to be unrealistic.[189] But despite this belief, Glick testified that he thought the mineral rights possessed substantial value. He also expressed his belief that Chisholm's scheme was legitimate at the time he prepared the financial statements.[190]

The jury convicted Glick on eight counts of mail fraud in violation of 18 U.S.C. § 1341[191] and two counts of travel in interstate commerce to execute a scheme to defraud in violation of 18 U.S.C. § 2314.[192] On appeal, Glick raised two issues, only one of which will be addressed in

183. *Id.*

184. *Id.* Government experts testified to the contrary. *See infra* note 187 and accompanying text.

185. 710 F.2d at 641. "Chisholm had previously been convicted in a federal criminal proceeding in Portland, Oregon, on charges apparently arising from other acts involving the same fraudulent plan." *Id.*

186. *Id.* Chisholm indicated to potential investors that he would mine the limestone or construct a real estate development on the property above the minerals. A government expert testified at trial that Chisholm would not have been able to do either. *Id.*

187. 710 F.2d at 641, 642.

188. *Id.* at 641. A fifth appraisal was obtained by Chisholm in preparation for his Portland trial. That appraisal was admitted into evidence in Glick's trial and stated that commercial mining could be considered given the amount of limestone in the deposits. *Id.*

189. *Id.* at 642.

190. *Id.* at 641-42.

191. *See supra* note 133.

192. 18 U.S.C. § 2314 (1982) provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execu-

this survey.[193] Glick claimed that the trial court's instruction on the doctrine of "deliberate ignorance" was not warranted by the evidence and that, even if warranted, the form of the instruction permitted the jury to convict him on "proof of a lesser degree of knowledge than that required by the statute."[194] The instructions at issue read in relevant part:

> In order to convict the defendant in this case, you must find that he acted knowingly.
>
> . . . .
>
> However, the element of knowledge may be established by proof that a defendant deliberately closed his eyes to what otherwise would have been obvious to him. In other words, the requirement that the defendant has acted knowingly does not mean that the defendant needed to have positive knowledge. If the defendant failed to have positive knowledge only because he conscientiously avoided acquiring it, the requirement of knowledge is satisfied.
>
> . . . .
>
> . . . . It is not sufficient to merely prove that . . . Glick prepared fraudulent financial statements. The prosecution must also prove beyond a reasonable doubt that Mr. Glick knowingly participated in the scheme or artifice involved in this case. Thus, if you find that Mr. Glick prepared fraudulent financial statements but did not intentionally and knowingly participate in the scheme or artifice involved in this case, you must find him not guilty.[195]

The Tenth Circuit, Judge Seymour writing, upheld Glick's convictions despite imperfections in the instruction on deliberate ignorance.[196] The court first examined whether the instruction was proper in light of the fact that the government, prosecuting pursuant to the mail fraud statute, was required to prove that Glick specifically intended to defraud.[197] Judge Seymour implicitly agreed with the part of the instruction that stated positive knowledge of a fraudulent scheme is not

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tion or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; . . . .

. . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Glick was also charged with aiding and abetting the above crimes in violation of 18 U.S.C. § 2(a) (1982). 710 F.2d at 640 & n.2.

193. Glick also argued that he was denied effective assistance of counsel. 710 F.2d at 644-45.

194. *Id.* at 642.

195. *Id.* at 643-44 n.4 (quoting Record, vol. VIII, at 672-73). The trial court also instructed the jury on the definition of "knowingly":

> An act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.
>
> The purpose of adding the word "knowingly" is to ensure that no one would be convicted for an act done because of mistake, or accident or innocent reason.

Id. at 643 n.4 (quoting Record, vol. VIII, at 670).

196. *Id.* at 643-44.

197. *Id.* at 642 (quoting United States v. Martin-Trigona, 684 F.2d 485, 492 (7th Cir. 1982)). Specific fraudulent intent is crucial because it can turn otherwise innocent actions

required. In the court's view, conscious avoidance of knowledge is equally as culpable as positive or actual knowledge. The court pointed out, however, that in order to avoid convictions based on mere negligence, a deliberate ignorance instruction should only be given where the evidence points to such conduct.[198]

The court found no merit in Glick's argument that the evidence at trial did not justify the instruction. Several facts, taken together, could have led a reasonable juror to conclude that Glick was aware of facts which indicated that Chisholm was involved in a fraudulent scheme, but that he nevertheless *chose* to remain ignorant concerning the propriety of the venture.[199] These facts included Glick's knowledge that Chisholm was collecting fees for financial statements which Glick knew to be inadequate to obtain a loan, as well as his personal belief that Chisholm's mineral rights were overvalued. Furthermore, Glick had repeatedly violated basic accounting and auditing principles in the preparation of the financial statements.[200] The court found that a reasonable juror could conclude that Glick either knew of the fraudulent purpose of Chisholm's scheme or deliberately avoided gaining such knowledge.[201]

Glick also argued that the instruction was fatally incomplete because it did not require the jury to find that "the defendant was subjectively aware of a high probability of the existence of the fact whose knowledge is imputed, and that knowledge of that fact may not be imputed if the defendant actually believed that such fact did not exist."[202] As the court noted, this instruction is designed to assure that a defendant's ignorance is deliberate or willful. If a defendant is merely negligent or has only made a mistake, then the required knowledge cannot be imputed.[203] The court admitted that this added language would have resulted in a better instruction, but found that its exclusion did not constitute plain error.[204] Examining the instruction given, the court found that it contained sufficient language concerning deliberate and intentional ignorance of facts which would have been obvious to Glick had he

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into an actionable crime. Badders v. United States, 240 U.S. 391, 394 (1916). *See also supra* note 139 and accompanying text.

198. 710 F.2d at 642. *See also infra* notes 214-15 and accompanying text.

199. 710 F.2d at 642.

200. *Id.*

201. *Id.*

202. *Id.* at 642-43 (quoting Brief for Appellant at 17). Such language is similar to that adopted by the Tenth Circuit from the Ninth Circuit case of United States v. Jewell, 532 F.2d 697, 704 n.21 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976). The preferable instruction would require, in addition to the instruction given to the jury in *Glick*: "(1) that the required knowledge is established if the accused is aware of a high probability of the existence of the fact in question, (2) unless he actually believes it does not exist." 532 F.2d at 704 n.21. *See also infra* note 212 and accompanying text.

203. 710 F.2d at 642 (quoting Griego v. United States, 298 F.2d 845, 849 (10th Cir. 1962)).

204. 710 F.2d at 643-44. Glick was required to show that the omission constituted plain error because defense counsel was given several opportunities to alter the language at trial (the trial judge even offered to use the quote from *Jewell*) but did not do so. Therefore, FED. R. CRIM. P. 52(b) permits the appellate court to reverse only if failure to include the added language was plain error. *Id.*

not closed his eyes to them.[205]

The jury instruction on deliberate ignorance given in *Glick* was important because it concerned the statutory requirement of specific intent under the mail fraud statute.[206] Specific intent to defraud can sometimes be shown by direct evidence. This is possible where a party actively misrepresents material facts to his victims, as Chisholm did in the *Glick* case. However, circumstantial evidence is usually required to prove intent. Actions of a defendant may permit the inference that he was involved in a scheme which he knew, or should have known, was fraudulent.[207]

Frequently, a relatively minor actor will take steps to remain ignorant of facts which he suspects will show his complicity in a fraudulent scheme, with the hope that ignorance will excuse his conduct. For this reason the federal courts have accepted deliberate ignorance, willful blindness, or conscious avoidance as a substitute for positive or actual knowledge.[208] The courts have long recognized that deliberate ignorance is equally as culpable as positive knowledge.[209] Therefore, one who consciously avoids obtaining knowledge which a reasonable man exercising due diligence would discover "has sufficient *mens rea* for an offence based on such words as . . . 'knowingly'."[210]

The federal circuit courts have adopted several different formulations of the deliberate ignorance instruction. Unlike rules of law in other statutory contexts, these different formulations are substantially similar and reflect a high degree of concern for consistency among the circuits.[211] The courts agree that a proper jury instruction has three

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205. *Id.* at 643-44.

206. *See* Note, *A Survey of the Mail Fraud Act*, 8 MEM. ST. U.L. REV. 673, 677-78 (1978). *See also* Note, *White-Collar Crime: A Survey of Law—Mail Fraud and Wire Fraud*, 18 AM. CRIM. L. REV. 197, 200 (1980). The government must also show that the mails were used to further the fraudulent scheme. *See, e.g.*, Pereira v. United States, 347 U.S. 1 (1954); United States v. Diggs, 613 F.2d 988, 997 (D.C. Cir. 1979); United States v. Azzarelli Constr. Co., 612 F.2d 292, 298 (7th Cir. 1979); United States v. Beecroft, 608 F.2d 753, 757 (9th Cir. 1979). *See also supra* note 139 and accompanying text.

207. *See* Note, 8 MEM. ST. U.L. REV., *supra* note 76, at 678. *See also* Note, *Survey of the Law of Mail Fraud*, 1975 U. ILL. L.F. 237, 242.

208. The term for conduct showing deliberate ignorance varies among the federal circuits because of repeated attempts to clarify the concept. *See infra* note 211.

209. United States v. Jewell, 532 F.2d at 700. *See* R. PERKINS, CRIMINAL LAW, 776 (2d ed. 1969); G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART, § 57 at 157 (2d ed. 1961). *See also* Stone v. United States, 113 F.2d 70 (6th Cir. 1940) ("Ignorance of inculpatory fact is no more a defense than ignorance of inculpatory law. There is evidence that each of the appellants knew, or could have known by the exercise of reasonable diligence, that the statements made to prospective purchasers concerning the value of the stocks of the respective corporations were false.").

210. Edwards, *The Criminal Degrees of Knowledge*, 17 MOD. L. REV. 294, 298 (1954) (quoted in *Jewell*, 532 F.2d at 700).

211. *See, e.g.*, United States v. Ciampaglia, 628 F.2d 632, 642 (1st Cir.) (deliberately closing eyes to the obvious; refusal to be enlighted and take notice; "willful blindness to the existence of the fact"), *cert. denied*, 449 U.S. 956 (1980); United States v. Aulet, 618 F.2d 182, 190 (2d Cir. 1980) (purposeful ignorance of evidence); United States v. Eaglin, 571 F.2d 1069, 1074-75 (9th Cir. 1977) (suspicion aroused but defendant deliberately failed to make further inquiries so as to remain in ignorance; closing eyes to facts which should prompt investigation), *cert. denied*, 435 U.S. 906 (1978); Griego v. United States,

characteristics: 1) it must refer to purposeful avoidance of the knowledge of a material fact or facts; 2) the defendant must have been aware of a high probability that the fact exists; and 3) deliberate ignorance can not be found if the defendant had an actual belief that the fact did not exist.[212] The Tenth Circuit, as *Glick* demonstrates, follows this construction of the doctrine of deliberate ignorance. As stated in *Glick*, however, failure to include the final two elements is not plain error where the jury is properly instructed on conscious avoidance.[213]

Use of a deliberate ignorance instruction is strictly limited by the courts. The instruction may only be given when there is evidence that points toward deliberate action with the purpose of remaining in the dark.[214] This restriction is necessary to ensure that a jury will not impute specific intent based merely on negligence.[215]

Certainly in Glick's case there seemed to be evidence which pointed toward deliberate ignorance. By testifying that four appraisals substantiated the stated value of Chisholm's mineral rights (as included in the financial statements), Glick seemed to implicitly claim that he had an actual belief that that value was legitimate.[216] However, his own testimony that he personally thought the value to be overstated[217] effectively defeated that contention. Furthermore, despite Glick's belief and knowledge of how Chisholm was using the financial statements, Glick included the "unrealistic" value in the statements.[218] Apart from this fact, the statements contained blatant and numerous violations of proper accounting procedures.[219] The Tenth Circuit was undoubtedly correct in upholding the trial court's instruction. The evidence, taken as a whole, pointed to deliberate ignorance. Glick purposefully attempted to avoid culpability by closing his eyes to facts which a reasonable man would discover after exercising due diligence. In short, Glick tried to limit his culpability in a fraudulent scheme from which he intended to benefit.[220]

III. False Claims

In *United States v. Montoya*,[221] the defendant had contracted, through his corporation, with the State of New Mexico to weatherize the homes

298 F.2d 845, 849 (10th Cir. 1962) ("willfully and intentionally remaining ignorant of a fact"; "conscious purpose to avoid enlightenment").

212. *Aulet*, 618 F.2d at 191.

213. 710 F.2d at 643-44. *See also Eaglin*, 571 F.2d at 1074-75.

214. United States v. Garzon, 688 F.2d 607, 609 (9th Cir. 1982); United States v. Ciampaglia, 628 F.2d 632, 642-43 (1st Cir.), *cert. denied*, 449 U.S. 956 (1980); United States v. Murrieta-Bejarano, 552 F.2d 1323, 1325 (9th Cir. 1977).

215. *Garzon*, 688 F.2d at 609.

216. If a defendant has an actual belief that a fraudulent fact does not exist, knowledge of that fact may not be imputed. *Jewell*, 532 F.2d at 704 n.21. *See also supra* note 202 and accompanying text.

217. 710 F.2d at 642.

218. *Id.*

219. *Id.*

220. *See supra* note 208 and accompanying text.

221. 716 F.2d 1340 (10th Cir. 1983).

of elderly, low income New Mexico citizens.[222] The weatherization project was funded by a lump sum grant from the United States Department of Energy.[223] Montoya submitted claims to the Governor's Office of Community Affairs, the administrator of the program, for work which he had not done.[224] The United States then indicted Montoya on six counts of submitting false claims to the federal government in violation of 18 U.S.C. § 287 (1976).[225]

Before trial, Montoya moved the district court to dismiss the case for lack of federal jurisdiction, arguing that because his claims were presented to a state agency receiving no apparent supervision from the federal government his conduct did not violate federal law. The district court denied the motion and convicted Montoya on all counts.[226]

On appeal, Montoya again raised the claim that because he contracted with and was paid by a state agency he could not have presented false claims to the United States government.[227] The Tenth Circuit affirmed the convictions and held that it is not necessary that a false claim be presented directly to the United States or one of its agencies or departments in order to be actionable under the criminal version of the False Claims Act.[228]

The court first established that claims presented to an intermediary could be actionable under section 287 if the payment ultimately comes from the United States.[229] The court reached this holding from an examination of the analysis in both *United States ex rel. Marcus v. Hess*[230] and *United States v. Catena*.[231] *Hess* involved a violation of the precursor of 18 U.S.C. § 287 (section 5438 of the Revised Statutes[232]) in which Hess made false claims to a municipality with which he had contracted to do public works projects funded largely by the United States Public Works Administration.[233] The Supreme Court held that section 5438 did not

222. *Id.* at 1341.

223. The funds were granted pursuant to the Energy Conservation in Existing Buildings Act of 1976, 42 U.S.C. §§ 6851-73 (1982).

224. 716 F.2d at 1341.

225. 18 U.S.C. § 287 (1982) provides in pertinent part:

> Whoever makes or presents to . . . the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

226. 716 F.2d at 1341. "Montoya was sentenced to five years on each count, the sentences to run concurrently." *Id.*

227. *Id.*

228. *Id.* at 1341-44. Judge Timbers of the Second Circuit sat by designation and wrote the opinion of the court.

229. *Id.* at 1342-43.

230. 317 U.S. 537 (1943).

231. 500 F.2d 1319 (3d Cir.), *cert. denied*, 419 U.S. 1047 (1974).

232. Section 5438 provided in pertinent part:

> Every person who makes *or causes to be made*, or presents *or causes to be presented*, for payment or approval to . . . the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent . . . [shall be punished].

Act of March 2, 1863, ch. 67, 12 Stat. 696 (emphasis added).

233. 317 U.S. at 542-43.

require that the false claim be presented directly to the federal government as long as federal funds would ultimately be used to pay the claims.[234]

The Tenth Circuit then rejected the potentially troublesome argument that section 5438 should be distinguished from 18 U.S.C. § 287.[235] The two statutes differ in that section 5438 contained language that expressly prohibited a defendant from *causing* claims to be presented to the United States government. The court relied on *Catena*, where the Third Circuit rejected the distinction.[236] In *Catena*, the Third Circuit held that the "causes" language of section 5438 was replaced by 18 U.S.C. § 2(b), which provides that "[w]hoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."[237] Therefore, by reading sections 287 and 2(b) together the Tenth Circuit agreed with the Third Circuit that section 287 prohibits causing, directly or indirectly, a false claim to be presented to the federal government.[238]

Montoya also argued that federal involvement in a program should have to be substantial, if not direct.[239] Because the Department of Energy exercised only minimal day to day control over the program after it granted the funds to New Mexico, Montoya claimed that the state and not the federal government truly controlled the money.[240] The court noted that the Department of Energy was the source of the funds, promulgated regulations for the states to follow, was required to monitor each program, and received audits from the state agencies.[241] The court held that the source of the funds and the nature of the program are critical rather than the timing of the federal payment.[242] The court pointed out that the federal government would have more interest in preventing false claims where funds are spent on a particular project than in preventing claims where funds are spent "pursuant to a comprehensive federal program or project."[243]

As a final challenge, Montoya asserted that absent day-to-day federal control, a defendant must have knowledge of the federal involvement.[244] The court held that this knowledge is irrelevant by analogizing section 287 to cases interpreting the False Statements Act.[245] Those cases hold that knowledge of federal involvement is irrelevant and

234. *Id.* at 543-45.
235. 716 F.2d at 1342-43.
236. 500 F.2d at 1322-23.
237. 18 U.S.C. § 2(b) (1982). The failure of the indictment to charge Montoya with violation of § 2(b) was not fatal because the indictment provided sufficient notice of the criminal violation charged. 716 F.2d at 1343 & n.1. *See also Catena*, 500 F.2d at 1323 & n.7; United States v. Koptik, 300 F.2d 19, 22 (7th Cir.), *cert. denied*, 370 U.S. 957 (1962).
238. 716 F.2d at 1343.
239. *Id.*
240. *Id.*
241. *Id.* (citing 42 U.S.C. §§ 6866-68 (1982)).
242. *Id.* at 1344.
243. *Id.* at 1344 n.2.
244. *Id.* at 1344.
245. 18 U.S.C. § 1001 (1982).

would give the False Statements Act a narrow and unintended construction.[246] Knowledge of federal involvement is not required to form a mens rea under section 1001 and should not be required under section 287.[247]

In *Montoya*, the Tenth Circuit held for the first time that a person may be convicted under the federal False Claims Act even if he submits his claims to a state or local intermediary. The focus is on the source of the money and the nature of the program rather than whether the funds flow directly from the United States Treasury to the accused. The new test is sound in that it best serves section 287's purpose of protecting federal funds from false, fraudulent or fictitious claims.[248] Accepting Montoya's claims would divert the focus of a rule away from this purpose. Just because the federal government has entrusted state and local governments with the administration of many federal programs, it does not follow that the federal government has any less interest in punishing the fraudulent use of those funds.[249]

A rule that would focus on the technical and day to day control of a federally funded program would result in a quagmire of factual disputes and judicial inconsistency. As the Supreme Court aptly stated in *Hess*, "funds [given to the states in the form of grants in aid] are as much in need of protection from fraudulent claims as any other federal money, and the statute does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution."[250] While the rule enunciated by the Tenth Circuit may broaden the power of the federal government to prosecute persons under 18 U.S.C. § 287, it should serve to protect the integrity of federal funds and programs.

IV. EXTORTION—EXPANDING JURISDICTION UNDER THE HOBBS ACT[251]

In *United States v. Boston*,[252] a case of first impression in the Tenth Circuit,[253] the Tenth Circuit assessed the degree of impact a robbery or extortion scheme must have on interstate commerce to sustain federal

246. 716 F.2d at 1344 (citing United States v. Baker, 626 F.2d 512, 516 (5th Cir. 1980); United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979)).

247. 716 F.2d at 1345. The mens rea derives from the intent to present a fraudulent claim. *Id. See also* 716 F.2d at 1345 n.3 suggesting that Montoya had at least constructive knowledge of the federal involvement.

248. Note, *False Claims*, 19 AM. CRIM. L. REV. 371 (1981).

249. *See Hess*, 317 U.S. at 544 ("Government money is as truly expended whether by checks drawn directly on the Treasury to the ultimate recipient or by grants in aid to states.").

250. *Id.* (citation omitted).

251. 18 U.S.C. § 1951 (1982). The Hobbs Act provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

252. 718 F.2d 1511 (10th Cir. 1983), *cert. denied*, 104 S. Ct. 2352 (1984).

253. *Id.* at 1516.

jurisdiction under the Hobbs Act.[254] Defendant Boston was an Oklahoma County Commissioner charged with taking "kickbacks" from sellers of equipment and supplies.[255] The Tenth Circuit sustained his conviction under a "depletion of assets" theory, holding that the kickbacks depleted both the sellers' assets and the county's assets, and that the depletion of assets affected interstate commerce because the sellers and the county both were engaged in interstate commerce.[256] The court sustained the conviction even though the indictment did not specifically allege depletion of assets in its charge of interference with interstate commerce.[257]

A. *Background*

The Hobbs Act prohibits interfering with interstate commerce by way of extortion or robbery. Originally, the Hobbs Act was enacted to combat labor-related racketeering.[258] In *United States v. Culbert*,[259] however, the Supreme Court held that all criminal conduct, racketeering or otherwise, within the reach of the statutory language is criminal under the Act.[260] In recent years the Hobbs Act has become the primary federal tool for fighting local political corruption.

Extortion is "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."[261] The courts have read this provision disjunctively so that extortion "under color of official right" need not be by force, violence, or fear.[262] Furthermore, a public official need not induce an extortionate payment, as long as "the motivation for the payment focuses on the recipient's office."[263] As long as the public official wrongfully takes money not due him or his office he is guilty of extortion within the meaning of the Hobbs Act.[264]

254. *Id.* at 1516-17. The federal government obtains jurisdiction through the commerce clause: "The Congress shall have Power to . . . regulate commerce . . . among the several States." U.S. CONST. art I, § 8.

255. 718 F.2d at 1513.

256. *Id.* at 1516.

257. *Id.* at 1514-16.

258. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1174-75 (1977).

259. 435 U.S. 371 (1978).

260. *Id.* at 380. *See also* Ewing, *Combating Official Corruption by All Available Means*, 10 MEM. ST. U.L. REV. 423, 446-47 (1980).

261. 18 U.S.C. § 1951(b)(2) (1982).

262. United States v. Kenny, 462 F.2d 1205, 1229 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972). *See also* United States v. Cerilli, 603 F.2d 415, 424 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980); United States v. Wright, 588 F.2d 31, 34 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); United States v. Brown, 540 F.2d 364, 372 (8th Cir. 1976); United States v. Hall, 536 F.2d 313, 321 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976); United States v. Hathaway, 534 F.2d 386 (1st Cir.), *cert. denied*; 429 U.S. 819 (1976).

263. United States v. Hedman, 630 F.2d 1184, 1195 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); *see* United States v. Butler, 618 F.2d 411, 417-19 (6th Cir.), *cert. denied*, 447 U.S. 927 (1980). Originally the courts required a showing that the public official had threatened the subject of the extortion by coercion or duress. *See, e.g.*, United States v. Hyde, 448 F.2d 815, 832-33 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972).

264. *Kenny*, 462 F.2d at 1229.

The second element of the offense, interference with interstate commerce, gives the federal government jurisdiction over the extortionate act. While the legislative history of the Hobbs Act seems to have contemplated a direct and substantial effect on interstate commerce,[265] courts have interpreted the Act as requiring only a minimal effect.[266] Several circuits have held that any *de minimis* effect is sufficient to sustain federal jurisdiction.[267] Furthermore, the effect need only be probable or potential; it does not have to be direct or clearly demonstrated.[268] Frequently, the government will attempt to show the requisite interference by proof that the victim's assets were depleted as a result of the extortion, thus reducing the purchasing power of the victim to further obtain goods which have moved in interstate commerce. It is this "depletion of assets" theory which was at issue in *Boston*.

B. *United States v. Boston*

The defendant, William Boston, was County Commissioner of Major County, Oklahoma. In his role as County Commissioner, Boston was obligated to purchase equipment and supplies for maintaining the county's infrastructure. Boston was charged with accepting and soliciting kickbacks from suppliers in return for purchasing equipment and materials from those suppliers. The indictment charged seven counts of extortion in violation of the Hobbs Act, 18 U.S.C. § 1951,[269] and fifty counts of mail fraud in violation of 18 U.S.C. § 1341[270] and 18 U.S.C. § 2.[271]

At trial, seven suppliers testified that Boston had accepted, and in some cases solicited, kickbacks. The kickbacks were paid in cash at private meetings which occurred after Boston had mailed County checks to the suppliers in payment for the materials purchased. Boston offered the testimony of several suppliers who stated that Boston had never asked for or received kickbacks from them. He also took the stand and

265. *See* Note, *Prosecution Under the Hobbs Act and the Expansion of Federal Criminal Jurisdiction*, 66 J. CRIM. L. & CRIMINOLOGY 306, 307-11 (1975).

266. *See* Stirone v. United States, 361 U.S. 212, 215 (1960). *See also* Note, *Extortion*, 19 AM. CRIM. L. REV. 396, 402-03 (1981).

267. United States v. Richardson, 596 F.2d 157, 160 (6th Cir. 1979); United States v. Phillips, 577 F.2d 495, 501 (9th Cir. 1977), *cert. denied*, 439 U.S. 831 (1978); United States v. Mazzei, 521 F.2d 639, 642-43 (3d Cir.), *cert. denied*, 423 U.S. 1014 (1975); *see* United States v. Brown, 540 F.2d 364, 373 (8th Cir. 1976); United States v. Hathaway, 534 F.2d 386, 396-97 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976); United States v. Staszcuk, 517 F.2d 53, 59 (7th Cir.), *cert. denied*, 423 U.S. 837 (1975).

268. United States v. Rindone, 631 F.2d 491, 494 (7th Cir. 1980) ("realistic probability" that interstate commerce would have been affected if threat to victim's business had been carried out); United States v. Phillips, 577 F.2d 495 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978); United States v. Harding, 563 F.2d 299, 301-02 (6th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978); United States v. Staszcuk, 517 F.2d 53, 59-60 (7th Cir.), *cert. denied*, 423 U.S. 837 (1975). The *Boston* trial judge instructed the jury that the government was required to prove that Boston "actually or potentially obstructed, delayed, or affected interstate commerce or attempted to do so." 718 F.2d at 1516 (citing Record at 264).

269. *See supra* note 251; 718 F.2d at 1513.

270. The statute prohibits using the Postal Service in counterfeiting or fraudulent schemes. 18 U.S.C. § 1341 (1982).

271. Section 2 prohibits offenses against the United States. 18 U.S.C. § 2 (1982).

testified that he had never accepted any kickbacks. Nevertheless, the jury convicted Boston on all counts of violating the Hobbs Act and on forty-seven of the fifty counts of mail fraud.[272]

On appeal, Boston argued that the jury should not have been instructed on the "depletion of assets" theory and that the evidence presented at trial did not establish that his actions had a sufficient effect on interstate commerce as required by the Hobbs Act.[273] The Tenth Circuit, Judge Holloway writing, affirmed the convictions, holding that evidence of the depletion of the assets of a company involved in interstate commerce is sufficient to establish an interference with interstate commerce.[274] The court also held that an indictment charging a violation of the Hobbs Act need not allege the exact nature of the effect on interstate commerce so long as the indictment notifies the defendant of the acts for which he is charged.[275]

Boston first argued that the jury instruction given at trial on the depletion of assets theory amounted to a broadening of the charges against him in violation of his fifth amendment right to have a conviction based solely on the charges included in the indictment.[276] In effect, Boston argued that the indictment charged one type of interference, while the depletion of assets constitutes another type. Boston relied on the case of *Stirone v. United States*,[277] in which the Supreme Court reversed a conviction under the Hobbs Act because the jury was instructed that it could convict Stirone if it found the specific effect on interstate commerce charged in the indictment, or if it found another specific effect which the government had introduced at trial.[278]

The Tenth Circuit rejected this argument citing language from *Stirone*. In *Stirone*, the Supreme Court stated that a conviction could rest on any sufficient effect on interstate commerce shown at trial if the indictment charges the effect in general terms.[279] The indictment in *Boston* charged that Boston had knowingly and willfully attempted "to obstruct, delay or effect (sic) commerce and the movement of articles and commodities in commerce, as the term is defined in [the Hobbs Act] by extortion."[280] Because this charge was general in nature, the depletion of assets theory fell within its bounds.[281]

Boston also challenged the depletion of assets theory on the basis

272. 718 F.2d at 1513-14.
273. *Id.* at 1514, 1516.
274. *Id.* at 1516. The court also rejected Boston's challenge of the trial court's voir dire examination and his argument that the use of the mails was not sufficient to bring the scheme within the federal mail fraud statute. *Id.* at 1517-18. The court reversed his conviction on two of the mail fraud courts for insufficient evidence and because, in one case, the mails were not used.
275. *Id.* at 1515-16.
276. *Id.* at 1514-15. Such a variance would have mandated reversal of the Hobbs Act convictions. *See* Stirone v. United States, 361 U.S. 212, 217-18 (1960).
277. 361 U.S. 212 (1960).
278. *Id.* at 218-19.
279. *Id.* at 218.
280. 718 F.2d at 1515-16 (quoting Record at 1-2).
281. 718 F.2d at 1516.

that such an interference is not a sufficiently substantial interference with interstate commerce.[282] Because the Tenth Circuit had not previously decided how much interference is required, it looked to the decisions of several other circuits concerning the issue. The court adopted the decisions of several circuits which hold that any *de minimis* effect on interstate commerce is sufficient to sustain federal jurisdiction under the Hobbs Act.[283] The specific language of the Act prohibits interference "in any way or degree."[284] The court then followed the other circuits by holding that evidence of depletion of assets can show a large enough effect to meet this "*de minimis*" standard.[285]

By adopting the depletion of assets test, the Tenth Circuit has given federal prosecutors within the circuit a powerful tool to bring more crimes into federal jurisdiction under the Hobbs Act. But this test may not be applied to every entity which may deal in interstate commerce. The extortionate act must deplete the assets of a business and not an individual.[286] As stated in *United States v. Boulahanis*,[287] the justification for this distinction is that "extortion is likely to have a greater effect on interstate commerce when directed at businesses than at individuals."[288]

The required nexus between the extortionate act and the effect on interstate commerce has become increasingly tenuous. Because interference with interstate commerce need only be a "potential" result of the depletion of assets, the required effect upon interstate commerce is in danger of becoming "assumed by the courts for jurisdictional purposes."[289] In order to resist this trend, the Tenth Circuit should apply the depletion of assets test only where the business whose assets are depleted is engaged in customary or ongoing dealings in interstate commerce.[290] Such a limitation would give substance to the interference requirement. If limits are not placed on the interference requirement the scope of the Hobbs Act will continue to expand to the point where any extortion or robbery would fall within its purview. Such a situation would amount to an undesirable usurpation of jurisdiction from state and local governments over what are essentially local crimes.[291]

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282. *Id.*

283. *Id.* (citing United States v. Glynn, 627 F.2d 39, 41 (7th Cir. 1980); United States v. Harding, 563 F.2d 299, 301-02 (6th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978)).

284. 18 U.S.C. § 1951 (1982).

285. 718 F.2d at 516 (citing United States v. Boulahanis, 677 F.2d 586, 589-90 (7th Cir.), *cert. denied*, 459 U.S. 1016 (1982); United States v. Zemek, 634 F.2d 1159, 1173 n.20 (9th Cir. 1980), *cert. denied*, 450 U.S. 916, 985; 452 U.S. 905 (1981); United States v. French, 628 F.2d 1069, 1075-78 (8th Cir.), *cert. denied*, 449 U.S. 956 (1980); United States v. Daley, 564 F.2d 645, 649-50 & n.4 (2d Cir. 1977), *cert. denied*, 435 U.S. 933 (1978)).

286. United States v. Mattson, 671 F.2d 1020, 1024-25 (7th Cir. 1982).

287. 677 F.2d 586 (7th Cir.), *cert. denied*, 459 U.S. 1016 (1982).

288. *Id.* at 590.

289. Note, *Prosecution Under the Hobbs Act*, *supra* note 265, at 314.

290. *See* United States v. Boulahanis, 677 F.2d at 590; United States v. Elders, 569 F.2d 1020, 1025 (7th Cir. 1978); United States v. Merolla, 523 F.2d 51, 55 (2d Cir. 1975).

291. *See* United States v. French, 628 F.2d at 1077 (dictum).