CRIMINAL LAW—CONSPIRACY AND ASSAULT—IT IS UNNECESSARY TO PROVE SCIENTER TO SUPPORT A CONVICTION FOR ASSAULT OR CONSPIRACY TO ASSAULT A FEDERAL OFFICER—*United States v. Feola*, 95 S. Ct. 1255 (1975).

Ralph Feola, Michael Farr, Henry Rosa, and Enriquito Alsondo were arrested for assaulting and conspiring to assault federal officers who were engaged in the performance of their official duties.[1] The charges stemmed from an attempt by Feola and his codefendants to effectuate "a classic narcotics 'rip-off,' "[2] a ploy destined to fail due to the convincing undercover roles played by two federal narcotics agents.[3] Deceived by the agents' appearance as drug purchasers, the conspirators designed a scheme whereby they hoped to obtain a substantial sum of money by selling sugar as heroin or by forcibly relieving the purchasers of their money.[4]

At a rendezvous selected by the conspirators, the two agents became temporarily separated.[5] While one agent was examining the purported heroin, Alsondo, in an apparent effort to take the "buy" money, assaulted the other agent.[6] Recognizing the urgency of the situation,[7]

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[1] United States v. Alsondo, 486 F.2d 1339, 1341–42, *modified on rehearing*, 486 F.2d 1346 (2d Cir. 1973), *rev'd in part sub nom.* United States v. Feola, 95 S. Ct. 1255 (1975). The federal assault provision under which the parties were charged imposes a fine of not more than $5,000 and/or imprisonment of up to three years upon anyone who

> forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties . . . .

18 U.S.C. § 111 (1970).

The conspiracy charges were founded upon 18 U.S.C. § 371 (1970), which provides in part:

> If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not for more than five years, or both.

[2] United States v. Feola, 95 S. Ct. 1255, 1259 (1975).

[3] *See id.* The agents were employees of the Bureau of Narcotics and Dangerous Drugs. *Id.* They are included among the many specifically enumerated individuals protected by the federal assault provision. *See* 18 U.S.C. §§ 111, 1114 (1970).

[4] *See* United States v. Feola, 95 S. Ct. 1255, 1259 (1975).

[5] United States v. Alsondo, 486 F.2d 1339, 1341, *modified on rehearing*, 486 F.2d 1346 (2d Cir. 1973), *rev'd in part sub nom.* United States v. Feola, 95 S. Ct. 1255 (1975).

[6] United States v. Alsondo, 486 F.2d 1339, 1341–42, *modified on rehearing*, 486 F.2d 1346 (2d Cir. 1973), *rev'd in part sub nom.* United States v. Feola, 95 S. Ct. 1255 (1975).

[7] The conspirators had apparently commandeered the apartment in which the "buy" was to take place. *See id.* Aside from the manner in which he was ushered into a bedroom and left alone, the agent was alerted to the possibility of danger by his discovery of the lessor bound and gagged in a closet. 486 F.2d at 1341 & n.3.

the first agent quickly interceded, and, after a brief struggle, all four parties were placed under arrest.[8] At trial, the Government contended that the defendants had either agreed in advance to assault the officers, or had reasonably foreseen that possibility, and were, therefore, guilty of conspiracy to assault federal officers.[9] The federal district court judge instructed the jury that in order to convict the defendants of either the substantive offense of assault or the related charge of conspiracy, it was unnecessary to find that they were aware of their intended victims' federal status.[10]

In *United States v. Alsondo*,[11] Feola, Rosa, and Alsondo appealed their convictions on the conspiracy charge, contending that the supporting evidence was insufficient as a matter of law.[12] The United States Court of Appeals for the Second Circuit, however, approached the case from the standpoint of "scienter"; *i.e.*, whether the defendants knew their intended victims were federal officers.[13] The issue before the court was, therefore, whether either offense should require proof that the guilty party had specific knowledge of his victim's public office.

The *Alsondo* court found that although it was unnecessary to prove such knowledge to sustain a conviction for the substantive offense of assault, proof of scienter was necessary to establish the requisite antifederal intent to sustain a conviction under the federal criminal conspiracy statute.[14] Upon examination of the jury instructions, the court determined that failure to charge on this essential element of scienter constituted plain error,[15] and, inasmuch as the

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[8] United States v. Alsondo, 486 F.2d 1339, 1342, *modified on rehearing*, 486 F.2d 1346 (2d Cir. 1973), *rev'd in part sub nom.* United States v. Feola, 95 S. Ct. 1255 (1975).

[9] *Id.*

[10] United States v. Feola, 95 S. Ct. 1255, 1259 (1975). The trial judge also imparted an identical charge regarding those persons who impede or resist federal officers, as well as the fact that an accused need not even know whom he is assaulting. *Id.* at n.7.

[11] 486 F.2d 1339, *modified on rehearing*, 486 F.2d 1346 (2d Cir. 1973), *rev'd in part sub nom.* United States v. Feola, 95 S. Ct. 1255 (1975).

[12] 486 F.2d at 1344. None of the appellants took exception to the instructions given the jury, apparently accepting the view that an accused's knowledge of the federal identity of his intended victim is not an essential element of either an assault or a conspiracy to assault a federal officer. *Id.*

The remaining defendant, Michael Farr, was tried and convicted with the other conspirators, but was sentenced under the provisions of the Youth Corrections Act, 18 U.S.C. §§ 4209, 5010(b) (1970), and raised a separate appeal. United States v. Farr, 487 F.2d 1023, 1024 (2d Cir. 1973), *cert. denied*, 95 S. Ct. 1422 (1975).

[13] 486 F.2d at 1342. The terms "knowledge" and "scienter" are used interchangeably throughout this Note, each denoting an awareness on the part of an accused that his intended victim is a federal officer.

[14] *Id.* at 1343.

[15] *Id.* at 1344. An appellate court's authority to question jury charges is not entirely

defendants' knowledge had not been considered a requisite element of criminal conspiracy by the trial court, the evidence on that specific issue was, necessarily, insufficient.[16] The conspiracy convictions were accordingly reversed,[17] and, after an initial ruling partially to the contrary,[18] the assault convictions of all three appellants were affirmed.[19]

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dependent upon the claims of the parties. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." FED. R. CRIM. P. 52 (b).

In practice, a defendant's "substantial rights" are nearly always affected by a failure to charge an essential element of the crime with which he is charged. 486 F.2d at 1344. *See, e.g.*, United States v. Fields, 466 F.2d 119, 121 (2d Cir. 1972) (even where evidence of guilt is substantial, a failure to charge on an essential element requires a new trial).

More specifically, the *Alsondo* court noted that the issue of scienter in the federal assault provision "ha[s] been a fertile source for judicial willingness to invoke the 'plain error' rule." 486 F.2d at 1344. *See, e.g.*, United States v. Young, 464 F.2d 160, 162–64 (5th Cir. 1972); United States v. Rybicki, 403 F.2d 599, 602–04 (6th Cir. 1968).

[16] 486 F.2d at 1344.

[17] *Id.* at 1346.

[18] *Id.* Prior to rehearing, the appellate court had affirmed Alsondo's conviction for an assault upon a federal officer, but reversed the assault convictions of Rosa and Feola on the theory that their criminal responsibility had been founded upon the existence of a conspiratorial objective among the parties. *Id.* at 1345–46. *See* Pinkerton v. United States, 328 U.S. 640, 645–48 (1946) (discussion of a conspirator's liability for activities of his coconspirators in furtherance of the criminal plan). *See also* 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 90 (1957).

Since Feola had remained hidden in a closet throughout the entire affair, there was no evidence to link him to a direct assault upon either agent. The court, therefore, assumed that the reversal of his conspiracy conviction destroyed the sole basis of his responsibility for the assault count. 486 F.2d at 1345. Accordingly, the court reversed his conviction and dismissed the charge against him. *Id.* at 1346.

Rosa had shoved one of the agents in an apparent effort to escape, therefore there was sufficient evidence to allow a jury to conclude that he was guilty of a direct assault. *Id.* at 1342, 1345. Although the federal district court judge gave an appropriate instruction pertaining to a direct assault, his alternative instruction, citing the existence of a conspiracy as a basis of responsibility, rendered the jury finding uncertain. *Id.* at 1345. Consequently, the court reversed Rosa's assault conviction, but remanded the case for a new trial. *Id.* at 1346. *See* Mills v. United States, 164 U.S. 644, 649 (1897) (reversing rape conviction where jury charge failed to convey proper meaning of consent).

[19] 486 F.2d at 1346–47. On rehearing, the court determined that the assault committed by Alsondo was not a remote and unforeseeable consequence "of a conspiracy of indefinite scope and duration"; instead, it was the direct result of an agreement in which Feola and Rosa played active roles. *Id.* at 1347. Criminal responsibility was founded, therefore, upon the general principles of agency, and the lack of a specific conspiratorial objective among the parties to assault the federal officers in no way lessened their individual culpability for the crime that actually occurred. *Id.* at 1346–47.

The United States Court of Appeals for the Second Circuit summarized this approach in United States v. Jones, 374 F.2d 414 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967):

> There need be no charge of conspiracy to make actions and declarations of joint actors in furtherance of a common illegal plan admissible against each actor.

The Government sought review of Feola's case via a writ of certiorari,[20] and in *United States v. Feola*,[21] the United States Supreme Court dealt with the question of whether knowledge of an intended victim's status as a federal officer is required to sustain a conviction under the federal criminal conspiracy statute.[22] The Government contended that since the conspiracy represented no more than an agreement to commit the assault, no greater level of knowledge or scienter should be required for a conviction on the conspiracy charge than is required for the substantive offense of assault.[23] The Court accepted this proposition, reversed the court of appeals, and held that knowledge of a victim's federal identity was, for the most part, irrelevant to a conviction for either the substantive crime of assault upon a federal officer or the related conspiracy offense.[24]

Inquiry into an accused's knowledge or intent was unnecessary in early criminal law;[25] however, it is now a well-established principle that crime is generally defined not only in terms of a prohibited act or omission, but also with regard to the actor's state of mind.[26] As a result, criminal responsibility is generally founded upon the concurrence of the actus reus and some culpable state of mind on the part of the actor.[27] This mental element is known alternatively as mens rea or criminal intent.[28] The concept of criminal intent does not provide fixed guidelines to be easily applied in all situations, but varies depending upon the context in which it is used.[29] A criminal intent may

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374 F.2d at 418; *accord,* Davis v. United States, 409 F.2d 1095, 1100 (5th Cir. 1969).

For a complete discussion of *Alsondo* see Note, 43 FORDHAM L. REV. 128 (1974).

[20] Since the other defendants had received either suspended or concurrent sentences on the conspiracy count, the Government did not seek review of their cases. United States v. Feola, 95 S. Ct. 1255, 1258–59 & n.5 (1975). Feola, however, received a sentence of four years' imprisonment on the conspiracy count and three years' probation for the assault conviction. *Id.* at 1258. Thus, the reversal of Feola's conspiracy conviction had the effect of setting him free.

[21] 95 S. Ct. 1255 (1975).

[22] *Id.* at 1258.

[23] *Id.* at 1259–60.

[24] *Id.* at 1269. *See* notes 95–96 *infra* and accompanying text.

[25] The criminal law began by meting out penalties solely on the basis of the acts committed, thereby following the theory that people were responsible "for all the ills of an obvious kind that their deeds bring upon their fellows." 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 470 (2d ed. 1898).

[26] *See, e.g.,* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 27, at 191–92 (1972) [hereinafter cited as LAFAVE & SCOTT].

[27] *Id.* § 34, at 237. *See also* J. SALMOND, JURISPRUDENCE § 127, at 380 (8th ed. 1930).

[28] BLACK'S LAW DICTIONARY 1137 (rev. 4th ed. 1968).

[29] *See* Kadish, *The Decline of Innocence,* 26 CAMB. L.J. 273, 273–75 (1968); Perkins, *A Rationale of Mens Rea,* 52 HARV. L. REV. 905, 909–10 (1939). Although "intent" could

be general in nature, requiring no more than a showing that the accused purposely engaged in the prohibited conduct, or it may be specific, demanding proof that an accused intended his conduct to produce a certain result.[30] The requirement of criminal intent may even be eliminated, as in the instances where an accused may be held criminally liable without any reference to his state of mind or purpose.[31] Still other crimes require only a showing of negligence to support a conviction.[32]

In *Feola*, the Court approached the issue of the knowledge necessary to warrant a conviction on the conspiracy charge by first examining the underlying premise of the Government's case—that

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conceivably be "limited to the narrow dictionary definition of purpose, aim, or design," its meaning in the substantive criminal law has "encompass[ed] much of what would ordinarily be described as knowledge." LAFAVE & SCOTT, *supra* note 26, § 28, at 197. The failure to distinguish between a strict definition of "intent" and "knowledge" is, for the most part,

> of little consequence in most areas of the law, as usually there is good reason for imposing liability whether defendant desired or merely knew of the practical certainty of the results.

Id. (footnote omitted). In the present case, to say that the defendants had knowledge of their victims' official status would be the equivalent of saying that the defendants had the specific intent to assault and to conspire to assault federal officers.

[30] *See* LAFAVE & SCOTT, *supra* note 26, § 28, at 201–02; J. MILLER, HANDBOOK OF CRIMINAL LAW, § 17 (1934).

[31] These crimes have been termed "public welfare offenses," and they represent an exception to the general requirement of mens rea. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 (1933). The major distinguishing feature of a public welfare offense is that it emphasizes "regulating the social order" rather than "singling out wrongdoers for the purpose of punishment or correction." *Id.* at 72. Consequently, the focus is on the nature and effects of the criminal act or omission rather than on individual culpability of the actor. *See id.* at 68. The purpose of this approach is to afford better protection to the public at large from widespread social injuries at the expense of the individual who breaks the law unintentionally. *See id.*

Where a court deems that a statute, silent as to scienter, is intended to protect against a serious and prevalent public danger, it may decline to read in any requirement of knowledge which would have the effect of depriving society of that protection. *See, e.g.*, United States v. Balint, 258 U.S. 250, 251–52 (1922) ("modification" of scienter requirement where purpose of statute would be frustrated); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 69–70 (1910) (elimination of scienter consistent with public policy). A statute which adopts common law terminology, however, will not be divested of its traditional requirement of mens rea absent a clear showing of legislative intent. *See* Morissette v. United States, 342 U.S. 246, 263 (1952).

[32] Under MODEL PENAL CODE § 2.02(2)(d) (1974),

> [a] person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

scienter is not a requisite element of an assault upon a federal officer.[33] Justice Blackmun, writing for the Court, initially framed the issue in terms of jurisdiction: whether the "federal officer" designation in the assault statute has a substantive effect, requiring a showing of scienter as an additional element of the offense, or whether it was intended merely to confer jurisdiction on the federal courts.[34] The parties apparently viewed the restriction as serving no function beyond that of insuring a federal interest in the offense committed, and the premise that an accused need not be aware of the official capacity of his victim was conceded both by Feola[35] and the *Alsondo* court.[36] Although the weight of judicial authority supported this construction,[37] the Court sua sponte assumed the task of testing its

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[33] 95 S. Ct. at 1260.

[34] *Id.* at 1260 & n.9. "[D]espite its potential to mislead," the term "jurisdiction" was employed to characterize a factual element sufficient to warrant federal involvement in what would otherwise amount to only a state offense. *Id.* In analyzing the jurisdiction issue, the Court noted:

> The significance of labeling a statutory requirement as "jurisdictional" is not that the requirement is viewed as outside the scope of the evil Congress intended to forestall, but merely that the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute. The question, then, is not whether the requirement is jurisdictional, but whether it is jurisdictional only.

Id. at 1260 n.9.

[35] *Id.* at 1260.

[36] *Id.* The *Alsondo* court noted without comment that the prevailing view within the Second Circuit was that conviction of assault upon a federal officer was not dependent upon proof that the defendant had knowledge of his victim's federal status. 486 F.2d at 1342. *See, e.g.*, United States v. Montanaro, 362 F.2d 527, 528 (2d Cir.) (per curiam), *cert. denied*, 385 U.S. 920 (1966); United States v. Lombardozzi, 335 F.2d 414, 416 (2d Cir.), *cert. denied*, 379 U.S. 914 (1964).

[37] The *Feola* Court recognized what it considered "the practical unanimity of the courts of appeals," that scienter is not a required element of an assault upon a federal officer. 95 S. Ct. at 1260 (footnote omitted). *See, e.g.*, United States v. Johnson, 462 F.2d 423, 427 (3d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973); United States v. Kartman, 417 F.2d 893, 894 (9th Cir. 1969); Pipes v. United States, 399 F.2d 471, 472 (5th Cir. 1968), *cert. denied*, 394 U.S. 934 (1969); Bennett v. United States, 285 F.2d 567, 570–71 (5th Cir. 1960), *cert. denied*, 366 U.S. 911 (1961).

Justice Stewart, joined in a dissenting opinion by Justice Douglas, described this consensus as being "both very recent and very shaky." 95 S. Ct. at 1277 n.19. He emphasized the fact that the majority of decisions prior to 1964 required scienter as a requisite element of an assault upon a federal officer. *Id. See, e.g.*, Carter v. United States, 231 F.2d 232, 235 (5th Cir.), *cert. denied*, 351 U.S. 984 (1956); Hargett v. United States, 183 F.2d 859, 865 (5th Cir. 1950); Sparks v. United States, 90 F.2d 61, 63 (6th Cir. 1937). Even under the *Feola* rationale, these types of offenses may be excusable where the defendant lacked knowledge of his victim's status and reasonably believed that the agent was himself acting unlawfully. For a discussion of mistake see notes 64–66 *infra* and accompanying text.

The approach taken by the Second Circuit, however, is that Congress did not include a scienter requirement in the language of the assault provision and that

validity.[38]

Beginning its inquiry with an examination of the congressional intent leading to enactment of the assault provision, the Court reopened an issue previously considered in *Ladner v. United States*.[39] In *Ladner*, two federal agents were wounded by a single discharge from a shotgun while they were transporting a prisoner in their automobile.[40] In seeking the legislative purpose behind the statutory predecessor to the modern assault provision,[41] the Court hoped to define a proper "unit of prosecution"—either the single act of firing the shotgun or the multiple of officers who were injured by the blast.[42] The Government contended that the congressional goal in enacting a federal assault statute was " 'to protect the individual officers, as "wards" of the federal government, from personal harm.' "[43] Under this approach, the unit of prosecution would be the individual officer, and there would be as many offenses as there were officers assaulted or interfered with.[44] The *Ladner* Court, however, emphasized that it was equally plausible that the statute was intended

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[t]he courts should not by judicial legislation change the statute by adding, in effect, the words "with knowledge that such person is a federal officer."

United States v. Lombardozzi, 335 F.2d 414, 416 (2d Cir.), *cert. denied*, 379 U.S. 914 (1964). *Accord*, Bennett v. United States, *supra*, 285 F.2d at 570–71.

The confusion regarding the issue of scienter in an assault upon a federal officer seems to stem mainly from the inclusive scope of the statutory provision under which a prosecution must commence—not only are assaults covered, but also a variety of other offenses, including resisting, opposing, impeding, or interfering with a federal officer. 18 U.S.C. § 111 (1970). These obstruction offenses have traditionally required proof that an accused was aware of his victim's status, since "it is [his] official character that creates the offence." Pettibone v. United States, 148 U.S. 197, 205 (1893).

In his dissenting opinion, Justice Stewart pointed out that several decisions have sought to distinguish between the scienter required for an assault upon a federal officer and that required for the other offenses proscribed in section 111; however, he added that these efforts were unsupported by prior case law and were "directly at odds with the history of the provisions." 95 S. Ct. at 1277 n.19. For cases in which courts have distinguished between the scienter required for an assault conviction and that required for an obstruction conviction see United States v. McKenzie, 409 F.2d 983, 986 (2d Cir. 1969); United States v. Rybicki, 403 F.2d 599, 601–02 (6th Cir. 1968).

[38] 95 S. Ct. at 1260. The Government requested that symmetry be established between the scienter required for conviction of an assault on a federal officer and that needed in a related conspiracy charge. *Id.* at 1259–60. Realizing the necessity of laying a sound foundation for this decision, the Court indicated that it must first pass upon the underlying premise that scienter was not required in an assault. *Id.* at 1260.

[39] 358 U.S. 169, *rev'g on rehearing* 355 U.S. 282 (1958), *mem. aff'g by an equally divided court* 230 F.2d 726 (5th Cir. 1956).

[40] 358 U.S. at 171.

[41] Act of May 18, 1934, ch. 299, § 2, 48 Stat. 781.

[42] 358 U.S. at 173.

[43] *Id.* at 174 (quoting from Government's brief).

[44] *Id.* at 173.

"to assure the carrying out of federal purposes and interests, and was not to protect federal officers except as incident to that aim."[45] Under that view, the unit of prosecution would correspond to the act of obstruction—in Ladner's case, the single act of firing the weapon.[46]

Basing its decision "largely" upon a letter from the then incumbent Attorney General of the United States who had requested the legislation,[47] the *Ladner* Court found that the history of the act failed to support a positive choice between the two goals.[48] Because acceptance of the "wards of the state" theory could lead to "incongruous results,"[49] the Court applied a policy of leniency and chose to protect federal officers only insofar as their safety related to federal functions and not as wards of the Government.[50] Thus, the *Ladner* Court, by

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[45] *Id.* at 175–76.

[46] *Id.* at 176–77.

[47] On January 3, 1934, Attorney General Homer Cummings wrote a letter to Senator Henry Ashurst, Chairman of the Senate Committee on the Judiciary, in which he sought a legislative enactment

> "making it a Federal offense forcibly to resist, impede, or interfere with, or to assault or kill, any official or employee of the United States while engaged in, or on account of, the performance of his official duties."

358 U.S. at 174 n.3 (quoting from letter from Homer Cummings to Senator Ashurst, Jan. 3, 1934).

The Attorney General went on to illustrate that Congress had already foreseen the need for such legislation, as evidenced by several isolated statutes dealing with particular federal officers or functions. *Id.* Cummings sought a broader provision to protect " 'Federal officers and employees other than those specifically embraced in the statutes' " already enacted. *Id.*

Although the Court indicated that additional legislative history was available, the letter from the Attorney General was apparently the only material examined. *See* 358 U.S. at 174.

[48] 358 U.S. at 177. Since Attorney General Cummings sought legislation both " 'for the protection of [federal] investigative and law-enforcement personnel' " and " 'to further the legitimate purposes of the Federal Government,' " the Court found the letter did not point precisely to either meaning to the exclusion of the other. *Id.* at 175 n.3, 177.

[49] *See id.* at 175–78. The Court noted that the interpretation sought by the Government had a tendency to go awry:

> [U]nder the meaning for which the Government contends, one who shoots and seriously wounds an officer would commit one offense punishable by 10 years' imprisonment, but if he points a gun at five officers, putting all of them in apprehension of harm, he would commit five offenses punishable by 50 years' imprisonment, even though he does not fire the gun and no officer actually suffers injury.

Id. at 177.

The Court also constructed a hypothetical situation in which a defendant locked a door in an unlawful attempt to prevent the entry of federal officers in the performance of their duties. *Id.* at 176. Under the Government's "wards of the state" theory, there would be as many offenses as there were officers denied entry to the premises. *Id.*

[50] *Id.* at 177–78. In opting for a policy of leniency, the Court reaffirmed the principle that a clear congressional meaning must be shown before a court may apply the

deciding the issue on the basis of policy, failed to resolve the question of congressional purpose.

Deprived of a definite statement of legislative intent, the *Feola* Court similarly acknowledged both interpretations, but found no need to choose between competing interests of "federal officers" and "federal functions."[51] Instead, the Court viewed the two policies as complementary, holding that "rejection of a strict scienter requirement is consistent with both purposes."[52] Thus reconciling the element of scienter with the alternate theories of legislative intent, the Court next considered the means by which Congress chose to implement its purpose.[53]

Whatever the ultimate goal of the legislation, the vehicle selected to reach its objective was the same—the provision of "a federal forum in which attacks upon named federal officers could be prosecuted."[54] Though the Court found that, by itself, this was an insufficient reason to conclude that scienter was not intended as an element of the offense, it did find that a contrary conclusion would necessarily be based upon a faulty interpretation of the true function of the federal assault statute.[55] The view that an accused must be aware of the official capacity of his victim rests squarely upon the assumption that the federal legislation was intended "to fill a gap in the substantive law" of those states where only assaults upon state of-

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harsher of two plausible alternatives. *Id. See, e.g.*, Bell v. United States, 349 U.S. 81, 83–84 (1955); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952).

[51] 95 S. Ct. at 1261. The *Feola* Court noted the potential error that could result from focusing on only one of the statute's apparent aims and went on to accept both legislative goals, thereby endorsing a twofold purpose of the legislation—"to protect *both* federal officers and federal functions." *Id.* (emphasis by the Court).

Actually, the *Ladner* Court had previously recognized this duality, and had approached the issue not from the standpoint of which purpose was correct, but from the position that one goal should be given primary consideration, while the other was only of secondary significance. *See* 358 U.S. at 174–75. The Government contended that both purposes were valid, but that federal functions were to be protected only as incidental to the protection afforded federal officers. *See id.* at 173–74. The rationale of this proposition lies in the fact that federal processes would suffer " 'in proportion to the number of individual officers affected' "; therefore, the individual officer must be protected. *Id.* at 174 (quoting from Government's brief). The Court disagreed with this view and held that federal officers should be given protection only as incident to the primary goal of "prevent[ing] hindrance to the execution of official duty." *See id.* at 175–76, 178.

[52] 95 S. Ct. at 1261. The *Feola* Court also found that "Congress clearly was concerned with the safety of federal officers insofar as it was tied to the efficacy of law enforcement activities." *Id.* at 1262. In light of the Court's prior finding that scienter was not a requisite element under either interpretation of legislative purpose, the significance of this recognition is greatly diminished.

[53] *Id.* at 1263.

[54] *Id.*

[55] *Id.*

ficers were elevated to aggravated status.[56] Under the "gap-filler" theory, the same requirement of specific knowledge on the part of an accused would be imposed on the federal statute as is customarily required by the state provisions.[57]

Rejecting this argument, the Court noted that the Attorney General had requested legislation not only to cover assaults upon federal officers, but also to make it a federal offense to kill a federal officer in the performance of his official duties.[58] The Court reasoned that had the legislation been intended as a "gap-filler" to the state proscriptions, the homicide provision would not have been included, since there was no "gap" in existing state homicide laws which already punished that offense with the utmost severity, irrespective of a victim's occupation or official identity.[59]

Instead, the Court concluded that if federal officers were to receive the protection that Congress intended when it made assaults upon them punishable in the federal courts, the proposition that an accused need be aware of his victim's federal identity must be rejected.[60] Jurisdiction would otherwise be lost to state courts which, in the language of the Attorney General, " 'afford[ed] but little relief . . . under the circumstances.' "[61] The Court implied that state prosecutions could be adversely influenced by the hostile reception often afforded enforcement of federal laws in local communities.[62] More specific to Feola's case, the imposition of a strict requirement of sci-

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[56] *Id.* The *Feola* Court was of the opinion that an assault on a federal agent would be treated only as a simple assault under some state laws. *Id.* In his dissenting opinion, Justice Stewart was even more positive in stating that "state [aggravated] statutes protect only state officers." *Id.* at 1271. It is at least arguable, however, that state provisions couched in general terms may be broad enough to encompass assaults upon federal officers as well. For example, New Jersey considers assault and battery as an aggravated offense where the victim is "any . . . law enforcement officer, acting in the performance of his duties." N.J. STAT. ANN. § 2A:90–4 (1969). Other jurisdictions have also afforded aggravated assault status liberally to "police officers" and "peace officers." *See, e.g.*, ILL. ANN. STAT. ch. 38, § 12–2(b) (Smith-Hurd 1972); N.Y. PENAL CODE § 120.05 (McKinney 1975); PA. STAT. ANN. tit. 18, § 2702 (1973).

[57] 95 S. Ct. at 1263. In most jurisdictions, an assault upon a police officer is not deemed to be aggravated unless the actor has knowledge of the officer's status. *Id.* at 1270 (Stewart, J., dissenting). *See, e.g.*, N.J. STAT. ANN. § 2A:90–4 (1969); CAL. PENAL CODE §§ 241, 243, 245(b) (West 1970), *as amended*, (West Supp. 1975); ILL. ANN. STAT. ch. 38, § 12–2(a)(6) (Smith-Hurd 1972).

[58] 95 S. Ct. at 1263.

[59] *Id.*

[60] *Id.* at 1264.

[61] *Id.* at 1262 n.16 (quoting from letter from Homer Cummings to Senator Ashurst, January 3, 1934).

[62] *Id.* at 1263–64. The Court stated:

From the days of prohibition to the days of the modern civil rights movement,

enter would provide no protection whatsoever to a federal agent acting undercover.[63]

The Court, however, would not disregard a defendant's knowledge in every situation, since wrongful intent is still an essential element of a criminal assault. Therefore, a reasonable mistake of fact could constitute a complete defense by negating even a general mens rea.[64] For example, if the actions of a federal officer were misinterpreted as an unlawful attack, an individual may be justified in exerting a like amount of force in his own self-defense.[65] Accordingly, the Court held that responsibility under the federal assault provision was predicated solely upon "the criminal intent to do the acts therein specified."[66] The question remained as to what degree of scienter was necessary to support conviction for conspiring to assault a federal officer.

Conspiracy is a separate and distinct crime, "serv[ing] ends dif-

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the statutes federal agents have sworn to uphold and enforce have not always been popular in every corner of the Nation. Congress may well have concluded that § 111 was necessary in order to insure uniformly vigorous protection of federal personnel, including those engaged in locally unpopular activity.

Id.

[63] *Id.* The Court discovered further proof of a congressional intent to protect undercover agents "from the inclusion of the term 'Secret Service operative' in the list of protected officials in the 1934 Act." *Id.* at 1264 n.18.

[64] *Id.* at 1264.

[65] *Id.* For further discussion of the defense of a reasonable mistake of fact see 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 157 (1957); LAFAVE & SCOTT, *supra* note 26, § 47, at 356–57; MODEL PENAL CODE § 3.05, Comment 1 (Tent. Draft No. 8, 1958).

In theory, the proper function of a reasonable mistake of fact defense is to negate the existence of a general criminal intent, thereby destroying an element of the prima facie case. LAFAVE & SCOTT, *supra* at 356. In practice, however, such a mistake is generally treated as a defense to be raised by the accused. *Id.* Although the general view within the circuits is that scienter is not required for the conviction of an assault upon a federal officer, *see* note 37 *supra*, the courts have noted this exception. *See, e.g.*, United States v. Perkins, 488 F.2d 652, 654–55 (1st Cir. 1973) (both the mistake as to identity and the amount of force used in response must be reasonable); United States v. Young, 464 F.2d 160, 163 (5th Cir. 1972) (scienter irrelevant where defendant has demonstrated a criminal intent); United States v. Rybicki, 403 F.2d 599, 601–02 (6th Cir. 1968) (scienter significant where identity of victim makes actions which are otherwise innocent criminal).

The *Feola* Court noted that the defense of a reasonable mistake of fact should be available wherever an accused lacks knowledge of the official identity of his intended victim and could reasonably have interpreted the officer's actions to be "the unlawful use of force directed either at the defendant or his property." 95 S. Ct. at 1264. The defense has been recognized where a defendant reasonably believed an officer was stealing his auto (United States v. Rybicki, *supra* at 601–02); was about to commit a robbery (Hargett v. United States, 183 F.2d 859, 860–61 (5th Cir. 1950)); and was trespassing on his property (Sparks v. United States, 90 F.2d 61, 62–63 (6th Cir. 1937)).

[66] 95 S. Ct. at 1264–65.

ferent than, and complementary to those served by criminal prohibitions of the substantive offense."[67] It has been defined as "a confederation to effect an unlawful object by lawful means, or by unlawful means a lawful object."[68] To be guilty of conspiracy, a person must have not only the intent to effectuate an illicit scheme but also the intent to join as a member of the common criminal plan—he must "inten[d] to combine with one or more persons to further the unlawful design."[69] Thus the essence of a conspiracy lies in the agreement between the parties.[70]

Two purposes are served by the individual treatment afforded the crime of conspiracy. First, the law of conspiracy provides a vehicle to cope with the added danger to society posed by concerted criminal activity.[71] This danger is manifested not only in the increased likelihood that the criminal objective will be achieved, but also by the more complex, comprehensive schemes normally associated with group activity.[72] Second, by recognizing conspiracy as a separate offense, a criminal plan may be effectively thwarted while still in its inchoate stages.[73] It would appear that nothing in either of these purposes would demand a stronger showing of criminal intent than that required for the underlying offense—in this case, assault.

Although the respondent conceded that scienter was not a requisite element of the substantive crime, he nevertheless urged that it was necessary for the Government to establish that he had knowledge of the federal identity of his victim in order to sustain a conviction for

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[67] *Id.* at 1268.

[68] 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 82, at 171 (1957) (footnote omitted). *See also* Pettibone v. United States, 148 U.S. 197, 203 (1893); J. MILLER, HANDBOOK OF CRIMINAL LAW § 32, at 108 (1934).

[69] Zumwalt, *The Conspiracy Confusion*, TRIAL, July/August 1974, at 27 (footnote omitted). *See also* Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 646–47 (1941).

[70] *See, e.g.*, United States v. Bayer, 331 U.S. 532, 542 (1947); United States v. Falcone, 311 U.S. 205, 210 (1940); 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 82, at 173 (1957).

[71] *See* J. MILLER, HANDBOOK OF CRIMINAL LAW § 32, at 110-14 (1934). Regarding the crime of conspiracy, the Supreme Court has stated:

> 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. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices.

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

[72] *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 923–25 (1959).

[73] *See id.* at 922; LAFAVE & SCOTT, *supra* note 26, § 61, at 459.

conspiracy to assault a federal officer.[74] The Court found no support for this proposition in the language of the general conspiracy statute which makes it an offense merely to " 'conspire . . . to commit any offense against the United States.' "[75] In the majority's view, the plain language of the provision seemed to impose no greater requirement of scienter in conspiracy than that necessary for the substantive offense itself.[76] Furthermore, two prior decisions by the Supreme Court were viewed as "implicitly" rejecting the respondent's contention.[77] However, in those cases, criminal responsibility was founded either upon the theory of negligence[78] or strict liabil-

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[74] 95 S. Ct. at 1265.

[75] *Id.* (quoting from 18 U.S.C. § 371 (1970)).

[76] 95 S. Ct. at 1265.

[77] *Id.* Although there were no prior Supreme Court decisions to support the respondent's contention that a greater degree of knowledge was required for conspiracy than for conviction of an assault upon a federal officer, the Court was unable to cite any direct authority opposing the proposition. *Id.* The *Alsondo* court had previously noted a "dearth of direct authority" on the issue, but explained the lack of precedent by theorizing that a conspiracy to assault a federal officer would not generally occur "except perhaps as incident to another, more serious crime." 486 F.2d at 1343. The *Feola* Court, however, offered a more plausible explanation—that the difficulties of prosecuting a crime involving a specific antifederal intent have been avoided "by the simple expedient of inferring the requisite knowledge from the scope of the conspiratorial venture." 95 S. Ct. at 1266 (footnote omitted). For example, in Nassif v. United States, 370 F.2d 147 (8th Cir. 1966), the defendants were charged with conspiracy to steal goods in interstate commerce. *Id.* at 149. In discussing the defendant's intent, the court noted:

> Clearly, if the plan was to steal merchandise only from a known defined local source [the defendant] might have been guilty of conspiracy to steal or conceal, which only a state may punish. But if the scheme is to steal goods, wherever they may be found, and in fact, goods are stolen from interstate commerce, then we feel the scope of the conspiracy can be broad enough to imply intent to commit a federal crime.

Id. at 153 (footnote omitted). *Accord*, United States v. Garafola, 471 F.2d 291, 291–92 (6th Cir. 1972); United States v. Cimini, 427 F.2d 129, 130 (6th Cir. 1970).

Although the theory of inferred intent may be an attractive solution to the problem, the *Alsondo* court foreclosed any possible resort to its use by noting that the defendants could not have reasonably anticipated that their supposed criminal associates were federal officers. 486 F.2d at 1344. Instead, the court found it "altogether unlikely that would-be swindlers would knowingly . . . assume even the most remote risk of such occurrence." *Id.* at 1345.

[78] The first case noted by the Court was *In re* Coy, 127 U.S. 731 (1888). In *Coy*, the defendants were charged with conspiring to influence the outcome of an election that included national as well as local candidates. *Id.* at 743–48. The defendants argued that no federal offense had been committed, since they only intended to tamper with the state ballots. *Id.* at 753. Taking notice of the legislative goal "of securing purity in elections and accuracy in the returns," the Court characterized the offense as one in which a showing of negligence alone was sufficient basis for the imposition of criminal responsibility. *Id.* at 754–55. For a discussion of the theory of criminal negligence see note 32 *supra* and accompanying text. Even if an antifederal intent was required to support a

ity;[79] therefore, neither conspiracy had as its underlying object an offense involving mens rea.

Thus, finding no direct support in prior decisions, the Court examined what it considered to be the sole support for Feola's position—the rationale set forth by Judge Learned Hand in *United States v. Crimmins*.[80] In *Crimmins*, the defendant had been convicted of conspiracy to transport stolen securities in interstate commerce.[81] Although the prosecution established that Crimmins was aware that the bonds he received were stolen, it was not shown that he knew they were stolen out of state.[82] The issue on appeal was whether it was necessary to prove knowledge of the interstate nature of the bonds for a conviction under the federal conspiracy statute.[83]

Assuming arguendo that scienter was not a required element of the substantive offense, the *Crimmins* court turned its attention to the conspiracy charge, noting the general principle that parties to a conspiracy may be held criminally responsible for the acts of coconspirators "in furtherance of the joint venture" if those acts are within "the reasonable intendment of the common understanding."[84] Since the crime as Crimmins understood it did not include any interstate dealings, Judge Hand viewed the resulting federal nature of the crime as possibly going beyond Crimmins' reasonable intentions.[85] He analyzed the situation in a passage that has been designated the " 'traffic light' analogy":

> While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspir-

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conviction, the same could have been reasonably inferred from the fact that the names of both federal and state candidates were included on the same ballot and handled in the same manner. *See* 127 U.S. at 751–52.

[79] The second case relied upon, United States v. Freed, 401 U.S. 601 (1971), is clearly a strict liability case. In *Freed*, the Court reviewed a lower court ruling dismissing an indictment charging both possession and conspiracy to possess unregistered hand grenades in violation of the National Firearms Act. *Id.* at 604–05, 607. Describing the statute as "a regulatory measure in the interest of public safety," the Court found that proof of a specific intent was unnecessary as an element of the substantive offense of possession. *Id.* at 607, 609–10. And, insofar as an agreement to possess hand grenades could hardly be considered an innocent act, the Court found the imposition of a greater requirement of scienter upon the related charge of conspiracy to be likewise unnecessary. *Id.* at 609 n.14. For a discussion of strict liability see note 31 *supra*.

[80] 123 F.2d 271 (2d Cir. 1941). *See* 95 S. Ct. at 1266.

[81] *Id.* at 272.

[82] *Id.*

[83] *See id.*

[84] *Id.* at 273.

[85] *Id.*

> ing to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past.[86]

Declining to pass on the overall validity of the analogy, the *Feola* Court appeared satisfied to limit its potential applicability to offenses predicated upon strict liability.[87] The Court saw no danger of unfairly imposing criminal sanctions upon those who agree to apparently innocent conduct later shown to be against the law, for a person cannot agree to assault another " 'of whose existence [he] is ignorant.' "[88] Viewed in this fashion, the traffic-light analogy was not only "bad law" as applied to the facts in *Feola*, but also an inappropriate solution for *Crimmins*, since both assault and the receipt of stolen goods involve conduct which is knowingly wrongful although the full identity of the victim of an assault or the exact location from which goods have been stolen may not be known by the actor.[89] Thus rejecting *Crimmins*, the Court accepted the argument that no greater intent was required to sustain a conviction for conspiracy than was required for conviction of the substantive offense, at least where the substantive offense already involved an element of mens rea.[90]

The Court also rejected the alternate ground of *Crimmins*—that conspiratorial liability could not be based upon the existence of a jurisdictional element which was unknown to the parties.[91] The Court

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[86] *Id. See* 95 S. Ct. at 1266.

[87] 95 S. Ct. at 1267. The *Feola* Court did not render a positive endorsement of the traffic light analogy, even where it is applied to cases involving strict liability; instead, the issue was "save[d] for another day." *Id.*

[88] *Id.* The Court noticed a similarity between the traffic light analogy and the " 'Powell doctrine.' " *Id.* In People v. Powell, 63 N.Y. 88 (1875), the Court of Appeals of New York sought to distinguish a "conspiracy" from a simple agreement to do an act which later turns out to be against the law, by requiring an evil purpose in the former instance. *Id.* at 92. In holding that a conspiracy is more than mere concert, the court stated:

> Persons who agree to do an act innocent in itself in good faith and without the use of criminal means, are not converted into conspirators because it turns out that the contemplated act was prohibited by statute.

Id.

The *Feola* Court further qualified this principle "to the effect that a conspiracy, to be criminal, must be animated by a corrupt motive or a motive to do wrong." 95 S. Ct. at 1267. *Cf. Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 936–37 (1959).

[89] 95 S. Ct. at 1266–67.

[90] *Id.* at 1267.

[91] *Id.* at 1267–68. It has been uniformly accepted that a conspirator need not be aware of the precise details of the criminal venture to be criminally responsible for engaging in a conspiracy:

> [T]he law rightly gives room for allowing the conviction of [conspirators] upon showing sufficiently the essential nature of the plan and their connections with

refused to accept the proposition that such an action would expand the scope of the parties' agreement beyond its reasonable intendment; instead, it posed the rhetorical question:

> [D]oes the identity of the proposed victim alter the legal character of the acts agreed to, or is it no more germane to the nature of those acts than the color of the victim's hair?[92]

Applying the same reasoning to both assault and conspiracy, the Court found an agreement to assault no less blameworthy and no less dangerous "solely because the participants are unaware which body of law they intend to violate."[93] Thus, the Court held that knowledge of an intended victim's official identity was not a required element of an assault or a conspiracy to assault a federal officer.[94]

The majority, however, noted two caveats: First, since scienter was relevant to conspiracy to the same extent that it was relevant to the substantive offense of assault upon a federal officer, the accused's lack of knowledge might in some cases go so far as to negate the existence of a general mens rea.[95] Second, since a mere agreement to assault is insufficient to warrant federal intervention, it must additionally be shown that had the object of the conspiracy been carried out, the victim would, in fact, have been a federal officer.[96]

The majority's resolution of the scienter requirement in the substantive offense of assault was arrived at "without the benefit of either briefing or oral argument by counsel."[97] Justice Stewart, in a dissenting opinion joined in by Justice Douglas, criticized the majority's timing of the *Feola* decision as premature, since the question of what knowledge should be required for a conviction of the substantive offense of assault was placed squarely before the Court in a pending petition for certiorari.[98] In his view, the Court's determination

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> it, without requiring evidence of knowledge of all its details or of the participation of others.

Blumenthal v. United States, 332 U.S. 539, 557 (1947) (footnote omitted). *See also* Sigers v. United States, 321 F.2d 843, 847 (5th Cir. 1963); Lefco v. United States, 74 F.2d 66, 68 (3d Cir. 1934); Allen v. United States, 4 F.2d 688, 691 (7th Cir. 1925).

[92] 95 S. Ct. at 1268.

[93] *Id.* at 1268–69.

[94] *Id.* at 1269.

[95] *Id. See* notes 64–65 *supra* and accompanying text.

[96] 95 S. Ct. at 1269. Federal intervention is not warranted upon a mere showing of wrongful intent. There "must be a 'general *federal* danger,'" that is, "[t]he agreement must be dangerous to the federal government, or to an area which the federal government controls." *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 938 (1959) (emphasis in original).

[97] 95 S. Ct. at 1269–70 (Stewart, J., dissenting).

[98] *Id.* The question was never answered by the Supreme Court, since the case in

of the scienter issue as it applied to conspiracy before first determining that issue as it applied to the substantive offense of assault was a "conspicuous disregard of the most basic principle of our adversary system of justice."[99]

Addressing the substantive issue, Justice Stewart cited the severe penalties imposed under the assault provision as the surest evidence that the federal law was intended as a "gap-filler" to the laws of those states where aggravated status applied only to assaults upon state officers.[100] Furthermore, he identified two justifications for imposing greater sanctions against those who assault public officials:

> to reflect the societal gravity associated with assaulting a public officer and, by providing an enhanced deterrent against such assault, to accord to public officers and their functions a protection greater than that which the law of assault otherwise provides to private citizens and their private activities.[101]

Justice Stewart concluded that the majority's rejection of a scienter requirement clearly disregarded the import of these two functions, since an unknowing assault upon a federal officer could hardly be deterred if an accused were unaware of his intended victim's federal status.[102] And where the defendant did not intend to assault a public official, his crime could not reasonably be regarded as any more opprobrious than a similar offense against a private citizen.[103] Moreover, the dissent reasoned that an assailant should only be subjected to an "aggravated" penalty upon a showing of "aggravating" circumstances, as where he had knowledge, either constructive or implied, that his victim was a public officer.[104]

In addition to the obvious appeal of making the punishment fit the crime, the view that the federal law was intended as a counterpart to state aggravated-assault statutes is at least arguably supported by the legislative history of the provision.[105] In a convincing attack on

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which it was presented was denied certiorari. *See* United States v. Fernandez, 497 F.2d 730 (9th Cir. 1974), *cert. denied*, 95 S. Ct. 1423 (1975).

[99] 95 S. Ct. at 1270.

[100] *See id.* at 1272. For a discussion of the "gap-filler" theory see notes 56–59 *supra* and accompanying text.

[101] 95 S. Ct. at 1270 (footnote omitted).

[102] *Id.* at 1271.

[103] *Id.*

[104] *Id. See* note 57 *supra*. Under Justice Stewart's reasoning, it is not necessary that an assailant have knowledge that his victim is a *federal* officer. 95 S. Ct. at 1271. The governmental body which employs the public official is relevant only to the question of jurisdiction. *Id.* It plays no role as an element of the crime "for it does not affect the moral gravity of the act." *Id.*

[105] Justice Stewart observed that the original assault statute of 1934 prohibited the

the very foundation of the majority's rejection of that view, Justice Stewart emphasized the contrasting treatment afforded the homicide and assault sections in the 1934 Act, thereby exposing the weakness in the Court's examination that went only so far as to note the physical pairing of the two sections.[106] In dealing with homicides, Congress, through cross-referencing, adopted the graded penalty scheme which was already imposed on such killings "within the maritime, admiralty, and territorial jurisdiction of the United States"; however, it declined the opportunity to cross-reference the assault section, preferring instead to provide an entirely new structure of punishments.[107] On the basis of this observation, Justice Stewart argued that "[u]nless . . . Congress was scatterbrained, we must conclude that it regarded the victim-status element as of substantive —and not merely jurisdictional—importance."[108]

Support for this conclusion was also found in the language of the federal assault provision which included offenses such as obstructing and interfering with a federal officer in the performance of his official duties.[109] These crimes have traditionally required proof that the defendant knew that the person he obstructed or interfered with was a public officer.[110] To avoid the inference that an assault must likewise have a scienter requirement, the Court made a distinction that an assault was wrongful no matter who was intended as a victim, and, therefore, prosecution under the federal assault statute even in the absence of scienter was "no snare for the unsuspecting."[111] This

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assault of a federal officer "only if perpetrated '*on account of* the performance of his official duties.' " 95 S. Ct. at 1272 (quoting from Act of May 18, 1934, ch. 299, § 2, 48 Stat. 781) (emphasis by Justice Stewart). From this he concluded that scienter was a requisite element of the crime as the statute originally appeared. 95 S. Ct. at 1272. Although the present law proscribes assaults upon an officer "while engaged in . . . the performance of his official duties," 18 U.S.C. § 111 (1970), Justice Stewart denied the significance of this change in language, contending that it derived from a "technical alteration" in 1948 which "produced no instructive legislative history." 95 S. Ct. at 1272.

[106] 95 S. Ct. at 1273. The majority had previously focused its attention on the dual sections of the Act of May 18, 1934, and concluded that the assault section could be treated no differently from the homicide section, since both were included in "one bill with a single legislative history." 95 S. Ct. at 1263, 1264 n.18.

[107] *Id.* at 1273 (Stewart, J., dissenting).

[108] *Id.*

[109] *Id.* at 1275. *See* 18 U.S.C. § 111 (1970).

[110] In prior cases, both the Supreme Court and lower courts have refused to hold a party strictly liable for obstructing or interfering with a federal officer. *See, e.g.*, Pettibone v. United States, 148 U.S. 197, 205–07 (1893); United States v. McKenzie, 409 F.2d 983, 986 (2d Cir. 1969); United States v. Rybicki, 403 F.2d 599, 601–02 (6th Cir. 1968).

[111] 95 S. Ct. at 1264.

rationale, however, fosters the proposition that not only are all assaults wrong, but that "it is 'fair' to regard them all as *equally* wrong."[112]

Relying upon the state proscriptions which uniformly require scienter as an element of the aggravated offense, Justice Stewart characterized the Court's interpretation as posing a genuine threat of injustice to those who commit an unknowing assault upon a federal officer.[113] The question is whether a similar injustice would occur upon acceptance of scienter as an element of the crime; *i.e.*, whether it would be "unfair" to permit an assault upon a federal officer to be prosecuted in a state court as a simple assault.[114] In finding the federal officer requirement to be "jurisidictional only,"[115] the Court selected a policy in which the federal interest in punishing assaults and conspiracies to assault certain enumerated officials overrides the occasional unfairness that may result from the severe sanctions imposed on the perpetrator of an unknowing offense.[116] Apparently, the reason for this policy decision was the Court's fear that the state courts would not provide adequate protection to officers engaged in the enforcement of federal laws.[117] This interpretation, however,

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[112] *Id.* at 1276 (Stewart, J., dissenting) (emphasis in original).

[113] *Id.*

[114] Imposing a scienter requirement on the assault provision would not result in allowing the perpetrator of an unknowing assault to go completely unpunished. He would still be answerable under the general law of assault. *Id.* at 1271. This is the same protection afforded state officers when they are assaulted by individuals who are unaware of their official status. *Id.*

[115] *See* note 34 *supra*.

[116] The *Feola* Court, apparently disregarding the increase of penalties, viewed the assault provision as imposing no consequence beyond a change in forum. *See* 95 S. Ct. at 1264. In United States v. Fernandez, 497 F.2d 730 (9th Cir. 1974), *cert. denied*, 95 S. Ct. 1423 (1975), the United States Court of Appeals for the Ninth Circuit also rendered a decision against the imposition of a scienter requirement on the substantive offense of assault. 497 F.2d at 738. Unlike *Feola*, the *Fernandez* court plainly stated that its interpretation posed a risk of injustice, since persons who committed an unknowing assault upon a federal officer could "pay an inappropriately harsher price for their ignorance." *Id.* The court, nevertheless, justified its choice of policy on the ground that a contrary finding would impede prosecutions:

> If knowledge were made an element, conviction, of course, would become dependent upon the state of mind of the defendant, and successful prosecution would necessarily become more speculative. . . . Opening the floodgates to countless unknown difficulties could only emasculate the protection the Congress intended. We hesitate to take such a step.

Id. (footnote omitted).

[117] The Court gleaned support for its holding by reconciling portions of the statute's legislative history with the allegedly unpopular nature of federal laws, concluding that state officials would not always or necessarily share congressional feelings of

is little more than a supposition, and, as Justice Stewart pointed out, there is no actual evidence that Congress, when it passed the assault statute, was concerned either with the unpopular nature of federal laws or with a lack of aggressive prosecutions in the individual states.[118] Furthermore, the reference to state courts found in the legislative history of the enactment could be plausibly explained as dissatisfaction with the state statutory scheme of penalties, rather than a condemnation of the local courts.[119]

Even if it were assumed that the state courts are loath to prosecute an assault upon a federal officer engaged in locally unpopular activities, the elimination of scienter as an element of the offense is a questionable means of providing protection. The heavier penalties imposed under the federal assault provision can hardly act as a deterrent when an assailant is unaware of the federal identity of his intended victim.[120] In such a case, the only protection reasonably afforded is from the general prohibitions against a criminal assault.[121] Regardless of the nature of a federal officer's activities, a knowing assault is the only type of offense that could be deterred by the threat of an increased penalty.[122]

Interpreting the present federal statute as mandating a finding of scienter would not necessarily represent a repudiation of the federal interest in assaults committed upon governmental officials, since at least two alternatives exist whereby jurisdiction could be maintained in all such cases. Under one proposed plan, the federal code could be revised to separate all jurisdictional factors from the elements of the crimes contained therein.[123] Once a federal interest was shown, no further significance would attach to the jurisdictional base.[124] In this manner, the jurisdictional bases would provide a gateway to the federal criminal laws without confusing substantive and jurisdictional is-

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urgency as to the necessity of prompt and vigorous prosecutions of those who violate the safety of the federal officer.

95 S. Ct. at 1263.

[118] *Id.* at 1274–75.

[119] *Id.* at 1275. Justice Stewart supports this interpretation by noting "that, absent some statute aggravating the offense," such assaults are misdemeanors, a type of offense which is handled in the " 'police court' " in many states. *Id.*

[120] *Id.* at 1274 (Stewart, J., dissenting).

[121] *Id.*

[122] *Id.*

[123] *See* NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE § 201 (1970).

[124] *Id.*, Comment, at 11. The federal statutes would then parallel those of the states, since there would be no need to prove knowledge of a jurisdictional factor in either case. *Id.* at 11–12.

sues. This proposed plan would not only benefit the prosecution by making the federal officer requirement jurisdictional only,[125] but would also benefit defendants in that the plan calls for a concomitant lessening of assault penalties absent any aggravating circumstances.[126] Another solution, less far reaching, is simply to bifurcate the existing penalty structure for an assault upon a federal officer, providing only a simple assault penalty where the defendant was unaware of his intended victim's official identity.[127]

Absent a legislative solution to the dilemma, the question remains one of policy; a choice between steadfastly maintaining jurisdiction or yielding to the thrust of a substantial penalty provision. With no clear showing that the states are unable or unwilling to judicially protect federal officers from simple assaults, the increased penalties under the federal law seem to pose too great a threat of unfairness to persons who unknowingly assault or unwittingly conspire to assault one who is a federal officer.

John R. Piepenbrinck

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[125] United States v. Alsondo, 486 F.2d at 1343. The court noted that there would be no problem with the issue of scienter if it were used " 'not as an element of the respective crimes but frankly as a basis for establishing federal jurisdiction.' " *Id.* (footnote omitted) (quoting from MODEL PENAL CODE § 5.03, Comment, at 112 (Tent. Draft No. 10, 1960)). Barring a legislative change, the *Alsondo* court ruled that the accused's knowledge of his intended victim's identity was an element of the crime of conspiracy, not a simple matter of jurisdiction. 486 F.2d at 1343.

[126] Under one proposed revision to the federal criminal statutes, a simple assault would be treated as a misdemeanor. NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE § 1611 (1970). Although the proposed code calls for more severe penalties when the usual aggravating circumstances, such as the seriousness of the injuries inflicted and the use of a weapon in the attack are present, it provides no additional sanction when an assailant commits a knowing assault upon a federal agent. *See id.* § 1612. Knowing assaults may fall within the purview of the subchapter entitled "Physical Obstruction of Government Function and Related Offenses," however, the consequences are still the same; *viz.*, the crime is treated as a misdemeanor. *See id.* §§ 1301–02.

[127] *See* United States v. Fernandez, 497 F.2d 730, 738 (9th Cir. 1974), *cert. denied*, 95 S. Ct. 1423 (1975).