COMMENT

FEDERAL CRIMINAL JURISDICTION: A CASE AGAINST MAKING FEDERAL CASES

I. INTRODUCTION

Nearly two centuries ago, Alexander Hamilton, in defense of a proposed constitutional provision for the establishment of lower federal courts, wrote that the "possibility of particular mischiefs" which may be wrought by their creation should not be viewed as a "solid objection" to a system designed "to avoid general mischiefs." Such was Hamilton's conclusion to his paper outlining the "proper extent" and "proper objects" of federal jurisdiction.[1]

One "particular mischief" unforeseen by Hamilton is the expansion of federal criminal jurisdiction to encompass prosecutions rightly within the purview of the states.[2] This expansion, and the concomitant explosion in the number of federal criminal prosecutions, has been decried by legal scholars during the past four decades.[3] The

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[1] THE FEDERALIST No. 80, at 534, 541 (A. Hamilton) (J. Cooke ed. 1961). Hamilton's examples of the "proper objects" of federal jurisdiction are embodied in article III, § 2 of the Constitution. Hamilton noted that the states, by virtue of their union, were prohibited from doing certain things, such as imposing duties on imports and printing currency, because these activities would be detrimental to the Union:

> No man of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the state laws, or an authority in the federal courts, to over-rule such as might be in manifest contravention of the articles of union.

Id. at 535.

Though an ardent advocate of a strong federal government, Hamilton's discussion of the role of federal courts indicates he believed that these tribunals were necessary for the enforcement of matters which *necessarily* were delegated by the states to the federal government in order to preserve the Union.

[2] *See* H. FRIENDLY, *The Minimum Model Today*, in FEDERAL JURISDICTION: A GENERAL VIEW (1973); Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROBS. 64 (1948).

[3] *See* H. FRIENDLY, *supra* note 2; Schwartz, *supra* note 2. Although 25 years elapsed between the publication of these works, both Professor Schwartz and Judge Friendly recommended restraint by federal prosecutors in determining what types of offenses merit federal attention. Professor Schwartz urged that "the proper employment of the federal court in the criminal field requires the recognition . . . by United States attorneys to turn over to state authorities persons who, by the same conduct, violate local laws as well as national laws intended to be auxiliary to local enforcement." Schwartz, *supra* note 2, at 66.

Judge Friendly questioned whether federal criminal jurisdiction whose "primary basis" is the "use of facilities crossing state lines" is an unreasonable expansion of federal criminal jurisdiction. H. FRIENDLY, *supra* note 2, at 56. He asserted that: "The question whether federal criminal prosecutions have not greatly outreached any true federal interest . . . deserves the most

passage during this time of more federal statutes[4] which federal prosecutors use to attack local crimes, notably crimes of political corruption, promises that federal prosecutions of cases with little or no federal interest will increase.

This Comment recommends a radical approach designed to limit federal criminal prosecutions to those which have a substantial federal interest by eliminating one important incentive to federal prosecution: the advantage which some federal procedural and substantive rules of law offer to prosecutors in comparison to the rules applied in the courts of many states, including New Jersey.[5] It is therefore recommended that the application of the procedural and substantive rules of a state be applied to criminal prosecutions brought in federal courts within that state. This would eliminate the prosecutor's incentive to bring essentially state cases in federal courts, and have the effect of returning such prosecutions to their proper forum.[6] The proposed

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serious examination. . . ." *Id.* at 58. "It is thus fair to say that today '[t]here is practically no offense within the purview of local law that does not become a federal crime if some distinctive federal involvement happens to be present'—and the involvement may be exceedingly thin." *Id.* at 57 (quoting Abrams, *Consultant's Report on Jurisdiction:* Chapter 2, in I WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 36 (1970)).

[4] *See, e.g.*, Travel Act, 18 U.S.C. § 1952 (1982) (making interstate travel in furtherance of crime a federal felony); Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1963 (1982) (establishing additional penal provisions and more severe punishments for financial infiltration, through pattern of racketeering activity, of legitimate businesses which affect interstate commerce).

[5] *Compare* State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982) (prohibiting warrantless seizure by state authorities of individual's telephone toll records) *with* Smith v. Maryland, 442 U.S. 735 (1979) (individual has no legitimate expectation of privacy in telephone numbers he dials) *and* State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981) (granting standing to challenge search and seizure to those with possessory interest in items seized) *with* United States v. Salvucci, 448 U.S. 83 (1980) (standing to challenge search limited to those with legitimate expectation of privacy in area searched, regardless of ownership of items seized). *Compare* N.J. CT. R. 3:13-3(a)(18) (providing pretrial discovery by defendant of signed and unsigned statements of government witnesses or potential witnesses) *with* 18 U.S.C. § 3500(a) (1982) (prohibiting criminal defendant from obtaining statements or reports of government witnesses until witness has testified on direct examination at trial). *See generally infra* note 10.

[6] The United States Department of Justice has a policy, established in 1959, which provides that once a state has prosecuted criminal activity, the federal government will refrain from a prosecution based on the same core of facts or conduct unless there is a substantial federal interest in the prosecution. This is known as the "Petite" policy, after the Supreme Court *per curiam* decision recognizing the policy. *See* Petite v. United States, 361 U.S. 529 (1960). Observing that the concept of dual sovereignty permits both state and federal prosecution of the same criminal conduct without violation of the double jeopardy clause, Justice Brennan, joined by Justices Black and Douglas, urged the Court to adopt the policy. *Id.* at 533.

The Justice Department does not always follow its "Petite" policy. *See In re* Washington, 544 F.2d 203 (5th Cir. 1976) (upholding denial of government's post-conviction motion to dismiss indictment, the subject of which had been source of earlier state convictions, for government's bad faith in intentionally violating its own policy), *vacated sub nom.* Rinaldi v. United States, 434 U.S. 22 (1977).

system would operate as the criminal counterpart to the mandate of the United States Supreme Court in *Erie Railroad v. Tompkins*.[7] In federal prosecutions which have only a tenuous connection to federal law violations, state law would apply.[8] This would be the case when the elements of a state crime more aptly describe the alleged criminal conduct than do the elements of any federal crime. When the alleged offense is clearly federal, however, federal law would apply.[9]

Several reasons exist to support this concept. One is the inherent unfairness to a defendant who loses the increased protections his state constitution may afford when he is brought into federal court. In recent years, the highest courts of several states, including New Jersey, have relied on their state constitutions in granting greater individual protections,[10] particularly in the area of criminal

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[7] 304 U.S. 64 (1938). The *Erie* decision minimized "forum shopping" by civil litigants by requiring that state law be applied to civil actions brought in federal court through diversity jurisdiction. The Court recognized the inherent unfairness of permitting the outcome of a case to be decided by the forum in which it is heard as being a denial of equal protection. In addition to diversity cases, there are other instances when federal courts look to state law to supply the rule of decision. *See, e.g.*, FED. R. EVID. 501 (privilege governed by principles of common law as interpreted by federal courts in light of reason and experience; in civil proceedings privileges shall be determined according to state law). In Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979), the Third Circuit considered the Pennsylvania newspaper reporter's Shield Law, 42 PA. CONS. STAT. ANN. § 5942 (West Supp. 1983-1984), in determining that reporters have the privilege not to reveal their sources in a civil case brought under federal statutes. *Cf.* Branzburg v. Hayes, 408 U.S. 665 (1972) (first amendment does not permit newspaper reporter to assert privilege before grand jury investigating crime).

[8] Unlike the *Erie* Doctrine, this approach would require a statutory enactment. *Cf.* Assimilative Crimes Act, 18 U.S.C. § 13 (1982) (state criminal law applicable to crimes committed on federally-owned reservations within state). The *Erie* Doctrine, judicially adopted, applies to cases clearly arising under state law which are in federal court solely because of diversity jurisdiction.

[9] One possible method of implementing this proposal could be for the defendant to challenge the federal jurisdiction in a pretrial motion by making a *prima facie* showing that the elements of the allegation against him more closely fit the elements of a state crime. The prosecutor would then have the burden of showing the substantial federal interest which would permit federal law to control. If the prosecutor failed to make such a showing, it could be of substantial advantage to the defendant because he therefore could prevent the escalation of a misdemeanor into a more substantial federal offense. *See, e.g.*, United States v. Curry, 681 F.2d 406 (5th Cir. 1982) (defendant convicted of federal felony of mail fraud for filing false campaign report with state election committee, an offense which was misdemeanor under state law); United States v. McNeive, 536 F.2d 1245 (8th Cir. 1976) (federal Mail Fraud Act prosecution of city plumbing inspector who accepted five-dollar gratuities from contractor; activity which was misdemeanor under city ordinance); *see infra* notes 40-48 and accompanying text.

Another benefit of this proposal might be dismissal of the case from federal court, without prejudice, when there has been no showing that state or county prosecutors are unwilling or unable to prosecute the case, and their authority has been usurped by federal prosecutors.

[10] *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Wefing, *Search and Seizure*—New Jersey Supreme Court v. United States Supreme Court, 7 SETON HALL L. REV. 771 (1976); *see also* Ziegler, *Constitutional Rights of the*

law.[11] At the same time, the Burger Court has contracted or even refused to recognize these rights. A criminal defendant should not be stripped of them, however, simply because he finds himself in federal rather than state court. The disparity in treatment of defendants in the two jurisdictions holds the potentiality for "forum shopping" by state and federal prosecutors working together, and is likely to affect the treatment of the defendant at both trial and sentencing.[12]

Further, the importance of a state court's decision to grant a particular right wanes when a federal prosecutor may simply ignore it.[13] For example, the Supreme Court of New Jersey, in reliance on the state constitution,[14] recently held that a search warrant is required before law enforcement officials may seize an individual's toll records from the telephone company.[15] The federal courts, on the other hand,

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Accused—Developing Dichotomy Between Federal and State Law, 48 PA. B.A.Q. 241 (1977). These articles trace Supreme Court rulings in the area of criminal law through the Warren and Burger Courts and note the reliance which state courts place on state constitutions to expand individual rights. *See generally supra* note 5.

[11] *See* State v. Hunt, 91 N.J. 338, 358, 450 A.2d 952, 962 (1982) (Handler, J., concurring); Brennan, *supra* note 10; Wefing, *supra* note 10; *supra* notes 5 & 10.

[12] *Compare* State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975) (establishing "knowing waiver" test, i.e., one who consents to search must understand he had right to refuse search) *with* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (establishing "totality of circumstances" test, i.e., consenter need not realize he had right to refuse search if circumstances indicate consent freely given). *Compare* State v. Culotta, 343 So. 2d 917 (La. 1976) (granting standing to challenge search to anyone aggrieved by it) *with* United States v. Salvucci, 448 U.S. 83 (1980) (standing to challenge search limited to those with legitimate expectation of privacy in area searched, regardless of ownership of items seized). *Compare* People v. Disbrow, 16 Cal. 2d 101, 113, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976) *and* State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971) *and* Commonwealth v. Triplett, 341 A.2d 62, 64 (Pa. 1975) (statements made by defendant in absence of *Miranda* warnings may not be used to impeach defendant's credibility if he takes witness stand at trial) *with* Harris v. New York, 401 U.S. 222, 226 (1971) (statement inadmissible as direct evidence under Miranda v. Arizona, 384 U.S. 436 (1966), may be used to impeach defendant's credibility at trial).

Justice Brennan has written approvingly of the increasing use of state constitutions as "guardians of our liberties," and believes it is a "highly significant development for our constitutional jurisprudence and for our concept of federalism." Brennan, *supra* note 10, at 491-95.

[13] *See* cases cited *supra* notes 5 & 12; *infra* text accompanying notes 116-36.

[14] Article 1, § 7 states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

N.J. CONST. art. I, § 7.

Although the words are virtually identical to the fourth amendment, the state supreme court has interpreted them to give broader rights to defendants. *See, e.g.*, cases cited *supra* note 5.

[15] State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982).

do not require the protection of a warrant; federal investigators may seize these records at will, without having made a showing of probable cause to an independent magistrate.[16] The individual is protected from state intrusion into his privacy by the state constitution, but this probably matters little to him when a federal investigatory agency may rummage at will through his personal business. When state and federal prosecutors work together, this state-granted protection has even less meaning, because what the state authorities cannot obtain without a proper showing of probable cause, the federal agency can. Similarly, when state officials seize evidence in a manner which the state court has held to be illegal under the state's constitution, the state officials may simply turn it over to the federal prosecutors, who may use it with impunity.[17] Application of a state's procedural and substantive rules of law, acting as a disincentive to federal prosecutions of what are really state crimes, would also free an already overburdened federal docket[18] for litigants in that forum with a substantial federal claim. Moreover, it would free federal prosecutors to investigate crimes which have a substantial federal interest, and truly require the resources of the federal government.[19]

Federal prosecution of cases with only a tenuous or contrived connection to federal law violations is a "particular mischief" anticipated by neither the Framers nor the Congresses which passed some of the federal statutes now used to usurp the authority of state prosecu-

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[16] Smith v. Maryland, 442 U.S. 735 (1979).

[17] *See* Ziegler, *supra* note 10. Judge Ziegler calls this phenomenon the "Copper Platter Doctrine." This is a reversal of the Silver Platter Doctrine, which developed before the exclusionary rule was made applicable to the states. Under the Silver Platter Doctrine, federal officers who had illegally seized evidence which was excluded from federal court would turn it over "on a silver platter" to state officials for state prosecutions. The Supreme Court ended this practice in Elkins v. United States, 364 U.S. 206 (1960). Judge Ziegler points out that now that many states afford their citizens greater rights under state constitutions, state officials have begun turning over evidence to federal prosecutors which state but not federal law would hold was illegally seized. *See, e.g.*, United States v. Scolnick, 392 F.2d 320 (3d Cir. 1968); *infra* notes 114-36 and accompanying text.

[18] The federal civil caseload has increased each year since 1960. The number of filings increased by 17.8% during the one-year period ending March 31, 1983, compared to the previous year, for a total of 233,065. STATISTICAL ANALYSIS & REPORTS DIV., ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 7 (1983). The number of criminal cases filed in the same period was 34,778, an increase of 8.9% over the previous one-year period. *Id.* at 13.

[19] Professor Schwartz suggested five criteria to determine when federal action is justified: (1) when states are unwilling or unable to act; (2) when the federal jurisdictional aspect of the crime is "an important ingredient of its success"; (3) when a substantial federal interest is protected by use of federal authority; (4) when a criminal operation extends into more than one state; and (5) when it would be more efficient for federal prosecution of a complex case "investigated and developed on the theory of federal prosecution." Schwartz, *supra* note 2, at 73.

tors. Staunch Federalists such as Hamilton might have endorsed the breadth now given to the first clause of article III[20] of the Constitution, which grants federal jurisdiction "to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States."[21] Many of the Framers would be astounded, however, to see that this clause now encompasses the prosecution in federal court of a small-town politician accused of what is essentially bribery—a crime adequately prohibited by state criminal codes.[22] They would be bemused by the sentencing to federal prison of a local political operative whose conviction on mail fraud charges arose from the fraudulent procurement of absentee ballots for a municipal school board election.[23] They might wonder what would have become of the federal prosecution if the ballots had been hand delivered, rather than mailed, to the election board. They might also wonder at the fairness

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[20] The Act of Feb. 13, 1801, 2 Stat. 89, made federal jurisdiction "almost coextensive with the constitutional authorization." P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 36-37 (2d ed. 1973). It was repealed when the Jeffersonians came to power the following year. *Id.* (referring to Act of Mar. 8, 1802, 2 Stat. 132).

[21] U.S. CONST. art. III, § 2, cl. 1.

[22] *See, e.g.*, United States v. Jannotti, 673 F.2d 578, 623-27 (3d Cir.) (Aldisert, J., dissenting), *cert. denied*, 457 U.S. 1106 (1982); United States v. Pacente, 503 F.2d 543 (7th Cir.), *cert. denied*, 419 U.S. 1048 (1974); *see supra* text accompanying notes 16-19.

The Civil Rights Act of 1964 is an example of a federal law enacted pursuant to the commerce clause which resulted in proscribing conduct with miniscule effects on interstate commerce. Enforcement of that Act resulted in cases such as Katzenbach v. McClung, 379 U.S. 294 (1964) (refusal to serve Blacks in public accomodations affects interstate commerce and is violative of Title II of Civil Rights Act), and Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (same). Neither the correctness of the results of these decisions nor the authority of Congress to enact legislation pursuant to its commerce power is questioned here. *But see Heart of Atlanta Motel, Inc.*, 379 U.S. at 280-86 (Douglas, J., concurring) (decision based on 14th amendment rather than commerce clause would have "more settling effect" and make unnecessary litigation over whether inn or restaurant is within "commerce" definitions of Act); Letter from Gerald Gunther to the Department of Justice (June 5, 1963), *excerpts reprinted in* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 203 (10th ed. 1980) (urging enactment of Civil Rights Act on basis of 14th amendment and asserting use of commerce clause as Act's basis is "strained").

The Court's somewhat strained analyses of the effect on interstate commerce resulting from an inn and a family restaurant's refusal to serve Blacks in the *Heart of Atlanta* and *McClung* cases illustrate how jurisdiction based on the commerce clause can be stretched until it sometimes appears to be a legal fiction. In these cases, however, the Court was using federal authority to protect a substantial federal interest—equality of all people at a time when many states were adamantly refusing to recognize the rights of minorities. *See* Schwartz, *supra* note 2, at 73.

At issue here is the application of legislation, properly enacted pursuant to the commerce clause, to cases where the effect on interstate commerce is so attenuated as to be ephemeral, no national interest is furthered by the prosecution, and state law will suffice to prosecute the alleged activity.

[23] *See* United States v. Cherubini, No. 82-5780 (D.N.J. Oct. 21, 1982), *aff'd*, slip op. (3d Cir. July 21, 1983), *cert. denied*, No. 83-844 (U.S. Feb. 21, 1984).

of exposing the defendant to a sentence under the federal statute when the actual state crime carries a much lighter penalty.[24]

Against this background, it is clear that the integrity of state constitutions and their interpretation by state courts, the inherent unfairness to criminal defendants prosecuted for essentially state-prohibited behavior, and the overburdened and ever-burgeoning federal court docket,[25] require the remedy which would be afforded by applying a state's procedural and substantive rules of law in the federal courts within that state's district. This Comment will discuss the history of the two federal statutes which are among the more popular vehicles used by federal prosecutors to stretch their jurisdiction, the Mail Fraud Act[26] and the Hobbs Act.[27] Cases brought under these statutes will be used to illustrate the unfairness to defendants and the perversion of legislative intent which results when they are used to prosecute state crimes.[28]

II. THE MAIL FRAUD ACT

The legislative history of the Mail Fraud Act (18 U.S.C. § 1341) is scant, yet indicates that the statute was directed at fraudulent conduct

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[24] *See id.; see also* United States v. Curry, 681 F.2d 406 (5th Cir. 1982); United States v. McNeive, 536 F.2d 1245 (8th Cir. 1976). In *Curry*, federal prosecution was based on the fact that the defendant used the United States mails to submit a false campaign contribution report to the state election committee—a misdemeanor under state law. In *McNeive*, the federal prosecution was based on the fact that a contractor who gave the defendant-plumbing inspector five-dollar gratuities had *mailed* them to the defendant. McNeive's conduct was at most a violation of a city ordinance.

[25] Former Federal District Court Judge for the District of New Jersey H. Curtis Meanor recently asserted that "80 per cent, at least, of the criminal cases that come into the federal courts, could just as easily be handled in the state courts. For example, I can't think of a mail fraud case that could not be brought instead under state laws." The Sunday Star Ledger, Feb. 27, 1983, at 1, col. 5. The former federal judge believes New Jersey's federal court system is "in danger of collapsing from its own weight of cases as a result of matters which don't belong in these courts. . . ." *Id.* at col. 3.

[26] 18 U.S.C. § 1351 (1982).

[27] *Id.* § 1951. By no means are these the only statutes abused by federal prosecutors. The Travel Act, *id.* § 1952, is another favored tool. *See, e.g.*, Rewis v. United States, 401 U.S. 808 (1971); United States v. Archer, 486 F.2d 670 (2d Cir. 1973).

[28] The Mail Fraud Act and the Hobbs Act represent two types of federal penal statutes, those which are designed to protect local interests from abuse through use of the facilities of interstate commerce, and those designed to protect the federal interest in interstate commerce itself, respectively. The former type must be narrowly construed. *See, e.g.*, Jerome v. United States, 318 U.S. 101, 105 (1943) ("where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute"). An argument could be made that, with regard to the latter type of statute, there is no reason not to read them as broadly as the commerce clause permits. What is permissible, however, may not necessarily be in line with congressional intent in enacting these statutes.

where the mails were indispensable vehicles for carrying out the fraud.[29] The predecessor to section 1341 was section 301 of the Act of June 8, 1872. Its sponsor[30] stated that it was designed to "prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country," and sought to proscribe the mailing of circulars from bogus offices in the cities offering get-rich-quick schemes to those who were unable to check whether the offices existed.[31] These schemes to defraud which the Congress sought to prevent could operate only because of the schemers' use of the mails.[32] Early cases brought under the statute involved prosecutions

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[29] Section 1341, the Mail Fraud Act, reads:

> 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, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, 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, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (1982).

[30] Rep. John Farnsworth (R. Ill.).

[31] CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth).

[32] Rep. Farnsworth illustrated the type of conduct targeted by his bill:

> I have here . . . a large number of specimen circulars and letters . . . sent from various bogus offices in the large cities . . . . Some of them are schemes for selling counterfeit money. They send out genuine specimens of fractional currency, and say to their correspondents, "We can sell you so much of this money for so much." . . . [T]hey may, perhaps, send a genuine twenty-five or fifty cent currency note. The person receiving the circular may not be particularly ignorant, but being somewhat greedy, he shows it to some banker or broker, who, of course, pronounces it to be good money. Thereupon, the countryman immediately sends to the address of the agent, in New York, for instance, . . . an order. . . . A box or package is sent to him, . . . which . . . is found to contain waste paper, sawdust, or maybe bogus money. . . . Thus all through the country thousands of innocent and unsophisticated people, knowing nothing about the ways of these city thieves and robbers, are continually fleeced and robbed, and the mails are made use of for the purpose of aiding them in their nefarious designs.

Id.; *see also* Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562, 568-69 (1980). The author suggests that federal prosecutors abuse the legislators' purpose in enacting § 1351 by applying it in instances wherein the victims are "defrauded" of intangibles, such as good government, rather than property. *Id.* An amendment to § 301, in 1899, added specific prohibitions against counterfeiting schemes prevalent at the time. The 1909 amendment added a prohibition against "obtaining money or property by means of false or fraudulent pretenses." Act of Mar. 4, 1909, ch. 321, §

consistent with Congress' intent to punish swindlers who used the mails to dupe others.[33]

A century later, the Supreme Court observed in *United States v. Maze*[34] that the Mail Fraud Act could only encompass mailings that are "sufficiently closely related" to a fraudulent scheme.[35] The Court also has noted that the mail fraud statute does not reach all frauds, "but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."[36]

Despite these mandates and congressional intent, section 1341 has been used to prosecute cases in which the "rapscallion" did not aim to fleece anyone in particular out of anything in particular. An expansive view of what could be the object of a fraudulent scheme first arose, for example, in *United States v. States*.[37] The prosecution employed a theory of "intangible rights," neither pecuniary nor proprietary, of which a victim may be defrauded, such as the right to good government.[38] The defendants in *States*, who were candidates running for local party committee seats, used fictitious names to obtain fraudulent voter registrations, and then used these registrations to obtain absentee ballots.[39] They were foiled when an alert postal worker, attempting to deliver the absentee ballots, realized that the "voters" to whom they were being sent did not exist.[40] The power of the federal government was brought to bear on the perpetrators. Election fraud, however, can be perpetrated without using the mails, and state law prohibits such conduct.[41] The election at issue in *States*

215, 35 Stat. 1130. It was enacted without debate or comment. See Comment, *supra*, at 566-78 for a thorough review of the legislative history of 18 U.S.C. § 1341.

[33] For example, in Durland v. United States, 361 U.S. 306 (1896), an early mail fraud case, the Court upheld the convictions under the statute of a defendant who had mailed circulars soliciting buyers for bonds. The bonds did not mature as promised in the circulars, and the defendant knew they would not. He "was trying to entrap the unwary, and to secure money from them on the faith of a scheme glittering and attractive in form, yet unreal and deceptive in fact, and known to him to be such." *Id.* at 312.

[34] 414 U.S. 395, 399-405 (1974).

[35] *Id.* at 399.

[36] Kann v. United States, 323 U.S. 88, 95 (1944).

[37] 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974).

[38] *Id.* at 764. One commentator criticized this theory as being unsupported by the statute's legislative history and the meaning of fraud in the 19th century, when the statute was first enacted, concluding that its use "against politically corrupt politicians thus remains contrary to Congress's [sic] original intent." Comment, *supra* note 32, at 587.

[39] *States*, 488 F.2d at 763-64.

[40] *Id.*

[41] Indeed, Congress has recognized that it may intrude in election matters only when a federal election is involved. *See, e.g.*, 42 U.S.C. § 1973i(c) (1976 & Supp. IV 1980). The Fourth Circuit has permitted an expansion of prosecution of local election fraud under this statute when

was for seats on local party committees—as "local" an election as there might be. Nevertheless, a coterie of federal employees devoted its time to investigating and prosecuting the election fraud.

The Eighth Circuit upheld the *States* convictions, but at least one judge did so reluctantly, stating:

> I cannot believe that it was the original intent of Congress that the Federal Government should take over the prosecution of every state crime involving fraud just because the mails have been used in furtherance of that crime. The facts in this case show that this election fraud was purely a state matter. It should have been prosecuted in state court. The Assistant United States Attorney conceded in oral argument that the case was not the type of mail fraud case covered by written instructions contained in the United States Attorneys' manual. . . . [H]e relieved the state of its duty to police the violation of its local election laws and helped create a precedent which will encourage the same sort of unwarranted federal preemption in the future.[42]

The Eighth Circuit demonstrated its reluctance to let section 1341 encroach so far into state territory two years after *States* by reversing the conviction in *United States v. McNeive*.[43] McNeive, the chief plumbing inspector for the City of St. Louis, was prosecuted under section 1341 because he had accepted five-dollar gratuities from a plumbing contractor each time he issued a permit to the contractor.[44] McNeive's acceptance of the tips was a violation of an unwritten departmental policy and a city ordinance.[45] There was no indication, however, that McNeive had extended any special favors to the contractor.[46] The government contended that his activity had deprived the people of St. Louis of the intangible right to his honest services.[47] That was the fraud element. The United States Attorney who brought the case apparently believed that the fact that the contractor had *mailed* the gratuities to McNeive along with his application for permits constituted the second element of section 1341.[48]

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the local candidates are on the same ballot as candidates for federal office. United States v. Carmichael, 685 F.2d 903 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 1187 (1983).

[42] *States*, 488 F.2d at 767 (Ross, J., concurring).

[43] 536 F.2d 1245 (8th Cir. 1976).

[44] *Id.* at 1246.

[45] *Id.*; ST. LOUIS, MO., REV. CODE § 41.040 (1960 & Supp. 1964) (recodified as § 4.02.010 (1980)). This section prohibits the solicitation or acceptance of any gift of money by city officials for their services. *McNeive*, 536 F.2d at 1246 n.1.

[46] *McNeive*, 536 F.2d at 1246.

[47] *Id.* at 1247.

[48] The court did not discuss that element, having found that McNeive's acceptance of the gratuities had worked no fraud. *Id.*

In reversing McNeive's conviction, the Eighth Circuit stated: "Historically, § 1341 provides no foundation for the pervasive view the Government now accords it."[49] Basing its view on the language and underlying policy of section 1341, the court concluded that McNeive's conduct "was beyond the pale of that statute,"[50] and refused to accept "that Congress, by enacting the mail fraud statute, contemplated that a situation similar to McNeive's would be classified as a scheme to defraud."[51] Had McNeive been prosecuted under the city ordinance, his conviction probably would have been valid. The cost of McNeive's prosecution would have been borne by the people of St. Louis—those people who were "defrauded" by McNeive's conduct, if indeed anyone was cheated[52]—and federal dollars and energy would have been conserved for the prosecution of true federal felons.

Another example of federal intrusion into state matters occurred in *United States v. Curry*.[53] *Curry* involved the conviction under section 1341 of the head of a political action committee who had filed a false campaign contribution report to the Louisiana state election committee.[54] The Fifth Circuit reversed Curry's conviction on three counts of mail fraud because the trial court had failed to include in its charge to the jury that good faith is a defense to section 1341.[55] The circuit court remanded the case, holding that Curry would have violated the statute if he had knowingly mailed false reports to the state committee.[56]

Judge Garwood, although concurring with the majority's decision to reverse the conviction, rejected its contention that if Curry had knowingly mailed false reports, he would have "defrauded" the committee of its right to accurate information.[57] Judge Garwood also criticized the *States* decision as giving "an excessively broad reading"

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[49] *Id.*

[50] *Id.* at 1249.

[51] *Id.*

[52] The court did not believe that anyone had been defrauded, noting that "the tips . . . were clearly not kickbacks and the City of St. Louis . . . suffered no pecuniary detriment. . . ." *Id.* at 1248.

[53] 681 F.2d 406 (5th Cir. 1982).

[54] *Id.* at 408.

[55] *Id.* at 416.

[56] *Id.* at 416-17.

[57] *Id.* at 420 (Garwood, J., concurring). Judge Garwood observed that: "no case has held that the mere denial to the victim of accurate information . . . is of itself sufficient to render the knowingly [sic] making of a false statement a defrauding. There must be contemplated some significant detriment to the victim, or benefit to the perpetrator, *apart* from the deception itself." *Id.* (emphasis in original).

to Fifth Circuit decisions cited therein[58] to bolster the court's support of States' conviction under the intangible rights theory.[59] Significantly, Judge Garwood pointed out that prosecuting Curry under section 1341 made a felony out of conduct which was at most a misdemeanor under Louisiana law, punishable only by a fine.[60] Each count of mail fraud, however, exposes the defendant to five years in prison plus a considerably larger fine, not to mention the brand of a felon.[61]

Similarly, in New Jersey, a federal prosecution under section 1341 for allegedly fraudulent certifications of absentee ballots which were delivered by mail to the county elections commission would expose the defendant to a five year sentence for each ballot.[62] Under state law, this is a crime of the fourth degree,[63] punishable by disenfranchisement[64] and a maximum sentence of eighteen months,[65] with a presumption of a noncustodial sentence.[66] Although it is important to safeguard the integrity of even minor elections, the punishment should fit the crime. Federal mail fraud prosecutions do not deter election fraud, they merely encourage the hand delivery of absentee ballots.

Further, the government faces the risk of losing cases prosecuted under section 1341 where the fraud clearly occurred but the mailings did not. The United States Attorney's Office came close to losing its case against Robert C. Botti, then-Mayor of Union City, New Jersey, because the bids he was accused of rigging may have been hand delivered.[67] Although the jury convicted Botti of mail fraud, the trial

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[58] Fifth Circuit decisions cited by the *States* court included: Abbott v. United States, 239 F.2d 310 (5th Cir. 1956); Steiner v. United States, 134 F.2d 931 (5th Cir.), *cert. denied*, 319 U.S. 774 (1943); Shushan v. United States, 117 F.2d 110 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941).

[59] *Curry*, 681 F.2d at 418 n.1. Judge Garwood's opinion also traced the legislative history of § 1341, and concluded that the intangible rights theory of mail fraud prosecutions is in derogation of Congress' intent.

[60] *Id.* at 421. The fine is not to exceed $500, plus 150% of the amount not reported to the committee.

[61] 18 U.S.C. § 1341. Each count exposes the defendant to a $1000 fine. Professor Schwartz has noted that, because each use of the mail in a single scheme is a separate offense, a court may sentence the defendant to as much as "five years multiplied by the number of different letters which the prosecutor cares to make the subject of separate counts in the indictment." Schwartz, *supra* note 2, at 79-80.

[62] N.J. STAT. ANN. § 19:57-17 (West Cum. Supp. 1983-1984).

[63] *Id.* § 19:57-37.

[64] *Id.*

[65] *Id.* § 2C:44-1(f) (West 1982).

[66] *Id.* § 2C:44-1(e).

[67] Botti v. United States, No. 83-718 (3d Cir. Sept. 22, 1983), *cert. denied*, 52 U.S.L.W. 3422 (U.S. Nov. 29, 1983).

judge stated that he would have dismissed the mail fraud counts.[68] If Botti had been prosecuted in state court under the New Jersey law requiring competitive bidding,[69] the manner in which the bids were submitted would have been irrelevant.

III. THE HOBBS ACT

Another federal statute which has been acknowledged as a useful tool for federal prosecution of certain state crimes, bribery and extortion in particular, is the Hobbs Act.[70] This statute was enacted by Congress in 1945 to thwart "highway robbery" by members of the Teamsters Union.[71] It amended the Anti-Racketeering Act of 1934[72]

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[68] Judge Meanor, in denying Botti's motion for acquittal, nonetheless stated that "I myself, as a factfinder, would have acquitted Mr. Botti [on the mail fraud counts]." The Dispatch, Jan. 25, 1983, at 16, col. 3.

[69] N.J. STAT ANN. § 40A:11-1 to -37 (West 1980 & Cum. Supp. 1983-1984) (local Public Contracts Law). Theft by Deception, N.J. STAT. ANN. § 2C:20-4 (West 1982), could also apply.

[70] The Hobbs Act reads, 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.
>
> . . .
>
> (2) The term "extortion" means 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.

Hobbs Act, 18 U.S.C. § 1951 (1982) (emphasis added). See Stern, *Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion,* 3 SETON HALL L. REV. 1 (1971), for an approving view of such prosecutions. *But see* Comment, *Prosecution Under the Hobbs Act and the Expansion of Federal Criminal Jurisdiction,* 66 J. CRIM. L. & CRIMINOLOGY 306 (1975).

Judge Stern, a former federal prosecutor, stated that whether a political official was in reality guilty of either passively accepting bribes or actively extorting payments, he may be prosecuted under the Hobbs Act. This view was adopted by the Third Circuit. United States v. Kenny, 462 F.2d 1205 (3d Cir.), *cert. denied,* 409 U.S. 914 (1972); United States v. Jannotti, 673 F.2d 578 (3d Cir.), *cert. denied,* 457 U.S. 1106 (1982). But see Judge Aldisert's dissent in United States v. Cerilli, 603 F.2d 415, 426 (3d Cir. 1979), *cert. denied,* 444 U.S. 1043 (1980), wherein he denounced the circuit's "revolutionary interpretation of the Hobbs Act" in *Kenny,* and urged the panel to "cure our error by having the full court reexamine the *Kenny* rule. . . ." *Id.* at 426-27 (Aldisert, J., dissenting). The Third Circuit's *Kenny* decision "became the country's landmark case interpreting extortion under the Hobbs Act. . . ." *Id.* at 427 (Aldisert, J., dissenting). The decision resulted in the blurring of the distinction between extortion and bribery. The Third Circuit's "failure to reexamine its rationale has resulted in a perpetuation of erroneous law not only in this circuit but in the First, Second, Fourth, Seventh, Eighth and Tenth Circuits which have followed our lead without setting forth a reasoned elaboration for their conclusions." *Id.* (footnote omitted).

[71] 91 CONG. REC. 11,841 (1945) (remarks of Rep. Cox of Georgia). Congressman Cox said: "The sole purpose of the bill . . . is to undo the outrageous opinion of the Supreme Court in the

and, like that statute, prohibits extortion.[73] The Hobbs Act, however, only proscribes extortion which affects or restrains interstate commerce. It is this limitation which distinguishes Hobbs Act violations from the state crime of extortion, and which gave Congress authority to enact the law.[74]

The Hobbs Act had its genesis in the Supreme Court's interpretation of the earlier Act,[75] which the Court held did not apply to organized labor because its aim was the "elimination of terroristic activities by professional gangsters."[76] The Court, in *United States v. Local 807, International Brotherhood of Teamsters*[77] reversed the convictions of twenty-six members of the New York City Teamsters local who had exacted tributes[78] from out-of-state, nonunionized truck drivers who brought goods into the City.[79] The Court based its decision on section two of the Act,[80] which it interpreted to exempt union members. Reaction among many members of Congress was vehement,[81] and the Hobbs Act was proposed to "plug up [the] loopholes"[82] in the earlier law.

Some congressmen expressed concern that the new bill was unnecessary because all the states had laws against extortion, and the Hobbs Act might be an impermissible preemption of these laws.[83]

Teamsters Union case, where that Court legitimatized highway robbery when committed by a labor goon." *Id.*

[72] Act of June 18, 1934, ch. 569, §§ 1-6, 48 Stat. 979 (codified as amended at 18 U.S.C. § 1951 (1982)).

[73] Extortion, as defined by the Hobbs Act, 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." 18 U.S.C. § 1951(b)(2) (1982).

[74] United States v. Local 807, Int'l Bhd. of Teamsters, 315 U.S. 521 (1942); *see also* 91 CONG. REC. 11,848 (1945) (remarks of Rep. Lane).

[75] *See infra* text accompanying notes 78-80.

[76] United States v. Local 807, Int'l Bhd. of Teamsters, 315 U.S. 521, 530 (1942).

[77] *Id.* at 521.

[78] The tribute was payment of one day's wages at union scale by the nonunion drivers to union members, who sometimes assisted in off-loading the trucks, and sometimes did not. *Id.* at 526.

[79] *Id.* at 525.

[80] *Id.* at 527. The Court, quoting § 2(a) of the Anti-Racketeering Act, said it "excepts from punishment any person who 'obtains or attempts to obtain, by the use of or attempt to use or threat to use, force, violence, or coercion, . . . the payment of wages by a bona-fide employer to a bona-fide employee.' " *Id.*

[81] *See* 91 CONG. REC. 11,843-48 (1945)

[82] *Id.* at 11,848 (remarks of Rep. Lane). "The act of 1934 was directed against gangsters, yet the case brought before the Supreme Court in October 1941 (United States v. Local 807, Int'l Bhd. of Teamsters, 315 U.S. 521 (1942)) involved a labor union. . . . H.R. 32 (the Hobbs Act) was inspired by that decision. It seeks to plug up loopholes. . . ." *Id.*

[83] *See, e.g., id.* at 11,843 (remarks of Rep. Rooney); *id.* at 11,848 (remarks of Rep. Powell). Congressman Powell stated: "Ample State laws and police are provided. Why then, gentlemen of

Hobbs Act supporters reassured them that the bill was not an excursion into the province of the states, emphasizing the interstate aspects of the facts in *Teamsters*. One congressman remarked:

> [T]his proposal applies to interstate commerce only. The Congress has no other jurisdiction. . . . Every State in the Union . . . should enforce its laws. However, if interstate commerce is being interferred [sic] with, and if the farmers and truckers, who take food into New York from surrounding territory and States, must submit to [threats and violence] then it seems clear that it is the obligation of the Congress to furnish national protection in these interstate operations.[84]

The House record clearly delineates the bill's intent: protection of nonunionized farmers and truckers, and elimination of any loophole through which labor unions could escape punishment if they used violence or coercion against nonunion members on the highway.[85]

For the next several years, Hobbs Act prosecutions were in accord with Congress' intent in passing the Act, in that they centered on extortionate demands of labor officials.[86] In *United States v. Green*,[87] for example, the defendants, a labor union and an official, were found guilty under the Hobbs Act of extorting money from two employers by forcing them to pay for the services of nonexistent union members.[88] The district court arrested the judgments of conviction, reasoning that the defendants' activities did not constitute a crime under the Act, and that entering the judgment would extend its jurisdiction beyond constitutional limits.[89] The Supreme Court reversed, holding that the extortionate labor activity was precisely the type of conduct which Congress had intended to proscribe by the Hobbs Act.[90]

In later cases, however, Hobbs Act prosecutions moved away from extortionate union activity wherein either the threatened work

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the States' rights school, do we need Federal legislation?" *Id.* It is apparent from the record, however, that most Hobbs Act opponents saw the bill as anti-labor. *Id.* at 11,843-48.

[84] 91 CONG. REC. 11,843 (1945) (remarks of Rep. Michener).

[85] See Comment, *supra* note 70, at 310-11, for a detailed analysis of the legislative history of the Act. The author concludes that Congress' intent was to discourage labor extortion and obstruction of the movement of individuals across state lines for the purpose of marketing their goods, two activities which have direct effects upon commerce. *Id.*

[86] *See, e.g.*, Stirone v. United States, 361 U.S. 212 (1960); United States v. Green, 350 U.S. 415 (1956); United States v. Kramer, 355 F.2d 891 (7th Cir.), *vacated and remanded in part, cert. denied in part*, 384 U.S. 100 (1966); *see also* cases cited in Comment, *supra* note 70, at 313 n.60.

[87] 350 U.S. 415 (1956).

[88] *Id.* at 417.

[89] *Id.* at 416.

[90] *Id.* at 418-20.

stoppages or the depletion of the victim-employer's assets would affect interstate commerce. The Act was invoked in cases not involving labor threats,[91] and the effect on interstate commerce was presumed, no matter how small the alleged extortion payment nor how attenuated the nexus to interstate commerce.[92] This type of Hobbs Act prosecution parallels the Mail Fraud Act prosecutions brought in cases like *States* and *Curry*: both involve plumbing the depths of absurdity in the attempt to find a federal nexus. For example, in *United States v. Pacente*,[93] a Chicago police officer was convicted of extortion under section 1951 for taking a $200 bribe from a liquor store owner. The store was located in Chicago, and the proprietor bought his liquor from Chicago distributors who had purchased their merchandise from persons at locations outside Illinois.[94] The Seventh Circuit upheld the district court's determination that the $200 bribe depleted the resources of the store owner, who bought from people who bought from people outside the state, and thus affected interstate commerce.[95]

It is not only the virtual presumption of the jurisdictional element of the Hobbs Act which has broadened its reach. Courts also blur the distinction between the separate crimes of extortion,[96] which the

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[91] *See, e.g.*, United States v. Pearson, 508 F.2d 595 (5th Cir.) (defendant convicted under Hobbs Act for robbery of hotel), *cert. denied*, 423 U.S. 845 (1975); United States v. Staszcuk, 517 F.2d 53 (7th Cir.) (Chicago alderman convicted under Hobbs Act for accepting $3,000 payment to support municipal zoning change), *cert. denied*, 423 U.S. 837 (1975); United States v. Augello, 451 F.2d 1167 (2d Cir. 1971) (defendant convicted under Hobbs Act for demanding $250 monthly from restaurant owner for "protection"), *cert. denied*, 405 U.S. 1070 (1972); *see* Comment, *supra* note 70, at 313.

[92] United States v. Pearson, 508 F.2d 595 (5th Cir.) (hotel robbery affects interstate commerce because many guests were from out-of-state), *cert. denied*, 423 U.S. 845 (1975); United States v. Staszcuk, 517 F.2d 53 (7th Cir.) (payment to alderman to support zoning change so animal hospital could be built had sufficient potential to affect interstate commerce because, although hospital was never built, if it had been, some furnishings would have come from out-of-state), *cert. denied*, 423 U.S. 837 (1975); United States v. Augello, 451 F.2d 1167 (2d Cir. 1971) (monthly "protection" payments of $250 by New York hamburger drive-in restaurant owner affects interstate commerce because meat purchased in New Jersey), *cert. denied*, 405 U.S. 1070 (1972); *see also* Comment, *supra* note 70, at 314. The author notes that many courts "simply assumed the effect upon interstate commerce from the depletion of assets alone and not from the projected result of the threat if carried out," and asserts that "the unarticulated probability or potential for effect upon interstate commerce have [sic] become increasingly more speculative in the recent decisions." *Id.* (citing United States v. Pearson, 508 F.2d 595 (5th Cir.), *cert. denied*, 423 U.S. 845 (1975); United States v. Braasch, 505 F.2d 139 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); United States v. Augello, 451 F.2d 1167 (2d Cir. 1971), *cert. denied*, 405 U.S. 1070 (1972)).

[93] 503 F.2d 543 (7th Cir.), *cert. denied*, 419 U.S. 1048 (1974).

[94] *Id.* at 550-51.

[95] *Id.* at 551.

[96] Extortion is "[t]he obtaining of property from another induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." BLACK'S LAW DICTIONARY 525 (rev. 5th ed. 1979).

Hobbs Act proscribes, and bribery,[97] which it does not address. This permits prosecution under the Act whether the defendant has passively accepted a payment or actively threatened a victim for the purpose of extortion.[98] This was the case in *United States v. Jannotti*,[99] one of the infamous ABSCAM prosecutions. *Jannotti* resulted from the Federal Bureau of Investigation's (FBI) brief foray[100] into the City of Philadelphia, and provides an example of a Hobbs Act prosecution in which (1) the effect on interstate commerce is so unrealistic as to be ephemeral; and (2) the necessity of the element of coercion to prove extortion is overlooked. Jannotti was a member of the City Council, and his codefendant, Schwartz, was the Council's president.[101] The FBI agents, posing as representatives of the now famous and nonexistent "Arab Sheik," told the defendants the "Sheik" was interested in building a hotel in their city.[102] Eventually, the defendants accepted money from the "Sheik's" representatives.[103]

Putting aside the defendants' moral turpitude, the fact remains that, whether or not Jannotti and Schwartz accepted money, the hotel never would nor could have been built. It was for this reason that District Court Judge John P. Fullam dismissed the substantive Hobbs Act counts before trial, "reasoning that there was no possibility that

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[97] Bribery is "[t]he offering, giving, receiving, or soliciting of any thing of value to influence action as an official or in discharge of legal or public duty." *Id.* at 173.

[98] *See supra* note 70. This phenomenon, the allegedly unnecessary distinction between bribery and extortion, insofar as Hobbs Act prosecutions are concerned, was premised by a former United States Attorney. *See* Stern, *supra* note 70. It was adopted by the Third Circuit in United States v. Kenny, 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972); *see also* United States v. Jannotti, 673 F.2d 578, 624 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982); United States v. Cerilli, 603 F.2d 415, 426 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980). In *Cerilli*, Judge Aldisert in dissent urged his colleagues to reconsider this interpretation because the legislative history of the Hobbs Act, whose definition of extortion was based on the New York Penal Code, requires the element of "fear, threat or duress." *Cerilli*, 603 F.2d at 435 (Aldisert, J., dissenting). Judge Aldisert noted that the elimination of this factor denies a Hobbs Act defendant the defense that, if anything was received, it was at the instance of the donor, which is a "logically and jurisprudentially sound" defense. *Id.* "Our tolerance of this prosecutorial legerdemain is an indulgence in jurisprudential anarchy at the expense of basic tenets of criminal law—the presumption of innocence, the government's burden in all prosecutions, and the basic maxim *nullum crimen, nulla poena.*" *Id.* at 436 (Aldisert, J., dissenting).

[99] 673 F.2d 578 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982).

[100] "The ABSCAM show was to play only 10 days in Philadelphia. The operation had to move to another location if fish were not caught." *Id.* at 617 n.20 (Aldisert, J., dissenting).

[101] *Id.* at 580.

[102] *Id.* at 580-88.

[103] *Id.* at 589. This Comment will focus only on the legal reasoning behind the defendants' convictions for conspiracy to violate the Hobbs Act. Neither the entrapment issue, the merits of ABSCAM itself, nor the defendants' moral fiber in accepting money which was not theirs are at issue here.

the bribe payments could actually have affected commerce."[104] A jury found the defendants guilty of the conspiracy charges.[105]

Judge Fullam dismissed the verdict for lack of jurisdiction. He rejected the government's position that because a federal conviction could be premised on the defendants' *perception* that the acts they conspired to do could have had an effect on interstate commerce, that perception also was sufficient to grant federal jurisdiction.[106] Federal jurisdiction, the judge observed, "is not conferred by a defendant's erroneous perceptions." It cannot be conferred by "purely hypothetical potential impacts on commerce which could never occur."[107] Judge Fullam also noted that to permit the convictions to stand "would represent a substantial stretching of the definition of extortion, and a corresponding expansion of federal jurisdiction in derogation of the criminal jurisdiction of state courts."[108]

The Third Circuit, sitting *en banc*, reversed, asserting that federal jurisdiction existed because "the defendants agreed to do acts which, had they been attainable, would have affected commerce." The court found that this implicated "a sufficient federal interest."[109] Judge Aldisert, writing in dissent, noted that the majority's reasoning supports "a conclusion that belief by a listener can somehow convert a speaker's fancy into fact . . . [But] [w]ithout a modicum, or at least a scintilla . . . of '*some* effect on commerce,' the door to the federal courthouse simply cannot be opened."[110]

Judge Aldisert hit upon the fatal flaw in the majority's analysis, and, indeed, the type of analysis used in many Hobbs Act conspiracy cases:[111] the confusion of jurisdictional and substantive law relating to the effect on interstate commerce. While the substantive, or actual, effect *need not* have occurred to successfully prosecute a conspiracy whose end was to have the effect occur, there still must be a realistic possibility that it *could have* occurred in order for the federal interest to be triggered.[112] He recognized the central problem which prompted the thesis of this Comment: "Instead of *proving* the conclusion (pres-

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[104] United States v. Jannotti, 501 F. Supp. 1182, 1184 (E.D. Pa. 1980), *rev'd*, 673 F.2d 578 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982).

[105] *Id.* at 1183-84.

[106] *Id.* at 1184-85.

[107] *Id.* at 1185.

[108] *Id.*

[109] *Jannotti*, 673 F.2d at 592.

[110] *Id.* at 625 (Aldisert, J., dissenting) (emphasis in original).

[111] *See supra* note 70.

[112] *Jannotti*, 673 F.2d at 626 (Aldisert, J., dissenting).

ence of jurisdiction), the [majority's] argument *assumes* it and then argues substantive law. . . ."[113]

IV. THE "COPPER PLATTER"[114] AND MANUFACTURED JURISDICTION

Hobbs Act prosecutions such as *Pacente* and *Jannotti* and Mail Fraud Act prosecutions such as *States* and *Curry* constitute an expansion of the limits of federal jurisdiction beyond any recognizable federal interest. *States* and *Curry* demonstrate not only how such prosecutions unnecessarily burden federal courts, but also how they prejudice defendants by exposing them to much stiffer penalties merely because they were brought to federal rather than state courts. Perhaps the most cogent reason supporting the extension of the *Erie* Doctrine to certain federal criminal prosecutions, however, is illustrated by what one judge[115] has termed the "Copper Platter Doctrine."[116] That is the phenomenon whereby state officers who have seized evidence in violation of their state's standards, thereby precluding its use in state courts, turn over that evidence to federal officers for use in federal prosecutions.[117]

The Copper Platter Doctrine is a reversal of the "Silver Platter Doctrine," which existed before the exclusionary rule[118] was made applicable to the states in *Mapp v. Ohio*.[119] One year prior to *Mapp*, in *Elkins v. United States*,[120] the Supreme Court abolished the Silver Platter Doctrine, and no longer permitted federal agents, who had seized evidence illegally and were barred by the rule from using it in a federal prosecution, to turn it over "on a silver platter" to state

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[113] *Id.* (emphasis in original).

[114] Judge Donald Ziegler of the Pennsylvania Court of Common Pleas gave the name "Copper Platter Doctrine" to the process whereby state law enforcement officers, precluded from using evidence in state courts because it had been illegally seized when measured against the *state's* standards, merely turn it over to federal officers for use in federal court. The "Copper Platter Doctrine" is the reverse of the "Silver Platter Doctrine," abolished by the Supreme Court in Elkins v. United States, 364 U.S. 206 (1960). Ziegler, *supra* note 10.

[115] Donald Ziegler, Court of Common Pleas, Allegheny County, Pa.

[116] *See supra* note 114.

[117] The test of whether the evidence may be used in federal courts is whether the search meets federal constitutional standards, regardless of whether the search was made by state or federal officers. Compare, however, the standard for probable cause to arrest when it is made by state officers but the defendant is prosecuted in federal court. United States v. Di Re, 332 U.S. 581 (1948) (standard of probable cause to arrest determined by state law, provided it meets federal standards, when arrest made by state officers).

[118] The exclusionary rule, by which illegally seized evidence is barred from use at trial, was mandated for federal prosecutions in Weeks v. United States, 232 U.S. 383 (1914).

[119] 367 U.S. 643 (1961).

[120] 364 U.S. 206 (1960).

prosecutors.[121] *Elkins* specifically forbade federal use of evidence seized illegally, according to federal standards, even though federal agents obtained it legally by serving a warrant on the state agents who had committed the illegal seizure.[122] The *Elkins* Court rested its decision to bar the evidence in federal court on the fact that the state court had deemed the evidence to be illegally seized, observing: "To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer."[123] Further, Justice Stewart, writing for the majority, noted that federal admission of the evidence "implicitly invites federal officers to withdraw from [cooperation with state authorities] and at least tacitly [encourages] state officers in the disregard of constitutionally protected freedom."[124] By eliminating the Silver Platter Doctrine, thus making the fruits of a federally unlawful search inadmissible in both federal and state courts, the *Elkins* Court found that "there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered."[125]

The *Elkins* Court, although particularly deferential to states which were trying to protect their citizens' constitutional rights,[126] overlooked the loophole in its holding: evidence seized illegally according to *state* standards may still be admissible in federal court because *Elkins* goes only to whether the search, if conducted by *federal* officers, would violate the Federal Constitution. This lacuna did not go unnoticed by dissenting Justice Frankfurter, who noted that state law violations by law enforcement officers were not relevant to the majority's rule. Thus, Justice Frankfurter continued, the *Elkins* holding would have the result of "creat[ing] undesirable conflict with

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[121] Interestingly, it was the state court in *Elkins* which determined that the evidence had been seized illegally and dismissed the petitioner's indictment. The federal officials then obtained the evidence by warrant and used it to convict Elkins in federal court. *Id.* at 207. But before *Mapp*, states were not required to exclude illegally seized evidence, and not all of them did.

[122] *Id.* at 215.

[123] *Id.* (footnote omitted).

[124] *Id.* at 221-22.

[125] *Id.* at 222.

[126] Justice Stewart wrote:

> The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts. Yet when a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution.

Id. at 221.

valid and praiseworthy state policies which attempt to protect individuals. . . . [C]omity plays no part at all, and the fruits of illegal law enforcement may well be admitted in federal courts directly contrary to state law,"[127] because the police action is tested only by the minimum federal standards. Justice Frankfurter was prophetic in anticipating that the silver platter would be replaced with another utensil:

> A state officer who disobeys [his state's laws] need only to turn his evidence over to the federal prosecutor, who may freely utilize it under [the *Elkins* decision] in disregard of the disciplinary policy of the State's exclusionary rule. I cannot think why the federal courts should thus encourage state illegalities.[128]

This phenomenon, the "Copper Platter Doctrine," grows more serious as state courts expand individual protections through their interpretations of state constitutions.[129] One example[130] of this occurred in *United States v. Scolnick*,[131] in which local police officers, upon arresting the defendant as a burglary suspect, seized from him a key to a safe deposit box.[132] Police obtained a warrant to search the box, but did not comply with a state law requiring the box's lessee to be notified of the impending search and to be given the opportunity to contest it.[133] The police did not find the stolen jewels they sought, but did find $100,000 in cash, which they reported to the Internal Revenue Service (IRS). The IRS put a lien on the box's contents and sealed it, in effect seizing it.[134] Scolnick contested the IRS's action in federal court on the basis of the state's search, which the state had conceded was illegal, but the Third Circuit upheld the search and the use of the evidence because " '[*t*]*he test is one of federal law*.' "[135] Judge Freedman, dissenting in *Scolnick*, stated that the fruits of an illegal state search should not be admissible in federal court, just as the fruits of an illegal federal search are forbidden as evidence in state courts.[136]

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[127] *Id.* at 244-45 (Frankfurter, J., dissenting).

[128] *Id.* at 245-46 (Frankfurter, J., dissenting).

[129] *See* Ziegler, *supra* note 10, at 251.

[130] Another is United States v. Ullrich, 580 F.2d 765, 770 n.4 (5th Cir. 1978) (evidence suppressed in state court as fruits of illegal arrest admissible in federal courts).

[131] 392 F.2d 320 (3d Cir. 1968), *cert. denied*, 392 U.S. 931 (1968).

[132] *Id.* at 322.

[133] *Id.* at 325.

[134] *Id.* at 321.

[135] *Id.* at 325 (quoting *Elkins*, 364 U.S. at 224) (emphasis in original).

[136] Judge Freedman wrote:

> I see no reason why the policy of the state . . . should not be respected, especially by state officers, sworn to uphold the state's laws. To allow them to violate the statute and produce to a federal prosecutor the information thus obtained for use in a

Somewhat akin to the Copper Platter Doctrine, in that it attempts to create federal court jurisdiction—and the imposition of federal law—in derogation of state authority, is the device known as "manufactured jurisdiction." This "artificial federalization of purely state crimes"[137] occurs when federal officials induce or supply an act, such as an interstate telephone call, solely to gain federal jurisdiction. An egregious example of manufactured jurisdiction occurred in *United States v. Archer*.[138] In that case, the United States Attorney's Office for the Southern District of New York, during an investigation into alleged corruption in the Queens, New York, District Attorney's Office, set up a crime to see whether members of the local office could be bribed to drop the charges.[139] To gain jurisdiction, two federal agents, following the orders of an Assistant United States Attorney, went to a hotel in Newark, New Jersey, solely to have one of the defendants engage in an interstate telephone call.[140] The defendants subsequently were indicted and convicted in federal court under the Travel Act,[141] but the Second Circuit reversed the convictions and ordered the indictment dismissed.[142] Judge Friendly, who authored *Archer*, observed that the federal officers' conduct "needlessly injected the Federal Government into a matter of state concern,"[143] and dismissed the case on the ground that the interstate element of a federal offense cannot be manufactured by federal officers.[144]

V. CONCLUSION

This Comment argues in support of applying the laws of a state in federal courts within that state, an application of the *Erie* Doctrine to criminal law. If *Erie* were so applied, the rights a state confers

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federal trial is to lend federal encouragement to the violation by state officers of the laws which control their conduct.

Id. at 328 (Freedman, J., dissenting).

[137] United States v. Jannotti, 501 F. Supp. 1182, 1204 (E.D. Pa. 1980), *rev'd*, 673 F.2d 578 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982).

[138] 486 F.2d 670 (2d Cir. 1973).

[139] *Id.* at 672.

[140] *Id.* at 674.

[141] 18 U.S.C. § 1952 (1982).

[142] *Archer*, 486 F.2d at 672.

[143] *Id.*

[144] *Id.* at 682. The Supreme Court also eschews specious attempts to gain federal jurisdiction, even when such attempts are less blatant than those in *Archer*. In Rewis v. United States, 401 U.S. 808 (1971), for example, the Court observed that overexpansive interpretations of the Travel Act could "alter sensitive federal-state relationships, . . . overextend limited federal police resources, and might well produce situations in which . . . relatively minor state offenses [are transformed] into federal felonies." *Id.* at 812.

upon its citizens could not be denied them by the discretionary authority of federal prosecutors to bring what are essentially state cases in federal courts. This idea may seem cumbersome, and perhaps even bizarre, to some—a sacrifice of simplicity on the altar of "states' rights." It is in fact, however, merely a recognition of what ought to be axiomatic, but what many federal prosecutors have decided to ignore: that federal courts are courts of limited jurisdiction. This somewhat radical approach is offered because past entreaties to save federal courts for federal matters have been ignored.

An analysis of certain prosecutions under the Mail Fraud and Hobbs Acts has shown that the purpose and plain meaning of the statutes in many cases must be tortured beyond recognition in order to find a nexus to federal law. Application of state criminal law in federal courts is simpler, and certainly more intellectually honest, than the mental acrobatics engaged in by federal prosecutors and jurists as they search, for example, for effects on interstate commerce to justify their prosecutions and decisions. It is also a recognition that every individual in this country has two sources of rights and protections, emanating from dual sovereigns. The *Elkins* Court sought a "healthy federalism" by requiring the federal government to respect a state's efforts to uphold the Federal Constitution. But federalism's health is equally jeopardized when the federal government, in effect, may ignore state constitutions and statutes. The rights a state has chosen to confer on its people, as well as the right of a state to prosecute state crimes, are obliterated when the federal government is permitted to misuse federal criminal laws by an expansive interpretation of their scope.

In the abstract, the legal reasoning often used to make a federal statute reach a particular defendant may be seen as an interesting, albeit cumbersome, mental exercise. The reality, however, is that frequently, such "exercises" are engaged in at the expense of an individual's liberty. It is unsettling to realize that federal prosecutors' power to turn minor state offenses into federal felonies gives them broad discretion to determine the degree of punishment to be meted out.

Federal prosecutors, because of their vast powers, should be forced to demonstrate a substantial federal interest before spending federal dollars to investigate and prosecute a crime. If this demonstration cannot be made, and it is determined that federal prosecutors are usurping the authority of their state counterparts, the defendant should not be the one to pay the price by facing less protective rules of law and stiffer penalties.

The choice for prosecutors pursuing criminal actions in a federal forum should be clear: They must either demonstrate that the case involves conduct related to a substantial federal interest, or face the application of state law.

Camille Kenny