GRAPPLING WITH *GEBARDI*: PARING BACK AN OVERGROWN EXCEPTION TO CONSPIRACY LIABILITY

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ABSTRACT

For over a century, the Supreme Court has recognized that someone can conspire to commit a crime that he is not eligible to commit himself. Though this broad rule seeks to prevent the exploitation of statutory loopholes by concerted bad actors, courts have recognized narrow exceptions to this baseline reach of conspiracy liability for nearly as long as the rule itself. One such exception was announced in Gebardi v. United States*, a 1932 Supreme Court case concerning an early human trafficking law that criminalized the act of transporting a woman across state lines for prostitution. The Court held that a woman transported in violation of this law was not guilty of conspiring with her transporter merely because she acquiesced to the journey. In the ensuing decades, lower courts debated the implications of the case for other kinds of criminal conspiracies and reached conflicting interpretations of the* Gebardi *exception—with some deriving broad, categorical exceptions for large classes of actors.*

This Note argues that Gebardi *created only a narrow exception requiring inquiries into both statutory construction and individual intent. While this reading comports with recent Supreme Court discussion of* Gebardi *as a narrow exception, one circuit court has since dismissed that brief treatment and expanded the* Gebardi *exception to its breaking point. This incongruence suggests further clarity and direction are needed to ensure cohesion in an area that could implicate a vast array of criminal statutes.*

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INTRODUCTION

More than one hundred years ago, Justice Oliver Wendell Holmes found it unremarkable that "plainly a person may conspire for the commission of a crime by a third person."[1] For just as long, the Supreme Court has recognized a necessary corollary: even if an actor cannot commit an offense himself under the letter of a statute, he can still be held responsible for conspiring with someone who can.[2]

Conspiracy law's broad scope stems from a recognition that the conspiratorial agreement *itself* is an "offense of the gravest character," which can be more harmful to the public than even the planned offense.[3] Because they are characterized by secrecy and complexity to better "subvert the laws," conspiracies are especially difficult to uncover.[4] This complexity facilitates more wide-ranging and repeated conduct than an individual could achieve alone.[5] In the context of modern white-collar crime—where well-resourced actors operating in complex schemes have ample means of concealing their conduct—the compounded dangers of conspiracy are especially acute.[6]

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1. United States v. Holte, 236 U.S. 140, 144 (1915). A conspiracy to commit a crime is an independent offense in U.S. federal law. 18 U.S.C. § 371 (2018). In its most essential form, the charge of conspiracy at the federal level consists of an agreement to commit an unlawful act and at least one overt act in furtherance of the agreed-to criminal offense. 4 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW §§ 678, 681 (15th ed. 1996).

2. United States v. Rabinowich, 238 U.S. 78, 86 (1915). In the seminal *Rabinowich* case, the Supreme Court upheld the indictments of six defendants for conspiring to conceal property from a bankruptcy trustee, even though several of the coconspirators were not themselves bankrupt and thus could not violate the bankruptcy statute. *Id.* at 87.

3. *Id.* at 88.

4. *Id.*

5. *See id.* (remarking that conspiracies' dangers include "further and habitual criminal practices").

6. *See, e.g.*, Brian Harrison, *Breaking Free from Insanity: A White-Collar Crime Approach to Drug War Policy*, 15 U.D.C. L. REV. 129, 135 (2011) (arguing that prosecutors should investigate an easier category of banks in the anti-money-laundering context because the other category of banks "may have a program that appears fully compliant and any conspiracy, secret in nature, is more difficult to investigate"); Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 993 (2008) ("Certain kinds of cases—drug conspiracies, antitrust, corporate fraud, terrorism—are difficult to investigate or prosecute without [informants], as the government is in a poor position to obtain incriminating information without inside help."); Mark A. Racanelli, *Bugs in the Boardroom? Congress Is Poised To Allow Wiretapping in Federal Antitrust Investigations*, 5 ANTITRUST SOURCE 1, 2 (2006) (noting that wiretaps are useful to uncover "criminal activity by members of tight-knit conspiracies that are difficult to investigate because of the surrounding secrecy fostered by the loyalty of the participants" and that "[m]any . . . would argue that antitrust cartels share these characteristics"); Ioana Vasiu & Lucian Vasiu, *Riders on the Storm: An Analysis of Credit Card Fraud Cases*, 20 SUFFOLK J. TRIAL & APP. ADVOC. 185, 218 (2015) ("[Credit card frauds] often

Just a few decades after articulating these baseline conspiracy principles and their justifications, the Supreme Court faced a puzzling conspiracy prosecution that seemed incompatible with the baseline principle, leading it to carve out a limited exception to conspiracy liability. In the 1932 case *Gebardi v. United States*,[7] the Court considered a conspiracy to violate the Mann Act,[8] which then prohibited transporting "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose," regardless of whether the woman had consented.[9] One of the defendants was a woman who had been so transported, but she had consented to the trip.[10]

The Supreme Court held that a woman who merely consents to be transported in violation of the Mann Act, without more, is not guilty of conspiring with her trafficker to transport *herself*.[11] The Court noted that the transported woman's acquiescence would be present in every case where she acted voluntarily at all, so this minimal participation would be an "inseparable incident" of the "frequent[], if not normal[]" case.[12] Thus, the Court reasoned that Congress could not have meant to punish this "mere consent."[13] And if that acquiescence was an innocent part of the statutory offense, it could not simultaneously constitute its own distinct crime as a conspiratorial agreement to

involve extensive conspiracies, some very sophisticated, crossing over many jurisdictions, which are difficult to prevent or investigate.").

7. Gebardi v. United States, 287 U.S. 112 (1932).

8. White-Slave Traffic (Mann) Act, ch. 395, § 2, 36 Stat. 825, 825 (1910) (codified as amended at 18 U.S.C. § 2421 (2018)).

9. *Gebardi*, 287 U.S. at 118 (quoting 18 U.S.C. § 398 (1932)). The Mann Act has been recodified and amended several times since *Gebardi*, with various components modernized and made gender neutral in 1978 and 1986. *See* 18 U.S.C. § 2421(a) (2018) (codifying the current version of the Mann Act); H.R. REP. NO. 99-910, at 3 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5952, 5953 ("The bill rewrites the Mann Act ('White Slave Traffic') to eliminate its anachronistic features and to make it gender neutral."); S. REP. NO. 95-438, at 3 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 40, 41 ("[T]here is presently no Federal statute prohibiting interstate trafficking in boy prostitutes. The Committee would extend the Mann's [sic] Act provision against juvenile female prostitution to include juvenile males.").

10. *Gebardi*, 287 U.S. at 116.

11. *Id.* at 116, 118, 123.

12. *Id.* at 121–23. The notion of voluntary conduct in criminal law differs significantly from the modern lay understanding. *See* 1 TORCIA, *supra* note 1, § 25 ("An act is 'voluntary' when the bodily movement is the product of conscious effort or determination. Conversely . . . an act is not voluntary when it is performed during unconsciousness, sleep . . . or when it is otherwise not the product of conscious effort or determination." (footnotes omitted)).

13. *Gebardi*, 287 U.S. at 123.

violate the statute.[14] This Note argues that careful examination of the Court's analytical process in *Gebardi* reveals a two-step inquiry for determining whether *Gebardi*'s exception to conspiracy liability applies in a particular case: first, does the criminal statute at issue suggest participation by a third party beyond the principal actor without punishing that third party's conduct; and second, did the defendant charged for that participation have a mens rea beyond "mere consent"?

However, the *Gebardi* Court's opinion is not a model of clarity, in part because it needed to accommodate the background common law of conspiracy and one seemingly contradictory precedent—which had held that a transported woman *could*, at least theoretically, be liable for a Mann Act conspiracy.[15] Because of the *Gebardi* Court's careful dance, subsequent courts have latched onto different aspects of the case and have read it to stand for drastically different propositions.[16] In many of these cases, courts have read *Gebardi* to create an all-or-nothing rule, where certain classes of actors omitted from charging statutes cannot be prosecuted for *conspiring* to violate those laws, regardless of the specific defendant's intent or conduct.[17] Scholarly commentary is not immune to this misreading either, as one recent commenter—even in sorting through the different circuits' treatment of *Gebardi*—argued that *Gebardi* created a categorical exception.[18] The result of this confusion is a patchwork at the margins of conspiracy

14. *See id.* at 121–23 (characterizing such acquiescence in the Mann Act context as an "inseparable incident" of the underlying violation).

15. *See infra* Part I.C.

16. *See infra* Part II.

17. *See infra* Part II. However, not every circuit court application of *Gebardi* has taken this expansive approach. *See, e.g.*, United States v. Spitler, 800 F.2d 1267, 1275–76 (4th Cir. 1986) (affirming a conviction for conspiracy to commit extortion where the subject of the extortion was also a coconspirator instrumental to the extortion, and rejecting *Gebardi*'s application beyond victims who merely acquiesce in the crime); United States v. Southard, 700 F.2d 1, 20 (1st Cir. 1983) (rejecting a proposed argument that *Gebardi* insulated from accomplice liability a gambler charged under a statute proscribing the business of gambling); United States v. Falletta, 523 F.2d 1198, 1200 (5th Cir. 1975) (rejecting a proposed application of *Gebardi* to immunize someone who aided a felon in illegally receiving a firearm).

18. *See* Shu-en Wee, Note, *The* Gebardi *"Principles*," 117 COLUM. L. REV. 115, 126 (2017) (arguing that the "necessity" of a category of actors and their "omission" from statutory liability provide the key levers for the statutory construction inquiry, but neglecting to recognize the additional step of considering the defendant's intent).

law, where prosecuting the same conduct could result in a conspiracy conviction in one circuit but an acquittal in another.[19]

In 2018, a Second Circuit panel in *United States v. Hoskins*[20] exacerbated this confusion further still by relying on *Gebardi* to create an expansive "affirmative-legislative-policy exception" to conspiracy liability.[21] This new exception, derived from language in the *Gebardi* opinion that could be read to suggest a policy rationale for the Court's holding,[22] posits that certain categories of individuals are immune from conspiracy and complicity liability when Congress demonstrates some affirmative policy to leave them unpunished.[23] The Second Circuit, in *Hoskins*, explained that such a policy should be discerned from the statute's text, structure, and legislative history.[24] Accordingly, the panel turned to the legislative history of the substantive offense statute at issue: the Foreign Corrupt Practices Act ("FCPA"), which proscribes various forms of bribery of foreign officials.[25] The court concluded from this history that Congress's policy had been to extend liability only to the categories of defendants enumerated in the statute who were eligible for direct liability.[26]

It was undisputed that these categories did not include the defendant before the court, Lawrence Hoskins, a foreign national who

19. *Compare* United States v. Pino-Perez, 870 F.2d 1230 (7th Cir. 1989) (en banc) (holding that nonemployees of a criminal enterprise can conspire with its leader to violate the Drug Kingpin Statute), *with* United States v. Amen, 831 F.2d 373 (2d Cir. 1987) (holding that only the kingpin can violate the statute and no one can conspire with him to do so).

20. United States v. Hoskins, 902 F.3d 69 (2d Cir. 2018).

21. *Id.* at 77–78, 80, 83.

22. In *Gebardi*, the Court had said, "[W]e perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished." Gebardi v. United States, 287 U.S. 112, 123 (1932).

23. *Id.* This Note deals with a principle that applies to both conspiracy and accomplice (aiding and abetting) liability. While the two theories of liability are distinct, the distinctions are generally not relevant for this Note. *See* United States v. Falletta, 523 F.2d 1198, 1199–1200 (5th Cir. 1975) ("*Gebardi* . . . dealt with the federal conspiracy statute (18 U.S.C. § 371 and its predecessors) rather than the aiding and abetting statute. But we doubt that any distinction can be drawn on that account, since the logic of the argument has identical force in either context."). Accordingly, this Note will primarily use the term "conspiracy" to refer to both modes of liability, except when discussing cases that specifically implicated accomplice liability.

24. *Hoskins*, 902 F.3d at 80.

25. 15 U.S.C. § 78dd-1–dd-3 (2018).

26. *Hoskins*, 902 F.3d at 77–80, 83–95. While this conclusion about the legislative history of the FCPA is debatable, that discussion is beyond the scope of this Note, which focuses instead on the Second Circuit's exception to conspiracy liability and its bases. Suffice it to say, the government contended that explicit references to conspiracy and complicity liability in the historical documents should have controlled this inquiry. *Id.* at 87, 92–93.

had been accused of directing business operatives in the United States to funnel sham consulting payments to Indonesian officials in exchange for a multimillion-dollar contract.[27] And because of the perceived legislative "policy," the court held that actors in Hoskins's position could also never be guilty of *conspiring* to violate the FCPA, regardless of their actual involvement in—let alone *coordination* of—the criminal bribery.[28] The Second Circuit's approach appears to presume that classes of actors not specified by the charging statute are not liable, absent an affirmative reason to *extend* conspiracy liability to the particular class of unmentioned actors that encompasses the defendant. This represents a complete inversion of the presumption articulated by the foundational cases and *Gebardi*: that conspiracy law covers all unspecified actors by default, with only limited exceptions.[29]

Despite the inconsistent readings of the lower courts, the Supreme Court has not weighed in to provide a definitive rule, and it recently failed to seize an opportunity to do so. In *Ocasio v. United States*,[30] the Court provided some insight into its reading of the *Gebardi* exception, but its analysis was too cursory and its guidance incomplete—leaving room for disagreeing lower courts to distinguish their own interpretations. For example, the Second Circuit's contradictory *Hoskins* opinion came two years *after Ocasio*, but dismissed *Ocasio* as relevant only to its statutory context.[31] To repair the division among the circuits, the Supreme Court must provide lower courts with more direct guidance on this interpretive principle.[32] *Hoskins* demonstrates that lower courts are still willing to stretch *Gebardi* further and further from its narrow holding to excuse wide swaths of defendants from conspiracy liability—including some, like Lawrence Hoskins, who orchestrate vast and complex criminal schemes.

This Note argues that *Gebardi* creates only a narrow exception with both a statutory and an individualized inquiry—corresponding to

27. *Id.* at 72.

28. *Id.* at 95; *see also id.* at 77 (acknowledging that "if Hoskins did what the indictment charges, he would appear to be guilty of conspiracy to violate the FCPA," before laying out the court's exception).

29. *See infra* notes 137–44 and accompanying text.

30. Ocasio v. United States, 136 S. Ct. 1423 (2016).

31. *See Hoskins*, 902 F.3d at 83. Subsequent commentary on the *Hoskins* case has been similarly dismissive of *Ocasio*'s import for reading *Gebardi*. *See* Wee, *supra* note 18, at 141 (commenting on the district court's *Hoskins* opinion and tracing the lower courts' disagreement over *Gebardi*'s rule but devoting just two unconnected paragraphs to *Ocasio*'s "cursory treatment" of *Gebardi*).

32. *See infra* Part III.

"when" and "to whom" the exception applies. When a charging statute omits an actor whose participation is an "inseparable incident" of the typical case, courts must examine the mens rea of the specific defendant before them to determine if conspiracy liability fairly reaches that defendant. Properly read, *Gebardi* does not give courts license to explore legislative history or categorically exclude entire classes of actors from conspiracy liability regardless of their actions.

Part I of this Note focuses on *Gebardi*, beginning with discussion of the background common law principles and key precedent on which the *Gebardi* Court relied. Part II then examines how courts have erred by stretching *Gebardi* into a categorical interpretative principle across statutory contexts, including the most recent expansion in *Hoskins*. Part III turns to the Supreme Court's 2016 *Ocasio* opinion for guidance and elaborates on the Court's reasoning to develop a functional "mens rea approach" for assessing the scope of conspiracy liability as a manageable way to apply the *Gebardi* exception.

I. *GEBARDI* AND ITS BACKGROUND

In *Gebardi*, the Supreme Court relied on and engaged with a few longstanding principles of conspiracy law, as well as one key precedent dealing specifically with the Mann Act. None of this preexisting law, however, was sufficient to resolve the case before the Court. The cases that have engaged most meaningfully with *Gebardi* have likewise engaged with this background—or have erred in considering *Gebardi* while neglecting this crucial material.[33] Thus, understanding the nuances of the *Gebardi* opinion and how subsequent courts have misread it first requires exploring these background principles and precedent. After laying the foundation of the common law doctrine in Section A and the precedent in Section B, this Part turns to unpacking the *Gebardi* opinion itself in Section C.

A. Unspecified Actors and Wharton's Rule

American courts have long recognized the principle that began this Note: an actor can conspire with someone to commit an offense he is not eligible to commit himself.[34] In *Gebardi*, the Court recognized this principle as a preliminary hurdle to exempting from conspiracy

33. *See infra* Part II.

34. *See supra* notes 1–2 and accompanying text.

liability a woman transported in violation of the Mann Act.[35] This principle does admit some exceptions though, including one similarly long-standing common law rule: Wharton's Rule.

Wharton's Rule, named after the influential treatise author who articulated it, provides that an agreement to commit a crime necessarily requiring consensual participation by two people cannot be prosecuted as a separate conspiracy;[36] the agreement merges with the crime itself. Typically, criminal law treats an agreement to commit a criminal act independently and separately punishable from the commission of the criminal act itself.[37] Wharton's Rule is thus an exception to this normal framework, where one offense includes both a criminal act and an agreement to commit that act.[38]

This Rule governs many typical purchase-and-sale crimes, in addition to several (now obsolete) sexual crimes, like adultery and fornication.[39] Beyond the logical merger of the conspiratorial agreement with the crime, courts and commenters have also observed an additional justification for Wharton's Rule: agreements to commit

35. Gebardi v. United States, 287 U.S. 112, 120–21 (1932) ("Incapacity of one to commit the substantive offense does not necessarily imply that [s]he may with impunity conspire with others who are able to commit it.").

36. 2 FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW § 1339, at 175 (Phila. Kay & Brother, 9th ed. 1885) ("[P]lurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained.").

37. Iannelli v. United States, 420 U.S. 770, 777 (1975); 1 TORCIA, *supra* note 1, § 24. The concept of merger stems from the common law, where a misdemeanor conspiracy would be subsumed within the greater charge of the substantive felony that was its aim. *Iannelli*, 420 U.S. at 777 n.11; *see also* Callanan v. United States, 364 U.S. 587, 589–91 (1961) (providing further detail on the procedural differences at common law between misdemeanors and felonies which justified merger doctrine). When conspiracy became a recognized felony on its own, the law evolved such that the offenses are now separately cognizable. *See Iannelli*, 420 U.S. at 781 n.13 (discussing scholars' change in attitude towards conspiracy merger in the latter half of the nineteenth century).

38. *Iannelli*, 420 U.S. at 779, 781–82.

39. *See, e.g.*, Pinkerton v. United States, 328 U.S. 640, 643 (1946) (recognizing an exception "where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime"); United States v. Katz, 271 U.S. 354, 355 (1926) (holding that where "agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity"); *see also* State v. Law, 179 N.W. 145, 145 (Iowa 1920) ("An agreement to commit an offense, which can only be committed by the concerted action of the two persons to the agreement, does not amount to conspiracy."); Shannon v. Commonwealth, 14 Pa. 226, 227–28 (1850) ("[N]othing is more ridiculous than a conspiracy to commit adultery . . . . [I]t may be said that where concert is a constituent part of the act to be done, as it is in fornication and adultery, a party acquitted of the major cannot be indicted of the minor.").

these kinds of crimes typically do not pose the same dangers to society that conspiracy law is designed to prevent, such as a tendency toward more generalized or sophisticated criminal conduct.[40] This is because the parties to the agreement inherent in these crimes are the only people who participate in the offense, and "the immediate consequences of the crime rest on the parties themselves rather than on society at large."[41] By contrast, conspiracy can be charged separately—and sometimes harshly—precisely because it expands the number of actors involved in a given crime and makes feasible additional crimes beyond that originally contemplated.[42]

B. The Mann Act before Gebardi

Gebardi was not the first Supreme Court case to address conspiracy liability for women transported in violation of the Mann Act. Nearly two decades earlier, in *United States v. Holte*,[43] the Court considered a demurrer to an indictment against a woman transported in violation of the Mann Act.[44] The *Holte* opinion, written by Justice Holmes, distinguished Mann Act violations from the classic Wharton's Rule offenses.[45] While at first blush the Rule may seem to cover the case of a woman transported across state lines—after all, her presence is required to violate the Act—there is a subtle but crucial limitation on the Rule that renders it inapplicable in this context. The Rule requires that the party's consent be *necessary* to effect the crime, but as the *Holte* Court observed, "[t]he substantive offense [proscribed by the Mann Act] might be committed without the woman's consent; for instance, if she were drugged or taken by force."[46]

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40. *Iannelli*, 420 U.S. at 783–84 (citing United States v. Rabinowich, 238 U.S. 78, 86 (1915)); *id.* at 783 n.16 (citing *Shannon*, 14 Pa. at 227).

41. *Id.* at 782–83 (referring specifically to the "classic Wharton's Rule offenses" of adultery, incest, bigamy, and dueling before drawing generalized observations about the harms of such agreements).

42. *Id.* at 778 (citing *Callanan*, 364 U.S. at 593–94).

43. United States v. Holte, 236 U.S. 140 (1915).

44. The classic formulation of Wharton's Rule requires dismissal of the indictment before trial because no set of facts proved could support charging the conspiracy separately from the underlying offense. *Iannelli*, 420 U.S. at 775. However, some more recent courts have "held that the Rule's purposes can be served equally effectively by permitting the prosecution to charge both offenses and instructing the jury that a conviction for the substantive offense necessarily precludes conviction for the conspiracy." *Id.*

45. *See Holte*, 236 U.S. at 145 ("[T]he decisions [holding] that it is impossible to turn the concurrence necessary to effect certain crimes such as bigamy or duelling [*sic*] into a conspiracy to commit them do not apply.").

46. *Id.*

Instead of relying on Wharton's Rule, then, the Court turned to the first common law principle described above—that parties can conspire to commit an offense they cannot commit themselves—and held that it *could be* possible, at least theoretically, for a woman to be guilty of conspiring to violate the Mann Act.[47] This would be the case, the Court hypothesized, if she had suggested the trip, blackmailed the man, and bought the railroad tickets.[48] And because the case arose from the government's appeal from a demurrer, the Court was required to accept the indictment's allegations unless no set of facts could prove the alleged crime. Therefore, the mere possibility that the woman could double as a conspirator was sufficient.[49] *Holte* proved to be an important precedent for the *Gebardi* Court two decades later, but was then largely overlooked in ensuing interpretations of *Gebardi* until the Supreme Court revisited the case in the twenty-first century.[50]

C. The Gebardi *Opinion*

Against this backdrop, in 1932 Louise Rolfe and Jack Gebardi appealed their convictions for conspiring to transport Rolfe across state lines "for immoral purposes"—that is, amorous trysts—in violation of the Mann Act.[51] Because the case had gone to trial, the Supreme Court operated with real facts and was not limited to the realm of mere possibility as it had been in *Holte*.[52] This difference in procedural posture would allow for more nuance in the Court's decision than had been possible in the earlier decision.

The facts at trial indicated that Rolfe and Gebardi, a married man, had been engaged in a sustained affair in Chicago and had travelled by train to Miami, Florida, Jacksonville, Florida, and Gulfport, Mississippi to consummate their illicit romance.[53] Crucially, Gebardi had organized the trips—he had booked the hotel rooms and purchased the

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47. *Id.*

48. *Id.*

49. *See id.* at 144 (noting that the only question presented was "to decide whether it is impossible for the transported woman to be guilty of a crime in conspiring as alleged").

50. *See infra* Part III.A.

51. *See* Gebardi v. United States, 57 F.2d 617, 618 (7th Cir.), *rev'd*, 287 U.S. 112 (1932). As noted above, the Mann Act has since been updated to remove anachronistic elements, such as the criminalization of interstate adultery. *See supra* note 9.

52. *See* Gebardi v. United States, 287 U.S. 112, 117 (1932) ("In the present case we must apply the law to the evidence; the very inquiry which was said to be unnecessary to [reach a] decision in [*Holte*].").

53. *Gebardi*, 57 F.2d at 617–18; *see also id.* at 620 (Alschuler, J., dissenting) (noting that the pair had been "long and intimately acquainted in Chicago").

train tickets.[54] Rolfe had done nothing more than agree to Gebardi's arrangements.[55]

The *Gebardi* Court agreed with Justice Holmes's *Holte* opinion that Wharton's Rule did not apply to Mann Act offenses.[56] It departed from *Holte*, however, in determining that the case could not be disposed of with the common law principle that one who cannot commit the underlying offense can still conspire to commit that offense.[57] Rather, the Court found that this case concerned "something more than an agreement between two persons for one of them to commit an offense which the other cannot commit."[58]

That "something more" involves the unique role of consent in a statute that contemplates a woman's presence as necessary for the crime but does not punish the minimum level of her engagement. Essentially, there are two ways a woman could be transported in violation of the Mann Act: (1) involuntarily, by force or incapacitation, or (2) voluntarily, with some minimal level of acquiescence. For a conspiracy to be possible in the Mann Act context, a woman would have to be, at a minimum, a voluntary actor. But in all cases involving voluntariness, the substantive offense of transporting the woman would require her acquiescence, which is thus an "inseparable incident" of such cases.[59] And in *Gebardi*, this minimum, "inseparable" conduct of merely consenting was the same agreement that was charged as the act of conspiracy itself.[60] Thus, the same principle

54. *Id.* at 617–18 (majority opinion).

55. *Gebardi*, 287 U.S. at 116. While the particular facts of this case—an ongoing affair with multiple rendezvous—might suggest Rolfe's participation was greater than mere consent, the appellate courts do not refer to any further action on her part. *See id.* (noting only that Rolfe "consented to go on the journey and did go on it voluntarily"). Arguably, the Supreme Court's treatment of her participation in terms of merely consenting may have been motivated by a desire to frame the case as the most appropriate vehicle for reform. Notably, such reframing would only be necessary if the Court did not want to directly overrule *Holte*.

56. *See id.* at 122 ("[W]here it is impossible *under any circumstances* to commit the substantive offense without co-operative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy." (emphasis added)). This express distinction in the *Gebardi* opinion was arguably overlooked by the drafters of the Model Penal Code ("MPC"), who used *Gebardi*'s "inseparable incident" language to describe an exception that actually reflects Wharton's Rule. *See* MODEL PENAL CODE AND COMMENTARIES § 2.06 cmt. 6(b) at 324–25, 325 n.82 (AM. LAW INST., Official Draft and Revised Comments 1985) (using the "inseparable incident" language (and citing *Gebardi* for the language) to capture transactional crimes like prostitution, alcohol prohibition, and bigamy).

57. *Gebardi*, 287 U.S. at 120–21.

58. *Id.* at 121.

59. *Id.* at 121–22.

60. *Id.* at 121.

underlying Wharton's Rule would apply with equal force in all of these nonforce cases: the "conspiratorial" agreement would merge with the unpunished conduct of acquiescing to the crime.

Accordingly, the Court held that it "perceive[d] in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished."[61] This statement economically summarizes the Court's observations about this unique facet of the Mann Act: the statute contemplates the woman's bare consent as required in many cases to effect the criminal transportation, but it does not distinguish these cases from totally involuntary transportations; it does not single out the woman involved for punishment simply for being transported, regardless of how she got in the train car. Thus, any conspiracy to violate this unusual kind of statute requires greater participation than the "mere consent" inherent in the principal's underlying violation. Notably, the "legislative policy" language refers only to the Court's conclusion that the statute's structure suggests Congress must have intended this result. In identifying a congressional policy that Louise Rolfe go unpunished, the Court did not consult the statements of legislators, or even a codified pronouncement of legislative purpose. Instead of a searching inquiry of diverse sources for some definitive legislative intent, this reference to "policy" merely stood for the byproduct of examinations of the statute and of Rolfe's role in the crime—revealing in turn when and to whom the exception from ordinary conspiracy liability applies.

In sparing Rolfe (the woman) and Gebardi (her lover-transporter) from conspiracy liability, the Court could have created a bright-line rule and excepted all women transported in violation of the Mann Act from such liability. While this may have been more administrable than the Court's nuanced holding has proven to be, it declined to do so. The Court prefaced its opinion by acknowledging *Holte*, on which the lower court had relied exclusively.[62] But rather than overrule *Holte*, the *Gebardi* Court distinguished it. *Holte* did not apply, the Court said, because the hypothetical circumstances from that case under which a woman could violate the act were not present.[63] Here, Jack Gebardi

61. *Id.* at 123.

62. *Id.* at 116.

63. *See id.* at 117 ("In the present case we must apply the law to the evidence; the very inquiry which was said to be unnecessary to [reach a] decision in [*Holte*].").

had purchased the train tickets, and there was no evidence that Rolfe "was the active or moving spirit" in the crime.[64]

Thus, properly read, *Gebardi* calls for a two-part inquiry. First, it will only apply where a statute criminalizes some aspect of a transaction in which one actor's consent is an "inseparable incident" of that conduct but is not expressly punished.[65] If that prong is met, courts must then determine whether their specific defendant's participation constituted "mere consent" or "the active or moving spirit" of the crime.[66] While the Court did not clarify exactly *when* an actor's conduct tips over into evidencing a "moving spirit," the hypothetical situation in *Holte*—which the *Gebardi* Court quoted in full—provides a useful example: a woman would be liable where she suggested the trip, intending to blackmail the man, and purchased the railroad tickets.[67] This example demonstrates that initiative, corrupt motive, and conduct beyond the act of agreeing to the criminal transaction are relevant factors in determining whether an actor was the "moving spirit." And while lower courts have undertaken various alternative and flawed interpretations of *Gebardi* in the intervening years,[68] this "mens rea approach," focusing on the level of willfulness implicitly envisioned by the statute and actually exhibited by a defendant, has recently found support in the Supreme Court. The next Part of this Note dives into the circuit courts to unpack the myriad flawed approaches, before Part III returns to the Court for support.

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64. *Id.*

65. At least one previous commenter has noted that the *Gebardi* exception acts as a principle of construction for criminal statutes. *See* Wee, *supra* note 18, at 126 ("The *Gebardi* principle as first introduced in the *Gebardi* case is arguably a rule of construction . . . ."). However, Wee erred in determining that this rule of statutory construction concluded the inquiry if it yielded a necessary class of actors omitted from liability. *See id.* (arguing that "necessity" and "omission" provided the key levers for the statutory construction inquiry). As this Note argues, *Gebardi* does not support categorical exclusions based *purely* on an actor's status, without subsequent inquiry into a defendant's mens rea. Wee's error, then, stems principally from attributing insufficient weight to the *Gebardi* Court's distinguishing *Holte* without overruling that opinion. *See id.* at 126 & n.82 (arguing for *Gebardi* as a rule of categorical exclusion while acknowledging in a footnote that the *Gebardi* case itself only excepted women "*to the extent* that the woman transported did not display the initiative and proactivity contemplated in *Holte*" (emphasis added)).

66. More precisely, courts would make this determination in judging the sufficiency of an indictment, or on postconviction appeal to determine the sufficiency of the evidence, but juries would make this determination at trial.

67. Gebardi v. United States, 57 F.2d 617, 618 (7th Cir.), *rev'd*, 287 U.S. 112 (1932).

68. *See infra* Part II.

II. *GEBARDI*'S GROWTH IN THE CIRCUIT COURTS: THE DRUG KINGPIN STATUTE AND THE FOREIGN CORRUPT PRACTICES ACT

Some later courts apparently heeded *Gebardi*'s emphasis on intent and conduct,[69] but many others did not. And over the course of the intervening eighty-six years, some courts have invoked *Gebardi* for a much broader exclusion from liability than is justified by the Supreme Court's opinion. This is the wrong approach. To demonstrate the divergent paths taken, this Note will focus on two contexts where more than one federal appellate court has addressed *Gebardi*'s application.[70]

Two statutes in particular have generated multiple cases that have reached the circuit courts, and each has produced conflicting interpretations of *Gebardi*'s exception. First, in the late 1980s, multiple courts faced *Gebardi*-based challenges to indictments for conspiring to violate the Continuing Criminal Enterprise ("CCE") statute, which provides harsher penalties for individuals who supervise a large-scale drug operation, on top of what the individual drug transactions themselves might yield. Second, the FCPA has seen *Gebardi* challenges reach the appellate courts twice—both with potentially significant results for the Department of Justice's charging policy in this infrequently litigated area.

A. The Continuing Criminal Enterprise—"Drug Kingpin"—Statute

The CCE statute—also known as the "drug kingpin" statute—subjects leaders of drug organizations with at least five subordinates to additional prosecution beyond mere participation in a continuing criminal enterprise.[71] These kinds of organizations present precisely

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69. *See supra* note 17 (collecting cases).

70. A third context, Hobbs Act extortion, is considered *infra* Part III.A., when discussing the Supreme Court's missed opportunity to resolve the disuniformity.

71. The relevant text of the statute provides:

> (b) Life imprisonment for engaging in continuing criminal enterprise
>
> Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a), if—
>
> (1) such person is the principal administrator, organizer, or leader of the enterprise . . . .
>
> (c) "Continuing criminal enterprise" defined
>
> For purposes of subsection (a), a person is engaged in a continuing criminal enterprise if—
>
> (1) he violates any provision of this subchapter . . .
>
> (2) such violation is a part of a continuing series of violations . . .

the dangers that conspiracy law is designed to combat: secret, complex, and repeated criminal activity. The question several courts faced was whether other actors besides the kingpin could conspire with him to violate the CCE. Courts quickly determined that the statutorily required subordinates—the enterprise's "employees"—could not conspire with the kingpin to help him achieve kingpin status; such a result would effectively convert the statute into a general enterprise-participation law.[72] The more divisive question, however, was whether individuals *outside* the enterprise—"nonemployees"—could conspire with the kingpin.

In *United States v. Amen*,[73] the Second Circuit held that a nonemployee of a criminal enterprise could never conspire to violate the kingpin statute.[74] The court reasoned that the statute was meant only to more severely punish an organization's leader—no one else.[75] While this holding may seem sensible, the court reached it in part by relying on a mistaken reading of *Gebardi*'s holding. The court first identified two classes of actors apparently considered by the CCE statute: the "top brass" and the "lieutenants and foot soldiers."[76] It then cited *Gebardi* for the overbroad proposition that "[w]hen Congress assigns guilt to only one type of participant in a transaction, it intends to leave the others unpunished for the offense."[77] And because Congress had only defined punishment in the CCE statute for "those who lead," it followed—in the court's view—that Congress necessarily excluded "those who do not lead."[78] The Second Circuit then supported this finding with an extensive discussion of the legislative history of the CCE statute and what it viewed as the practical

> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management . . . .

Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 848(b)–(c) (2018) (emphasis added).

72. *See, e.g.*, United States v. Ambrose, 740 F.2d 505, 507 (7th Cir. 1984) ("Congress, in establishing such harsh penalties for being a drug kingpin, could not have intended to subject mere aiders and abettors [such as those who the kingpin organizes, supervises, or manages] to equivalent penalties. . . . Otherwise there would be no differential punishment for the kingpin.").

73. United States v. Amen, 831 F.2d 373 (2d Cir. 1987).

74. *Id.* at 381.

75. *Id.*

76. *Id.* (quoting Garrett v. United States, 471 U.S. 773, 781 (1985)).

77. *Id.* (citing Gebardi v. United States, 287 U.S. 112, 123 (1932)).

78. *Id.*

difficulties of distinguishing employees from nonemployees in this context.[79]

This inaccurate rendering of *Gebardi* errs twice: first, by eliding that opinion's nuance and casting its holding as a bright-line rule; and second, by applying *Gebardi* to actors whose conduct is entirely severable from the statutory offense. As previously described,[80] *Gebardi did not* draw blanket distinctions between "transporter" and "transported" and then conclude that a transported woman could never be a coconspirator. It follows, then, that the *Amen* court's categorization of "leaders" and "non-leaders" misses *Gebardi*'s emphasis on individual conduct and intent. More fundamentally, though, applying *Gebardi* to the question of CCE nonemployees *at all* skips over the preliminary inquiry into how common or necessary these actors' participation is—that is, whether their agreement is ever an "inseparable incident" that merges with the substantive offense. Plainly, the statute contemplates the CCE employees' participation, but it says nothing about those external to the enterprise, so their agreement would never merge with the offense. That is, their participation would never constitute the same conduct made illegal by the CCE and would always be a separate act.

The effect of the Second Circuit's interpretation is thus to *invert* the *Gebardi* exception. Rather than identifying specific defendants who are *excluded* from the default presumption of eligibility for conspiracy liability, the Second Circuit's version identifies a specific class alone who are *included* in liability to the exclusion of all others, effectively closing off all conspiracy and complicity liability under this statute. This inversion drastically expands the exception's scope—to the point of potentially swallowing the rules of conspiracy and complicity whole.

Three years later, in *United States v. Pino-Perez*,[81] the Seventh Circuit faced virtually the same question the Second Circuit had—but reached the opposite conclusion. There, Judge Posner, writing for the en banc court, declined to apply *Gebardi* to exculpate nonemployees who conspired with the kingpin, despite the fact they were not covered

79. *Id.* at 381–82. The court deemed such a distinction "unworkable" and provided examples of various actors to illustrate its point: the kingpin's lawyer, his bodyguard, and a businessman who leases the kingpin a boat for smuggling. *Id.* at 382.

80. *See supra* notes 61–64 and accompanying text.

81. United States v. Pino-Perez, 870 F.2d 1230 (7th Cir. 1989) (en banc).

by the letter of the CCE statute.[82] He read *Gebardi* to stand for the principle that "members of a group that the criminal statute seeks to protect . . . cannot be charged as an aider and abettor."[83] Thus, Judge Posner still read *Gebardi* incorrectly as creating a kind of categorical exception. His exception just inserted a different category from the *Amen* court: excepting a protected class rather than simply an omitted one.[84]

Just like the Second Circuit in *Amen*, the Seventh Circuit here made no mention of either *Gebardi*'s emphasis on acquiescence or that *Gebardi* exempted only some transported women. But even though this "protected class" reading of *Gebardi* was incorrect, it nonetheless resulted in the same outcome as a proper reading: the exception from conspiracy liability does not apply to CCE nonemployees. After dismissing *Gebardi*'s application to nonemployees, the Seventh Circuit proceeded to issue the straightforward holding that people who aid a kingpin and are not "supervised, managed, or organized by him" *could* be liable for aiding and abetting the kingpin.[85]

The Seventh Circuit engaged directly with *Amen* while recognizing—and criticizing—its contrary outcome.[86] In fact, the court pointed out that no cases outside the Second Circuit had held the aiding and abetting statute "totally inapplicable to a federal criminal statute."[87] Judge Posner pointed out the dramatic implications of the Second Circuit's version of the *Gebardi* exception:

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82. *Id.* at 1231.

83. *Id.* at 1232.

84. Notably, the MPC cited *Gebardi* to support this very proposition, though only with a "*cf.*" signal and only as support in addition to the classic statutory rape case of *Regina v. Tyrrell*, [1894] 1 Q.B. 710 (Eng.). MODEL PENAL CODE AND COMMENTARIES § 2.06 cmt. 9(a) at 324 n.74 (AM. LAW INST., Official Draft and Revised Comments 1985). While the outcome of *Gebardi* certainly aligns with the victim-protection principle of the MPC and *Tyrrell*, this Note's position is that its reasoning and nuanced holding do not support such a standalone victim exception.

Some courts have advanced this "protected class" exception with more nuance, accounting for a defendant's particular mens rea and conduct. *See, e.g.*, United States v. Spitler, 800 F.2d 1267, 1275–76 (4th Cir. 1986) (reading *Gebardi*'s holding to include that "[w]hen an individual protected by such legislation exhibits conduct more active than mere acquiescence . . . he or she may depart the realm of victim and may unquestionably be subject to conviction for aiding and abetting and conspiracy"). In *Spitler*, the court affirmed a conspiracy conviction for the subject of a Hobbs Act extortion because he could not "be deemed a mere extortion victim whose conduct . . . Congress chose not to criminalize." *Id.* at 1275.

85. *Pino-Perez*, 870 F.2d at 1232. This holding created a direct split with the Second Circuit, which remains unresolved today.

86. *Id.* at 1233.

87. *Id.*

> It would introduce great uncertainty into federal criminal law if the liability of a conceded aider and abettor depended on the results of an inquiry into Congress's intent concerning such liability in creating the offense. . . . Yet that is the inquiry required by *Amen*. . . . [*Amen*] could even be interpreted to mean that unless a specific intent to punish aiders and abettors appears in the legislative history of a criminal statute . . . aiding and abetting violations of the statute is not a crime. That approach would essentially abolish federal aider and abettor liability.[88]

While the *Pino-Perez* court also acknowledged the *Amen* court's practical concerns[89]—that is, its "rhetorical questions and classroom-type hypotheticals"—it found that the well-established standard for aiding-and-abetting liability took care of these line-drawing issues.[90] That standard, articulated a half century earlier by Judge Learned Hand in *United States v. Peoni*,[91] provides that an aider and abettor must "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."[92] This "Learned Hand Standard" would prevent, for example, a policeman who participated in an isolated incident of gang protection from being prosecuted as a kingpin's accomplice, because "[a]iding and abetting implies a fuller engagement with the kingpin's activities."[93] Thus, *Pino-Perez* illustrates not only that there are multiple ugly patches in the *Gebardi* quilt, but also that conspiracy and complicity law may already have built-in mechanisms to address concerns with the potential for unfair expansion of conspiracy liability—undermining one of the Second Circuit's primary justifications for its broad reading of *Gebardi*.

B. The Foreign Corrupt Practices Act

The second statute to which multiple appellate courts have applied some version of *Gebardi*'s exception is the Foreign Corrupt Practices Act. The FCPA prohibits three specific kinds of defendants from

88. *Id.* at 1234. Of course, Judge Posner's concerns regarding legislative history have been amplified famously by Justice Scalia, who observed, "In any major piece of legislation, the legislative history is extensive, and there is something for everybody." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 36 (1997).

89. *Pino-Perez*, 870 F.2d at 1235.

90. *Id.*

91. United States v. Peoni, 100 F.2d 401 (2d Cir. 1938).

92. *Id.* at 402.

93. *Pino-Perez*, 870 F.2d at 1237.

offering bribes (payments or "anything of value") to foreign officials and political parties.[94] While the *Amen* and *Pino-Perez* courts had faced virtually the same question over *Gebardi*'s application in the CCE context, *Gebardi* has been invoked in two very different contexts under the FCPA. First, the Fifth Circuit considered the liability of bribe takers, as opposed to bribe payors, in *United States v. Castle*.[95] And most recently, the Second Circuit's *Hoskins* opinion addressed the liability for foreign actors who worked with Americans to bribe officials.

In the two-paragraph *Castle* decision, the Fifth Circuit easily affirmed the district court's conclusion that two Canadian officials could not be liable for conspiracy to violate the FCPA and expressly adopted the lower court's opinion as its own.[96] There, the Canadian defendants allegedly received bribes from the U.S.-based Eagle Bus Company in exchange for a contract to provide exclusive bus service for the Saskatchewan provincial government—an arrangement the court acknowledged was plainly within the terms of the FCPA.[97] The Fifth Circuit, via the adopted district court opinion, relied exclusively on *Gebardi* and the FCPA's text and legislative history to reach its holding.[98]

Contrary to the drug-kingpin cases discussed above, the adopted district court opinion paid attention to the nuances of the *Gebardi* opinion—or at least attempted to.[99] But even though the court recognized *Gebardi*'s emphasis on "acquiescence,"[100] it failed to

94. *See* 15 U.S.C. §§ 78dd-1–dd-3 (2018) (prohibiting, in turn, issuers of securities on American exchanges, "any domestic concern," or any person acting "while in the territory of the United States"—or any employees or agents of these—from making the payments described).

95. United States v. Castle, 925 F.2d 831 (5th Cir. 1991) (per curiam).

96. *Id.* at 831–32. Even when counting the district court's order, as appended to the appellate decision, the entire opinion is an economical six pages.

97. *Id.* at 832. Specifically, the FCPA prohibits making "an offer, payment, promise to pay, or authorization of the payment of any money—" to "any foreign official" with the purpose of "influencing any act or decision of such foreign official in his official capacity." 15 U.S.C. § 78dd-1.

98. *Castle*, 925 F.2d at 832–36 (referencing only *Gebardi*, the FCPA statute, and legislative history).

99. Indeed, the trial court devoted two of its order's five pages to discussion of *Gebardi*. *See id.* at 832–33 (discussing *Gebardi*).

100. *See id.* at 833 ("Yet the [Mann] Act did not make *the woman's consent* a crime. . . . Congress evinced an affirmative legislative policy 'to leave *her acquiescence* unpunished.' A necessary implication . . . was that the woman's *agreement to participate* was immune." (emphasis added) (citation omitted) (quoting Gebardi v. United States, 287 U.S. 112, 123 (1932))).

attribute any significance whatsoever to this qualification, and it failed to acknowledge the "moving spirit" language in the opinion. Moreover, the court inaccurately suggested that both the FCPA and the Mann Act punished conduct which "necessarily involved the agreement of at least two people";[101] in fact, *neither* statute's prohibited conduct *necessarily* requires such agreement.[102] If they did, Wharton's Rule would control. But the *Gebardi* Court was clear that the use of force or threat would effectuate a Mann Act violation without agreement,[103] and the FCPA can be violated by a mere unsolicited offer of a bribe.[104] Nonetheless, the *Castle* court interpreted *Gebardi*'s principle as vindicating congressional intent to exempt from liability one party necessary to an agreement.[105] The court ultimately concluded this principle "squarely applie[d]" to immunize foreign officials who accept bribes from all derivative FCPA liability.[106]

Finally, and perhaps most fatally, the *Castle* court determined that the *Gebardi* Court could not have been concerned with only a "protected" class, because the Court had "built its analysis on Congress' clear intention . . . to exempt the transported women from *all* prosecutions for their involvement in the prohibited activities."[107] While the "protected class" reading of *Gebardi* may not be the most accurate,[108] the Fifth Circuit's repudiation of this theory is nonetheless entirely incompatible with the *Gebardi* opinion itself. *Gebardi*, for better or for worse, declined to overrule *Holte* and explicitly left room

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101. *Id.*

102. Michael F. Dearington, Ocasio v. United States*: The Supreme Court's Sudden Expansion of Conspiracy Liability (And Why Bribe-Taking Foreign Officials Should Take Note)*, 74 WASH. & LEE L. REV. ONLINE 204, 223–24 (2017) (supporting the *Castle* decision while conceding it was "doubly incorrect" in reaching this conclusion and that it "overstated the strength of [the legislative history] argument").

103. *Gebardi*, 287 U.S. at 122.

104. *See* 15 U.S.C. § 78dd-1 (2018) ("It shall be unlawful . . . to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an *offer*, payment, promise to pay, or authorization of the payment of any money . . . ." (emphasis added)); *cf.* United States v. Sanjar, 876 F.3d 725, 744 (5th Cir. 2017) (holding that Wharton's Rule did not apply to the context of the Anti-Kickback Statute ("AKS") and thus did not cause that violation to merge with a separate conspiracy charge because it is possible to violate the AKS just by soliciting a kickback; cooperative action was not necessarily required).

105. *Castle*, 925 F.2d at 833.

106. *Id.* Thus, the Fifth Circuit expressly rejected the argument that *Gebardi* only exempted "protected" persons—the position the Seventh Circuit had enunciated in the *Pino-Perez* decision just two years prior. *See id.*; *supra* note 83 and accompanying text.

107. *Castle*, 925 F.2d at 833–34.

108. *See supra* notes 81–85 and accompanying text.

for a woman transported in violation of the Mann Act to be prosecuted under certain circumstances; namely, where she was "the active or moving spirit."[109] Thus, because the Supreme Court actually *had* been willing to draw finer distinctions within the broad class of "transported women"—contrary to the Fifth Circuit's assertion—it is entirely consistent that the *Gebardi* exception applies to only a subset of the actors whose conduct could be an "inseparable incident," be it a transported woman or a foreign bribe taker.

Applying a correct reading of *Gebardi* to the FCPA bribe-taker context, then, leads to the conclusion that a foreign official theoretically could be liable for conspiracy if he did more than merely acquiesce to the offer of a bribe. At step one, the *Gebardi* exception should apply to the FCPA. Like the Mann Act, the FCPA does not *necessarily* require another person's agreement, but certainly contemplates that agreement in the typical case. Bribes may be offered with no expectation of return, but the FCPA does specifically encompass and contemplate quid pro quo arrangements as the typical violations, which would involve some agreement from the bribe recipient.[110] And because agreeing to accept a bribe would be an "inseparable incident" of the FCPA offense itself, that mere agreement could not be charged as a conspiracy. Step two of the inquiry would then call for examination of the defendant's mens rea and level of participation in the scheme, an inquiry which could very well implicate corrupt foreign officials as conspirators.

Because the FCPA is litigated so infrequently, the *Castle* decision has stood as the de facto authority on the question of liability for bribe-taking foreign officials. The government has even incorporated the decision into its FCPA Resource Guide.[111] For the same reason, it would take another twenty-seven years for an appellate court to consider the statute's application to a different class of actors in *Hoskins*.

In 2015, the United States indicted Lawrence Hoskins for conspiring to bribe Indonesian officials into awarding a $118 million

109. *See* Gebardi v. United States, 287 U.S. 112, 117 (1932).

110. *See, e.g.*, 15 U.S.C. § 78dd-1(a)(1)(A)(ii) (2018) (prohibiting payments or offers to induce a foreign official "to do or omit to do any act in violation of [his] lawful duty").

111. Dearington, *supra* note 102, at 224–25; U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 48–49 (2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [https://perma.cc/GUB2-7FLC] (citing *Castle* for the guidance that "foreign officials cannot be prosecuted for FCPA violations").

contract to an American company.[112] Hoskins, a U.K. citizen, was a Senior Vice President for the French power giant Alstom S.A.[113] The bribery scheme centered, however, on Alstom's American subsidiary, Alstom Power, Inc. ("Alstom U.S.").[114] While Hoskins was never employed by the Connecticut-based Alstom U.S., the government alleged that he worked closely with this subsidiary to develop and implement the bribery scheme.[115] Specifically, he approved the selection of two consultants and authorized payments to them from Alstom U.S.[116] Hoskins knew, the government contended, that these consultants were then steering these payments to Indonesian officials in exchange for their influence and assistance with awarding the massive contract.[117] Several parts of the scheme were alleged to have taken place in the United States, although Hoskins himself remained abroad throughout its duration.[118]

While the Second Circuit acknowledged that the FCPA plainly prohibited the alleged scheme,[119] it determined that the FCPA prohibited the conduct of only three specific categories of defendants: (1) companies traded on a U.S. stock exchange and their agents, (2) American companies and persons, and (3) foreign persons or businesses acting while in the United States.[120] Hoskins—a foreign citizen, working abroad, for a foreign company—was none of these. Thus, he was incapable of violating the FCPA *directly*.[121]

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112. United States v. Hoskins, 902 F.3d 69, 72 (2d Cir. 2018). Hoskins's coconspirators were charged separately. Third Superseding Indictment at 1, 2, 6, United States v. Hoskins, No. 3:12-cr-00238-JBA, 2015 WL 11018855 (D. Conn. Apr. 15, 2015).

113. Hoskins worked directly for Alstom U.K., a subsidiary of Alstom S.A., and was also assigned to Alstom Resources Management—a France-based division of Alstom S.A.—during the conspiracy. *Hoskins*, 902 F.3d at 72.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 77 (acknowledging that "if Hoskins did what the indictment charges, he would appear to be guilty of conspiracy to violate the FCPA," before laying out the court's exception).

120. *Id.* at 71.

121. The government also charged Hoskins with other substantive offenses including money laundering, which were not dismissed, and also alleged an alternative theory of FCPA liability that would not implicate the court's exception. *Id.* at 72–73 (listing the seven indictment charges on appeal); *id.* at 98 (allowing certain counts to proceed). Under this theory, Hoskins acted as an *agent* of Alstom U.S., which would make him one of the statutorily-specified actors. *See id.* at 97–98 (describing the government's alternative theory); 15 U.S.C. § 78dd-2(a) (prohibiting the conduct of "domestic concern[s]" and their "employee[s]" and "agent[s]"). This would thus remove him from the protection of even the Second Circuit's broad exception. *Hoskins*, 902 F.3d

Despite acknowledging that the government's theory[122] rested on the "firm baseline rule" that began this Note—that a person may be liable for a conspiracy even though he could not have committed the substantive offense[123]—the Second Circuit relied on *Gebardi* and its earlier *Amen* decision to announce its affirmative-legislative-policy exception to conspiracy liability.[124] In deriving this exception, this opinion provided one of the most extensive appellate court discussions of *Gebardi* since that decision was issued, but nonetheless missed the mark on two of its fundamental takeaways. The first error expanded *when* this inquiry should be conducted, while the second error expanded *who* gets excluded under a given statute.

The first major error relates to assessing which statutes are appropriate candidates for the *Gebardi* exception. The *Hoskins* panel dismissed the *Gebardi* Court's focus on a statutory offense with "inseparable incidents" and instead derived from the case an invitation to forage for a legislative policy to *exclude* classes of actors from conspiracy liability in any case where the underlying statute explicitly punishes some other class. The court initially conceded that the firm baseline rule of conspiracy law would generally foreclose the court's policy search.[125] To overcome the baseline rule, the court relied on language from *Gebardi* indicating that the circumstances of that case presented "something more than an agreement between two persons for one of them to commit an offense which the other cannot commit."[126] But recall that the *Gebardi* Court's analysis that the case involved "something more" was simply a recognition of the interaction between the conspiracy statute and the underlying Mann Act offense: that a woman's acquiescence was an "inseparable incident" in all cases where a woman was transported voluntarily,[127] and therefore the two

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at 98 ("Provided that the government makes this showing [of agency], there is no affirmative legislative policy to leave his conduct unpunished . . . ."). This Note is only concerned with the government's primary theory and the heart of the Second Circuit's opinion: conspiracy to violate the FCPA by an actor not formally affiliated with the principal bribe offeror.

122. *Hoskins*, 902 F.3d at 73, 78 (discussing the government's original motion in limine and then its argument on appeal).

123. *Id.* at 77.

124. *Id.* at 77, 80.

125. *Id.* at 80 (acknowledging that the baseline rule mandates that "we cannot identify [an affirmative legislative policy] whenever a statute focuses on certain categories of persons at the exclusion of others").

126. *Id.* (quoting Gebardi v. United States, 287 U.S. 112, 121 (1932)).

127. *Gebardi*, 287 U.S. at 123.

offenses would merge where a conspiracy was based only on that "mere acquiescence."

To be sure, the *Hoskins* court acknowledged the role that this "something more" language played in the *Gebardi* opinion.[128] But rather than accepting it as merely the threshold inquiry used to determine *when* to consider applying the *Gebardi* exception—when the statute includes an unpunished "inseparable incident"—the Second Circuit took the standalone phrase "something more" out of context as nonspecific criteria sufficient to circumvent the baseline rule and search for any evidence of legislative intent to exclude a class of actors from liability.[129] The court analogized the "something more" language in *Gebardi* with what it viewed as the distinctive consideration in its prior *Amen* decision: a legislative policy to punish "the top brass in the drug rings, not the lieutenants and foot soldiers."[130] This extraordinarily broad conception of the element necessary to remove a case from the typical parameters of conspiracy law demonstrates that the Second Circuit's "something more" is in fact rudderless as a first step. The court effectively confirmed this assessment by moving past the text of the FCPA and pointing to a policy derived *from legislative history* as the "something more" that purportedly acted as the trigger for the exercise.[131]

To demonstrate the inversion at work here, consider the seminal case cited for the baseline principle that began this Note: *Rabinowich*. That case concerned a conspiracy to conceal assets from a bankruptcy trustee.[132] There are no third parties mentioned in the bankruptcy

128. *See Hoskins*, 902 F.3d at 80 (identifying the "inseparable incident" component of the Mann Act violation in *Gebardi* as the "something more" warranting an exception to conspiracy liability (quoting and citing *Gebardi*, 287 U.S. at 121–23)).

129. Once a court has identified "something more" to enable the inquiry, such a policy is to be derived by looking to "the statute's text, structure, and legislative history." *Id.* at 80–81. It is important to note here that the Second Circuit was faced with a case where conspiracy liability plainly would lie *but for* this or some other doctrine. *See supra* note 119 and accompanying text. Because this was not a case involving an ambiguous statute, further inquiries into legislative intent beyond the statute's text would typically be disfavored. *See* Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.").

130. *Hoskins*, 902 F.3d at 80 (quoting United States v. Amen, 831 F.2d 373, 381 (1987)).

131. *See id.* at 84–85 (reviewing the FCPA's text and structure to find "utter silence" on the question at hand, and then beginning the review of legislative history by observing that "[t]he question thus becomes whether there is 'something more,' a policy basis for Congress to exclude Hoskins's category of defendants from criminal liability"); *id.* at 93 (summarizing that review by noting that "[t]he strands of legislative history demonstrate, in several ways, the affirmative policy described above . . . .").

132. United States v. Rabinowich, 238 U.S. 78, 84 (1915).

statute, and thus the conspiracy defendants—some of whom were not themselves bankrupt—were not all directly liable.[133] In *Rabinowich*, the omission of named third parties from the statute presented no hurdle to the conspiracy prosecution, and the case was allowed to proceed without any consideration of policy or legislative history.[134] Under the Second Circuit's approach, however, there is no initial screen for inseparable incidents. So, instead of applying the default rule as they have for one hundred years, courts would be invited to search for "something more" to justify an exception—some policy to punish the bankrupt alone. To find this, they could explore the text, structure, and legislative history.

The court's second major error concerns the scope of actors excluded in a particular case once a court invokes the *Gebardi* exception. The Second Circuit panel correctly recognized several of the key qualifying aspects of *Gebardi*'s holding—those focusing on individual conduct and intent—when it summarized the case, but failed to accord them any significance when announcing the rule it derived from the Supreme Court's opinion. The *Hoskins* court conceded that *Gebardi* did not exempt all women transported across state lines for illegal purposes, and that the Supreme Court held instead "that Congress intended for the women not to be liable for *at least some class of violations* of the [Mann] Act."[135] Moreover, the *Hoskins* court repeatedly acknowledged *Gebardi*'s emphasis on the woman's consent and acquiescence,[136] and even suggested that holding *rested* on this determination: "*Because* the defendant in *Gebardi* had merely consented to her transportation, the Court ruled that her conviction for conspiracy could not stand . . . ."[137]

Given the repeated recognition of these qualifications, it is odd indeed that the Second Circuit ignored them when it came time to articulate who is eligible for the *Gebardi* exception once it has been invoked. Despite its previous acknowledgments to the contrary, the

133. *Id.* at 84–86.

134. *Id.* at 86–88.

135. *Hoskins*, 902 F.3d at 78 (emphasis added).

136. *E.g.*, *id.* ("[T]he Court determined it could not 'infer that *the mere acquiescence* of the woman transported was intended to be condemned by the general language punishing those who aid and assist the transporter.'" (emphasis added) (quoting Gebardi v. United States, 287 U.S. 112, 119 (1932))); *id.* at 79 ("Congress intended to leave the woman unpunished when she *merely acquiesced* in her own illegal transportation . . . ." (emphasis added)); *id.* ("[T]his *acquiescence* . . . was not made a crime under the Mann Act itself." (omission in original) (emphasis added) (quoting *Gebardi*, 287 U.S. at 121)).

137. *Id.* (emphasis added).

Second Circuit concluded that the only relevant portion of *Gebardi* was the Court's invocation of an "affirmative legislative policy" behind the Mann Act. However, even this language is actually bookended in the original *Gebardi* opinion by qualifying language of criminal intent and participation: "[W]e perceive in the failure of the Mann Act to condemn the woman's participation in those transportations *which are effected with her mere consent*, evidence of an affirmative legislative policy to leave *her acquiescence* unpunished."[138] In announcing its broad affirmative-legislative-policy exception to conspiracy liability,[139] the court made no mention of *Gebardi*'s emphasis on the defendant's participation and intent. Instead, the announced rule excludes defendants from conspiracy liability where "it is clear from the structure of a legislative scheme[140] that the lawmaker must have intended that accomplice liability not extend to certain persons whose conduct might otherwise fall within the general common-law or statutory definition of complicity."[141] The court's descriptions of the affected categories of actors—"certain . . . persons," and the equally unhelpful "some type of participant"[142]—admit no limits. Under this approach, legislative policy, however discerned, is the *only* factor by which classes of actors are identified and selectively excluded from conspiracy liability. While other courts had expanded the scope of excluded actors on a categorical basis, this error is magnified when such determinations are no longer limited to statutes with "inseparable incidents"—a Pandora's Box opened by the court's threshold error. By eliding both steps of the *Gebardi* opinion's two-step inquiry and instead considering only legislative policy for both when and to whom the exception applies, the *Hoskins* court created an exception that

138. *Id.* at 79–80 (emphasis added) (quoting *Gebardi*, 287 U.S. at 123).

139. Ironically, the Second Circuit characterized its exception as "narrowly circumscribed." *Id.* at 77.

140. The court paid homage to "the structure of a legislative scheme" in this articulation of its rule, but recall that the "something more" identified as the key to unlock legislative history in *Hoskins* was itself derived from legislative history, *not* statutory structure. *See supra* note 131 and accompanying text.

141. *Hoskins*, 902 F.3d at 78. If, however, statutory structure were the guiding light suggested by the quote, query how the court was satisfied on that account when the statute before them offered "utter silence regarding the class of defendants involved in this case." *Id.* at 84. The court also framed its exception without reference to structure—and perhaps more accurately—by observing that: "[C]onspiracy and complicity liability will not lie when Congress demonstrates an affirmative legislative policy to leave some type of participant in a criminal transaction unpunished . . . ." *Id.* at 80 (citing *Gebardi*, 287 U.S. at 123).

142. *Id.*

could swallow a baseline rule of conspiracy liability.[143] As Judge Posner wrote in response to the Second Circuit's previous and more cursory iteration of this analysis in *Amen*, "It would introduce great uncertainty into federal criminal law if the liability of a conceded aider and abettor depended on the results of an inquiry into Congress's intent concerning such liability in creating the offense."[144]

* * *

This sampling of cases illustrates, at the very least, that the lower courts cannot agree on what *Gebardi* means or on how far conspiracy liability really extends for a variety of statutes. Some circuits have identified in *Gebardi* a relatively narrow exclusion for a "protected class" of individuals, and cast statutory distinctions at relatively fine levels—as in *Pino-Perez*, where the Seventh Circuit distinguished criminal-enterprise employees from those outsiders who assist the kingpin. But others have recognized an increasingly broad exclusion with little room for nuance. *Amen* recognized only a criminal enterprise's leaders or nonleaders, and *Hoskins* drew a bright line between actors specifically covered by the FCPA and all others. However, in these cases, courts have either neglected or declined to give precedential credence to *Gebardi*'s emphasis on acquiescence and moving spirits. And while this confusion could be explained, in part, by the lower courts' operating for the last eighty-odd years with little guidance in this realm, in 2016 the Supreme Court finally stepped in. Unfortunately, this case failed to fully resolve the confusion.

III. BACK TO THE ROOTS: A RETURN TO MENS REA

This Note's proposed focus on mens rea is not unique. This Part begins by discussing the Supreme Court's most recent treatment of *Gebardi* in 2016, including how that treatment provided an essentially correct and intent-oriented interpretation of the exception but failed to definitively set the record straight. Section B then turns to clarifying and adding gloss to the Court's comments to provide a workable reading going forward.

143. The panel was not unanimous, however, in announcing this exceedingly broad exception. Judge Lynch concurred in the judgment on an alternative basis but was not persuaded that "*Gebardi* opens a broad door to finding 'legislative policy' exceptions to the general principle that persons outside defined legislative categories of principal liability may still be guilty of conspiracy and complicity." *Hoskins*, 902 F.3d at 100 (Lynch, J., concurring).

144. United States v. Pino-Perez, 870 F.2d 1230, 1234 (7th Cir. 1989) (en banc).

A. The Missed Opportunity: Ocasio v. United States

In early 2012, Samuel Ocasio, a former Baltimore police officer, was convicted under the Hobbs Act[145] for his participation in a small-time kickback scheme with the Majestic Auto Repair Shop ("Majestic").[146] Whenever Ocasio and his fellow officers-*cum*-coconspirators[147] reported to the scene of a car accident, they would direct owners of damaged vehicles to take their business to Majestic, and would then receive cash payments from the shop owners in exchange.[148] The Hobbs Act criminalizes "extortion," which it defines, rather awkwardly, as "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."[149] Ocasio was charged via the latter prong, extortion "under color of official right."[150] This is "the rough equivalent of what we would now describe as 'taking a bribe.'"[151] Thus, this kind of "extortion" functionally means using a position of power to induce someone to part with money, instead of using fear or violence.[152] In addition to substantive violations of the Hobbs Act, Ocasio was also charged with and convicted of *conspiracy* to violate the Hobbs Act—the conspiracy including fellow officers and Majestic's owners.[153]

Ocasio argued that a conspiracy to obtain property "from *another*" could not logically include seeking money from a member of the conspiracy itself—there, the shop owners.[154] He sought a jury instruction suggesting the law required "that the conspiracy was to obtain money or property from some person who was not a member of the conspiracy."[155] The argued-for instruction represented one side of an argument that had been the subject of a circuit split. The Sixth Circuit had previously taken Ocasio's position—that money had to be sought from a nonconspirator—while the Fourth Circuit had rejected

145. 18 U.S.C. § 1951 (2018).

146. Ocasio v. United States, 136 S. Ct. 1423, 1427 (2016).

147. The Court noted that as many as sixty Baltimore police officers were implicated in the scheme. *Id.*

148. *Id.*

149. 18 U.S.C. § 1951(a)–(b)(2).

150. *Ocasio*, 136 S. Ct. at 1427.

151. Evans v. United States, 504 U.S. 255, 260 (1992).

152. 31A AM. JUR. 2d *Extortion, Blackmail and Threats* § 83 (2019).

153. *Ocasio*, 136 S. Ct. at 1428.

154. *Id.*

155. *Id.*

this limitation.[156] The Supreme Court sided with the Fourth Circuit's view and affirmed Ocasio's conspiracy conviction.[157]

The Court's holding rested primarily on the "longstanding principles of conspiracy law"[158] with which this Note began. First, a conspirator does not need to agree to commit the offense himself; he just needs to agree that "the underlying crime *be committed* by some member of the conspiracy."[159] Second, the Court invoked the now-familiar principle that someone can conspire to commit a crime he cannot commit himself.[160] To illustrate how these principles applied there, the Court turned to *Holte* and *Gebardi*.[161]

The Court recognized the holding from *Holte* that even if a transported woman could not violate the Mann Act herself, she could still theoretically be liable for conspiring to violate it.[162] The Court suggested *Gebardi* "expanded on these points," by "fully accept[ing] *Holte*'s holding."[163] *Gebardi*'s gloss, the *Ocasio* Court suggested, was its recognition that the woman in that case was not "the active or moving spirit in conceiving or carrying out the transportation," and that "mere consent" or "acquiescence" was not enough for a conspiracy conviction.[164] The Court said these cases together "make perfectly clear" that: (1) "a person may be convicted of conspiring to commit a substantive offense that he or she cannot personally commit," and (2) that "when that person's consent or acquiescence is inherent in the underlying substantive offense, something more than bare consent or acquiescence may be needed to prove that the person was a conspirator."[165]

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156. *Compare* United States v. Brock, 501 F.3d 762, 767–71 (6th Cir. 2007) (rejecting Hobbs Act conspiracy liability for two bail bondsmen who made payments to a court clerk in exchange for records), *with* United States v. Spitler, 800 F.2d 1267, 1269–70, 1278–79 (4th Cir. 1986) (affirming a Hobbs Act–conspiracy conviction for a highway-inspection company's vice president who had provided valuable items to a state highway official in exchange for approval of fraudulently inflated bills).

157. *Ocasio*, 136 S. Ct. at 1429.

158. *Id.*

159. *Id.* (quotation marks omitted).

160. *Id.* at 1430 (citing United States v. Rabinowich, 238 U.S. 78, 86 (1915)).

161. *Id.* at 1431.

162. *Id.* (citing United States v. Holte, 236 U.S. 140, 144–45 (1915)). The Court also invoked *Holte*'s hypothetical blackmailing, train-ticket-purchasing woman. *Id.* at 1431 n.3.

163. *Id.* at 1431 (citing Gebardi v. United States, 287 U.S. 112, 116–17 (1932)).

164. *Id.* (quoting *Gebardi*, 287 U.S. at 117, 123).

165. *Id.* at 1432.

The Court applied these principles collectively to Ocasio's case and held that a conspiracy only requires an agreement that one person execute the agreed-to crime; here, obtaining property "from another" under color of official right.[166] There, the whole group had conspired for Ocasio and the officers to obtain property from the shop owners.[167] It did not matter that the shop owners could not have extorted themselves, and thus could not have violated the statute on their own. The whole group did not need to agree to *each* commit the violation; rather, they could all agree for one coconspirator to take property from someone else, including another coconspirator.

Ocasio argued that in every case, this approach would cause the substantive offense of extortion to merge with the conspiracy to commit extortion.[168] The substantive offense of Hobbs Act extortion requires the property be obtained "with [the other's] consent," so Ocasio argued that such consent could theoretically be the basis for a separate conspiracy charge in every case.[169] But the Court had no trouble dismissing this slippery slope argument, because the "consent" required by the Hobbs Act represented only a minimal acquiescence, such as to distinguish extortion from robbery.[170] And as *Gebardi* illustrated, "such 'consent' is quite different from the *mens rea* necessary for a conspiracy."[171] In fact, the Court drew an explicit connection between the transported woman's "mere acquiescence" and the extorted party's "minimal consent," such that a conspiracy charge in this area would require a greater degree of culpability than the statutory consent.[172]

This Note argues that this is essentially the correct way to read *Gebardi* and *Holte*, if a bit imprecise. And while a page and a half of analysis of these cases is their most significant treatment by the Supreme Court in the last eighty-six years,[173] several questions remain.

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166. *Id.* at 1433.

167. *Id.* at 1433–34.

168. *Id.* at 1435.

169. *Id.*

170. *Id.* "Robbery" is defined in the Hobbs Act as "obtaining of personal property from the person or in the presence of another, *against his will*." 18 U.S.C. § 1951(b)(1) (2018) (emphasis added).

171. *Ocasio*, 136 S. Ct. at 1435.

172. *Id.* at 1435–36.

173. *See, e.g.*, Abuelhawa v. United States, 556 U.S. 816, 820–21 (2009) (citing *Gebardi* in dicta as one example where the Court had declined to impose complicity liability on one party to a transaction that a statute treated more leniently than the other party, before conceding that the listed cases did not control); Iannelli v. United States, 420 U.S. 770, 774 n.8, 775 (1975) (citing

The Court's discussion was too cursory in condensing the nuance of the *Gebardi* opinion, leaving a wide berth for commentators to criticize[174] and for lower courts to distinguish[175] the Court's approach. Moreover, the case raises several practical questions for lower courts trying to apply its guidance. The next Section attempts to fill in some of these gaps.

B. Looking Ahead: The Mens Rea approach to Conspiracy for Inseparable Incidents

Ocasio has laid the groundwork for a consistent approach to applying *Gebardi* in the federal courts, but further guidance is needed. The groundwork begins with *Ocasio*'s concise statement of *Gebardi*'s holding: "[W]hen [a] person's consent or acquiescence is inherent in the underlying substantive offense, something more than bare consent or acquiescence may be needed to prove that the person was a conspirator."[176] Implicit in this concise statement is the two-part *Gebardi* inquiry advanced above[177]: (1) an assessment of the substantive offense statute to determine if *Gebardi* even applies (the "inseparable incident" or "inherent consent" prong); and (2) an assessment of the specific defendant's conduct ("something more than bare consent or acquiescence"). Together, these prongs represent a heightened focus on the necessary mens rea, or criminal intent, for these kinds of "inseparable incident" conspiracy charges—a focus derived both from the face of a statute and from the particular defendant.

Of course, as Justice Sotomayor rightly pointed out in her *Ocasio* dissent, the Court did not tell us what, precisely, constitutes "something

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Gebardi only for recitation of Wharton's Rule); Ingram v. United States, 360 U.S. 672, 680 (1959) (citing *Gebardi* with a "*cf.*" signal for the suggestion that conspiracy should require knowledge of the criminal conduct); Pinkerton v. United States, 328 U.S. 640, 643 (1946) (citing *Gebardi* in dicta for conspiracy exceptions that were not available to the defendants there); Direct Sales Co. v. United States, 319 U.S. 703, 714 n.10 (1943) (citing *Gebardi* with a "*cf.*" signal to support the proposition that the relevant statute had not implicitly exempted certain actors from conspiracy).

174. *See, e.g.*, Dearington, *supra* note 102, at 214–20 (arguing that the *Ocasio* Court overlooked *Gebardi*'s analysis of the statutory text and that it paid insufficient attention to legislative intent); Wee, *supra* note 18, at 129 (declining to attribute significance to the *Ocasio* Court's "cursory treatment" of *Gebardi*, while suggesting Justice Sotomayor's dissent provided a better approach). *But see* Wee, *supra* note 18, at 145 (suggesting nonetheless that *Ocasio* gives cause to "question how durable the broader variant of the *Gebardi* principle would be").

175. *See* United States v. Hoskins, 902 F.3d 69, 83 (2d Cir. 2018) (finding no demonstration of an affirmative-legislative-policy exception).

176. *Ocasio*, 136 S. Ct. at 1432.

177. *See supra* Part I.C.

more than bare consent or acquiescence," and so we must ask, as she did, "When does mere 'consent' tip over into conspiracy?"[178] Thankfully, we are not without clues. The Court has provided at least one example that draws this distinction: *Holte*'s hypothetical blackmailing, train-ticket-purchasing woman.[179] The *Gebardi* Court fairly contrasted its case with this hypothetical by saying there was no evidence the woman there, Louise Rolfe, was "the active or moving spirit in conceiving or carrying out the transportation."[180] The contrast demonstrates that initiative and corrupt motive—some improper personal gain—are relevant factors.

In the bribery context specifically, *Ocasio*'s Fourth Circuit predecessor, *United States v. Spitler*,[181] provided further clues. There, a highway-inspection company executive had provided gifts, including "an Uzi semi-automatic weapon . . . a lady's diamond ring, and a one-hundred-ounce silver bar," to a state highway official in exchange for approving his company's inflated bills.[182] The Fourth Circuit held that the executive had conspired with the official to violate the Hobbs Act and was not a "mere extortion victim."[183] The executive advanced essentially the same argument that Samuel Ocasio would present several decades later: that *Gebardi* prevented the bribe payor from being prosecuted as an accomplice or conspirator to his own "extortion."[184] The court examined the interaction between *Holte* and *Gebardi* and reached largely the same conclusion that the Supreme Court would later reach in *Ocasio*.[185] And while the court did pause at the question of "[t]he degree of activity necessary" to tip the scales from acquiescence into "moving spirit," it surveyed past cases and identified a common thread.[186] Where a bribe payor assumed a role involving "more than the mere payment of money," such as where he had "actively solicited and procured" or "actively induced" the

178. *Ocasio*, 136 S. Ct. at 1445 (Sotomayor, J., dissenting).

179. United States v. Holte, 23 U.S. 140, 145 (1915); *see supra* note 48 and accompanying text (discussing the *Holte* hypothetical).

180. Gebardi v. United States, 287 U.S. 112, 117 (1932).

181. United States v. Spitler, 800 F.2d 1267 (4th Cir. 1986).

182. *Id.* at 1270.

183. *Id.* at 1277–78.

184. *Id.* at 1275.

185. *See id.* at 1276 (finding that when an individual exhibits conduct more active than mere acquiescence, he or she may be subject to conspiracy liability).

186. *Id.* at 1277.

recipient's "extortion," then he would be subject to complicity and conspiracy liability.[187]

Finally, while not a precise fit, this notion of an "active or moving spirit" at least echoes language courts are intimately familiar with: Judge Learned Hand's *Peoni* standard for accomplice liability. The *Peoni* standard is that one aids or abets a principal actor in committing a crime when he "in some sort associate[s] himself with the venture, that he participate[s] in it as in something that he wishes to bring about, that he seek[s] by his action to make it succeed."[188] This standard has built-in limitations,[189] such that the minimal agreement necessary for a transaction may not rise to the level of "something that [one] wishes to bring about."[190] Moreover, this standard illustrates that federal courts are no strangers to flexible, subjective determinations of culpability for non-principal actors.

This question of the necessary level of conduct and intent trains on the second prong of this Note's proposed *Gebardi* exception: "to whom" the exception specifically applies in a given statutory context.[191] But the harder question for lower courts may actually occur at step one of the proposed *Gebardi* inquiry: determining which statutes inherently implicate an actor's consent without specifically punishing that actor—the "when" prong. In responding to one of Ocasio's arguments, the Court implicitly agreed with the defendant that *Gebardi* could create an exception in the Hobbs Act context—just not one that covered the defendants there.[192] But the Court failed to clarify any other contexts to which *Gebardi* would apply.

The *Ocasio* Court's only direction on this point lies in its brisk statement of *Gebardi*'s exception: "[W]hen [a] person's consent or

187. *Id.* at 1278. Note that the party directly punished in the Hobbs Act extortion/bribery scheme is the opposite of that in the FCPA bribery context. The Hobbs Act punishes the extorter, or *receiver* of bribes, *supra* note 149 and accompanying text, while the FCPA punishes the *offeror*, *supra* note 104.

188. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

189. *See* United States v. Pino-Perez, 870 F.2d 1230, 1237 (7th Cir. 1989) (en banc) (noting that the Learned Hand standard has limitations "built into it," such that "a policeman who took an isolated bribe from a kingpin" would not be aiding and abetting the kingpin because "[a]iding and abetting implies a fuller engagement with the kingpin's activities").

190. *See id.* at 1235.

191. As noted above, *supra* note 65, this second step of conduct-and-intent examination has been missing from past commentary.

192. *See* Ocasio v. United States, 136 S. Ct. 1423, 1435–36 (2016) (clarifying that even though the Hobbs Act did require some minimal consent in every case, every case would not automatically implicate a conspiracy because the additional requisite mens rea would be not be present in all bribe payors, such as those who merely complied with threatening demands).

acquiescence is inherent in the underlying substantive offense . . . ."[193] This language lends itself to interpretations that would not capture all the applicable statutes, so a clarification is necessary. For example, this language could be read to exclude even the situation in *Gebardi*. It is not clear that a woman's consent is "inherent in the underlying substantive offense"[194] of violating the Mann Act, because a woman's consent was not *absolutely* necessary to transport her across state lines and violate the Mann Act. Of course, a correct reading of *Gebardi*'s exception must apply to *Gebardi* itself, so the correct reading must add gloss to the *Ocasio* Court's statement.

A workable formulation could simply build on that statement to clarify its scope: a person is exempted from conspiracy liability when her consent or acquiescence is inherent in the underlying substantive offense, *as committed in a way expressly contemplated by statute*. "Contemplated" here means that the statute creating the substantive offense expressly recognizes some person's existence as necessary to commit the crime, but is indifferent to that person's consent. This would clarify that the exception is not as narrow as Wharton's Rule, but is also not so broad as to apply in all instances where at least one actor is specified by a criminal statute. The statutes discussed in this Note illustrate this distinction: The Mann Act made explicit reference to "a woman or girl" without requiring her consent, and the Hobbs Act makes explicit reference to the "other" from which money is taken without requiring that this "other" independently offer it. In contrast, the kingpin statute acknowledges the necessary subordinates but does not expressly contemplate any other actors, so the *Gebardi* exception would not apply to these "nonemployees."[195] The cases in the FCPA context have presented both situations. The statute makes explicit reference to foreign officials without requiring they accept the offered bribes, so these actors should be able to invoke the exception in appropriate cases—for example, where they find an unsolicited briefcase of cash on their desk with a note requesting a favor. Conversely, the FCPA does not expressly contemplate foreign non-government actors, like Lawrence Hoskins, who coordinate domestic

193. *Id.* at 1432.

194. *Id.*

195. The subordinates would be excepted from conspiracy liability by Wharton's Rule because their consent is absolutely necessary to establish the criminal enterprise over which the kingpin reigns.

conduct from abroad. Thus, a correct reading of *Gebardi* offers Hoskins no protection.

Beyond these practical questions, some have also argued that the *Ocasio* opinion failed to engage deeply with *Gebardi*'s discussion of "legislative policy" and the specific contours of the Mann Act's text.[196] These arguments are not without merit—*Ocasio* did not discuss these elements at any length—but they do not spoil what that opinion got right about *Gebardi*. As discussed above,[197] the *Gebardi* opinion's "affirmative legislative policy" language represented the *result* of the Court's inquiry, not an independent source of an exception. Thus, while some observers have suggested the *Gebardi* opinion "turned on congressional intent in enacting the Mann Act evidenced by the text and legislative history of the statute,"[198] this view is factually incorrect and significantly overstates the role of congressional intent in *Gebardi*.[199] First, the *Gebardi* Court did not consider legislative history. Second, it did not set out to identify a policy of excluding liability—one presented itself to the Court from the statute's interaction with conspiracy law.[200] Accordingly, that the *Ocasio* opinion did not discuss legislative intent does not affect the validity of that opinion's focus on context and conduct.

Additionally, there could be some dispute over the type of conduct that is properly excluded under *Gebardi*. This Note and *Ocasio* advance the position that only conduct resembling "mere acquiescence" is excepted from conspiracy liability under *Gebardi*. In arguing the view that *Ocasio* was mistaken, one commentator cast *Gebardi* as excluding *any conduct* that is "frequently, if not normally" part of the substantive crime's conduct but is omitted from express punishment.[201] This overinclusive exception could feasibly exclude, for example, a bribe-taking official's solicitation of the bribe. But this

196. *See* Dearington, *supra* note 102, at 214–20 (explaining that the *Ocasio* Court ignored the Hobbs Act's legislative intent in reaching its decision).

197. *See supra* Part I.C.

198. Dearington, *supra* note 102, at 212, 215.

199. For example, attorney Michael Dearington supports the claim that *Gebardi* invoked legislative history by pointing to the *Gebardi* Court's use of the phrase "Congress set out in the Mann Act to . . . ." *Id.* at 211 (citing Gebardi v. United States, 287 U.S. 112, 121 (1932)). But the Court provided no "evidence" of this intent—no legislative records nor floor debates. Instead, the Court effectively took notice of this intent from the face of the statute and the nature of the crime. *See Gebardi*, 287 U.S. at 121.

200. *See Gebardi*, 287 U.S. at 123 (inferring the policy behind the Mann Act by reasoning that the Mann Act would contravene itself if interpreted differently).

201. Dearington, *supra* note 102, at 217.

perspective is not consistent with the *Gebardi* Court's willingness to parse conduct rising above "mere consent"[202] and the holding that women who acted as the "moving spirit" of the offense would still be culpable.[203] Further, anything more than acquiescence would cease to be an "inseparable incident of all cases in which the [actor] is a voluntary agent at all,"[204] and thus the agreement would no longer merge with the substantive offense—removing the justification for the exception. And this makes sense, because it was the tension between the conspiracy statute and the near-ubiquitous consent in Mann Act violations that gave the Court pause in the first place.[205]

Finally, in the *Hoskins* decision, announced two years after *Ocasio*, the Second Circuit distinguished *Ocasio* in a brief discussion suggesting that decision was limited to the Hobbs Act context.[206] While the *Hoskins* court acknowledged that the recent opinion had considered *Gebardi*'s application to a statute with omitted actors,[207] it believed that *Ocasio* "d[id] not demonstrate a narrowing of the affirmative-legislative-policy exception, but simply a situation where there was no affirmative legislative policy to leave the bribe payors unpunished."[208] But this superficial perspective is entirely unmoored from the *Ocasio* opinion, which did not recognize any affirmative-legislative-policy exception or inquire into legislative intent *at all*.

The *Hoskins* court also trained on the Hobbs Act's awkward language and suggested that *Ocasio*'s holding rested solely on issues of sorting out what the statute actually meant—specifically the meanings of "from another" and "extortion."[209] There is more support for this position; sorting out those textual quirks was indeed a necessary step to the *Ocasio* decision. Nonetheless, these statute-specific inquiries do not limit the portion of *Ocasio* interpreting *Gebardi*, because that holding was still necessary to the Court's ultimate conclusion. The *Ocasio* Court's work was not done once it determined that extortion

202. *Gebardi*, 287 U.S. at 121.

203. *Id.* at 123.

204. *See id.*

205. *See id.* at 121 ("There is the added element that the offense planned, the criminal object of the conspiracy, involves the agreement of the woman to her transportation by the man, which is the very conspiracy charged.").

206. United States v. Hoskins, 902 F.3d 69, 82–83 (2d Cir. 2018).

207. *Id.* at 83 ("Although *Ocasio* arose in a setting where a statute's language arguably suggested that certain persons are spared from liability, the unique features of Hobbs Act extortion limit *Ocasio*'s helpfulness to the government.").

208. *Id.*

209. *Id.*

under color of official right could be read as "paying a bribe" and that the "from another" language only needed to apply to one coconspirator. The Court still had to address the argument that its reading of the Hobbs Act would implicate a separate conspiracy charge in every case, and it needed the *Gebardi* exception to draw the necessary line.[210] Because of the exception, bribe payors will *not* always be conspirators; rather, the Court's answer was essentially "it depends"—on mens rea, that is.[211]

CONCLUSION

Ocasio presented a golden opportunity for the Supreme Court to resolve more than just a disagreement about the Hobbs Act, but the Court failed to seize it. It could have resolved multiple splits in conspiracy liability for specific offenses by providing a workable and well-reasoned procedure for applying the interpretive rule from *Gebardi*. Moreover, the Court could have clarified liability for wide-ranging and complex conspiracies that can take years to investigate and uncover. Lawrence Hoskins is just one defendant in one case, but his case represents the difficulties of enforcing the criminal laws in today's white-collar context, where corporate fraudsters are increasingly sophisticated and days in court to test the law are increasingly rare.[212]

This Note suggests *Gebardi* was right not to overrule *Holte*, but that is not to suggest that crime victims should be harangued as

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210. Ocasio v. United States, 136 S. Ct. 1423, 1435–36 (2016).

211. *Ocasio* stated:

> Just as mere acquiescence in a Mann Act violation is insufficient to create a conspiracy, the minimal 'consent' required to trigger [the Hobbs Act] is insufficient to form a conspiratorial agreement. . . . In cases where the bribe payor is merely complying with an official demand, the payor lacks the *mens rea* necessary for a conspiracy. . . . [T]his mere acquiescence in the demand does not form a conspiracy.

Id. (citations omitted) (first citing Gebardi v. United States, 287 U.S. 112, 121–23 (1932); United States v. Holte, 236 U.S. 140, 145 (1915); then citing Salinas v. United States, 522 U.S. 52, 63–65 (1997); United States v. Bailey, 444 U.S. 394, 405 (1980); Anderson v. United States, 417 U.S. 211, 223 (1974); *Gebardi*, 287 U.S. at 121–23).

212. *Cf.* JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES 244 (2017) ("The case [against Wall Street executives involved in Enron fraud] fell, a victim of one of the many rulings from appellate courts in recent years that have raised the bar on white-collar corporate prosecutions."); Duke University School of Law, *Samuel W. Buell | Capital Offenses: Business Crime & Punishment in America's Corporate Age*, YOUTUBE (Oct. 6, 2016), https://www.youtube.com/watch?v=eVnYGvJP5NE [https://perma.cc/LRU5-562F] (extolling the value of bringing "hard" prosecutions of corporate crime and observing that, "[t]he more complex the wrongdoing, the more it threatens to end up basically beyond legal control—because it's too opaque; it's too complicated for the legal system to handle").

potential conspirators in every case where they consent to another's criminal conduct. This Note's interest is in getting right those background, governing principles of conspiracy law that allow our government to prosecute actors who seek to exploit statutory loopholes with conscious, intentional, and corrupt conduct. For more than a century, our courts have recognized broad conspiracy liability as a means to root out the unique dangers of pernicious schemes to "subvert[s] the laws."[213] This liability reaches the criminal who orchestrates at arms' length, ineligible as a principal, who fancies himself insulated from the law. This Note's proposed exception provides a workable and justifiable means of drawing the boundaries of that liability, while allowing prosecutors, courts, and juries to conduct the requisite individualized inquiry into each defendant's criminal intent. *Gebardi* and its justifications are as sound today as they were eighty-six years ago. It requires no more than immunity for "mere acquiescence" and calls for no less than justice for crime's "moving spirits."

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