THE *GEBARDI* "PRINCIPLES"

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In the 1932 case Gebardi v. United States*, the Supreme Court held that the failure of a statute to punish a party necessary to the commission of the proscribed conduct reflected an affirmative legislative policy to leave such party unpunished. As such, the Court declined to use the conspiracy statute to frustrate Congress's grant of immunity. In doing so, the Court carved out an exception to the federal conspiracy statute: an exception that is referred to as the* Gebardi *principle and that has been extended to operate as an exception to accomplice liability as well. This Note argues that while courts have employed, and continue to employ, what they call the* Gebardi *principle, this principle has fractured into two different forms and is thus more accurately understood as two separate "principles" as opposed to a single one. The first form is narrower and more in line with the Court's articulation of the principle in* Gebardi v. United States*—creating an exception to conspiratorial and accomplice liability where the words of the statute fail to punish a party necessary to the commission of the underlying criminal conduct. The second form, however, is broader. It is not pegged to the structure of the statute itself but instead allows courts to apply the* Gebardi *principle based on the courts' determination of legislative intent. This Note cautions against the use of this second form.*

INTRODUCTION

In August 2015, District Judge Janet Bond Arterton ruled on a motion to dismiss in the case *United States v. Hoskins.*[1] Although trial court decisions generally attract less attention than appellate decisions, *Hoskins* has since caused ripples in the legal world.[2] This is primarily because the law underlying the *Hoskins* case is the Foreign Corrupt Practices Act (FCPA)[3]—a piece of federal legislation that has been pushed to the fore in recent years through high-profile investigations and crackdowns on large multinational companies for corrupt acts.[4]

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1. 123 F. Supp. 3d 316, 327 (D. Conn. 2015).

2. See infra notes 117–118 and accompanying text (offering examples of the buzz *Hoskins* created among practitioners and online reporters).

3. 15 U.S.C. §§ 78dd-1 to -3 (2012).

4. See, e.g., Richard L. Cassin, Final Settlements for Siemens, FCPA Blog (Dec. 15, 2008, 7:22 PM), http://www.fcpablog.com/blog/2008/12/16/final-settlements-for-siemens.html [http://perma.cc/SHH2-6HZA] (discussing Siemens's $800 million settlement with the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) for FCPA violations); Richard L. Cassin, KBR and Halliburton Resolve Charges, FCPA Blog (Feb. 11,

This Note, however, argues that *Hoskins* is worthy of attention not merely because it involves the FCPA; it is worthy of attention because of its interpretation and application of the *Gebardi* principle—an exception to the federal general conspiracy[5] and complicity[6] statutes that operates in situations in which a strict application of the statutes would frustrate congressional intent to immunize certain persons from liability.[7] The Supreme Court first articulated this principle in the case *Gebardi v. United States*.[8] In that case, the Court presumed Congress's intention to immunize the woman transported under the Mann Act[9] from criminal liability and thus held that the conspiracy statute could not be used to frustrate that intent.[10] Since the *Gebardi* principle's first articulation, however, courts have diverged in the interpretation and application of the principle.[11] In particular, the briefs submitted by the defendant and the government in *Hoskins* are encapsulations of the two divergent forms the *Gebardi* principle has come to take.[12] Further, in holding that nonresident foreign nationals are per se never liable as conspirators or accomplices under the FCPA absent direct liability, *Hoskins* also reflects the practical dangers associated with the *Gebardi* principle's broader variant.[13] This Note terms this as the problem of the *Gebardi* "principles" and cautions against this broadening in the interpretation and application of the *Gebardi* principle.

Part I will sketch the legal backdrop for the problem of the *Gebardi* principles through a discussion of conspiratorial and accomplice liability under U.S. federal criminal law and the origins of the *Gebardi* principle.

2009, 7:08 PM), http://www.fcpablog.com/blog/2009/2/12/kbr-and-halliburton-resolve-charges.html [http://perma.cc/H9YG-9UTV] (reporting Kellogg Brown & Root LLC and former parent company Halliburton's $579 million settlement with the DOJ and SEC for FCPA violations); Richard L. Cassin, Total SA Pays $398 Million to Settle U.S. Bribe Charges, FCPA Blog (May 29, 2013, 12:18 PM), http://www.fcpablog.com/blog/2013/5/29/total-sa-pays-398-million-to-settle-us-bribe-charges.html [http://perma.cc/LL4C-LGJN] (reporting Total S.A.'s $398 million settlement with the DOJ and SEC for FCPA violations).

5. 18 U.S.C. § 371 (2012).

6. Id. § 2.

7. See infra notes 37–38 and accompanying text (introducing the *Gebardi* principle); see also infra section I.B (detailing the origins of the *Gebardi* principle).

8. 287 U.S. 112 (1932).

9. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424); see also infra text accompanying note 48 (quoting the language of the Mann Act).

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

11. See infra section II.A (detailing the two divergent forms of the *Gebardi* principle).

12. See infra section II.B.3 (comparing the defendant's and government's briefs submitted in the *Hoskins* case).

13. United States v. Hoskins, 123 F. Supp. 3d 316, 322–23 (D. Conn. 2015). The broader variant, as this Note will explicate further in section II.A.2, is when courts immediately turn to extrinsic material to determine whether Congress intended to immunize a certain class of individuals from liability without an eye to the inherent structure of the underlying offense and criminal statute.

Part II will argue that the current state of the *Gebardi* principle, or more accurately "principles," is problematic through an examination of the jurisprudence on the *Gebardi* principle, with particular focus on *Hoskins*. Finally, Part III will propose the solution of narrowly interpreting the *Gebardi* principle.

I. FEDERAL CRIMINAL LAW AND THE *GEBARDI* PRINCIPLE

A comprehensive understanding of the *Gebardi* principle requires an appreciation of how the principle fits within the framework of federal criminal law's provisions on conspiratorial and accomplice liability. Section I.A introduces how liability for conspiracy and complicity operate in U.S. federal criminal law. Section I.B details the origins of the *Gebardi* principle as introduced in the Supreme Court decision *Gebardi v. United States*.[14] This Part focuses on the rule, and the exception to the rule, by explicating the doctrines of conspiracy and complicity and how *Gebardi* functions as a common law exception to liability.

A. *Federal Conspiracy and Complicity Liability*

The theories of conspiracy and complicity are fundamental to federal criminal law. Both function as theories of liability that apply broadly and generally across the spectrum of substantive criminal offenses. Exceptions to the theories' broad applicability, however, exist and operate to curtail liability in certain situations.

1. *Conspiracy*. — Under federal law, it is a crime to conspire to commit a substantive offense against the United States.[15] Conspiracy is an inchoate crime: Liability under the conspiracy statute does not require the underlying substantive offense to have materialized,[16] as conspiracy is a distinct and separate offense.[17] As Justice Holmes once stated: "A conspiracy is a partnership in criminal purposes."[18] The focus of the offense is the partnership—"the agreement to commit a crime"—and not the underlying offense itself.[19] This is a policy choice that Congress made based on an

14. 287 U.S. 112.

15. 18 U.S.C. § 371 (2012).

16. E.g., Salinas v. United States, 522 U.S. 52, 65 (1997) ("It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues . . . ." (citing Callanan v. United States, 364 U.S. 587, 594 (1961))).

17. E.g., United States v. Rosbottom, 763 F.3d 408, 418 (5th Cir. 2014) ("'It is settled law that conspiring to commit a crime is an offense wholly separate from the crime which is the object of the conspiracy.'" (quoting United States v. Threadgill, 172 F.3d 357, 367 (5th Cir. 1999))).

18. United States v. Kissel, 218 U.S. 601, 608 (1910).

19. Sanford H. Kadish et al., Criminal Law and Its Processes: Cases and Materials 703 (9th ed. 2012).

acknowledgement of the "special danger" group criminal activities pose.[20]

The force of conspiratorial liability in federal criminal law lies in its general applicability—it applies to "any offense against the United States."[21] In *Pinkerton v. United States*, the Supreme Court held that a conspiracy charge would generally not be merged into the charge for the underlying offense.[22] Double jeopardy has no applicability as a defense against a conviction for the commission of the substantive offense and for a conspiracy to commit the substantive offense because each conviction is legally distinct.[23]

2. *Complicity.* — Federal criminal law also proscribes complicit behavior in the commission of substantive offenses.[24] In the words of the complicity statute: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission . . . [or] willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."[25] In other words, in the realm of federal criminal law, there are two ways an individual can be held liable for a substantive offense: by directly committing the offense as a principal or by being complicit with the principal, in which case the law would deem the accomplice to have committed the underlying offense as if she were the principal.[26]

Unlike conspiratorial liability, complicity is not an offense distinct and separate from the substantive offense. Rather, it is a *means* of being held liable under the substantive statute.[27] However, like conspiratorial liability, it is generally "applicable to all federal criminal offenses."[28] The

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20. Id. at 704 (internal quotation marks omitted).

21. See 18 U.S.C. § 371 (2012).

22. 328 U.S. 640, 643 (1946) (noting exceptions to conspiratorial liability are of "limited character").

23. Id. at 643–44 (highlighting the absence of a double jeopardy defense because conspiracy "has ingredients, as well as implications, distinct from the completion of the unlawful project").

24. 18 U.S.C. § 2.

25. Id.

26. See, e.g., United States Court of Appeals for the Third Circuit, Model Criminal Jury Instructions § 7.02, http://www.ca3.uscourts.gov/sites/ca3/files/Chap%207%20July%202014%20Rev.pdf [http://perma.cc/YXJ2-M3TX] (last visited Sept. 15, 2016) ("A person may be guilty of an offense(s) because (he) (she) personally committed the offense(s) (himself) (herself) or because (he) (she) aided and abetted another person in committing the offense.").

27. Kadish et al., supra note 19, at 659; see also United States v. Smith, 198 F.3d 377, 383 (2d Cir. 1999) ("[A]iding and abetting 'does not constitute a discrete criminal offense but only serves as a more particularized way of identifying "persons involved."'" (citing United States v. Oates, 560 F.2d 45, 54 (2d Cir. 1977))).

28. Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 181 (1994) (citing Act of Mar. 4, 1909, ch. 321, § 332, 35 Stat. 1152 (codified as amended at 18 U.S.C. § 2)).

general reach of the complicity statute within federal criminal offenses is understood best by comparing civil offenses, which lack a general aiding-and-abetting statute; there is, therefore, "no general presumption" that civil plaintiffs may bring suit against those complicit in causing their injuries.[29]

3. *Exceptions.* — As alluded to above, however, the conspiracy[30] and complicity[31] statutes do not necessarily lead to blanket liability even in situations that seem potentially amenable to their applications at first glance. At times, this is due to prosecutorial discretion;[32] at other times, this is due to common law exceptions[33] inextricably tied to legislative intent that courts have gradually carved out in federal criminal law jurisprudence.[34]

Wharton's rule is a common law exception to conspiratorial liability that is deeply rooted in U.S. federal criminal law.[35] Coined by its name-

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29. Id. at 182–83.

30. 18 U.S.C. § 371.

31. Id. § 2.

32. See Offices of the U.S. Attorneys, U.S. Attorney's Manual § 9-27.110(b) (1997), http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.110 [http://perma.cc/UA66-F4W6] ("Under the Federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of Federal criminal law."); see also Charles Doyle, Cong. Research Serv., R43769, Aiding, Abetting, and the Like: An Overview of 18 U.S.C. 2, at 4 (2014), http://www.fas.org/sgp/crs/misc/R43769.pdf [http://perma.cc/96T6-ECD2] (noting that prosecutorial discretion sometimes "void[s] . . . secondary criminal liability").

33. This Note recognizes that it is up for debate whether to characterize the judicially applied exceptions—in particular Wharton's rule and the *Gebardi* principle—as "common law exceptions." The thrust of the argument to the contrary is that there is no such thing as a federal common law, and thus federal common law exceptions necessarily do not exist. See Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law."); see also Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 422 (2011) (recognizing that just because "a subject is meet for federal law governance . . . does not necessarily mean that federal courts should create the controlling law"); Sosa v. Alvarez-Machain, 542 U.S. 692, 726 (2004) (denying the "existence of any federal 'general' common law" and emphasizing the "general practice" of "look[ing] for legislative guidance before exercising innovative authority over substantive law"). This Note, however, proceeds on the belief that the exceptions can still justifiably be termed "common law exceptions," as opposed to mere acts of statutory interpretation, as they are two sides to the same coin.

34. See Doyle, supra note 32, at 4 (identifying "judicial pronouncement" as another force "void[ing] . . . secondary criminal liability"); Daniel C. Richman, Kate Stith & William J. Stuntz, Defining Federal Crimes 467 (2014) (noting criminal statutes take on a broad scope of liability and punish aiders and abettors as principals unless there is a "clear legislative intent to the contrary").

35. See, e.g., Pinkerton v. United States, 328 U.S. 640, 643 (1946) (noting the 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

sake, Francis Wharton, the rule postulates that when a "plurality 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."[36] In essence, if a substantive crime can only be committed via concerted action of at least two individuals, Wharton's rule prohibits the government from charging the individuals with conspiracy to commit the substantive crime.

The *Gebardi* principle, which is the focus of this Note, is another common law exception to secondary criminal liability. Although the exact contours of the principle have been blurred due to variations in its interpretation and application across cases,[37] it generally applies in situations when a strict application of the conspiracy or complicity statutes would frustrate congressional intent to immunize certain persons from liability.[38]

Wharton's rule and the *Gebardi* principle are close relatives. Both function as common law exceptions to conspiratorial liability by triggering a rebuttable judicial presumption that Congress did not intend to punish a certain class of persons and that Congressional intent should therefore not be frustrated through the operation of the conspiracy statute.[39]

The two, however, are distinct exceptions. Notably, Wharton's rule is only an exception to conspiratorial liability,[40] whereas the *Gebardi* principle has been understood to function as an exception to both conspiratorial

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and seller for a conspiracy to make the sale would have been of doubtful validity"). For more recent cases implicating Wharton's rule, see also United States v. Ruhbayan, 406 F.3d 292, 300–01 (4th Cir. 2005); United States v. Worth, No. 1:15-cr-4-AT-GGB, 2015 WL 5970797, at *2–3 (N.D. Ga. Aug. 24, 2015); United States v. Dimora, 829 F. Supp. 2d 574, 582–83 (N.D. Ohio 2011).

36. 2 Francis Wharton, A Treatise on Criminal Law § 1339, at 176 (Phila., Kay & Brother, 9th ed. 1885).

37. See infra section II.A (discussing the two different variants of the *Gebardi* principle).

38. See Gebardi v. United States, 287 U.S. 112, 123 (1932) ("[W]e perceive . . . evidence of an affirmative legislative policy to leave [the transported woman's] acquiescence unpunished . . . . It would contravene that policy to hold that the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity . . . .").

39. In the context of Wharton's rule, the Supreme Court in *Iannelli v. United States* made clear that the rule was not predicated on "principles of double jeopardy" but has "current vitality only as a judicial presumption [of legislative intent], to be applied in the absence of legislative intent to the contrary." 420 U.S. 770, 782 (1975). Similarly, in the context of the *Gebardi* principle, the Supreme Court in *Gebardi* predicates the principle on the judicial finding of an "affirmative legislative policy." *Gebardi*, 287 U.S. at 123; cf. United States v. Falletta, 523 F.2d 1198, 1200 (5th Cir. 1975) (noting the *Gebardi* principle raises a "presumption about legislative intent," albeit a "weak" one that can be rebutted by "contrary and overriding indications").

40. See supra note 35 and accompanying text (listing cases in which Wharton's rule was applied, all of which pertained to conspiratorial liability).

and accomplice liability.[41] This distinction reflects a more fundamental difference between Wharton's rule and the *Gebardi* principle. While Wharton's rule, under which the judicial presumption of immunity from conspiratorial liability is triggered when the underlying offense necessarily requires an agreement, is predicated *solely* on the nature of the underlying offense,[42] the *Gebardi* principle—at least in its original form—is predicated on *both* the nature of the underlying offense and the structure of the statute in question. In particular, the *Gebardi* principle's judicial presumption of immunity from conspiratorial or accomplice liability is triggered only when the underlying offense necessarily requires the participation of a certain class of persons but such class is not subject to liability under the statute criminalizing the substantive offense.[43] Although the focus of this Note is the *Gebardi* principle and not Wharton's rule, the distinction between the two helps shed light on the *Gebardi* principle itself.

B. *Origins of the* Gebardi *Principle*

The *Gebardi* principle emerged in a context in which a strict application of the conspiracy statute in certain situations produced anomalous results. For example, when a statute was specifically designed to protect a certain class of persons, holding such persons liable as members of a conspiracy to violate the underlying statute seemed to go against the interest in protecting them in the first place.[44] The question then was whether immunity from liability was possible, and if so, how it should be circumscribed.[45]

1. United States v. Holte*: The Lead Up to* Gebardi. — *United States v. Holte*,[46] a Supreme Court case that preceded *Gebardi*, is critical to understanding the subsequent development of the *Gebardi* principle. In *Holte*, the female defendant was indicted for conspiring with another to cause her own transportation across state lines for the purpose of prosti-

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41. See infra note 65 and accompanying text (noting the extension of the *Gebardi* principle from the conspiracy context to the complicity context).

42. See *Iannelli*, 420 U.S. at 782 ("The classic Wharton's Rule offenses . . . are crimes that are characterized by the general congruence of the agreement and the completed substantive offense.").

43. See infra notes 62–64 and accompanying text (discussing the *Gebardi* principle as articulated in *Gebardi v. United States*).

44. See infra note 64 and accompanying text (discussing this in the context of the *Gebardi* case).

45. See infra section II.A (detailing two different ways courts have circumscribed the reach of the *Gebardi* principle in offering immunity from conspiratorial and accomplice liability).

46. 236 U.S. 140 (1915).

tution.[47] The underlying offense was the violation of the Mann Act, which provided:

> [A]ny person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose . . . shall be deemed guilty of a felony . . . .[48]

The sole question the Supreme Court faced was whether the defendant, the transported woman contemplated in the Mann Act, could *possibly* be guilty of conspiring with the transporter to violate the Act.[49] In a succinct opinion, Justice Holmes, writing on behalf of the majority, determined that it would be "going too far" to say that the transported woman could *never* be guilty of conspiring to violate the Act.[50] To support this conclusion, Justice Holmes raised a hypothetical situation in which the transported woman could be found guilty of violating the Act itself.[51] In essence, when the transported woman demonstrates a great degree of initiative in bringing about the transportation such that it is an "illusion" that the transported woman is a "victim," the woman transported could be liable under the Act and for conspiracy to violate the Act.[52] *Holte*'s contemplation of conspiracy in the context of the Mann Act set the stage for the *Gebardi* case that the Supreme Court would confront about two decades later.

2. Gebardi v. United States*: The* Gebardi *Principle.* — In *Gebardi,* the relevant federal law, like the *Holte* case, was the Mann Act.[53] The defendants were a man and a woman who were indicted for conspiring to violate the Act.[54] There was evidence that the man had purchased the railway tickets and that the woman had "consented" to "voluntarily" follow the man for the immoral purpose of engaging in sexual intercourse.[55] Defendants appealed the trial court's convictions, attacking the indictment and the sufficiency of facts that the trial court used to support

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47. Id. at 143.

48. White-Slave Traffic (Mann) Act, ch. 395, § 2, 36 Stat. 825, 825 (1910) (codified as amended at 18 U.S.C. § 2421 (2012)).

49. *Holte*, 236 U.S. at 144.

50. Id. at 145.

51. Id.

52. Id. Certain key facts in the hypothetical instance that availed the transported woman to conspiratorial liability under the Mann Act included the woman being a professional prostitute, being able to look out for herself, suggesting to carry out the journey with motive to blackmail the man, and purchasing the railroad tickets to cross state lines. Id.

53. See Gebardi v. United States, 287 U.S. 112, 115 (1932).

54. Id. at 115–16.

55. Id. at 116.

their convictions.[56] The Court of Appeals for the Seventh Circuit, however, affirmed the trial court's judgment, "dispos[ing] of [the defendants' contentions] without discussion."[57] In doing so, the Seventh Circuit relied solely on the authority of *Holte* despite conceding that defendants had advanced arguments that were not expressly considered in the *Holte* opinion.[58]

The defendants further appealed their convictions and secured Supreme Court review on certiorari.[59] Instead of deferring to the authority of *Holte*, the Supreme Court in *Gebardi* determined that the "exceptional circumstances" discussed in *Holte* were not present because there was no evidence that the woman had been the "active or moving spirit in conceiving or carrying out the transportation"—she had merely acquiesced.[60] In rejecting the Seventh Circuit's line of reasoning and reversing the conviction, the Supreme Court developed a principle that justified the Court's rejection of conspiratorial liability for the woman:

> [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. We think it a *necessary implication* of that policy that when the Mann Act and the conspiracy statute came to be construed together, as they necessarily would be, the same participation which the former contemplates as an *inseparable incident* of all cases in which the woman is a voluntary agent at all, but does not punish, was not automatically to be made punishable under the latter. It would contravene that policy to hold that the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity which the Mann Act itself confers.[61]

The passage quoted above is arguably where the answer to the proper framing of the *Gebardi* principle lies, but also where this conundrum begins. Relying solely on the Supreme Court's language in the *Gebardi* case, the *Gebardi* principle arguably stands for a judicial presumption that is only triggered when certain specific requirements have been met: First, the participation of a certain class of people must be an "inseparable incident" from the underlying offense, and second, the underlying offense must exclude such class from punishment.[62] The judicial presumption triggered here is that the "failure . . . to condemn" evinces an "affirmative legislative policy" to leave that class of people

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

57. Id. at 618.

58. Id.

59. *Gebardi*, 287 U.S. at 115–16.

60. Id. at 117; see also supra note 52 (detailing the "exceptional circumstances" contemplated in *Holte* to give rise to conspiratorial liability under the Mann Act).

61. *Gebardi*, 287 U.S. at 123 (emphasis added).

62. Id.

unpunished.[63] In the context of the *Gebardi* case itself, this policy not to punish meant that the conspiracy statute could not be used to frustrate the legislative policy to grant a certain class of people immunity from liability.[64] Subsequent cases in the line of *Gebardi* jurisprudence have applied the *Gebardi* principle to grant immunity from accomplice liability as well, for the same reasons cases grant immunity from conspiratorial liability.[65]

The conundrum, however, is what the *Gebardi* principle stands for today. As Part II will illustrate, two variants of the *Gebardi* principle have emerged in *Gebardi* jurisprudence, with one variant being more closely aligned with the express language in the *Gebardi* case and with the other variant broadening the principle beyond its original form.

II. Emergence of the *Gebardi* "Principles"

With more than eight decades of jurisprudence between the *Gebardi* principle's conception in 1932 and today, it would be unrealistic to expect absolute consistency in how courts across the United States have interpreted and applied it. The problem with the framing of the *Gebardi* principle, however, is not one of small variations in interpretation and application that are nonetheless amenable to characterization as a single principle; two distinct variations in interpretation and application have emerged such that the *Gebardi* principle is no longer a single principle, but two separate "principles."

This Part will discuss in detail the problem of the *Gebardi* "principles" by tracking the interpretation and application of *Gebardi* across its eight-decade jurisprudence. In particular, this Part will focus on the recent district court decision, *United Sates v. Hoskins*,[66] and use this discussion as a springboard into the deeper issues underlying the *Gebardi* principle today.

Section II.A introduces and crystallizes the distinction between the two *Gebardi* "principles" by drawing on key cases that have interpreted and applied the *Gebardi* principle. Section II.B explores the operation of the *Gebardi* principle in the context of *Hoskins*. Section II.C draws the link between sections II.A and II.B by explicating how *Hoskins* not only mirrors but adds to the problem of the *Gebardi* "principles."

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63. Id.

64. Id.

65. See, e.g., United States v. Hill, 55 F.3d 1197, 1205 (6th Cir. 1995) (applying the *Gebardi* principle in the context of accomplice liability); United States v. Pino-Perez, 870 F.2d 1230, 1234 (7th Cir. 1989) (same); United States v. Amen, 831 F.2d 373, 382 (2d Cir. 1987) (same); United States v. Wegg, 919 F. Supp. 898, 908 (E.D. Va. 1996) (same).

66. 123 F. Supp. 3d 316 (D. Conn. 2015).

A. Gebardi*: Narrow or Broad?*

When first articulated in the *Gebardi* case, the *Gebardi* principle arguably stood for a narrow rule of construction.[67] But since then, various courts dealing with various bodies of law have interpreted and applied the *Gebardi* principle in various ways.[68] This has resulted in the emergence of a variant of the *Gebardi* principle distinct from the form it took in 1932.[69] Instead of a narrow rule of construction, this new and broader variant operates as an open invitation to the judiciary to determine legislative intent. This is not to say, however, that the *Gebardi* principle as a rule of construction has been superseded by this broader variant. Instead, these two variants coexist today in *Gebardi* jurisprudence, transforming the *Gebardi* principle into the *Gebardi* "principles."

1. *Narrow Variant: A Rule of Construction.* — According to Francis Lieber,[70] the first philosopher to distinguish interpretation from construction through hermeneutics,[71] interpretation is the "art of finding out the true sense of any form of words";[72] construction is the "drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text," which is resorted to if the "true sense" cannot be discovered.[73] In other words, construction is a method of interpretation[74] that aims to come close to the "true sense" through the operation of a guiding principle.[75] In his treatise, *Statutes and Statutory Construction*, Sutherland suggests that rules of construction have the effect of introducing greater certainty to the process of interpretation.[76] Various examples of rules of construction

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67. See supra text accompanying notes 63–64 (characterizing the principle in the *Gebardi* case as a rule of construction).

68. See infra sections II.A.1–.2 (discussing the treatment of the *Gebardi* principle as a rule of construction and as a broad look to legislative intent, respectively).

69. See infra section II.A.2 (detailing the broader variation of the *Gebardi* principle).

70. Francis Lieber was a legal theorist who coined the word "hermeneutics" in his first book, *Legal and Political Hermeneutics.* John Catalano, Francis Lieber: Hermeneutics and Practical Reason 14 (2000) ("Prior to Lieber there is no record of the word 'hermeneutics' being used in the fields of politics or law in the English language.").

71. Id.

72. Francis Lieber, Legal and Political Hermeneutics 23 (Bos., Charles C. Little & James Brown 1839).

73. Id. at 56.

74. See Quintin Johnstone, An Evaluation of the Rules of Statutory Interpretation, 3 U. Kan. L. Rev. 1, 1 (1954) (noting that the "ostensible purpose" of the rules of construction "is to clarify statutory meaning").

75. Rules of construction are also commonly referred to as "rules of statutory interpretation" or "canons of construction." Id. They take the form of maxims and function as a tool for rendering statutory interpretation more "determinate." Nicholas Quinn Rosenkranz, Federal Rules of Statutory Interpretation, 115 Harv. L. Rev. 2085, 2148 (2002).

76. See 2 J.G. Sutherland, Statutes and Statutory Construction 696 (John Lewis ed., 2d ed. 1904) ("The function of such interpretation unrestrained by settled rules would

include *expressio unius est exclusio alterius*, which triggers a judicial presumption that all omissions were intended when a statute is extremely detailed in all respects,[77] and *reddendo singula singulis*, which triggers a judicial presumption that enumeration was not intended to be exclusive when a statute's opening words are general but its succeeding parts are specific.[78] Both are rules that trigger judicial presumptions based on the specific structure of the statute in question. The presumptions control unless a contrary legislative intent is apparent.[79]

The *Gebardi* principle as first introduced in the *Gebardi* case is arguably a rule of construction, as the words of the Mann Act do not expressly proscribe liability for a woman consenting to transportation.[80] Similar to the rules of construction introduced above,[81] the principle in *Gebardi* triggered a judicial presumption based on the specific structure of the statute in question. Putting this discussion in the context of the Mann Act, because the underlying offense necessarily required a man to transport and a woman to be transported but the statute only expressly created liability for the man, the court in *Gebardi* presumed this to reflect what it called an "affirmative legislative policy" not to punish the woman, whether under the Act itself[82] or under a theory of conspiracy.[83] This Note terms the structural prerequisites of "necessity" and "omission" for triggering the judicial presumption of immunity as the twin gatekeeping requirements of the *Gebardi* principle.

The interpretation and application of the *Gebardi* principle as a rule of construction can be discerned across a range of cases subsequent to

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introduce great uncertainty, and would involve a power virtually legislative."); see also Lawrence B. Solum, The Interpretation-Construction Distinction, 27 Const. Comment. 95, 106 (2010) (arguing "interpretation makes its exit and construction enters the scene" when "text is vague").

77. 2A Norman Singer & Shambie Singer, Sutherland Statutory Construction § 47:23 (7th ed. 2015).

78. Id. § 47:26.

79. See id. § 47:23 (describing a rule of statutory construction as different from a rule of law and thus susceptible to being overcome by a "strong indication of contrary legislative intent").

80. See White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012)) (creating liability for the male transporter in express words but not for the woman transported).

81. See supra notes 77–79 and accompanying text (introducing examples of rules of construction).

82. It is noted here that the court in *Gebardi* found this to be true at least to the extent that the woman transported did not display the initiative and proactivity contemplated in *Holte* to render the woman liable under the Mann Act. Gebardi v. United States, 287 U.S. 112, 117 (1932); see also supra note 52 (detailing the "exceptional circumstances" contemplated in *Holte* to give rise to conspiratorial liability under the Mann Act).

83. *Gebardi*, 287 U.S. at 123 ("It would contravene that [affirmative legislative] policy to hold that the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity which the Mann Act itself confers.").

the *Gebardi* case.[84] One of the earliest cases grappling with *Gebardi*-type issues, *Nigro v. United States*,[85] is evidence of this. In *Nigro*, the underlying law was the Harrison Anti-Narcotic Act, which expressly criminalized the act of selling, bartering for, exchanging, or giving away any drug listed in the statute but did not expressly criminalize the receipt of the drug.[86] The question facing the court in *Nigro* was whether a conspiracy charge could hold against the defendant-doctor (the provider of the drug) for conspiring with a drug addict (the recipient-purchaser of the drug) to violate the Act.[87] In language reminiscent of that employed by the Court in *Gebardi*, the court found that the "omission" of the purchaser of the drug from liability under the Act evinced an "affirmative legislative policy" to leave the purchaser unpunished.[88] Consequently, the conspiracy statute could not operate to contravene this policy. Since the drug addict could not be subject to conspiratorial liability, the court held that the conspiracy charge against the defendant doctor necessarily failed, as he "could not conspire with himself."[89]

United States v. Bowles[90] is another example of a case that has interpreted and applied the *Gebardi* principle strictly as a rule of construction. In the context of accomplice liability as a theory of liability under the conflict-of-interest statutes, the court reiterated that the *Gebardi* case, and thus the *Gebardi* principle, "authoritatively declared" that when an underlying offense "necessarily requires" two parties for its commission but the statute only expressly makes one of the two liable, the "clear meaning" is that the unpunished person is not liable under the statute, whether as a principal or an accomplice.[91]

The understanding of the *Gebardi* principle as a rule of construction has continued over the past eight decades of *Gebardi* jurisprudence. In 1989, the Seventh Circuit in the case *United States v. Pino-Perez* dealt with the *Gebardi* principle in the context of the drug-kingpin statute.[92] Under this statute, heavy penalties are imposed on the organizer, supervisor, or

84. See, e.g., United States v. Nasser, 476 F.2d 1111, 1119 (7th Cir. 1973) (characterizing *Gebardi* as an exception that "turns upon a *construction* of legislative intent" (emphasis added)); cf. United States v. Falletta, 523 F.2d 1198, 1200 (5th Cir. 1975) (identifying *Gebardi* as announcing a "rule of construction," albeit a weak one).

85. 117 F.2d 624 (8th Cir. 1941).

86. The Harrison Anti-Narcotic Act is officially known as the Harrison Narcotics Tax Act of 1914, ch. 1, 37 Stat. 785 (1914), superseded by the Controlled Substances Act, Pub. L. 91-513, 84 Stat. 1242 (1970) (codified as amended in scattered sections of 21 U.S.C. (2012)).

87. *Nigro*, 117 F.2d at 627.

88. Id. at 629; see also *Gebardi*, 287 U.S. at 123 (employing similar language of "failure" to condemn as evidence of an "affirmative legislative policy" to give "immunity").

89. *Nigro*, 117 F.2d at 629.

90. 183 F. Supp. 237 (D. Me. 1958).

91. Id. at 251.

92. 870 F.2d 1230, 1231 (7th Cir. 1989).

manager of a continuing criminal enterprise (CCE) engaged in a series of felony narcotics violations when such violations are conducted in concert with five or more persons.[93] In answering the question of whether an exception to accomplice liability applied to persons who assisted the drug kingpin in the violation of the statute but who were neither expressly held liable under the statute nor one of the five or more persons necessary for the commission of the crime, Judge Richard Posner emphatically argued that he could not say "amen."[94] By rejecting the operation of the *Gebardi* principle in this context, Judge Posner arguably conceived the principle as the *Gebardi* case set it out to be—a rule of construction that triggered a judicial presumption of immunity only in certain specific circumstances. Citing *Gebardi*, Judge Posner asserted that an exception to accomplice liability is only found where an "affirmative legislative policy" to create the exception exists.[95]

Although Judge Posner did not explicate *why* an affirmative legislative policy was absent, it can be implied from his citation to *Gebardi* that perhaps two aspects of the underlying case were driving his refusal to apply the *Gebardi* principle: First, the defendant in *Pino-Perez* was not a party necessary to the inherent nature of the underlying offense because the statute did not contemplate parties on opposite ends of a transaction but parties on the same side of a transaction; and second, the defendant in *Pino-Perez* was also not a necessary party as a function of statutory creation, as "[a]ides [not supervised by the kingpin] do not satisfy the five-supervised-persons requirement of the CCE statute."[96] It was probably this failure to satisfy the requirement of "necessity" that urged Judge Posner to determine that an affirmative legislative policy to immunize the defendant could not be found in the instant case, contrary to *Gebardi*.[97]

Perhaps the most recent authoritative enunciation of the *Gebardi* principle, however, was made in *Abuelhawa v. United States*.[98] Although the case did not engage in a deep discussion of the *Gebardi* principle because the Supreme Court found the principle to "not strictly control the outcome" in this case,[99] the Court nonetheless circumscribed the *Gebardi*

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93. Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 848 (2012).

94. See *Pino-Perez*, 870 F.2d at 1237 ("Aides do not satisfy the five-supervised-persons requirement of the CCE statute . . . ."). This was a clever play on words by Judge Posner, who was alluding to a prior case in the Second Circuit, *United States v. Amen*, that determined that a drug kingpin's helpers could *not* be held liable under the act on a theory of accomplice liability. 831 F.2d 373, 382 (2d Cir. 1987).

95. *Pino-Perez*, 870 F.2d at 1234 (quoting United States v. Falletta, 523 F.2d 1198, 1200 (5th Cir. 1975)).

96. Id. at 1237.

97. Id.

98. 556 U.S. 816 (2009).

99. Id. at 821.

principle as follows: "[W]here a statute treats one side of a bilateral transaction more leniently, adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature."[100] Finally, while given cursory treatment in the Court's majority opinion in *Ocasio v. United States*,[101] Justice Sotomayor's dissent is instructive. In essence, she frames the *Gebardi* decision as "based . . . explicitly on the language of the Mann Act."[102] Although she does not expressly refer to the *Gebardi* principle as a rule of construction, her acknowledgement that the *Gebardi* decision was closely tethered to the language of the statute supports the framing of the principle as such.

In each of these cases, the *Gebardi* principle was interpreted and applied as a rule of construction. An inference of an "affirmative legislative policy" not to create criminal liability was only triggered when two gatekeeping conditions were met: First, the nature of the offense necessarily required participation of a particular party; and second, the statute was structured such that liability for such necessary party was omitted. These two gatekeeping conditions had to be satisfied in order to trigger the presumption that in criminalizing the activity, Congress must have had all necessary parties in mind and thus any omission of a necessary party must have been a deliberate one. It is the requirement of a necessary party omitted from liability that undergirds *Gebardi* as a rule of construction, and it thereby bridges the gulf between the multitude of things Congress *possibly* contemplated and the discrete set of things Congress *probably* contemplated.

2. *Broad Variant: Unbounded by Rules.* — A broader variant of the *Gebardi* principle, however, has emerged more recently. This variant is broader because whereas *Gebardi* as a rule of construction guides and mediates the process of determining legislative intent through the twin gatekeeping requirements, this variant operates as an invitation for courts to delve into legislative history and congressional records in order to intuit a "policy" for or against prosecutorial immunity.[103] In other words, this broader take on *Gebardi* can defeat the default rule notwithstanding the absence of the twin gatekeeping requirements.

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100. Id. at 820–21.

101. 136 S. Ct. 1423 (2016). In *Ocasio*, the Supreme Court faced the question of whether the petitioner could be convicted of conspiring to violate the Hobbs Act, when the individuals being extorted from under the act were part of the same conspiratorial entity. Id. at 1427. The Court ruled that in spite of the statute's language defining the crime as obtaining property "from another," the fact that the individual members of the conspiratorial entity could never have committed the substantive crime on their own does not preclude a charge of conspiracy to commit the same substantive crime. See id. at 1433–34.

102. Id. at 1443 (Sotomayor, J., dissenting).

103. See, e.g., United States v. Amen, 831 F.2d 373, 382 (2d Cir. 1987) (examining legislative history to find a legislative policy).

United States v. Amen provides a case in point.[104] Similar to *Pino-Perez*,[105] the relevant law in *Amen* was the drug-kingpin statute.[106] One of the defendants, Michael Paradiso, had assisted the kingpin in communicating with his subordinates and performed tasks for the kingpin.[107] The question facing the court was whether Paradiso could be liable as an accomplice even though he was not an employee of the CCE and thus not one of the five supervised persons required for the commission of the offense.[108] In answering this question and ultimately convicting Paradiso for aiding and abetting the kingpin, the court noted, relying on the authority of *Gebardi*, that when "Congress assigns guilt to only one type of participant in a transaction, it intends to leave the others unpunished for the offense."[109]

However, attention to the court's analysis reveals that *Gebardi*'s influence in this case was not as a rule of construction. Instead of relying solely on statutory structure to infer a legislative policy, the court in *Amen* directly delved into legislative history to find a legislative policy.[110] The *Gebardi* principle was applied as an exception to the general principles of criminal secondary liability not when the particular rule of construction could be applied to give rise to an inference of legislative policy, but as a broad invitation for courts to parse through legislative history in search of such policy unbounded by the gatekeeping requirements.

Amen was not the first case to apply the *Gebardi* principle in a manner more expansive than a rule of construction. In *United States v. Falletta*,[111] the defendant was convicted for aiding and abetting the violation of 18 U.S.C. § 922(g), which proscribes the receipt, possession, and transportation of a firearm in interstate commerce by a convicted felon.[112] The prosecution's theory of the case was that the defendant had aided and abetted a convicted felon in the receipt of a firearm.[113] The defendant attempted to shield himself from accomplice liability through a reasoning akin to that undergirding the *Gebardi* principle as a rule of construction: Since Congress cabined liability for the firearm-transaction

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104. Id.

105. See supra notes 93–94 and accompanying text (detailing the mechanics of the drug-kingpin statute).

106. Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 848 (2012).

107. *Amen*, 831 F.2d at 375, 377.

108. Id. at 381.

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

110. The court found that "[w]hile the legislative history makes no mention of aiders and abettors, it makes clear that the purpose of making CCE a new offense rather than leaving it as sentence enhancement was not to catch in the CCE net those who aided and abetted the supervisors' activities." Id. at 382.

111. 523 F.2d 1198 (5th Cir. 1975).

112. Id. at 1198–99.

113. Id. at 1199.

offense to the recipient of the firearm in spite of the inherent necessity of a giver in order for the offense to materialize, Congress's failure to impose liability on the giver evinced a "legislative desire that such a person should go unpunished."[114] In essence, the twin gatekeeping requirements of (1) a transaction necessarily requiring the participation of a particular party and (2) the omission of such necessary party from liability under the statute were both satisfied in the context of a giver of a firearm vis-à-vis 18 U.S.C. § 922(g); as such, the judicial presumption of immunity for the giver ought to be triggered.

The Court in *Falletta*, however, rejected the defendant's line of reasoning. While conceding that there is "respectable authority supporting this approach to statutory construction," the Court concluded that "[t]he rule of construction in *Gebardi* amounts at best to a weak presumption about legislative intent."[115] Instead, the Court looked to the "main objective" of the statute—the restriction of firearm possession—and determined that Congress did not focus on the "receiving" aspect of the statute and so an "affirmative legislative policy" to immunize givers of firearms from liability could not be found.[116] Again, this is evidence of a court bypassing the structural requirements originally put in place in the *Gebardi* case and delving directly into materials beyond the text of the statute to ascertain legislative intent.

B. Hoskins *and the* Gebardi *Principle*

United States v. Hoskins was a key development in the *Gebardi* principle's jurisprudence on many levels. Yet the reason it drew almost immediate attention from both practitioners[117] and online reporters[118]

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114. Id.

115. Id. at 1199–200 (citing Gebardi v. United States, 287 U.S. 112 (1932)).

116. Id.

117. See, e.g., Martin S. Bloor & Christopher Howard, Federal Judge Rejects Government's Accomplice Theory of FCPA Liability, Insight Ctr.: Publications, Pepper Hamilton LLP (Aug. 26, 2015), http://www.pepperlaw.com/publications/federal-judge-rejects-governments-accomplice-theory-of-fcpa-liability-2015-08-26/ [http://perma.cc/J2VD-R6PL]; Charles S. Leeper & Joshua M. Link, Federal Court Rejects Invalid Theory of FCPA "Accomplice" Liability, Insights & Events, Drinker Biddle (Aug. 21, 2015), http://www.drinkerbiddle.com/insights/publications/2015/08/federal-court-rejects-invalid-theory-of-fcpa-acc__ [http://perma.cc/D3EE-CGKH]; Kimberly A. Parker et al., Federal Judge Rejects DOJ's Theory of FCPA Accomplice Liability, Publications & News, WilmerHale (Aug. 27, 2015), http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179879236 [http://perma.cc/2AWK-TFPD].

118. See, e.g., Judge Trims DOJ's FCPA Enforcement Action Against Lawrence Hoskins, FCPA Professor (Aug. 17, 2015), http://www.fcpaprofessor.com/judge-trims-dojs-fcpa-enforcement-action-against-lawrence-hoskins (on file with the *Columbia Law Review*); Stephanie Russell-Kraft, Judge Raises Hurdle for DOJ FCPA Conspiracy Charge, Law360 (Aug. 14, 2015, 4:56 PM), http://www.law360.com/articles/691453/judge-raises-hurdle-for-doj-fcpa-conspiracy-charge [http://perma.cc/T5D8-MMVU].

alike cannot be divorced from the hot-button nature of the underlying law, the FCPA.[119]

Enacted by Congress in 1977 in the wake of the Watergate political scandal,[120] the FCPA aimed to restore public confidence in U.S. business by stamping out corporate bribery.[121] Since then, the FCPA has undergone two amendments: one in 1988[122] and another in 1998.[123] The current FCPA anti-bribery provisions proscribe the offer to pay, payment, promise to pay, or authorization of payment of money or "anything of value" to a "foreign official" in her official capacity in exchange for some improper business advantage.[124] The statute expressly metes out three broad categories of natural and legal persons to which the antibribery provisions apply: issuers,[125] domestic concerns,[126] and certain real and legal entities (other than issuers and domestic concerns) acting within U.S. territory.[127] The FCPA is another area of law[128] within which the *Gebardi* principle has been interpreted and applied.

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119. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to -3 (2012).

120. For more information on the scandal, see generally Keith W. Olson, Watergate: The Presidential Scandal that Shook America (2003) (providing the broader context surrounding the scandal).

121. Criminal Div., U.S. Dep't of Justice & Enf't Div., U.S. SEC, A Resource Guide to the U.S. Foreign Corrupt Practices Act 3 (2012) [hereinafter FCPA Guide], http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [http://perma.cc/VUA6-VYVP].

122. The 1988 amendment added two affirmative defenses to the FCPA—namely, the "local law" defense and the "bona fide promotional expense" defense. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107, 1415–25 (1988); see also H.R. Rep. No. 100-576, at 916–24 (1988) (discussing the FCPA 1988 amendments); FCPA Guide, supra note 121, at 3 (discussing the background of the FCPA 1988 amendments).

123. The 1998 amendment involved bringing the FCPA in line with the requirements of the Anti-Bribery Convention that came into force in February 1999. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302; see also S. Rep. No. 105-277, at 2–3 (1998) (describing the FCPA 1998 amendments); FCPA Guide, supra note 121, at 4 (discussing the background of the FCPA 1998 amendments).

124. 112 Stat. at 3305; FCPA Guide, supra note 121, at 10.

125. Under the FCPA, an "issuer" is defined as a company that has a class of securities registered under section 12 of the Exchange Act or is required to file reports with the SEC under section 15(d) of the Exchange Act. 15 U.S.C. § 78c(a)(8) (2012). The FCPA Guide authored by the SEC and DOJ has clarified that this essentially includes any company that lists securities on a U.S. national securities exchange or is quoted in the U.S. over-the-counter market. FCPA Guide, supra note 121, at 11.

126. Under the FCPA, a "domestic concern" can refer to both individuals and legal entities. 15 U.S.C. § 78dd-2(h). In the context of an individual, a "domestic concern" would be either a citizen or a resident of the United States; in the context of a legal entity, a "domestic concern" would either be organized under the laws of the United States or have the United States as its principal place of business. Id.

127. This is the territorial jurisdiction provision of the FCPA. Id. at 78dd-3(a).

128. As discussed in section II.A, the *Gebardi* principle has been applied across a range of laws, including the Mann Act, the Harrison Anti-Narcotic Act, the federal conflict-of-interest statutes, and the drug-kingpin statute.

1. *FCPA and the* Gebardi *Principle Pre-*Hoskins. — *Hoskins* was not the first FCPA case to deal with *Gebardi* issues. However, given the FCPA's rather recent enactment[129] and the infrequency with which FCPA cases go to trial,[130] it is unsurprising that only two other cases had confronted the *Gebardi* principle before the *Hoskins* decision in 2015.

The first FCPA case involving the *Gebardi* principle was *United States v. Castle*.[131] The central question in the *Castle* case was whether the Canadian foreign officials who had accepted the bribe in question could be prosecuted for conspiring to violate the FCPA.[132] The Fifth Circuit, fully adopting Judge Sanders's trial court decision and opinion, held that foreign officials could not be prosecuted under a theory of conspiracy.[133] Judge Harold Barefoot Sanders's reasoning hinged on the application of the *Gebardi* principle, with respect to which he clearly stated: "The principle enunciated by the Supreme Court in *Gebardi* squarely applies to the case before this Court."[134] Framing the principle as a rule of construction and analogizing the structure of the FCPA to that of the Mann Act in *Gebardi*, Judge Sanders argued that both statutes involved an offense that "necessarily involved" at least two parties acting in concert but only explicitly assigned liability to one party.[135]

In the specific context of the FCPA, the twin gatekeeping requirements for triggering the judicial presumption of immunity from criminal secondary liability under *Gebardi* as a rule of construction are similarly met. First, in terms of the nature of the transaction, the offense of bribery necessarily involves a briber and a foreign official to be bribed.[136] Second, in terms of the structure of the statute, criminal liability is expressly created only for the briber, not the bribe recipient, notwithstanding the recipient's indispensability in the execution of the transaction.[137] As such, this allows for the judicial presumption that Congress did not intend to punish the foreign official (bribe recipient) and that prosecuting the foreign official through the conspiracy statute would only serve to "override the Congressional intent . . . ."[138] The *Castle* case is

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129. See supra text accompanying note 120 (noting enactment of the FCPA).

130. See Mike Koehler, Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era, 43 U. Tol. L. Rev. 99, 146 (2011) (noting there is "little substantive FCPA case law" due to strong incentives to settle).

131. 925 F.2d 831 (5th Cir. 1991).

132. Id. at 831.

133. Id. For a detailed presentation of the reasoning the Fifth Circuit adopted, see Judge Sanders's memorandum in United States v. Blondek, 741 F. Supp. 116 (N.D. Tex. 1990).

134. *Blondek*, 741 F. Supp. at 117.

135. Id.

136. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to -3 (2012).

137. Id.

138. *Blondek*, 741 F. Supp. at 118.

therefore another example of a court applying the variant of the *Gebardi* principle that operates as a rule of construction within the context of the FCPA.

The other FCPA case involving the *Gebardi* principle is *United States v. Bodmer*.[139] Like *Castle*, *Bodmer* also involved a foreign national charged with conspiring to violate the FCPA.[140] Unlike *Castle*, however, *Bodmer* involved charging a foreign national briber and not a foreign national bribe recipient.[141] One wrinkle that troubled the court in the *Bodmer* case was that it was heard in court after the 1998 amendments to the FCPA, but the alleged conspiracy—and thus the relevant law—predated the amendments.[142] This is a unique wrinkle because while the 1998 amendments clarified that foreign nationals could be subject to the FCPA if they were acting in the capacity of "agent[s] of a domestic concern,"[143] the liability for such persons under the FCPA of 1977 was ambiguous.

The most troubling aspect of the *Bodmer* case, however, was not the question of the scope of the FCPA of 1977; on this front, the court engaged in a thorough analysis of statutory canons,[144] legislative history,[145] and judicial interpretations.[146] Instead, it was what the *Bodmer* court unquestioningly adopted: If defendant foreign nationals could not be subject to criminal liability under the FCPA, the conspiracy charge necessarily had to be dismissed pursuant to *Gebardi* and *Castle*.[147]

This reasoning—or perhaps more accurately, the lack thereof—is extremely problematic. Neither *Gebardi* nor *Castle* stands for the following rule: If a person cannot be held liable under the substantive statute, such person also cannot be held liable for conspiracy to violate the substantive statute. On the contrary, the court in *Gebardi* was explicit in stating that the "[i]ncapacity of one to commit the substantive offense does not necessarily imply that he may with impunity conspire with others who are able to commit it."[148] Further, the *Gebardi* principle as conceived in *Gebardi* and as applied in *Castle* operated as a rule of construction, in which a judicial presumption to defeat the general reach of the conspiracy or accomplice-liability statutes was triggered only when

139. 342 F. Supp. 2d 176 (S.D.N.Y. 2004).

140. See id. at 177–78 (noting the defendant to be a Swiss national).

141. Id. at 179.

142. See id. at 181 ("[Defendant] has been charged pursuant to the FCPA of 1977, as it existed prior to the November 10, 1998 amendments . . . .").

143. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 3(b)(2), 112 Stat. 3302, 3304.

144. See *Bodmer*, 342 F. Supp. 2d at 182–84.

145. See id. at 184–86.

146. See id. at 186–87.

147. Id. at 181.

148. Gebardi v. United States, 287 U.S. 112, 120 (1932).

the gatekeeping requirements of "necessity" and "omission" were met.[149] Under the facts in *Bodmer* and assuming the application of the *Gebardi* principle as a rule of construction, an exception to conspiratorial liability should not be found as, even if the "omission" requirement were met, a *foreign national* briber was in no way a party necessary to a bribery transaction—any briber, foreign or not, would have sufficed.

The only way to rationalize the *Bodmer* court's sweeping take on the force of *Gebardi* is that the court was applying the broader variant of the *Gebardi* principle. Since in determining whether the defendant was liable under the FCPA the court was engaging in an exercise of ascertaining legislative intent through various methods (statutory construction, legislative history, and the like), the court assumed that if it found a legislative intent to leave the defendant unpunished, that would necessarily immunize the defendant from conspiratorial liability. The court made this assumption of legislative intent notwithstanding the failure to meet the twin gatekeeping requirements of *Gebardi* at the outset.[150] The *Bodmer* case is therefore another example of a court applying the *Gebardi* principle in the context of the FCPA—but this time, in its broader variant.

Overall, there were extremely few criminal cases interpreting and applying the *Gebardi* principle within the context of the FCPA pre-*Hoskins*. Even so, the splintering between the two variants of the *Gebardi* principle was already apparent.

2. *The* Hoskins *Case.* — As detailed above, even before the *Hoskins* case came before the District of Connecticut, *Gebardi*'s jurisprudence had already splintered into two distinct variants. This divergence was evident across all cases that dealt with *Gebardi*-type issues and also within the microcosm of *Gebardi* cases pertaining to the FCPA. *Hoskins*, however, was not a mere reflection of this ongoing problem. Instead, this Note argues that *Hoskins* not only reflected but also added to the problem.

In *Hoskins*, the government charged the defendant with participating and conspiring to participate in a bribery scheme for Alstom's U.S. subsidiary to secure a business contract.[151] The government alleged that the defendant had instigated and conspired with many others to violate the FCPA; the government also suggested that the defendant "may" have engaged a U.S. consultant to pay bribes to one of the highest-ranking officials of the Indonesian Parliament on his behalf and "caused" wire transfers to be made via U.S. bank accounts as part of the corrupt

149. See supra notes 136–138 and accompanying text (highlighting the satisfaction of the twin gatekeeping requirements in *Castle*).

150. See *Bodmer*, 342 F. Supp. 2d at 187–88 (reasoning that Congress "likely intended" to extend liability to the defendant based on importing the civil concept of personal jurisdiction to a criminal context, as opposed to meeting the twin gatekeeping requirements).

151. United States v. Hoskins, 123 F. Supp. 3d 316, 317–18 (D. Conn. 2015).

scheme.[152] Notably, the defendant was not an American citizen, was employed as a senior vice president for the Asia region by Alstom U.K., and was engaged in other responsibilities for Alstom Resources Management S.A. in France.[153] This meant the defendant was a "non-resident foreign national."[154]

On June 4, 2015, the defendant filed a motion to dismiss the count that charged him with conspiring "together with" a domestic concern to violate section 78dd-2 of the FCPA.[155] The limited question facing the Court on this motion to dismiss was whether assuming the defendant was *not* an agent of a "domestic concern" within the language of section 78dd-2 (i.e., the defendant could not be found directly liable for the substantive underlying offense), the defendant could nonetheless be prosecuted for conspiracy to violate the FCPA in the capacity of a "non-resident foreign national."[156] The ability of the defendant to escape liability thus had to turn—and did turn—on the applicability of a common law exception to general conspiratorial and accomplice liability. In other words, the defendant's fate turned on the *Gebardi* principle.

3. Hoskins*: Clash of the* Gebardi *"Principles."* — The briefs submitted in support of and in response to the June 4 motion to dismiss are telling. The respective stances the government and the defendant took on the applicability of the *Gebardi* principle underscore the tension between the two variants of the *Gebardi* principle that exist today.

a. *Defendant's Memorandum.* — The focus of the defendant's argument in the memorandum in support of this motion to dismiss was as follows: "[B]ecause the . . . conspiracy charge fails to allege that Mr. Hoskins falls into any defined FCPA class, it is defective and must be dismissed."[157] Interestingly, in support of this conclusion, the memorandum cites to *Castle*, a case that dismissed the charge of conspiracy to violate the FCPA not *solely* because the defendant in that case was not a

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152. Government's Response to Defendant's Second Motion to Dismiss at 2, *Hoskins*, 123 F. Supp. 3d 316 (No. 3:12CR238 (JBA)), 2015 WL 11018892, at *3–4 [hereinafter Government's Response to June 4 Motion to Dismiss].

153. *Hoskins*, 123 F. Supp. 3d at 317–18.

154. Id. at 318–19. Classification as a "non-resident foreign national" means that the defendant cannot be liable under the FCPA in an individual capacity because the defendant would not constitute a "domestic concern" under 15 U.S.C. § 78dd-2(a) (2012). The only way for the defendant to be liable under the FCPA, therefore, would be to either commit the proscribed act on U.S. territory, id. § 78dd-3(a), or act in the capacity of an "officer, director, employee, or agent" or "stockholder" of an "issuer" or "domestic concern," id. §§ 78dd-1(a), -2(a).

155. See Memorandum of Law in Support of Lawrence Hoskin's Motion to Dismiss Count One of the Third Superseding Indictment at 4, *Hoskins*, 123 F. Supp. 3d 316 (No. 3:12-cr-238 (JBA)), 2015 WL 11018889 [hereinafter Defendant's June 4 Motion to Dismiss].

156. *Hoskins*, 123 F. Supp. 3d at 319.

157. Defendant's June 4 Motion to Dismiss, supra note 155, at 5.

member of one of the defined classes subject to FCPA liability but *also* because the defendant—the foreign official who received the bribe—was a necessary party to a bribe transaction.[158] The twin gatekeeping requirements of "omission" and "necessity" inherent in *Gebardi* as a rule of construction were of paramount importance in *Castle*'s ultimate dismissal of the conspiracy charge, but "omission" was deemed dispositive in the defendant's memorandum in *Hoskins*.[159] The defendant's memorandum, notwithstanding the citation to *Castle*,[160] did not construe the *Gebardi* principle to be a narrow rule of construction; instead, it adopted its broader variant.

The fact that the defendant's memorandum subscribed to the broader variant of the *Gebardi* principle is even more apparent because of its extensive focus on legislative history to support Congress's apparent intent to immunize nonresident foreign nationals not expressly captured by the FCPA from conspiracy charges.[161] It was only *after* establishing that legislative history supports immunity that the memorandum argued that in light of the *Gebardi* principle, Congress's intent cannot be circumvented.[162] This is distinct from *Gebardi* as a rule of construction because congressional intent to immunize is reached through a presumption triggered by the structure of the statute, not through an examination of legislative history.[163]

b. *Government's Memorandum.* — On the other hand, the government's memorandum in response to the motion to dismiss construed the *Gebardi* principle as a rule of construction. It recognized that the *Gebardi* principle functioned as a "narrow exception" to the "long-established" rules of conspiratorial and accomplice liability, which applied only when a "necessary" party was "excluded" from prosecution for the underlying offense.[164] The government also highlighted that the defendant's

158. United States v. Castle, 925 F.2d 831, 835 (5th Cir. 1991) ("[T]he very individuals whose participation was required in every case—the foreign officials accepting the bribe—were excluded from prosecution . . . . [I]t is only logical to conclude that Congress chose to exempt this small class of persons from prosecution."); Defendant's June 4 Motion to Dismiss, supra note 155, at 5.

159. See Defendant's June 4 Motion to Dismiss, supra note 155, at 4 ("The new charging language of Count One confirms that the government is attempting to circumvent clear-stated congressional intent: that the FCPA was not intended to apply to individuals . . . who do not otherwise fit within one of the FCPA's purposefully and carefully defined classes.").

160. Id. at 5.

161. See id. at 5–18 (drawing on legislative history to support purported congressional intent).

162. Id. at 18–20.

163. See supra section II.A.1 (detailing gatekeeping requirements for the narrow variant of the *Gebardi* principle).

164. Government's Response to June 4 Motion to Dismiss, supra note 152, at 1–2. The government also contemplated another circumstance in which the *Gebardi* principle might apply—when the defendant charged with conspiracy or complicity fell within the class of

memorandum misinterpreted *Castle*, as the decision was not only "premised . . . on the fact that the foreign officials were merely 'exempted' from direct liability under the statute"; it was also premised on the necessary involvement of that party.[165]

The government's memorandum, though it applied *Gebardi* as a rule of construction, also examined legislative history.[166] Relying on the same legislative materials that the defendant relied on in his memorandum,[167] the government came out on the opposite side: Congress "expressly chose to subject individuals like the defendant to [conspiracy and accessorial] liability."[168]

c. *The Decision.* — Ultimately, Judge Arterton determined that the *Gebardi* principle applied in this case to exempt the defendant from conspiratorial liability because the "text and structure of the FCPA" and its "legislative history" reveal that Congress "did not intend to impose accomplice liability on non-resident foreign nationals who were not subject to direct liability."[169] Central to her reasoning was that the *Gebardi* principle allowed for congressional intent to immunize a given class of persons in "other circumstances" beyond the situation laid out in the government's memorandum.[170] In support of this, Judge Arterton drew heavily on the Second Circuit precedent, *Amen*, in which the court applied the *Gebardi* principle because "legislative history . . . makes it clear that the purpose [of the drug-kingpin statute] . . . was not to catch . . . those who aided and abetted the supervisors' activities."[171] As illustrated above, *Amen* is a case in which the court applied the broader variant of the *Gebardi* principle.[172] The *Hoskins* decision thus affirmed such a broad interpretation of the *Gebardi* principle.

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persons the substantive statute aimed to protect. Id. This Note, however, does not dwell on this situation, as "victims" are arguably a subset of "necessary" parties.

165. Id. at 21.

166. See id. at 26–33 (arguing legislative history supports congressional intent to hold the defendant liable).

167. All of the legislative materials that the government relied on in reaching its conclusion were also relied on in the defendant's memorandum, though for an opposing end. Compare Government's Response to June 4 Motion to Dismiss, supra note 152, at iv, with Defendant's June 4 Motion to Dismiss, supra note 155, at ii–iii. The reports include, for example, H.R. Rep. No. 105-802 (1998); S. Rep. No. 105-277 (1998); H.R. Rep. No. 95-831 (1977) (Conf. Rep.); S. Rep No. 94-1031 (1976); 122 Cong. Rec. 30,332 (1976).

168. Government's Response to June 4 Motion to Dismiss, supra note 152, at 26.

169. United States v. Hoskins, 123 F. Supp. 3d 316, 327 (D. Conn. 2015).

170. Id. at 322.

171. United States v. Amen, 831 F.2d 373, 382 (2d Cir. 1987); see also *Hoskins*, 123 F. Supp. 3d at 322 (quoting a passage from *Amen*).

172. See supra notes 104–110 and accompanying text.

C. *State of Affairs Post-*Hoskins

Hoskins serves as a continued extension of the applicability of *Gebardi* to contexts in which the principle is no longer cabined to a narrow rule of construction and is instead applied in any instance in which the judiciary believes Congress did not intend to penalize a certain class of persons. This section explains how *Hoskins* stretches the *Gebardi* principle beyond its preexisting jurisprudence.

1. *From Necessary Parties to Unnecessary Parties.* — One expansion that *Gebardi* has undergone since *Hoskins* is from a narrow application in cases involving only necessary parties to cases in which the relevant party is not necessary at all to the commission of the underlying offense. This is in line with *Amen*'s broadening of the *Gebardi* principle notably because the situation in *Amen* was not a bilateral transaction between a transporter and one to be transported, such as a buyer and a seller or a briber and an official to be bribed, that necessarily required such two parties on each side to commit the underlying offense; the situation was a single drug enterprise.[173] There was also no necessity as a product of statutory creation, as the defendant Paradiso in *Amen* was not one of the five subordinates who were essential to the kingpin's conviction under the CCE statute but a third-party aide.[174]

Similarly in *Hoskins*, the defendant was arguably not a necessary party at all, whether by function of the nature of the transaction or by function of statutory conditions.[175] Unlike the defendant foreign official in *Castle* who played the necessary role of bribe recipient in order for the bribe to have materialized,[176] the non-resident-foreign-national briber was not *necessary* for the bribe to have materialized in *Hoskins*.[177] So, just as *Amen* expanded the reach of the *Gebardi* principle to individuals neither necessary to the inherent nature of the offense nor necessary as a product of statutory creation,[178] *Hoskins* reinforced this expansion in the

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173. See supra notes 104–110 and accompanying text (discussing the application of the *Gebardi* principle in *Amen*).

174. See *Amen*, 831 F.2d at 381 (characterizing defendant Paradiso as a "non-employee[] who knowingly provide[d] direct assistance to the head of the organization").

175. In terms of the nature of the transaction, a bribe requires a briber and a bribe recipient but not necessarily a *non-resident-foreign-national* briber. Cf. *Hoskins*, 123 F. Supp. 3d at 327 (arguing the "text and structure" of the FCPA reveals congressional intent to immunize non resident foreign nationals against accomplice liability absent direct liability). In terms of the structure of the statute, there is no statutorily created necessity of a non-resident-foreign-national briber in order for to find FPCA liability. Id. As such, in the context of *Hoskins*, the defendant was in no way necessary to the bribe transaction.

176. See supra notes 135–138 and accompanying text (discussing the necessity of the defendant bribe recipient in the bribe transaction in *Castle*).

177. See supra note 175 and accompanying text (discussing the dispensability of a non-resident-foreign-national briber in the bribe transaction in *Hoskins*).

178. See supra notes 108–108 and accompanying text (noting *Amen*'s expansion of *Gebardi* from necessary to unnecessary parties).

FCPA context by applying the *Gebardi* principle to situations in which the party in question was not necessary by any means because the bribery scheme did not require a nonresident-foreign-national briber—*any* briber would have sufficed.

2. *From Acts to Status.* — Inseparable from the shift toward opening *Gebardi* immunity to nonessential parties is the more fundamental shift away from applying *Gebardi* to a party's substantive role and acts toward applying *Gebardi* to a party's status. In *Hoskins*, there was no other reason for the court granting the defendant immunity but for his status as a nonresident foreign national.[179] The court's decision was divorced from any substantive role the defendant played.[180] Again, this is in stark contrast to prior cases in *Gebardi* jurisprudence in which immunity was grafted to a specific role a party played in a transaction—the woman to be transported,[181] the purchaser,[182] or the bribe recipient.[183] It is not surprising that in a case not long after *Gebardi*, the Eighth Circuit assumed that *Gebardi* applied to an "act" and thus the individual in the capacity of having performed that "act"—not the individual per se.[184]

Proponents of the broader variant of the *Gebardi* principle might argue that if Congress did not intend to prosecute a certain class of persons, it should be immaterial whether the principle is applied in relation to the class's substantive acts or the class's status; prosecuting such a class under the conspiracy or complicity statute would similarly frustrate congressional intent. In theory, this is true. In practice, however, the narrow variant of the *Gebardi* principle recognizes that while giving effect to congressional intent is important, giving the judiciary free reign to search for this intent is dangerous. By functioning as a rule of construction and limiting judicial discretion through structural gatekeeping requirements central to the inherent nature of the underlying offense and statutory language, the narrow variant of the *Gebardi* principle arguably strikes a better balance between adhering to legislative policy and curtailing judicial intuitions.

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179. See *Hoskins*, 123 F. Supp. 3d at 319 (limiting the question of liability under the FCPA to turn on the status as a "non-resident foreign national").

180. See id. at 322 (concluding Congress did not intend to impose accomplice liability on bribers who are nonresident foreign nationals).

181. E.g., Gebardi v. United States, 287 U.S. 112, 121–22 (1932) (immunizing the woman being transported from conspiratorial liability).

182. E.g., Nigro v. United States, 117 F.2d 624, 629 (8th Cir. 1941) (immunizing a drug purchaser from conspiratorial liability).

183. E.g., United States v. Blondek, 741 F. Supp. 116, 119 (N.D. Tex. 1990) (immunizing a bribe recipient from conspiratorial liability).

184. Fulbright v. United States, 91 F.2d 210, 211–12 (8th Cir. 1937) ("[I]t is necessary that the *act* intended to be effected, in order to support a charge of conspiracy, must in some manner be prohibited by an act of Congress . . . . If the *act* is not prohibited by Congress, it is not unlawful to conspire to do it." (emphasis added) (citing *Gebardi*, 287 U.S. at 123)).

Ocasio,[185] however, gives cause to temper these concerns arising from the *Hoskins* decision and question how durable the broader variant of the *Gebardi* principle would be, at least in the FCPA context. Although this was a case involving extortion and not bribery, the *Ocasio* decision hinged on the premise that extortion was the "rough equivalent of what we would now describe as 'taking a bribe.'"[186] This suggests that since conspiratorial liability was found in the context of extortion in *Ocasio*, the Supreme Court might potentially find conspiratorial liability in the FCPA context as well, contrary to the ruling in *Hoskins*.

III. FINDING A SINGLE PRINCIPLE

The previous Parts identified and described the problem of the *Gebardi* principle's splintering. This Part will argue for the narrower framing of the *Gebardi* principle—in other words, the *Gebardi* principle as a rule of construction. To justify this interpretation and application of the *Gebardi* principle, this section first highlights the problematic practical implications of the broader *Gebardi* variant in section III.A and then moves on to analogize the *Gebardi* principle to Wharton's rule in section III.B.

A. *Problematic Implications*

The expansion of the applicability of the *Gebardi* principle through the emergence of the variant that allows courts to look beyond the statute itself to construct legislative intent, and *Hoskins*'s further expansion of this variant, leads to troubling implications in practice. Three main practical problems follow: (1) the inconclusiveness of legislative history; (2) undercriminalization; and (3) a more limited reach of the conspiracy statute.

1. *Inconclusiveness of Legislative History.* — First and foremost, this Note does not hope to join the theoretical debate on statutory interpretation and the tension between textualism and purposivism—that is well-covered ground.[187] This Note does, however, aim to highlight the practical problems that follow from the *Gebardi* principle interpreted and applied as its broader variant. The tension between the government's memorandum and the defendant's memorandum in the *Hoskins*

185. See supra notes 101–102 and accompanying text (discussing the *Ocasio* case).

186. Ocasio v. United States, 136 S. Ct. 1423, 1428 (2016) (internal quotation marks omitted) (quoting Evans v. United States, 504 U.S. 255, 260 (1992)).

187. See, e.g., John F. Manning, The New Purposivism, 2011 Sup. Ct. Rev. 113, 119 (discussing the Supreme Court's approach toward statutory interpretation as a "textually-structured" purposivism); John F. Manning, What Divides Textualists from Purposivists?, 106 Colum. L. Rev. 70, 91–109 (2006) (distinguishing modern textualism from purposivism); Jonathan T. Molot, The Rise and Fall of Textualism, 106 Colum. L. Rev. 1, 56–69 (2006) (arguing the end of textualism).

case provides a case in point because reliance on the exact same pool of legislative materials resulted in opposing conclusions.[188]

What this suggests is that legislative materials often fail to provide any clear or determinative indicator of legislative intent. As legal scholar Professor Max Radin argues, "[L]egislative history based on the 'materials' does not . . . enable us to discover without more ado what determinate situations or events are included in . . . the statute."[189] Professor W. David Slawson has also argued against the practicability of statutory interpretation driven by research into legislative history from the perspective of an attorney:

> Legislative history requires extraordinary amounts of research. It consists, at a minimum, of committee reports, conference reports, records of committee hearings, floor statements, Presidential signing statements, and all previous legislation or documents of any nature to which any of the foregoing refer . . . . If a lawyer were required to become knowledgeable in the legislative history of a statute he was interpreting in order to be regarded as having acted with professional competence, most of the lawyers in this country will be guilty of malpractice.[190]

Consequently, interpreting and applying the *Gebardi* principle to exempt conspiratorial and accomplice liability whenever Congress intended to do so, while theoretically ideal, runs into very real practical issues in execution when courts have free reign to construct this congressional intent unmediated by rules rooted in the nature of the transaction and the structure of the underlying statute. The cost inherent in determining congressional intent based on extrinsic materials such as legislative history without first meeting some threshold gatekeeping requirements is the greater risk of courts replacing congressional intent with judicial intuitions.

2. *Undercriminalization.* — The *Hoskins* case and the context of the FCPA also shed light on the problem of undercriminalization should the courts stretch the *Gebardi* principle too far. This might seem like an outrageous argument to make, especially in view of the trends within the FCPA today and the broader trends in federal criminal law. Indeed, within the context of the FCPA, the trend has been a growing concern

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188. See supra notes 167–168 and accompanying text (discussing the government's and the defendant's reliance on the same legislative materials in their respective memoranda).

189. Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 873 (1930).

190. W. David Slawson, Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law, 44 Stan. L. Rev. 383, 408 (1992). But see A. Raymond Randolph, Dictionaries, Plain Meaning, and Context in Statutory Interpretation, 17 Harv. J.L. & Pub. Pol'y 71, 77 (1994) ("Legislative history may be useful in filling the gap."); Fritz Snyder, Legislative History and Statutory Interpretation: The Supreme Court and the Tenth Circuit, 49 Okla. L. Rev. 573, 577 (1996) (arguing the dangers associated with relying on legislative history in statutory interpretation are "clearly overstated").

toward overenforcement.[191] The U.S. Chamber Institute for Legal Reform has been pushing for amendments to the FCPA since October 2010,[192] all of which serve to curtail and circumscribe liability under the Act.[193] Within federal criminal law more generally, the trend has been a growing concern toward overcriminalization[194] and a gradual increase in the invocation of the rule of lenity.[195] Overcriminalization has been defined as a trend that refers to not only the *quantitative* increase in the number of criminal statutes but also the *qualitative* broadening of existing statutes, which is inseparable from the courts' "penchant to construe ambiguous criminal statutes broadly."[196]

However, the broadening of the *Gebardi* principle, and the consequent extension of immunity from conspiratorial and accomplice liability in federal criminal law, is problematic not just conceptually but

191. See, e.g., The Anti-Bribery Business, Economist (May 9, 2015), http://www.economist.com/news/business/21650557-enforcement-laws-against-corporate-bribery-increases-there-are-risks-it-may-go (on file with the *Columbia Law Review*) (discussing the risk of FCPA enforcement going too far); Is the SEC Pushing the Foreign Corrupt Practices Act Too Far?, Risk & Compliance Hub (Aug. 20, 2015), http://www.riskandcompliancehub.com/is-the-sec-pushing-the-foreign-corrupt-practices-act-too-far/ [http://perma.cc/CTL2-PY9T]; Michael Volkov, Are Prosecutors Pushing the Envelope Too Far?, Volkov (Jan. 19, 2012), http://blog.volkovlaw.com/2012/01/are-prosecutors-pushing-the-envelope-too-far/ [http://perma.cc/BV3W-KYRL] (same). In the context of SEC enforcement of the FCPA, see Max Stendahi, Rare Scolding in FCPA Case Shows SEC Can Go Too Far, Law360 (Feb. 20, 2013, 8:05 PM), http://www.law360.com/articles/416967/rare-scolding-in-fcpa-case-shows-sec-can-go-too-far [http://perma.cc/8YM7-KGH6].

192. Andrew Weissmann & Alixandra Smith, U.S. Chamber Inst. for Legal Reform, Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act (2010), http://www.instituteforlegalreform.com/uploads/sites/1/restoringbalance_fcpa.pdf [http://perma.cc/TFB9-6EF4].

193. There are five primary amendments that were recommended: (1) creating a compliance defense against liability similar to the one in the U.K. Bribery Act, (2) limiting a company successor's liability for acts taken by the acquired company prior to point of purchase, (3) requiring a mental state of "willfulness" for corporate criminal liability, (4) limiting the parent company's liability for acts of the subsidiary, and (5) clarifying the definition of "foreign official." Id. at 11–27.

194. E.g., Michael Pierce, The Court and Overcriminalization, 68 Stan. L. Rev. Online 50, 50–51, 58–60 (2015), http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2015/10/68_Stan_L_Rev_Online_50_MPierce.pdf [http://perma.cc/5PHX-Z42T] (discussing new substantive canon against overcriminalization).

195. The rule of lenity dictates that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" (i.e., exculpating the defendant). Yates v. United States, 135 S. Ct. 1074, 1088 (2015) (plurality opinion) (Ginsburg, J.) (citing Cleveland v. United States, 531 U.S. 12, 25 (2000)). The *Harvard Law Review*'s report on the rule of lenity notes United States v. Santos, 553 U.S. 507 (2008), as the point at which the Supreme Court "revitaliz[ed]" the rule of lenity. The Supreme Court, 2007 Term—Leading Cases, 122 Harv. L. Rev. 276, 475–76 (2008).

196. Stephen F. Smith, Overcoming Overcriminalization, 102 J. Crim. L. & Criminology 537, 539 (2012); see also Erik Luna, The Overcriminalization Phenomenon, 54 Am. U. L. Rev. 703, 713 (2005) (noting the phenomenon of overcriminalization is not just a problem of "too many crimes" but also "what should be the boundaries of punishment").

practically, too. Especially in the corporate crime context, the narrowing of the pool of individuals who could be criminally prosecuted for corporate crimes could prevent prosecution of the most culpable individuals due to the preeminence of multinational companies with international operations and international employees.[197] This very problem was raised in the government's brief in the *Hoskins* case, in which the government argued that it was strange that a "high-level" executive like the defendant who potentially played a substantial role in orchestrating the entire bribery scheme should fall through the cracks of the FCPA and be "immune from prosecution" from the outset.[198] This is in contrast to the CCE context, in which a broader interpretation of *Gebardi*, while conceptually troubling,[199] at the very least allows for the prosecution of the most culpable individual: the drug kingpin.[200] Construing the *Gebardi* principle more narrowly is not overcriminalization but simply an application of federal criminal law to appropriately criminalize individuals who ought to be criminalized in the first place.

Furthermore, there is a case to be made that when Congress is insouciant and the executive selectively aggressive, the courts ought to play a greater role in upholding the integrity and clarity of statutes. This means minimizing both over- and undercriminalization. Arguably, while over- and undercriminalization seem to be opposites, they in fact are both symptoms of a similar problem—the tendency of courts to read breadth into ambiguities.[201] For example, a court's broad reading of a statute defining a criminal offense leads to overcriminalization; similarly, a court's broad reading of a principle like *Gebardi* leads to the opposite effect. Both are not ideal, especially in contexts such as that of the FCPA, in which the legislative mechanisms to keep courts and the executive in check are in a gridlock.[202]

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197. See generally Mark Casson, Introduction to the Growth of International Business 1, 1–2 (Mark Casson ed., 2013) (listing growth of multinational firms as one of the key contemporary developments driving research into international business and economics).

198. Government's Response to June 4 Motion to Dismiss, supra note 152, at 2.

199. This Note argues that a broader interpretation of the *Gebardi* principle in the CCE context is troubling because it disregards the twin gatekeeping requirements of the *Gebardi* principle in its original form by placing no analytic pressure on the element of "necessity." See supra section II.C.1 (analyzing the shift in *Gebardi* jurisprudence from necessary to unnecessary parties).

200. See United States v. Amen, 831 F.2d 373, 381 (2d Cir. 1987) (explaining that the purpose of the CCE statute is to target the kingpin, which is why "one cannot incur liability for aiding and abetting such a person").

201. See supra note 196 and accompanying text (identifying courts' "penchant to construe ambiguous criminal statutes broadly" as one of the causes of overcriminalization).

202. In the FCPA context, no amendments to the statute have been made since 1998 in spite of recommendations for such amendments to be effected. See supra notes 192–193 and accompanying text (discussing amendments to the FCPA proposed by the U.S. Chamber Institute for Legal Reform).

3. *Limiting Federal Conspiracy Liability.* — The practical effect of limiting conspiratorial liability through a broad interpretation of the *Gebardi* principle is also especially troubling in the particular context of federal criminal law. Under the law of many states and the Model Penal Code, conspiracy is a unilateral crime.[203] What this means is that an individual's violation of the conspiracy statute is not contingent on the "collaboration of several wrongdoers" but solely on the individual's behavior.[204] The language of the conspiracy statute under the Model Penal Code is illustrative. In section 5.03 of the Model Penal Code on Criminal Conspiracy, conspiracy is defined as follows: "A person is guilty of conspiracy . . . to commit a crime if with the purpose of promoting or facilitating its commission he . . . agrees with such other person . . . to commit such crime . . . or . . . agrees to aid such other person in the . . . commission of such crime . . . ."[205] The focus of the offense is on the individual's own agreement and thus has a unilateral formulation.

On the other hand, conspiracy in federal criminal law has a bilateral formulation.[206] The federal conspiracy statute defines the crime of conspiracy not as the act of an individual agreeing with another but as the act of "two or more persons" agreeing with each other.[207] In other words, "unless at least two people commit it, no one does."[208] The combined effect of a broad *Gebardi* exception to conspiratorial liability and the federal bilateral formulation of the conspiracy statute is that notwithstanding an individual satisfying all other elements of conspiracy, no conspiracy conviction can lie if the other member of the conspiracy happens to be immune or incapable of committing the conspiracy offense.

This was an issue in the *Gebardi* case itself. Because the court found that the conspiracy statute did not reach the woman who was transported, the court also reversed the male transporter's conspiracy charge because the bilateral formulation of federal conspiracy law meant that it was legally impossible for him to conspire with someone who was im-

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203. See Peter Buscemi, Note, Conspiracy: Statutory Reform Since the Model Penal Code, 75 Colum. L. Rev. 1122, 1135–36 (1975) ("Nearly all [state] jurisdictions have elected to follow the Model Penal Code recommendation that conspiracy be redefined as a unilateral, rather than a bilateral (or multilateral), crime.").

204. Id. at 1136.

205. Model Penal Code § 5.03 (Am. Law Inst. 1985).

206. Palato v. State, 988 P.2d 512, 515 (Wyo. 1999) ("The federal [conspiracy] rule . . . takes a bilateral approach . . . .").

207. 18 U.S.C. § 371 (2012); see also United States v. Escobar de Bright, 742 F.2d 1196, 1199 (9th Cir. 1984) ("A conspiracy is defined [under federal law] as an agreement between two or more people to commit an unlawful act . . . .").

208. Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 926 (1959); see also Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965) ("[A]s it takes two to conspire, there can be no indictable conspiracy with a government informer who secretly intends to frustrate the conspiracy.").

mune to prosecution for conspiracy.[209] Similarly, in other cases applying the *Gebardi* principle, conspiracy charges against the party not technically immunized by the *Gebardi* principle also had to be dropped because that party could not be guilty of conspiracy without a co-conspirator.[210]

A broadening *Gebardi* principle—one that does not just apply as a rule of construction but as an invitation to immunize anyone the court *thinks* Congress intended to exclude from criminal liability under a statute—in conjunction with the bilateral formulation of conspiratorial liability under federal criminal law is problematic. As the exception broadens, this collaterally broadens the scope of individuals beyond the reach of the conspiracy statute.

B. *The Wharton's Rule Analogy*

The case for a narrow *Gebardi* principle is more persuasive when analogized to the treatment of Wharton's rule. In general, exceptions to the general statutes on conspiratorial and accomplice liability are meant to be of a "limited character."[211] This underscores the policy choice Congress made to punish organized crime and to use the law of accomplice liability and conspiracy as "legal tools" for this end.[212] The treatment of Wharton's rule, a common law exception to conspiratorial liability, reflects the tightly cabined nature that other exceptions should take on.

Based on an assessment of the application of Wharton's rule by courts, the rule has been generally applied to only a narrow set of cases involving adultery, incest, bigamy, and dueling.[213] All these criminal offenses share the same characteristics: the "general congruence of the agreement and the completed substantive offense," "parties to the agreement are the only persons who participate in commission of the substantive offense," and "immediate consequences of the crime rest on the parties themselves rather than on society at large."[214] Notably, courts have interpreted and applied Wharton's rule as a rule of construction. The Supreme Court made clear that Wharton's rule does not stand for a

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209. Gebardi v. United States, 287 U.S. 112, 123 (1932).

210. See, e.g., Nigro v. United States, 117 F.2d 624, 629 (8th Cir. 1941) ("The proof, therefore, fails to show that Conley was a party to the conspiracy charged. It follows that appellant was not a conspirator, however guilty his own state of mind may have been. He could not conspire with himself."); Mackreth v. United States, 103 F.2d 495, 496 (5th Cir. 1939) ("Conceding that the man was guilty of the substantive offense denounced by the statute, that alone would not make him guilty of conspiracy. He could not conspire by himself.").

211. Pinkerton v. United States, 328 U.S. 640, 643 (1946).

212. Richman, Stith & Stuntz, supra note 34, at 465–66.

213. Iannelli v. United States, 420 U.S. 770, 781–82 (1975) (listing "adultery, incest, bigamy, [and] duelling" as "classic Wharton's Rule offenses").

214. Id. at 782–83 (citing United States v. Bobo, 477 F.2d 974, 987 (4th Cir. 1973)).

blanket exception against double jeopardy.[215] Instead, it functions as a tool to further that policy by triggering a "judicial presumption" when the aforementioned statutory characteristics are met.[216] Although "legislative intent to the contrary" can rebut this judicial presumption,[217] it is crucial that this is a search for an *affirmative* legislative intent not to grant immunity (i.e., to punish) and not a mere *absence* of a legislative intent to punish.

The treatment of Wharton's rule—though not in any way binding on how the *Gebardi* principle should be treated—is instructive. The *Gebardi* principle should also be narrowly construed and applied as a rule of construction that triggers a judicial presumption that is rebuttable only by evidence that Congress intended to punish the parties in question, and not a green light to immunize all parties in cases in which the court can find evidence indicating Congress did not intend to punish. In the latter situation, in which the *Gebardi* principle is interpreted and applied in its broader variant, the search for legislative intent beyond the structure of the statute no longer serves the limited function of *rebutting* a judicial presumption but instead functions as the principle in itself. Just as statutory structure plays a gatekeeping role in the operation of Wharton's rule, it should play a similar role in the operation of the *Gebardi* principle, as they both stand as narrow exceptions to general federal criminal law.

CONCLUSION

Ultimately, this Note argues that the broadening of the *Gebardi* principle needs to come to a halt and advocates for a definitive reading of the principle as a narrow rule of construction rather than a broad invitation to determine legislative intent. This Note recognizes the implication of the appeal for a narrower *Gebardi*: More people would be unable to use *Gebardi* as a shield to deflect conviction as a conspirator or an accomplice. This is especially at odds with calls for less prosecutorial aggression in the enforcement of the FCPA. However, this Note emphasizes the importance of adjudicative clarity and reminds naysayers of the sound policy that undergirds the conspiracy and complicity statutes, which should not be lightly annulled.

215. Id. at 782 (citing Pereira v. United States, 347 U.S. 1, 11 (1954); *Pinkerton*, 328 U.S. at 643–44).

216. *Iannelli*, 420 U.S. at 782; see also United States v. Lebeau, No. 5:14–CR–50048–KES, 2015 WL 3886823, at *2 (D.S.D. June 24, 2015) ("Wharton's Rule only applies if the government produces evidence that only two persons sold drugs to each other and there is no evidence of distribution to another person."); United States v. Fedele, No. 5:10–CR–50067–003, 2014 WL 3846904, at *7 (W.D. Ark. Aug. 5, 2014) ("Wharton's Rule is inapplicable when the conspiracy involves the cooperation of a greater number of persons than is required for the commission of the substantive offense.").

217. *Iannelli*, 420 U.S. at 782.