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CRIMINAL LAW—WHOSE HEAD IS IN THE SAND? PROBLEMS WITH THE USE OF THE OSTRICH INSTRUCTION IN CONSPIRACY CASES

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NOTES & COMMENTS

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INTRODUCTION

You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that a person had a strong suspicion that things were not what they seemed or that someone had withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly . . . .\(^1\)

The preceding is an example of a jury instruction given with increasing frequency in criminal cases in which the defendant's guilty knowledge is at issue. This instruction has several names, the most colorful of which is the Seventh Circuit's term, the "ostrich instruction."\(^2\)

The courts have used the instruction in a wide variety of contexts, including mail fraud,\(^3\) importation and possession of narcotics,\(^4\) aiding and abetting the misapplication of federally insured funds,\(^5\) aiding and abetting the escape of a federal prisoner,\(^6\) and recently, in conspiracy cases.\(^7\) This Comment will focus on the propriety of the instruc-

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3. Ramsey, 785 F.2d at 185.
5. Holland, 831 F.2d at 722.
7. United States v. Diaz, 864 F.2d 544, 549 (7th Cir. 1988) (sustaining district court's use of the instruction), cert. denied, 109 S. Ct. 2075 (1989); United States v. Kehm,
tion in conspiracy prosecutions in cases in which the defendant argues that he or she was not a member of the conspiracy. The Seventh Circuit allows the use of the instruction in such cases; the Second Circuit forbids it.

In United States v. Diaz, the Seventh Circuit Court of Appeals affirmed a conviction for conspiracy in a case in which the district court judge gave an ostrich instruction, although the defendant argued that he was not a member of the conspiracy. In its decision, the court criticized the decision of the Second Circuit in a similar case, United States v. Mankani.

In Mankani, the Second Circuit Court of Appeals held that the conscious avoidance theory of criminal knowledge, which is the basis for the ostrich instruction, cannot be used in a case in which the defendant's membership in the conspiracy is in dispute.

The Diaz and Mankani decisions demonstrate the differences between the two approaches, and the different results which may follow. The purpose of this Comment is to explore the reasoning behind the two approaches, and discuss how one court decided that the use of the ostrich instruction in certain conspiracy cases is nonsensical given the mens rea for conspiracy, while the other court chose to allow broad use of the instruction in conspiracy cases. The Comment also analyzes the implications of these differing views for a defendant who argues that he or she has never joined the alleged conspiracy. Section I focuses on the provision of the Model Penal Code which provides the basis for the ostrich instruction, and traces the Supreme Court's use

799 F.2d 354, 362 (7th Cir. 1986) (sustaining the district court's use of the instruction); United States v. Mankani, 738 F.2d 538, 547 n.1 (2d Cir. 1984) (reversing district court, and forbidding use of the instruction in connection with membership in the conspiracy).
8. Diaz, 864 F.2d at 549.
9. Mankani, 738 F.2d at 547. The other circuits have yet to hear this issue, and the Supreme Court has thus far never granted certiorari in a case involving the ostrich instruction and membership in a conspiracy.
11. Id. at 551.
12. Id. at 550-51.
13. 738 F.2d 538 (2d Cir. 1984) (criticized in Diaz, 864 F.2d at 549).
14. Id. at 547 & n.1. Mankani was distinguished in United States v. Lanza, 790 F.2d 1015, 1021-22 (2d Cir.), cert. denied, 479 U.S. 861 (1986) and United States v. Reed, 790 F.2d 208, 211 (2d Cir.), cert. denied, 479 U.S. 954 (1986). In both of these cases, the defendant admitted that he was a member of the group charged with conspiracy, but argued that he was ignorant of the group's illegal activity.
15. 864 F.2d 544.
16. 738 F.2d 538.
of this definition in the late 1960s and early 1970s. Section I concludes with a discussion of the development of jury instructions based on equating conscious avoidance of knowledge with actual knowledge. Section II explores the substantive law of conspiracy, focusing on the mens rea element. Section III discusses United States v. Diaz and United States v. Mankani, two cases which deal with the applicability of the theory behind the ostrich instruction to a situation in which membership in a conspiracy is at issue and the differences between the two approaches. Section IV analyzes the two approaches in light of the mens rea for conspiracy, certain procedural aspects of conspiracy trials and certain policy issues. Section IV also suggests that courts give an instruction which clarifies the mens rea for conspiracy if they give an ostrich instruction in connection with a defendant's membership in a conspiracy.

I. THE DEVELOPMENT OF THE OSTRICH INSTRUCTION

A. MODEL PENAL CODE § 2.02(7)

In response to the inconsistent penal codes in force in many states, the American Legal Institute began drafting the Model Penal Code ("M.P.C.") in the late 1950s. Among its general definitions of types of culpability, the M.P.C. included a provision equating deliberate ignorance with knowledge. In adopting this approach, the M.P.C. followed a common law tradition equating deliberate avoidance of knowledge with knowledge. In adopting this approach, the M.P.C. followed a common law tradition equating deliberate avoidance of knowledge with actual knowledge.


21. MODEL PENAL CODE § 2.02(7) (1985). The section provides, "[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."

B. Early Supreme Court Cases Applying MODEL PENAL CODE § 2.02(7): Leary v. United States\textsuperscript{23} and Turner v. United States\textsuperscript{24}

In 1969, the Supreme Court, citing the M.P.C., adopted the deliberate ignorance definition of knowledge in \textit{Leary v. United States}.\textsuperscript{25} While in possession of a small amount of marijuana, the defendant in \textit{Leary} drove from New York to Mexico with his son and daughter.\textsuperscript{26} The prosecution argued that the defendant deliberately avoided learning that the marijuana he carried was produced outside the United States, and that by bringing it across the border into Mexico and back, he was guilty of smuggling.\textsuperscript{27} On the issue of deliberate ignorance, the prosecution argued that the possession of marijuana proved that the defendant had the guilty knowledge necessary to sustain a conviction for the more serious crime of smuggling because only deliberate avoidance of knowledge could have kept the defendant ignorant of the foreign source of the narcotics he possessed.\textsuperscript{28} The Court, while endorsing the equation of deliberate ignorance with knowledge, found that the prosecution had not proved that the defendant had deliberately avoided learning that the marijuana he possessed had been produced outside the United States.\textsuperscript{29} The prosecution failed to establish that the marijuana in the defendant's possession was obviously not grown in the United States.\textsuperscript{30}

One year later, in \textit{Turner v. United States},\textsuperscript{31} the Court held that the prosecution's proof that the defendant had engaged in heroin and cocaine trafficking also satisfied the knowledge requirement of the smuggling statute. The Court stated that mere common sense would have led to the knowledge that the heroin came from a foreign source, unless the trafficker was deliberately ignorant. The prosecution successfully argued that anyone engaged in heroin trafficking must know that the source of that heroin was foreign, unless the trafficker deliberately avoided this knowledge. The Court held that, since little or no heroin was manufactured in the United States, and the defendant did not explain his ignorance as to the source of the heroin, a finding of

\begin{footnotes}
\footnotetext[23]{395 U.S. 6 (1969).}
\footnotetext[24]{396 U.S. 398 (1970).}
\footnotetext[25]{395 U.S. at 46 & n.93.}
\footnotetext[26]{\textit{Id.} at 9.}
\footnotetext[27]{\textit{Id.} at 46.}
\footnotetext[28]{\textit{Id.}}
\footnotetext[29]{\textit{Id.}}
\footnotetext[30]{\textit{Id.}}
\footnotetext[31]{396 U.S. 398, 416-17 (1970).}
\end{footnotes}
deliberate ignorance, and therefore knowledge, was proper.\textsuperscript{32} Thus, by 1970, the Supreme Court had acknowledged the validity of equating deliberate ignorance with guilty knowledge.

C. The Courts of Appeals Take the Next Step: Jury Instructions Based on Equating Deliberate Ignorance With Knowledge

While \textit{Leary} and \textit{Turner} did not focus on jury instructions based on conscious ignorance, the federal courts of appeals drew the inference that an instruction based on equating deliberate ignorance with knowledge was acceptable, and began to uphold such instructions in some situations during the 1970s.\textsuperscript{33} While the Second Circuit was the first to uphold a deliberate ignorance instruction, it soon had company in its approval of the instruction. By the late 1970s, nearly all of the circuits allowed the instruction in some contexts.\textsuperscript{34} Some courts were more cautious about the content and use of the instruction than others. For example, the Ninth Circuit, concerned about both context and content, was reluctant to approve of the instruction.\textsuperscript{35} Still, most of the courts of appeals have accepted the argument that the Supreme Court's use of the M.P.C.'s definition of knowledge\textsuperscript{36} indicates that an

\begin{footnotesize}
\begin{enumerate}
\item[32.] \textit{Id.} In \textit{Turner}, narcotics agents stopped the car in which the defendant was a passenger and retrieved several packages he had discarded. One of the packages contained a mixture of heroin and powder. \textit{Id.} at 401, 416-18.
\item[33.] The Second Circuit, which has since been cautious in its use of the ostrich instruction, was the first to allow an instruction based on MODEL PENAL CODE § 2.02(7). In \textit{United States v. Squires}, the Second Circuit adopted the definition of knowledge in 2.02(7) and approved a jury instruction based on conscious avoidance, but reversed the conviction on other grounds. 440 F.2d 859, 863-64 (2d Cir. 1971). Two years later, the Second Circuit sustained a conviction based upon an ostrich instruction in a case concerning the possession of stolen currency. \textit{United States v. Jacobs}, 475 F.2d 270, 287-88 (2d Cir.), cert. denied, 414 U.S. 821 (1973).
\item[35.] The Ninth Circuit, concerned that the instruction could lead to the substitution of negligence for knowledge as the level of mens rea the prosecution must prove for certain crimes, has suggested specific wording, and actively advocated cautious use of the instruction. See, e.g., United States v. Alvarado, 838 F.2d 311, 314-15 (9th Cir. 1987), cert. denied, 487 U.S. 1222 (1988); \textit{Jewell}, 532 F.2d at 702-04. For a discussion of the Ninth Circuit's use of the instruction in general, see Note, United States v. Alvarado: \textit{Reflections on a Jewell}, 19 GOLDEN GATE U.L. REV. 47 (1989).
\item[36.] \textit{Turner v. United States}, 396 U.S. 398, 416-17 & n.29 (1970) (quoting MODEL PENAL CODE § 2.02(7)); \textit{Leary}, 395 U.S. at 46 n.93 (also quoting MODEL PENAL CODE}
\end{enumerate}
\end{footnotesize}
instruction based on conscious ignorance is permissible. The instruction allows a prosecutor to make use of the inferences which can be drawn from a defendant's avoidance of knowledge of certain facts. By equating such deliberate ignorance with knowledge, a prosecutor may convict a criminal who is benefiting from criminal activity but has insulated himself from the actual commission of a crime.

More recently, the Second and Seventh Circuits have allowed the use of the instruction in conspiracy prosecutions, although the two courts disagree about how and when the instruction can be given in such cases. Much of the disagreement centers on the mens rea for conspiracy and the appropriateness of the ostrich instruction in light of the requisite mens rea. In order to evaluate the two approaches and consider alternatives, it is necessary to focus on the substantive law of conspiracy, particularly the mens rea element.

II. THE MODERN LAW OF CONSPIRACY

Like all crimes, conspiracy is comprised of an act and an accompanying mental state, the mens rea. The agreement on a criminal objective is the act; the required mental state is the topic of some debate. In their treatise on criminal law, Wayne LaFave and Austin Scott state that the mens rea for conspiracy is "the purpose of achieving a certain result." The M.P.C., in accord with LaFave and Scott, defines conspiracy as follows:

(1) Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

(a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or

(b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to com-
mit such crime.\textsuperscript{40}

Several other commentators agree that the mens rea for conspiracy is purpose, that is, a specific desire to further the criminal enterprise.\textsuperscript{41}

Most states have explicitly adopted the mens rea of purpose for conspiracy, either by statute or by judicial fiat,\textsuperscript{42} although a handful of state statutes either require a different mens rea requirement or are ambiguous on the subject.\textsuperscript{43} Although no federal statute explicitly prescribes a level of mens rea for conspiracy, the Supreme Court has, in several key cases, clearly stated that the mens rea for conspiracy is intent to further the aims of the conspiracy.\textsuperscript{44} “Intent” is the equivalent of purpose under the M.P.C.\textsuperscript{45}

Because the ostrich instruction equates deliberate ignorance with knowledge while the mens rea for conspiracy is intent to further the

\begin{itemize}
  \item \textsuperscript{40} Model Penal Code § 5.03(1) (1985) (emphasis added).
  \item \textsuperscript{41} See Fridman, Mens Rea in Conspiracy, 19 Mod. L. Rev. 276 (1956) (critical article cited by many courts that require proof of intent to further the criminal enterprise as the mens rea for conspiracy); Harno, Intent in Criminal Conspiracy, 89 U. Pa. L. Rev. 624 (1941) (arguing that any mens rea for conspiracy less than intent to further is nonsensical).
  \item \textsuperscript{44} See, e.g., Scales v. United States, 367 U.S. 203 (1961); Dennis v. United States, 341 U.S. 494 (1951); Hartzel v. United States, 322 U.S. 680 (1944); United States v. Falcone, 311 U.S. 205 (1940).
  \item \textsuperscript{45} Model Penal Code § 1.13(12) (1985) states: “‘intentionally’ or ‘with intent’ means purposely.”
\end{itemize}
conspiracy, use of the instruction in conspiracy prosecutions presents
a danger that the jury will find a defendant guilty without finding the
requisite mens rea. There is a meaningful difference between purpose
and knowledge. The drafters of the M.P.C. described the difference as
follows: "Knowledge that the requisite external circumstances exist is
a common element in both conceptions. But action is not purposive
with respect to the nature or result of the actor's conduct unless it was
his conscious object to perform an action of that nature or to cause
such a result." Thus, in a conspiracy case the prosecution must
show that a defendant knew of the conspiracy and had the purpose of
furthering its aims. If the ostrich instruction is carelessly worded, a
jury could be misled, and improperly find that the defendant's deliber­
ate ignorance establishes his intent to further the conspiracy as well as
his knowledge of the existence of the conspiracy. The Second and Sev­
enth Circuit Courts of Appeals have responded very differently to this
danger.

III. TWO APPROACHES TO THE USE OF THE OSTRICH
INSTRUCTION IN CONSPIRACY CASES

A. A Permissive Approach: United States v. Diaz

The defendants in Diaz were charged with conspiracy to possess
and distribute cocaine. The conspiracy had six members, only one of
whom challenged his conviction. On four separate dates, the con­
spiracy distributed cocaine. On three of these dates, the conspiracy
sold cocaine to an agent of the Drug Enforcement Administration
("DEA"). After their arrest, Peirallo, Perez, Rodriguez and Carmen
Diaz pleaded guilty, and the latter three testified as coconspirators at
the trial of Reynaldo Diaz and Jose Pineiro.

The prosecution's case against Reynaldo Diaz was based primar­
ily on the testimony of these witnesses. The prosecution acknowl­
46. Id. § 2.02 commentary at 233.
47. 864 F.2d 544 (7th Cir. 1988), cert. denied, 109 S. Ct. 2075 (1989).
48. Id. at 545.
49. Gerardo Perez, Luis Rodriguez, David Peirallo, Jose Pineiro, Carmen Diaz and
Reynaldo Diaz (no relation to Carmen) were all charged with conspiracy to possess and
distribute cocaine. Id. The ostrich instruction was given in connection with Reynaldo
Diaz. Id. Only Reynaldo Diaz appealed his conviction. Id.
50. Id. The dates were July 23, 1987, August 21, 1987, September 3, 1987, and
51. Id. at 546.
52. Id. The facts of the case are complex. On July 23, Carmen Diaz and Perez sold
cocaine to a DEA agent. The United States brought no evidence that Reynaldo Diaz was
involved in this sale, and Carmen Diaz was not directly involved in the subsequent sales.
edged that Reynaldo Diaz was not present for any sale but the last. However, Perez testified that one sale took place near Diaz’s house so that Diaz could see the buyer, and that he (Perez) dropped the money off at Diaz’s house afterwards. Agents in the neighborhood, however, were unable to confirm the dropoff. There was testimony to the effect that Diaz was to be present for the September 9, 1987 sale of a kilogram of cocaine to Collins. Diaz was not present at the scheduled location for the meeting with Perez and Rodriguez, but phone records demonstrated that the others called Diaz and spoke with him. Diaz was convicted in the district court. On appeal, Diaz challenged the use of the ostrich instruction. The court of appeals upheld the district court’s use of the instruction.

At trial, Diaz argued that while he was personally acquainted with some of the members of the conspiracy, he played no part in the group’s illegal activities. Thus, Diaz argued not that he was ignorant of some or all of the conspirators’ activities, but that he was not a member of the conspiracy at all. He did not testify, but introduced evidence of various types to support his contention. Diaz presented witnesses who stated that he was visiting friends in the area. He

The evidence showed that Perez asked Rodriguez for help in getting started in the drug business, and Rodriguez arranged a meeting between himself, Perez and Reynaldo Diaz, who agreed to supply Perez with drugs. On August 21, 1987 and September 3, 1987, Perez sold cocaine to DEA Agent Patricia Collins. Subsequently, Collins arranged to purchase a kilogram of cocaine from the conspiracy on September 9, 1987. Reynaldo Diaz was not present at the scheduled time and location of this sale, but phone records demonstrated that the others called and spoke with him. Soon after the call to Diaz, Peirallo arrived with the cocaine and Diaz arrived separately. Collins was an hour late, and Peirallo left the scene, asking to be paged when Collins arrived. Collins appeared soon after Peirallo left, and phone records indicated another call was made to Diaz. Perez went to Collins' car to await Peirallo, and soon thereafter Diaz sent Rodriguez to inform Collins that Peirallo had arrived. Once all of the parties to the sale were present, the cars were lined up in this order: Peirallo’s, then Diaz’s and finally Collins’. Diaz then raised the hood of his car. Perez went to Peirallo’s car to get the drugs, and Peirallo told Perez that he had a gun and intended to use it if necessary. During this conversation, Diaz and Rodriguez stood outside Diaz’s car and watched Collins. Once Perez brought the drugs to Collins, she signalled for the arrest. Id. at 545-46.

53. Id. at 546.
54. Id.
55. Id.
56. Id. at 545-46.
57. Id. at 546.
58. Id. at 545, 549. Diaz also questioned whether Peirallo’s use of a firearm was properly imputed to Diaz. The court found that the imputation was proper. Id. at 547-49.
59. Id. at 550-51.
60. Id. at 546.
61. Id. at 546-47.
62. Id. at 546.
claimed that the hood of his car was raised because he was experienc­ing engine trouble, and that this was the reason for his presence at the scene of the arrest.63 Diaz stated, through counsel, that he had called a mechanic, and the mechanic testified that Diaz had called him.64 However, phone records did not support this claim.65 Before the judge gave his instructions to the jury, Diaz objected to the ostrich instruction that the government had submitted.66 The district court allowed the instruction, and Diaz was subsequently convicted. On appeal, Diaz again raised his objection to the instruction.

Diaz argued that the ostrich instruction was inappropriately used in his case.67 The precise nature of his objection is not clear from the opinion of the court of appeals, but apparently Diaz argued that the facts did not support an inference of deliberate avoidance of knowledge.68 Rather, he argued, the facts could support two interpretations—either Diaz actually and directly knew of the conspiracy or he had no knowledge of it.69 The court, citing precedent in the Seventh Circuit70 and expressly disapproving of a holding in a similar Second Circuit case,71 held that the instruction was applicable to conspiracy cases, and that it was properly given in Diaz’s case.72

Thus, after Diaz, the Seventh Circuit has allowed the use of the ostrich instruction in connection with proof of the defendant’s membership in a conspiracy.

B. A Restrictive Approach: United States v. Mankani73

The defendants in Mankani were charged with conspiracy to pos-

63. Id. at 546-47. The prosecution argued that the raised hood duplicated a “standard method by which drug dealers prevent their buyers from seeing the supplier of the drugs.” Id. at 546.
64. Id. at 547.
65. Id.
66. Id.
67. Id. at 549.
68. See id. at 550-51. The court focused on the facts of Diaz as compared with those of other cases in which they had allowed the ostrich instruction. Also, the court cited evidence which supported the inference of deliberate ignorance in Diaz’s case: his presence at the scene of the fourth sale, his raising the hood of his car, which aided the sale, and his absence from the other transactions. Id. at 551.
69. Id. at 550-51.
70. Id. (citing United States v. Kehm, 799 F.2d 354 (7th Cir. 1986)).
71. Id. at 549 (citing United States v. Mankani, 738 F.2d 538 (2d Cir. 1984)).
72. Id. at 551.
73. 738 F.2d 538 (2d Cir. 1984). Because the defendants in Mankani were tried before the bench, no jury instructions were given. However, the prosecution applied the conscious avoidance theory to one of the defendants in Mankani, and the court used that theory to convict that defendant. Id. at 547.
sess and distribute marijuana. Nine individuals were charged with involvement at several levels with various aspects of the conspiracy. The district court applied the conscious avoidance theory to only one defendant, Sally Edith.

After receiving notice of the conspiracy's drug smuggling enterprise, the DEA began surveillance. A DEA agent went to the hotel where Mankani and Hamirani were staying, and was able to conduct aural surveillance through a hole in the wall. One of the officers conducting the aural surveillance testified that at one point Mankani complained that six people were extracting the hashish, and that he would have to pay all of them. If six people were working, Edith must have been one of them, since there were only five others, MacFarlane, Sturgeon, Fortin, Raxlen and Norris, present at the barn. The officer also testified that Mankani complained of "a girl hanging around."

While the aural surveillance continued, another agent placed a tracking device on MacFarlane's car, and the police later followed

74. Id. at 540-41. The defendants were Mohan Mankani, Kenneth Norris, Joseph Fortin, Peter MacFarlane, Gilles Stanton, William Sturgeon, Harold Raxlen, Nizarali Hamirani and Sally Edith.

75. Id. at 547. The facts of Mankani involve several defendants, and a long chain of activities. The Royal Canadian Mounted Police ("RCMP") first suspected two of the conspirators, Canadians MacFarlane and Stanton, of planning to import hashish into Canada. The RCMP began close observation of the two men in late spring of 1982, and obtained a court order to monitor the phone calls of the two. During the summer of 1982, nearly two tons of hashish arrived in Houston, Texas from India, contained in eight seven-foot-long steel tubes, weighing approximately 500 pounds each. These tubes were subsequently flown to John F. Kennedy International Airport on a commercial freight carrier. Several of the conspirators were waiting for the tubes, but Edith was not among them. On Wednesday, September 8, MacFarlane picked up the tubes at a warehouse. He had rented a forklift, and used it to load the tubes into a truck, also rented. MacFarlane then drove the truck to a small farm in Bakersfield, Vermont, where Edith and her boyfriend, defendant Joseph Fortin, lived. Edith and Fortin rented the house on the farm; Fortin also rented a portion of the small barn as a potting studio. Fortin had rented several pieces of heavy equipment to be used to open the tubes. Two other defendants, Kenneth Norris and Harold Raxlen, arrived with a hydraulic press to aid in the opening of the tubes. Another defendant, William Sturgeon, also assisted in removing the hashish from the tubes. Edith did not go to her regular job the day after MacFarlane arrived. On September 10, two other conspirators, Mohan Mankani and Nizarali Hamirani, flew to Burlington, Vermont and checked into a hotel. Mankani then called Stanton. The RCMP intercepted this call and notified the DEA and the Vermont State Police. This call led to the surveillance which in turn led to the arrests. Id. at 541-42; Brief for Appellant at 3-20, Mankani (No. 83-1303).

76. Mankani, 738 F.2d at 541.
77. Id.
78. Id.
79. Id.
MacFarlane by car and helicopter to the Bakersfield farm. The agent and police conducted visual surveillance of the house and barn. At trial, one of the officers who had conducted the surveillance of the house testified that Edith had gone out to the mailbox, gone back to the house, reemerged in a bathing suit, gone for a short swim in a pond on the farm property, then returned to the house. This agent also stated that during his entire surveillance, while he was stationed 150 yards from the barn, he could hear the loud grinding noise produced by the tools the defendants were using to extract the hashish from its containers. The house Edith shared with Fortin was forty feet from the barn. The DEA later sought and obtained a search warrant for the house and barn, which authorized a search for “hashish, invoice records, proceeds, processing tools, and other documentary evidence of the illegal drug operation.” The DEA executed the warrant on September 14, seized evidence and arrested Edith, Sturgeon, Norris, Raxlen, and MacFarlane. Fortin later responded to a summons, and Mankani was arrested at the hotel.

Sally Edith challenged the sufficiency of the evidence against her, and argued that the government had not proved her guilty beyond a reasonable doubt. The district court judge, acting as trier of fact, found her guilty of conspiracy. The prosecution attempted to prove Edith’s participation in the conspiracy on the basis of eight pieces of circumstantial evidence. The evidence included: first, that Edith was one of the two renters of the house; second, that she lived with Fortin; third, that she missed work the day after MacFarlane arrived with the hashish; fourth, that on the same day, Fortin leased the equipment to open the tubes which contained the hashish; fifth, that agents saw Edith in the house during the opening of the tubes; sixth, that the agent stationed 150 yards from the barn heard the noise from

80. Mankani, 738 F.2d at 542.
81. Id.
82. Brief for Appellant at 20, Mankani (No. 83-1303).
83. Id. at 17-18.
84. Id.
86. Id.
87. Id.
88. Id. In addition to Edith’s challenge, Mankani and MacFarlane challenged the aural surveillance of the hotel room, arguing that it constituted an unreasonable search in violation of the fourth amendment. All of the defendants challenged the search warrant for the barn, claiming that it was issued without a showing of probable cause, but only Fortin had standing to raise this challenge. Both challenges failed. Id. at 545-46.
89. Id. at 540-41.
90. Id. at 546-47.
the machinery, so Edith must have heard it while she was in the house, only 40 yards from the barn; seventh, that Edith walked to the mailbox and back to the house, thereby coming even closer to the barn; and eighth, that she later took a short swim and proceeded back to the house, again passing close to the barn. The government argued on appeal, and apparently at trial as well, that this evidence either established Edith’s participation in the conspiracy or at least proved that she consciously avoided knowledge of the conspiracy. The Court of Appeals for the Second Circuit found the evidence insufficient to prove Edith’s participation in the conspiracy. The court also stated that the conscious avoidance theory was inappropriate: “This [conscious avoidance] argument is totally illogical. How can a person consciously avoid participating in a conspiracy and also be a member of the conspiracy? The two notions are obviously mutually exclusive.” The court also noted that the conscious avoidance instruction is only appropriate where the “essential mental element of the crime is ‘guilty knowledge.’ ” Finally, the court stated that the required mental state for conspiracy is intent. For these reasons, the Second Circuit Court of Appeals held that the government had improperly applied the deliberate ignorance theory to Edith. Since the Mankani decision, the Second Circuit has clarified its position, and stated that the conscious avoidance theory, and instructions based upon that theory, cannot be used to prove that a defendant was a member of a conspiracy.

91. Id.
92. Id. The government must have made the conscious avoidance argument at the bench trial, because it could not have raised the argument for the first time on appeal.
93. Id. at 547.
94. Id. (emphasis in original).
96. Mankani, 738 F.2d at 547 n.1 (citing United States v. Soto, 716 F.2d 989 (2d Cir. 1983), and W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 61 (2d ed. 1972)).
97. United States v. Lanza, 790 F.2d 1015, 1021 (2d Cir.) (ostrich instruction permissible if the defendant claims lack of knowledge of specific illegal acts of conspiracy), cert. denied, 479 U.S. 861 (1986); United States v. Reed, 790 F.2d 208, 211 (2d Cir.) (ostrich instruction permissible if the defendant claims lack of knowledge of specific illegal acts of conspiracy), cert. denied, 479 U.S. 954 (1986). However, the Supreme Court has also clarified the standards for the use of coconspirator’s hearsay evidence, such that, if Mankani were heard today, the evidence against Edith would be admitted. See Bourjaily v. United States, 483 U.S. 171, 181 (1987) (such evidence admissible under preponderance standard, and judge not bound by any of the Federal Rules of Evidence other than privilege in making his or her determination of admissibility). Under Bourjaily, the government cannot be required to prove a conspirator’s participation in the conspiracy by a preponderance of the nonhearsay evidence before hearsay statements of coconspirators are admitted.
C. Other Cases Decided Under the Two Approaches

Three other cases decided under the two approaches to deliberate ignorance in conspiracy cases highlight the precise differences between them. In some types of conspiracy cases, the Seventh and Second Circuits agree that the instruction should be allowed. The circuits’ primary disagreement is over the use of the deliberate ignorance theory in proving a defendant’s membership in a conspiracy.

The Second Circuit clarified its position on the use of the conscious avoidance instruction in two cases that came before it after Mankani: United States v. Reed98 and United States v. Lanza.99 In Reed, the defendant was involved in a conspiracy to ship protective garments for use in chemical warfare to Iran in violation of a statutory embargo.100 The defendant argued that he was involved with the export scheme but did not know that the destination of the garments was Iran.101 Relying on Mankani, Reed argued on appeal that the ostrich instruction given at his trial was reversible error.102 The court held that the reasoning in Mankani prohibited the use of the ostrich instruction only in cases where the defendant’s membership in the conspiracy is at issue.103 In Reed, where the defendant conceded membership in the conspiracy, the court held that the ostrich instruction was proper.104

The defendant in United States v. Lanza was accused of conspiracy to commit wire fraud.105 The defendant argued, similarly to the defendant in Reed, that while he was involved in the group’s activities, he believed that he was helping to commit extortion, not wire fraud.106 On appeal, he similarly attacked the ostrich instruction given at his trial, arguing that it could not be used in conspiracy cases.107 Again, the court held that the Mankani approach only forbids the ostrich

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Thus, the hearsay statements offered against Edith would be admissible if a preponderance of the evidence showed that the statements themselves met the requirements of the coconspirator’s exception to the hearsay rule, regardless of the other evidence offered. The holding in Bourjaily has no effect on the Second Circuit’s approach to the deliberate ignorance issue in conspiracy cases, but more of the evidence against her would have been admissible.

98. 790 F.2d 208 (2d Cir.), cert. denied, 479 U.S. 954 (1986).
100. Reed, 790 F.2d at 209.
101. Id.
102. Id. at 211.
103. Id.
104. Id.
106. Id. at 1018.
107. Id. at 1020.
instruction in conspiracy cases if the defendant's membership in the conspiracy is in dispute. The court held that once a defendant admits his involvement with the conspiring group, as the defendant did in Lanza, the ostrich instruction is appropriate if the defendant claims ignorance of specific acts of the conspiracy. Thus, in both cases the Second Circuit held that once the government had proved membership in the conspiracy by actual intent, the ostrich instruction may be given in connection with the defendant's knowledge of specific criminal acts of the enterprise. However, the Second Circuit Court of Appeals preserved the distinction between membership and specific acts, and stated that the conscious avoidance instruction cannot be given in connection with proof of membership in a conspiracy.

After the Second Circuit's decision in Mankani, a defendant in United States v. Kehm, a conspiracy case in the Seventh Circuit Court of Appeals, attempted to use the reasoning in Mankani to object to an ostrich instruction which had been given in his case. However, the defendant in Kehm did not claim that he was not a member of the conspiracy. In fact, he admitted that he was involved in some way with the activities of those charged with conspiracy. Rather, he argued, and brought evidence that tended to show, that he did not know of the conspiracy's drug smuggling operation. The court rejected the defendant's argument, which was based on Mankani, and stated of the reasoning in Mankani itself: "[T]he point is unexceptionable; one cannot be a conspirator yet consciously avoid being a conspirator. To avoid being a conspirator is to be innocent of conspiracy. But this is not how an ostrich instruction is used in conspiracy cases." The court noted that the defendant in Kehm, Steven Greenberg, had actually helped to set up the corporation through which the

108. Id. at 1022.
109. Id. at 1022-23.
111. Lanza, 790 F.2d at 1015; Reed, 790 F.2d at 211. The Court of Appeals for the Fifth Circuit has recently followed this approach in a case involving the crime of knowingly renting property for the purpose of unlawfully storing, distributing and using a controlled substance. United States v. Chen, 913 F.2d 183, 186 (5th Cir. 1990). In Chen, the Fifth Circuit invalidated the defendant's conviction under 21 U.S.C. § 856(a)(1), a crime with an explicit mens rea of intent, because the district court gave a deliberate ignorance (ostrich) instruction without a further instruction on mens rea. Id. at 190-91.
112. 799 F.2d 354 (7th Cir. 1986).
113. Id. at 362.
114. Id.
115. Id.
116. Id.
conspiracy later engaged in the smuggling. A coconspirator testified that Greenberg left one of the group's meetings when a discussion of the use of the plane began, and stated that "he didn't want to hear about it." The court cited this and other facts as indicative of Greenberg's probable deliberate ignorance, and upheld the trial judge's use of the ostrich instruction.

The court could have upheld the instruction and still recognized the Second Circuit's distinction between the defenses of nonmembership and ignorance of specific acts. Greenberg's defense went only to specific acts. Thus, even the Second Circuit would have allowed the ostrich instruction in Kehm. Instead, the court in Kehm chose language that made it unclear whether it accepted the distinction: "We have sustained conspiracy convictions in cases in which ostrich instructions were given and we hold that in a conspiracy prosecution it is permissible to give an ostrich instruction as part of the definition of knowledge . . . ." In using this language, the Seventh Circuit did not clearly state whether it accepted the Second Circuit's distinction between proof of knowledge of specific acts once membership has been proved, and proof of membership itself. The Seventh Circuit's subsequent decision in Diaz relied on the ambiguous holding in Kehm.

IV. ANALYSIS OF THE SECOND AND SEVENTH CIRCUIT APPROACHES, AND PROPOSAL FOR AN ALTERNATIVE

The main purpose of equating deliberate ignorance with knowledge, and of giving a jury instruction based on this equation, is to prevent a guilty defendant from escaping punishment by avoiding knowledge of one or two key facts. The notion behind the theory is that the defendant is in fact guilty, and his ability to determine which knowledge to avoid demonstrates that he in fact did possess the required knowledge. The key question, which the Second and Seventh Circuits answer differently, is whether this notion makes sense in a case where the accused defends against a charge of conspiracy by claiming he was not a member of the conspiracy. The Second Circuit

117. Id.
118. Id.
119. Id.
120. Id. (citations omitted).
122. MODEL PENAL CODE § 2.02 commentary passim (1985); see also Robbins, supra note 22, at 196-98. Robbins ultimately concludes that deliberate ignorance should be viewed as the equivalent of recklessness, not knowledge. Id. at 231-34.
123. MODEL PENAL CODE § 2.02 commentary passim (1985).
allows the use of the ostrich instruction in conspiracy cases only if membership can be independently established. The Seventh Circuit allows the ostrich instruction in connection with membership or specific acts of the conspiracy, and does not require independent proof of a defendant's membership. It is this difference that must be analyzed.

A. The Ostrich Instruction and the Mens Rea for Conspiracy

The ostrich instruction equates deliberate ignorance with knowledge. Thus, an ostrich instruction that requires no proof of mental state beyond conscious avoidance should only be used in connection with crimes for which the required mental state is knowledge or some lesser mens rea. When the crime charged requires that the prosecution prove that the defendant acted with a specific purpose, a carelessly worded ostrich instruction may give the jury the impression that the defendant's willful blindness establishes not only his guilty knowledge, but his purpose as well. Therefore, although the instruction may be relevant to proof of guilt of a crime which requires a mental state greater than knowledge, it should never be given in connection with such a crime without a clear explanation that such knowledge alone is not enough to convict the defendant.

A concrete example will help to demonstrate the distinction between the two levels of mens rea. Suppose the defendant is charged with receiving stolen property under the Model Penal Code, which provides that a person is guilty of this crime if he "purposely receives . . . movable property of another knowing that it has been stolen, or believing that it has probably been stolen." His defense is that he did not know or believe that the property was stolen. Under the

125. Diaz, 864 F.2d at 551; United States v. Kehm, 799 F.2d 354, 362 (7th Cir. 1986).
126. See supra notes 22-37 and accompanying text.
127. Proof of a defendant's knowledge or deliberate ignorance does have evidentiary value even if the prosecution must also prove that the defendant acted intentionally. If the prosecution shows that a defendant had knowledge or the equivalent of knowledge of the conspiracy, it becomes more likely that the defendant was involved with the conspiracy and intended to further it. This meets the standard of relevancy required by the Federal Rules of Evidence, which provide: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401 (emphasis added).
M.P.C.'s definition of receiving stolen property, the defendant in this example has conceded that he received the property and does not claim that he did so accidentally. Thus, he has conceded that he acted purposely. Only the defendant's knowledge is at issue. If the prosecutor can prove that the defendant in fact knew that the property he received was stolen, his defense is negated, and he must be found guilty. In this context, the ostrich instruction is a powerful and legitimate weapon for the prosecutor: the defendant claims that he didn't know the property was stolen; the prosecutor demonstrates that the defendant deliberately avoided finding out certain facts, for example, the source of the goods, that would have led the defendant to the knowledge that the goods were stolen. If one accepts the equating of deliberate ignorance with knowledge, the defendant is guilty. His only defense is his lack of knowledge, and the prosecutor has proved that the defendant possessed the equivalent of that knowledge. The ostrich instruction is designed to prevent a defendant in this type of case from avoiding liability.

Now, suppose that the defendant is charged with arson under the M.P.C. in connection with the destruction of a building. The statute provides that a person is guilty of arson "if he starts a fire or causes an explosion with the purpose of . . . destroying a building or occupied structure of another."129 His defense is that he did not intend to destroy the building. In this case, proof that the defendant knew that his conduct would lead to the destruction of the building does not prove him guilty of arson in the absence of proof of a purpose to destroy the building. To give the ostrich instruction in this case without any other instruction on mens rea could lead a jury to the erroneous conclusion that the defendant's deliberate ignorance about the fact that his conduct would destroy the building also establishes that the defendant intended to destroy the building. Proof of knowledge or its equivalent should not be enough to convict this defendant of arson under the M.P.C.

Similarly, in a conspiracy case, the appropriateness of the ostrich instruction depends on the level of mens rea the government is required to prove and the defense offered. Therefore, a court must determine the required mental state for conspiracy before deciding whether, and in what form, to give the ostrich instruction.

The statutory scheme under which Diaz and Edith were charged provides no clear indication of the requisite mental state.130 Thus, the

130. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 406 (codi-
matter is left to the courts, and arguably, knowledge could be the mens
rea under the statute. Many authorities, however, agree that intent is
the requisite state of mind for conspiracy, at least for entrance into the
agreement. The lack of an explicit mens rea in the statute under
which Diaz was charged gives apparent judicial discretion on a matter
that is, in fact, fairly settled.

While the majority of authorities and jurisdictions have found
that the mens rea for conspiracy is purpose or intent, it is difficult to
determine exactly what this means in the context of a crime that may
involve no overt acts other than entrance into an agreement. The Diaz
decision raises a crucial question: the importance of the alleged con­
spirator's knowledge of the existence of the conspiracy in proving that
the defendant had the requisite mens rea. In analyzing this problem, it
is helpful to break the mens rea for conspiracy into two constituent
elements: knowledge to the existence of the conspiracy and its illegal
objectives and a purpose to further that conspiracy's objectives. This
approach merely points out the obvious: a defendant must know
of the conspiracy and its illegal objectives if he or she intends to fur­
ther these objectives. If the prosecution proves that the defendant
joined the conspiracy with the purpose of furthering its aims, the pros­
cection has also proven the defendant's knowledge of the conspiracy.
However, if only the defendant’s knowledge of the conspiracy is estab­
lished, the prosecution must still prove that the defendant acted with
the purpose of furthering the objectives of the conspiracy.

Under the two part approach to the mens rea for conspiracy, the
potential problem with the use of the ostrich instruction in these cases
becomes clearer. In cases in which the defendant argues only that he
or she did not know of the conspiracy's unlawful activities, the in­
struction is proper, without elaboration. Only the defendant's knowl­
dge is at issue. But, in cases such as Diaz, the defendant argues that
he or she had no connection, legal or illegal, with the conspiracy. In
such cases, the defendant's knowledge of the existence of the conspir­
acy and its aims is merely evidence which tends to discredit his or her
defense. The defendant's knowledge makes it more likely that he or

fied as amended at 21 U.S.C. § 846 (1988)) provides: "Any person who attempts or con­
spires to commit any offense defined in this subchapter shall be subject to the same
penalties as those prescribed for the offense, the commission of which was the object of the
attempt or conspiracy."

131. See supra notes 38-45 and accompanying text.
132. See supra notes 37-45, 121 and accompanying text.
133. This approach is suggested in Harno, supra note 41, at 633, and in the Model
she was involved in the conspiracy and intended to further it. Such knowledge can support an inference that the defendant must have been involved in some way with the members of the conspiracy in order to acquire the knowledge.\textsuperscript{134} However, this knowledge is not equivalent to an intent to further the aims of the conspiracy. Giving an ostrich instruction in this type of case could have the effect of depriving the defendant of his or her non-involvement defense, unless the court also gives a cautionary instruction that the prosecution must also prove the defendant's intent to further the conspiracy.

The Second and Seventh Circuit Courts of Appeals have responded very differently to this potential problem. In \textit{Mankani}, the Second Circuit explicitly stated that the mens rea for conspiracy is intent, and disallowed the conscious avoidance theory in cases where the defendant raised the non-involvement defense.\textsuperscript{135} The Seventh Circuit allowed the ostrich instruction in \textit{Diaz}, but without ever explicitly considering the question of mens rea. The \textit{Diaz} court also did not acknowledge that giving an ostrich instruction, without a further cautionary instruction on mens rea, could allow a conviction for conspiracy even when the government failed to prove that the defendant had the requisite intent to further the conspiracy.\textsuperscript{136} In this situation there are two issues: the defendant's knowledge of the acts of the conspiracy and his or her intent to further the conspiracy. The ostrich instruction, used injudiciously, tends to collapse the two issues, and this collapsing, in turn, could have the effect of depriving the defendant of a legitimate defense. The Second Circuit approach recognizes this concern; the Seventh Circuit does not make the connection between the mens rea for conspiracy and the appropriateness of the ostrich instruction.

In \textit{Diaz}, the Seventh Circuit seems to equate the defense of non-membership with a defense of lack of knowledge of the conspiracy's activities.\textsuperscript{137} As justification for upholding the use of the instruction, the court states:

\begin{quote}
Here, the trial record contained ample evidence to support the inference that the defendant's \textit{modus operandi} was to insulate himself from the actual drug transaction so that he could deny knowledge of it. During the other observed transactions, he had absented himself from the scene. On this occasion, [the final sale to DEA Agent
\end{quote}

\begin{footnotes}
\item[134] See \textit{supra} note 127 and accompanying text.
\item[135] \textit{United States v. Mankani}, 738 F.2d 538, 547 n.1 (2d Cir. 1984).
\item[137] \textit{Id.} at 551.
\end{footnotes}
Collins, at which the arrests took place while [the defendant was] present, he argued that he was preoccupied with his disabled vehicle and did not know that he was standing in the middle of his friends' drug transaction.138

The only evidence of Diaz's involvement in the prior sales was based on the testimony of his coconspirators, admitted under the coconspirators' exception to the hearsay rule.139 None of the evidence cited by the court speaks directly to Diaz's defense, which was that he was not a member of the conspiracy at all.140 The jury could choose to believe either Diaz's version of events or that of the government's witnesses; one account must have been false. Diaz's defense—that he was not a member of the conspiracy—only makes sense if the jury believed his version of these events. That is, that he was completely uninvolved in the first three sales, and was on the scene of the fourth only because of car trouble.141 If the jury believed Diaz, they believed that he was an innocent bystander to the conspiracy. Arguably, the ostrich instruction makes some sense under this scenario, because an inference of deliberate ignorance could cast doubt on Diaz's story. A jury could find that Diaz's ability to avoid learning of certain facts indicated a familiarity with the conspiracy's activities. This familiarity, in turn, may make it more probable that Diaz was a member of the conspiracy.

Without a further instruction indicating that deliberate ignorance alone is not enough to prove the defendant guilty, however, the ostrich instruction may have the effect of negating Diaz's defense. That is, the jury may find that Diaz deliberately avoided learning about the conspiracy and find him guilty based on this equivalent of knowledge alone. The jury might not understand the need to find that Diaz intended to further the conspiracy.142

However, if the jury believed the version of events given by the coconspirators, Diaz had no defense; he was not only a member of the conspiracy, he was one of its leaders, and had actual knowledge of the conspiracy resulting from his participation in the conspiracy. Under the coconspirators' version of events, Diaz's defense is a lie, and the ostrich instruction is both unnecessary and nonsensical.143 Thus, Diaz

138. Id.
139. Id. at 545-46.
140. Id. at 550-51.
141. Id.
142. See supra note 111 and accompanying text for a discussion of the Fifth Circuit's approach to this problem in another context.
argued on appeal that neither his version of events nor that of the
government's witnesses supported an inference that he deliberately
avoided knowledge of the conspiracy. 144 Under the two versions of
events offered to the jury, Diaz had either actual knowledge or no
knowledge. The ostrich instruction, given without further clarification,
is inappropriate under either scenario.

In upholding the instruction in spite of Diaz's defense of non-
membership, the Seventh Circuit allowed the instruction in a case
which is more similar to Mankani than to Kehm. In Kehm, the court
allowed an ostrich instruction in a conspiracy case in which the de-
fendant claimed that he was ignorant only of the conspiracy's criminal
activities. 145 Unlike Diaz, the defendant in Kehm never argued that he
was completely uninvolved with the alleged conspirators and their ac-
tivities. In allowing the use of the ostrich instruction in Diaz, the Sev-
enth Circuit went beyond the holding in Kehm, without
acknowledging that it had done so. 146

Looking at the probable result in Mankani had it been decided
under the Seventh Circuit approach makes it easier to see the dangers
involved in careless use of the ostrich instruction in conspiracy cases. 147 The jury would have heard the evidence of Edith's proximity
to the sounds of the illegal activity in the barn, the fact that she lived
with one of the conspirators and a description of her behavior on the
day of the arrests. 148 Then, the judge would have given the ostrich
instruction, thereby telling the jury that if they found that Edith had
deliberately shut her eyes to certain facts for fear of what she would
learn, she in fact knew of the conspiracy. If this was the extent of the
charge on mens rea, Edith could have been found guilty of conspiracy
on evidence that established nothing more than her proximity to a
conspiracy. In order to safeguard against such results, the Second Cir-
cuit forbids the use of the instruction altogether in conspiracy prosecu-
tions in which the defendant's membership in the conspiracy is at
issue.

Yet in doing so, the court perhaps goes too far. It protects a de-
fendant's right to raise the defense of nonmembership, but undervalues
the potential that a finding of deliberate ignorance has for damaging
the credibility of the defense of nonmembership in the conspiracy. The court thereby undervalues the significant policy concerns that underlie conspiracy law.

Thus, the Seventh Circuit errs on the prosecution's side, and does not closely examine the use of the ostrich instruction in *Diaz*. On the other hand, the Second Circuit errs on the side of the defendant, and forbids the use of the instruction altogether in cases like *Mankani*. The Second Circuit Court of Appeals thereby deprives the prosecution of a useful tool. Rather than balancing the two concerns at issue, each court chooses an all-or-nothing approach.

B. *Analysis of the Two Competing Concerns: Dangers to Society from Conspiracy and Confusion Caused by the Ostrich Instruction*

A defendant can be punished under conspiracy law although his or her crime is still in the planning stage. This punishment is justified by the unusual danger to society which group behavior presents.149 These dangers include greater likelihood of success, the ability to carry out more complex illegal acts, the increased likelihood of repeat offenses and patterns of crime, and other dangers.150 In part because of these dangers, the prosecutor in a conspiracy case has several advantages not normally present in a criminal trial. First, conspiracy statutes are often quite vague, and allow for a great deal of latitude in what a prosecutor must prove.151 In addition, the coconspirator exception to the hearsay rule allows the prosecutor to put statements by one conspirator into evidence against all parties to the conspiracy.152 The courts have construed the exception broadly, thereby increasing the prosecutor's advantage.153 Thus, evidence that would be inadmissible in a prosecution for a substantive criminal offense is admissible in conspiracy cases. Several other prosecutorial advantages, less directly relevant to the use of the ostrich instruction, also obtain in conspiracy trials.154 In light of these advantages, perhaps the dangers of conspir-
acy are adequately addressed, and there is no need for the expansive use of the ostrich instruction typified by Diaz.

Still, since the leaders of conspiracies often create elaborate networks of assistants in order to limit the leaders' criminal liability, the ostrich instruction may be an important and useful prosecutorial tool even in a case like Diaz or Mankani. A defendant's deliberate ignorance, and the inference of knowledge that it supports, can cast doubt on his or her claim that he or she was not involved in the conspiracy.

Yet the use of the ostrich instruction in cases where the defendant's membership in the conspiracy is at issue is arguably inconsistent with the mens rea for conspiracy: intent to further the conspiracy's objectives. Because the deliberate ignorance instruction can ultimately be traced to Model Penal Code section 2.02(7), one authority for evaluating the appropriateness of the instruction in conspiracy cases is the M.P.C.'s conspiracy statute. The drafters of this statute clearly required a mental state greater than knowledge for proof of conspiracy, "with the purpose of promoting or facilitating [the planned crime's] commission." Thus, the M.P.C. requires that the defendant enter into the agreement to conspire with the purpose of furthering the criminal act which is the focus of the conspiracy. Section 2.02(7), the basis for the deliberate ignorance theory of liability, applies to crimes for which knowledge is the requisite mental state. Guilty knowledge is relevant to extending the conspirator's guilt to acts committed by coconspirators on behalf of the conspiracy, but only after the defendant's purposeful agreement to conspire has been established. Thus, the drafters of the M.P.C. never intended that the deliberate ignorance theory be applied to membership in a conspiracy, because under the M.P.C., a defendant must enter into the agreement purposely.

United States v. Garelle, 438 F.2d 366 (2d Cir. 1970), cert. dismissed, 401 U.S. 967 (1971); Nye & Nissen v. United States, 168 F.2d 846 (9th Cir. 1948), aff'd, 336 U.S. 613 (1949). The prosecution may try all coconspirators together, and deprive the defendants of their right to separate trials. W. LAFAVE & A. SCOTT, supra note 38, § 6.4(b)(5). The justification for the joint trial is the need to have all defendants present at a single proceeding in order to establish a clear and complete picture of all steps of the conspiracy. Id. Overall, the prosecution enjoys unique advantages in conspiracy trials.

155. See supra notes 38-46 and accompanying text.
156. MODEL PENAL CODE § 5.03 (1985). See supra text accompanying note 40 for the text of § 5.03(1).
158. Id.
159. Id. § 2.02(7). See supra note 21 for the text of § 2.02(7).
161. Id. § 5.03(1).
A close reading of the Model Penal Code, then, supports the Second Circuit approach. First, the M.P.C.'s conspiracy statute states that the mens rea for the agreement, the act of conspiracy, is purpose. This is equivalent to the mental state the Second Circuit requires, intent. Second, the statute as a whole makes a distinction between the initial agreement, which the defendant must enter into purposely, and the defendant's liability for acts undertaken by the conspiracy once he or she has joined it, which may be proved by knowledge. The Second Circuit makes the same distinction in Reed and Lanza allowing the ostrich instruction in connection with knowledge of specific acts of the conspiracy once the defendant's intentional membership in the conspiracy is established.

In contrast, the Seventh Circuit's approach is, at best, unconcerned with the mens rea issue. The court never explicitly confronts the question of whether the mens rea for conspiracy is knowledge or intent. The court ignores the issue, and its potential implications for the use of the ostrich instruction, focusing instead on the dangers to society of conspiracy.

Thus, there are two concerns involved in using the ostrich instruction in conspiracy cases where the defendant's membership is at issue. The Seventh Circuit chooses to focus on the dangers of conspiracy; the Second Circuit focuses instead on the inconsistencies between the mens rea for conspiracy and the ostrich instruction. A better approach would attempt to balance the two interests.

C. Balancing the Interests: A Cautionary Instruction

The two approaches discussed in the previous section do not attempt to balance the competing interests that both courts acknowledge are present. A cautionary instruction on mens rea, which a judge would give after the ostrich instruction in conspiracy cases like Diaz and Mankani, would address both concerns.

The instruction would, in effect, divide the mens rea for conspir-
acy into two constituent parts. First, the judge would give an ostrich instruction, similar to that given in *Diaz*:

You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that a person had a strong suspicion that things were not what they seemed or that someone had withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly.

Then, to make it clear that knowledge alone does not establish the defendant's guilt, the judge would give a further instruction, clarifying the difference between knowledge and intent to further the conspiracy. The instruction should initially explain the role that knowledge and intent play in a conspiracy. The instruction should then state clearly that knowledge and intent, not knowledge alone, are required. Finally, the instruction should specify that deliberate ignorance can be evidence of intent, but does not on its own establish intent. This instruction, given after the ostrich instruction above, might be worded as follows:

However, a finding of knowledge alone is not enough to find the defendant guilty of conspiracy. The government must also prove that the defendant acted intentionally. You may find that the defendant acted intentionally if you find that he [she] acted with the conscious objective or desire to help the conspiracy achieve its aims. You must find both that he [she] knew about the conspiracy and that he [she] intended to join it and aid it. If you find only that the defendant knew of the conspiracy, or deliberately avoided learning of it, you cannot find that he [she] acted intentionally.

Such an instruction would allow the prosecution to make use of the inferences that the jury might draw from the defendant's deliberate ignorance. But, it would minimize the danger that a defendant would be convicted of conspiracy without a showing of the requisite intent. The jury would be instructed that knowledge alone does not establish guilt. This approach would combine the benefits of both the Second and the Seventh Circuits' approaches.

168. See supra notes 37-45, 112 and accompanying text.
The ostrich, or conscious avoidance, instruction is an important weapon in the prosecutor's arsenal. It allows for the conviction of a criminal who was clever enough to attempt to insulate himself or herself from liability by avoiding knowledge of certain acts or events. Nearly all of the federal courts of appeals allow the instruction in some contexts.\(^{171}\)

The instruction presents special difficulties when used in a conspiracy case, however, especially when the defendant argues that he or she was not a member of the conspiracy. The Second Circuit does not allow the instruction in connection with proof of membership in a conspiracy;\(^{172}\) the Seventh Circuit allows it freely.\(^{173}\) The Second Circuit approach is logically consistent. This approach is also in accord with the Model Penal Code, which is the source for the conscious avoidance theory, and the instructions based upon that theory.\(^{174}\) More importantly, the Second Circuit approach is in accord with the common law, from which federal conspiracy statutes are derived. On the other hand, it deprives the prosecutor of a valuable tool. The ostrich instruction is of some use even in cases where the defendant's membership is at issue, because the defendant's deliberate ignorance, which is the equivalent of knowledge, makes it somewhat more likely that he or she was involved in the conspiracy and did intend to further its aims. In completely disallowing the instruction in these cases, the Second Circuit perhaps goes too far.

If a court gives the instruction in connection with a defense of nonmembership, that court should take additional precautions that the jury understands that it must also find that the defendant had the requisite intent to participate in the conspiracy. Perhaps the best approach here would be a standard, clarifying instruction which would focus on three issues: the role that knowledge and intent play in conspiracy, the need to find both knowledge and intent to further the conspiracy, and the evidentiary value of deliberate ignorance in establishing that intent. With this set of instructions, the government could still make use of evidence that pointed to a defendant's deliberate ignorance, and in turn, use that ignorance as evidence of the defendant's actual participation in the conspiracy. Nevertheless, the

\(^{171}\) See supra notes 34-36 and accompanying text.

\(^{172}\) United States v. Mankani, 738 F.2d 538, 547 (2d Cir. 1984).

\(^{173}\) Diaz, 864 F.2d at 551.

\(^{174}\) See supra notes 156-64 and accompanying text.
clarifying instruction would help ensure that the defendant would not be convicted without a finding of intent.

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