HB

20

STATE OF ALASKA

PUBLIC DEFENDER AGENCY

STEVE COWPER, GOVERNOR

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March 20, 1990

The Honorable Peter Goll
The Honorable Max F. Gruenberg, Jr.
House Judiciary Committee, Co-Chairmen
Alaska State Legislature
Box V
Juneau, AK 99811

Re: HB20

Dear Representative Gruenberg:

The following are my comments regarding the most recent draft of HB20.

There are two general areas which this bill treats as concerns procedural criminal law. The most important, from the Department of Law's point of view, is section four, which amends Alaska Rule of Evidence 404(b). The Department of Law has argued that the Alaska appellate courts are not liberal enough with respect to permitting the use of "prior bad acts" evidence against a defendant accused of criminal activity. The draft amendment proposed in HB20 is a radical departure from current law.

In advancing its position, the Department of Law relies on two recorded Alaska decisions, Lerchenstein v. State, 697 P.2d 312 (Alaska App. 1985), affirmed 726 P.2d 546 (Alaska S.Ct. 1986) and Velez v. State, 762 P.2d 1297 (Alaska App. 1988). While it is true that certain prior bad act evidence was not allowed by the courts in each of these cases, a review of the applicable case law demonstrates that there is widespread use of this evidence against defendants in the Alaska courts. For every Lerchenstein case where the appellate court has ruled that the trial court impermissibly allowed prior bad act evidence in, there are several cases where a defendant has unsuccessfully appealed his/her conviction based on the prosecution's successful use of this type of evidence. See, for example, Adkinson v. State, 611 P.2d 528 (Alaska App. 1980) (evidence regarding prior confrontation between defendant and trespassers admitted), Coleman v. State, 621 P.2d 869 (Alaska 1980) (evidence of the circumstance of a prior rape committed by defendant was admitted), Doman v. State, 622 P.2d 448 (Alaska 1981) (evidence of prior drug use by defendant admitted), Vessell v. State, 624 P.2d 275 (Alaska 1981) (defendant's conduct at a store after armed robbery of another store admitted), Burke v. State, 624 P.2d 1240 (Alaska 1981) (evidence of defendant's prior sexual conduct with victim admissible in statutory rape case), State v. Grogan, 628 P.2d 570 (Alaska 1981) (evidence that

defendant previously vandalized an aircraft admitted), Davis v. State, 635 P.2d 481 (Alaska App. 1982) (assaults previously committed against other women admitted), Bidwell v. State, 656 P.2d 592 (Alaska App. 1982) (evidence of a previous assault of a pharmacist and an attempt to pass a forged prescription admitted in a kidnapping case).

The above-cited cases are by no means a complete list of the reported appellate decisions. See annotations to Alaska Rule of Evidence 404, Alaska Rules of Court, 1990 edition. Even a complete list of reported appellate decisions where the defendant unsuccessfully argues that prior bad acts were admitted would represent just the tip of the iceberg. I believe it a fair statement that the trial courts around the state of Alaska regularly admit evidence of this nature against a defendant. The exact number of cases in which this is true would be difficult to discern as not all cases are appealed and thus reported. Those cases which are appealed sometimes appear as memorandum decisions, and thus are not published opinions.

This revision of the evidence rules is being advanced based on the contention that the Alaska Court of Appeals treats Alaska Rule of Evidence 404(b) as a rule of exclusion. The Department of Law suggests that the federal system interprets the rule as one of inclusion. The fact of the matter is there is no unanimity either within the federal system or among the states. Among the federal courts, the Seventh Circuit, the Eighth Circuit and the District of Columbia have adhered to what some term as the "exclusionary view" (cites omitted but available). The federal courts in the Third and Sixth Circuits are undecided as to the issue. Justice Rabinowitz, in his dissent in Lerchenstein, supra, appears to have found that the exclusionary rule prevails in most other jurisdictions. Lerchenstein at 550, fn.8.

Even though there is reference in appellate decisions to Alaska's exclusionary approach to 404(b) evidence, the case decisions and the evidence rule itself suggests otherwise. If Alaska strictly applied the rule of exclusion, prior bad act evidence would only come in against a defendant if it was relevant to "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Alaska Rule of Evidence 404(b)(1). It appears from a review of the reported decisions in Alaska that our jurisdiction goes beyond that exclusionary view. In Patterson v. State, 732 P.2d 1102 (Alaska App. 1987), the Alaska Court of Appeals created the "lewd disposition" exception in a case involving sexual assault. See also Burke cited supra. The Court of Appeals in Soper v. State, 731 P.2d 587 (Alaska App. 1987), allowed in evidence of prior sexual assaults on members of an immediate family even though it did not fall within the "motive" exception. See also Davis v. State, 635 P.2d 481 (Alaska App. 1981) (a date rape case where the court allowed in evidence of prior sexual assaults by the defendant on similarly situated victims).

Lerchenstein and Velez cases are not representative of the court's unwillingness to admit prior bad act evidence. Instead they

reflect the court's careful study and treatment of this type of evidence, and the need for determining these issues on a case by case basis. While the Department of Law points to the dissent of Justice Rabinowitz in Lerchenstein, it should be noted that six of the eight appellate judges/justices who have reviewed this case are in agreement that the 404(b) character evidence proffered by the state should not have been admitted.

In summary, there is no need for change in the law as to Alaska Rule of Evidence 404(b). The change contemplated in HB20, if enacted, will mark a radical departure from presant law and will undoubtedly spawn considerable litigation as to these issues. The current proposal could open the floodgates for the use of character evidence to establish propensity. This would create a high potential for unfair prejudice in jury trials and considerably erode an individual's Fifth Amendment right to due process under the laws. It is clear from a review of the recorded case decisions in Alaska that this area of the law is evolving and will likely undergo continued expansion through the litigation process. The Rules of Evidence are highly technical and not easily susceptible to legislative change.

JOINDER ISSUES

HB20 also contains provisions (sections two and three) which would liberalize the rules concerning joint trials of defendants and the joining of separate offenses. I am opposed to any change in the law as to these joinder rules. Currently Alaska courts use the cross-admissibility of evidence test to determine the appropriateness of joinder. The suggested changes in HB20 would do away with this test. Eliminating the cross-admissibility test will increase the number of joint trials and "lumped together" separate charges in one trial.

When the rules regarding joinder are relaxed, the chances that unfair prejudice will occur and that the defendant will not receive a fair trial increases greatly. The present rules exist to ensure that evidence from separate cases or related to other defendants do not infect the process of fact-finding. Relaxing the joinder rules as to joint trials for separate defendants can create a situation where a defendant against whom the state has a weak case can still be convicted through guilt by association.

As to the second joinder issue, trying separate charges against one defendant together because they are similar in nature, this lumping together can create a perception, even if the cases are weak, that the accused must have done something wrong. This is similar to the old cliche "where there is smoke there must be fire." Thus a jury may convict not because the case has been proven beyond a reasonable doubt, but because it seems that the person is generally deserving of punishment.

In summary, relaxing the rules of joinder accomplishes very little except to increase the potential for unfair prejudice. While some judicial economy would be realized through advancement of these changes, it should be noted that over ninety percent of the cases which are prosecuted do not result in trials.

Based on the above comments, I urge this committee to leave the rules concerning joinder undisturbed.

Thank you for the opportunity to provide comment concerning this important bill.

PUBLIC DEFENDER AGENCY

By: _____
John B. Salemi
Public Defender

mw

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

STEVE COWPER, GOVERNOR

REPLY TO

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May 2, 1989

The Honorable Dave Donley
Alaska State Representative
P.O. Box V
Juneau, Alaska 99811

Re: Conspiracy Legislation/
Joinder and Severance

Dear Representative Donley:

You have asked for the Department of Law's position on conspiracy legislation, and requested that we advise you about the differences between federal and state law relating to joinder and severance. Finally, you asked us to provide you with specific suggestions for changes that could be made to the Alaska Criminal Rules and Rules of Evidence to make Alaska law relating to joinder and severance consistent with federal law.

I. Department of Law Position on Conspiracy Legislation

The Department of Law is essentially neutral on the question of whether conspiracy laws should be adopted in Alaska. Although we have no philosophical objection to the concept of conspiracy laws, we believe that the Alaska statutes applicable to criminal cases are sufficiently broad to allow the state to carry out its public safety responsibilities. The substantive differences between conspiracy and our current statutes relating to accomplice liability, attempt and solicitation are very minor, and unlikely to be significant in the vast majority of cases.

II. General Policy Considerations

A review of the Department of Law bill drafting historical index shows that the department has never requested that a conspiracy bill be prepared for introduction by the Governor. A limited conspiracy law, restricted to certain major crimes, was included in the Criminal Code Revision in 1978, but was rejected by the Legislature. If a conspiracy law is to be considered now, we believe it would be better to provide for conspiracy in cases such as murder or arson, as was proposed in 1978, than simply for drugs and prostitution as set out in the present proposal.

Supporters of conspiracy legislation say the law would make it easier to break up organized drug rings because investigators would not be required to accomplish the difficult and dangerous task of deeply infiltrating a criminal organization in order to obtain necessary evidence. The level of proof necessary to establish criminal intent in the proposed conspiracy legislation is identical to that currently required under existing law for criminal responsibility based on an aiding and abetting theory. Deep infiltration of drug rings, or strong circumstantial evidence, is required in either case.

The relationship between conspiracy and immunity is important to consideration of he policy issues surrounding conspiracy legislation. A conspiracy law theoretically expands the pool of persons who might be charged with any given crime and, therefore, also expands the pool of persons who might legitimately claim a Fifth Amendment privilege against testifying. Thus, unless immunity is granted, the prosecution could be deprived of valuable witnesses who may have been only peripherally involved in an offense. At trial, such immunized witnesses are subject to an obvious line of cross-examination that detracts from their credibility.

III. Joinder and Severance

A conspiracy charge against multiple defendants in most other jurisdictions is efficiently handled in a single trial. In a recent United States Supreme Court case, Richardson v. Marsh, 481 U.S. ___, 95 L.Ed.2d 176, 109 S.Ct. ___ (1987), the court noted that "joint trials play a vital role in the criminal justice system, accounting for almost one third of federal criminal trials in the past five years." However, in Alaska, separate trials are routinely granted. Alaska trial statistics for FY86 reflect that 8 out of 354 trials (2.26%) involved multiple defendants.

Although the Alaska and Federal Rules of Criminal Procedure relating to joinder, severance, and admissibility of evidence are substantially identical, the rules have been interpreted differently by the Alaska and federal courts. In addition, the Alaska supreme court has concluded that our constitution precludes joint trials in situations where the United States Supreme Court has held that joint trials are permissible under the federal constitution.

A. Joinder of Offenses - Cross Admissibility

1. Differences in State and Federal Law

Criminal Rule 8 (a) was amended by the legislature in 1988 to provide that offenses of the same or similar character could be joined for trial if "it can be determined before trial

that it is likely that evidence of one charged offense would be admissible to prove another charged offense." However, Criminal Rule 14 still vests the trial court with discretion to sever counts if joinder unfairly prejudices the defendant. The Alaska court of appeals has held that a defendant is prejudiced unless the evidence of the joined offenses is completely mutually cross-admissible (that is, the evidence of A is admissible at a trial on B and the evidence of B is admissible at a trial on A). Velez v. State, 762 P.2d 1297 (Alaska App. 1988).

Mutual cross-admissibility is not required under federal law. United States v. Harper, 680 F.2d 731, 734 (11th Cir.), cert. denied, 459 U.S. 916, 103 S.Ct. 229, 74 L.Ed.2d 182 (1982); United States v. Jamar, 561 F.2d 1103, 1107 & 1108 n.8 (4th Cir. 1977). This difference in interpretation means that more cases are severed in Alaska courts than in federal courts.

2. Proposed Amendments

Criminal Rule 14 could be amended to expressly provide that a showing that evidence of similar offenses is not completely and mutually cross-admissible is insufficient, by itself, to grant severance.

> Rule 14. Relief From Prejudicial Joinder
>
> If it appears that a defendant or the state is unfairly prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. A showing that evidence of one offense would not be admissible during a separate trial of a joined offense, or of a codefendant, is not a showing of prejudice that warrants severance. In ruling on a motion by a defendant for severance the court may order the attorney for the state to deliver to the court for inspection in camera any statements or confessions made by the defendants which the state intends to introduce at the trial.

This change alone, however, will not achieve the intended result -- bringing Alaska law into conformity with the federal law -- because state and federal law differ on the admissibility of other evidence.

B. Joinder of Offenses - Other Bad Acts

1. Differences in State and Federal Law

Federal Evidence Rule 404(b) and its Alaska counterpart, Alaska Evidence Rule 404(b), provide that evidence of prior acts of the defendant is not admissible to prove criminal propensity, but that the evidence is admissible if it is relevant to prove an issue in the case, such as motive or intent. The federal courts have adopted an "inclusionary" approach to Rule 404(b). For example, in United States v. McKoy, 771 F.2d 1207, 1213-14 (9th Cir. 1985), the court noted, "We permit the admission of any evidence of other crimes or acts relevant to an issue in the trial, except where the evidence proves only the defendant's criminal disposition. The inclusionary approach recognizes that evidence of other crimes may be probative on issues that are not listed specifically in Rule 404." (emphasis in original, citations omitted).

Alaska courts, on the other hand, treat Rule 404(b) as a rule of exclusion -- the evidence is presumed prejudicial and inadmissible even if it is relevant to an issue at trial. Lerchenstein v. State, 697 P.2d 312, 315 & 318 n.2 (Alaska App. 1985), aff'd, State v. Lerchenstein, 726 F.2d 546 (1986); Oksoktaruk v. State, 611 P.2d 521, 524 (Alaska 1980). In Lerchenstein, the court explained that "The exclusionary provision of Evidence Rule 404(b) represents the 'presumption in our law that the prejudicial effect of introducing a prior crime outweighs what probative value may exist with regard to propensity. No case by case balancing is permitted.'" 697 P.2d at 315.

Since the federal courts treat the federal rule as a rule of inclusion, federal courts are more willing to admit evidence of other charged acts when weighing the probative value of the evidence against the danger of unfair prejudice. Alaska's presumption of prejudice means that our courts are less likely to find cross-admissibility in the first place. It also means that the Alaska courts are more likely to find prejudice in the absence of complete mutual cross-admissibility.

Moreover, the Alaska courts want evidence of other crimes to fit neatly into the uses specifically set forth in Evidence Rule 404(b). If the evidence is not relevant to one of these expressly stated purposes, Alaska courts will generally find it inadmissible. This runs counter to the federal rule, quoted above, that the evidence is admissible for any non-propensity purpose.

2. Proposed Amendments

If the legislature wishes to expand the number of cases in which similar offenses can be tried together, it should rewrite Evidence Rule 404(b) to specifically make it a rule of inclusion. It should also amend the language of the rule to make it clear that the non-propensity purposes listed in the rule are not all-

inclusive and that evidence can be admitted if it is relevant to some other unlisted purpose. A legislative commentary to these changes could be adopted to provide some guidance to trial courts. [In Anchorage, the 1988 legislative amendment to evidence Rule 404(b), which provides that evidence of prior bad acts is admissible in child physical and sexual abuse cases, has helped the District Attorney to defeat severance motions in the trial courts.]

> Evidence Rule 404
> (b) Other Crimes, Wrongs, or Acts. (1) Evidence of other crimes, wrongs, or acts is not admissible <u>if the sole purpose for offering the evidence is</u> to prove the character of a person in order to show that he acted in conformity therewith. It <u>is</u> [MAY], however, [BE] admissible for other purposes, <u>including, but not limited to</u> [SUCH AS] proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

C. Joinder of Defendants - Joint Venture

1. Difference in State and Federal Law

The rules governing joinder of two or more defendants at the same trial are different than the rules for joinder of offenses because such joinder is governed by a different section of Criminal Rule 8. Under Criminal Rules 8(b) and 13, defendants may be tried together "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The major problem the state encounters in the application of this rule is the decision in Greiner v. State, 741 P.2d 662 (Alaska App. 1987), where the court of appeals held that evidence that co-defendants "were willing to sell drugs and were well-acquainted and cooperated with each other in the individual sale of drugs" was insufficient to show the existence of a conspiracy, joint venture or common scheme or plan.

2. Proposed Amendments

The legislature could amend Criminal Rule 8(b) to ensure that the court of appeals takes a broader view of the concept of joint venture. The commentary to these changes could state that the amendments were intended to overrule Greiner, and that a tacit joint venture can be shown by circumstantial evidence.

> Rule 8.
> (b) Joinder of Defendants. Two or more defendants may be charged in the same

> indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses or if they are members of a joint criminal venture. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count. The disposition of the indictment or information as to one of several defendants joined in the same indictment or information shall not affect the right of the state to proceed against the other defendants. In this rule, "joint criminal venture" means an express or tacit agreement to aid each other in accomplishing a criminal goal.

D. Joinder of Defendants - Codefendant Statements

1. Differences in State and Federal Law

The United States Supreme Court has held that in a joint trial the introduction of inculpatory admissions by a codefendant who does not take the stands violates the sixth amendment rights of the defendant, who is unable to cross-examine the codefendant. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The court had two primary reasons for the Bruton rule: First, the court believed that a codefendant's statements would add "substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination" because there is a substantial likelihood that a jury will use the codefendant's admission when considering the guilt or innocence of the defendant. 391 U.S. at 127. Second, the court stressed that the confession of a codefendant is inherently unreliable and that cross-examination is essential so that the truth of the codefendant's atements can be tested before the jury. 391 U.S. at 136.

The Bruton rule has a number of recognized exceptions. The Alaska court has refused to accept two important exceptions to Bruton recognized under federal law: the "interlocking" confessions exception and the "redacted" confession exception. This difference in interpretation means that more cases are severed for trial in Alaska than in the federal court system.

Under the interlocking confessions exception, the Bruton rule is not violated where the confessions of both codefendants are to be introduced at the same trial and both confessions contain identical or factually similar admissions. The rationale for the exception is that the admission of a codefendant's factually similar statements will always be harmless where the defendant's

own admissions are admitted at the same trial. Parker v. Randolph, 442 U.S. 62, 72-75, 99 S.Ct. 2132, 2138-2140, 60 L.Ed.2d 713 (1979).

In analyzing whether the interlocking confessions rule should be accepted in Alaska, the Alaska supreme court specifically considered and rejected the Parker ruling. Quick v. State, 599 P.2d 712, 723 (Alaska 1979). The court concluded that the right to confrontation, as it is preserved in article I, section 11 of the Alaska Constitution, precludes adoption of a per se rule allowing the admission of interlocking confessions. 599 P.2d at 723-35. Because the court based its ruling on the requirements of the Alaska constitution, a legislative rule change would not be effective to overturn this aspect of the decision in Quick.

The Quick court also considered, and rejected, the state's argument that a codefendant's confession may be introduced so long as reference to other codefendants is deleted, or "redacted." The United States Supreme Court reached a contrary conclusion in Richardson v. Marsh, supra: "We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence."

Although the ruling in Quick relating to redaction of confessions is not explicitly based on the Alaska constitution, we believe it would be difficult to legislatively mandate the result in Richardson. The resolution of each case will necessarily turn on its facts, and given the Alaska supreme court's expressed dislike of the use of redacted statements, the court is likely to impose a heavy burden on the state to show that the redacted confession did not implicate the complaining codefendant.

2. Proposed Amendments

As discussed above, we do not believe that anything short of an amendment to the Alaska constitution would be effective to make federal and state law relating to use of codefendant statements consistent.

E. Joinder of Offenses and Defendants -- Why Do It?

The United State Supreme Court in Richardson v. Marsh cogently set out the important role that joint trials play in the federal justice system:

"Joint trials play a vital role in the criminal justice system, accounting for almost one third of federal criminal trials in the past five years. Many joint trials -- for example, those involving large conspiracies to import and distribute illegal drugs

-- involve a dozen or more codefendants. Confessions by one or more of the defendants are commonplace -- and indeed the probability of confession increases with the number of participants, since each has reduced assurance that he will be protected by his own silence. It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interest of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability -- advantages which sometimes operate to the defendant's benefit. Even apart form these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." 95 L.Ed.2d at 187.

The Department of Law agrees that joint trials are desirable in most circumstances. However, the rules changes outlined above must be adopted before a significant number of joint trials can be held in Alaska. Thank you for the opportunity to comment on these important issues. If you have any questions, please let us know.

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: _____
Laurie H. Otto
Assistant Attorney General

LHO:me-56

HB20

CITY/BOROUGH OF JUNEAU
ALASKA'S CAPITAL CITY

February 22, 1989

Co-Chair Representative Peter Goll
House Judiciary Committee
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Dear Representative Goll:

It appears appropriate at this time for the state of Alaska and the law enforcement community to take a definitive stand on the issue of criminal conspiracy. We can then take our place with all the remaining 49 states and the federal government in adopting and implementing this type of legislation.

Those who plan with others to commit a criminal act are equally criminals as those who actually carry out the crime. Alaska needs to recognize this and take steps to enact enabling legislation to allow us to address the issue.

A conspiracy statute will give law enforcement a valuable tool in mounting an effective attack on criminals and the serious offenses they plan for and commit. Conspiracy statutes will allow law enforcement to proactively deal with criminal issues and not have to wait until an offense has occurred before stepping in and attempting to resolve the matter. If anguish to victims or economic loss to individuals can be prevented before it happens, this appears to be a strong argument for this type of legislation.

It would be extremely desirous to have a conspiracy statute for all felony offenses; however, House Bill 20's addressing of drug trafficking and of prostitution is a definite step in the right direction and a good place to start.

I also feel that the concept of an affirmative defense being offered a potential criminal conspirator who alters course and changes his criminal intent is a necessary part of this legislation. If a person give notice to law enforcement and undertakes affirmative steps toward the prevention of the planned criminal activity this behavior should be recognized. By extending this defense to criminal offenders I feel that the concept may serve as a possible incentive not to carry out the commission of a planned offense.

The time has come for Alaska to have a conspiracy statute. It would be a necessary adjunct to effective law enforcement and when used with discretion and applied fairly and equitably will serve as a deterrent to contemplated criminal activity.

I support House Bill 20 and solicit your scrutiny of the bill based on its merits and urge in turn your support of the bill.

Sincerely,

Mike Gelston

Michael S. Gelston
Chief of Police
Juneau Police Department
210 Admiral Way

MSG/ps13

American Civil Liberties Union

Alaska Civil Liberties Union -Legislative Committee-217 Second St. #204-Juneau, Alaska 99801

POSITION PAPER ON HB 20

Alaska Civil Liberties Union opposes this legislation. In our view, it is an unnecessary bill, given Alaska's extremely broad laws governing solicitation, attempt, and accomplice liability. It is inconceivable that conduct could be punished under this legislation which is not already punishable under existing solicitation, attempt, and accomplice statutes.

Conspiracy laws are disfavored because they can be and often are used to punish association, rather than actual conduct which society deems to be criminal. The present legislation requires no overt act in order for a person to be punished as a criminal. Police may arrest persons on charges of conspiracy merely for conversing about the commission of a crime. It is not required that the persons actually do anything toward commission of the crime, or even that they know that a crime is subsequently going to be committed. As a result, what is often punished under conspiracy laws is the company one keeps, not the acts one commits. We believe that criminal liability should be imposed only if the state can demonstrate that a person committed some act in furtherance of a crime. Any lesser standard opens up large areas of potential abuse by the state.

As a final example of the pitfalls of conspiracy laws, it should be remembered that the Smith Act and the Subversive Activities Control Act, under which McCarthy-ites jailed hundreds of suspected "communists" during the 1950's, were in essence conspiracy laws. Persons were convicted on the basis of association, or membership in, suspect organizations, without regard for whether the organizations actually had the power or the intention to commit subversive acts. While the present legislation is clearly well intended, the dangers of allowing authorities to punish persons merely for speech, without any clear and present danger of criminal acts, outweighs the marginal utility of these laws in combating crime. This is particularly true in Alaska, where all criminal activity is reachable under accomplice, attempt, and solicitation laws.

BILL NO:	CSHB 20 (Jud) DRAFT	DATE:	March 12, 1990
TITLE:	Amending Rules of Criminal Procedure and Evidence	CONTACT:	Gayle Horetski Deputy Commissioner 465-4322

DEPARTMENT OF PUBLIC SAFETY / STATE TROOPERS / STATE BOARD

Because of the way the appellate courts in Alaska have interpreted Alaska's court rules regarding joinder and severance of defendants and charges in criminal trials, many more separate trials have to be held in Alaska criminal cases than would be required under the federal or other states' systems. This is a waste of public resources, and causes additional trauma for the innocent victim, who may be required to testify in two, three, or more trials.

Under present interpretations of Alaska's Evidence Rule 404 (b) relevant evidence is withheld from the jury. Even though Alaska's Rule is virtually identical with the federal evidence rule, it has been applied much more restrictively in Alaska.

The proposed Judiciary Committee substitute for HB 20 would address both of these problems by making it clear that Alaska's court rules should be construed in a manner that would bring them into conformity to the federal rules and those in other states.

The DPS strongly supports proposed CSHB 20 (Jud) in its present form, and believes passage of the bill would significantly increase the efficiency of the criminal justice system in Alaska.

ARTHUR ENGLISH
Commissioner

Alaska Court System
State of Alaska
OFFICE OF ADMINISTRATIVE DIRECTOR

JANALEE R. STRANDBERG
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December 7, 1989

Representative Max Gruenberg
Representative Peter Goll
Co-chair, House Judiciary Committee
3111 C Street, Suite 440
Anchorage, AK 99503

Re: House Bill 20 An Act relating to the crime of conspiracy

Dear Representative Gruenberg and Representative Goll:

Thank you for the opportunity to comment on HB 20. Although it appears that the bill as a whole will have minimal fiscal impact on the court system, we have some concerns about section (e) of the bill. This paragraph provides an affirmative defense when the defendant and the law enforcement official or informant are the only persons conspiring and the agreement to commit the offense is obtained in order to obtain evidence of the commission of conspiracy.

Because defendants are likely to try to link co-conspirators with law enforcement officers, we expect that this provision will extend the length of pre-trial evidentiary hearings as well as trials.

Sincerely,

Jan Strandberg

Jan Strandberg
Staff Counsel

JS:gb

REPRESENTATIVE DAVE DONLEY

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VICE CHAIRMAN
ANCHORAGE CAUCUS

MEMBER
RULES COMMITTEE
STATE AFFAIRS COMMITTEE

February 7, 1990

M E M O R A N D U M

TO: Members of the House Judiciary Committee

FROM: Representative Dave Donley

RE: House Bill 20, Creating the Crime of Conspiracy

I would appreciate your support of House Bill 20, the legislation before you in committee today. This legislation would create the the Crime of Conspiracy.

This legislation is strongly endorsed by law enforcement officials and community groups across the state. Among those that support this legislations are: Alaska Police Chiefs Association, Alaska Police Officers Association, the Municipality of Anchorage, Anchorage Crime Commission, Fairbanks Police Department, Anchorage Police Department, Valdez Police Department, Soldotna Police Department, Anchorage Chamber of Commerce, Spenard Action Committee and Victims for Justice.

Alaska has the distinction of being the only state without a conspiracy statute on the books. I feel that this should be corrected. This legislation would give our law enforcement officers an essential tool in fighting crime in many of our neighborhoods. It would allow the prosecution of persons who mastermind and finance criminal drug and prostitution activities which are presently insulated from prosecution under current law.

I would appreciate your support of this legislation. Thank you.

JUNEAU OFFICE
(During Legislative Session January through May)
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REPRESENTATIVE DAVE DONLEY

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HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE
HOUSING AND BANKING SUBCOMMITTEE
FINANCE BUDGET SUBCOMMITTEE
DEPT. OF COMMERCE AND ECONOMIC DEVELOPMENT

April 25, 1989

M E M O R A N D U M

TO: Representative Max Gruenberg, Co-Chair
Judiciary Committee

Representative Peter Goll, Co-Chair
Judiciary Committee

FROM: Representative Dave Donley DD

RE: Scheduling HB 20

I would like to request that you schedule House Bill 20, "an act relating to the crime of conspiracy to commit murder and to deliver certain controlled substances," for a hearing at your earliest convenience.

Alaska is the only state without a conspiracy law. House Bill 20 will create such a conspiracy law directed against the crimes of murder and the delivery of controlled substances. Under existing law, our law enforcement officials have great difficulty in pursuing organizers and financial backers for these crimes. Using a conspiracy law, police officers can effectively pursue a person who has conspired to commit a crime and has taken further steps toward completion of the offense. This bill will allow police officers to apprehend those who insulate themselves from direct involvement but are nevertheless the backbone of such criminal activities.

This legislation has been supported by the Alaska Chiefs of Police Association and the Anchorage Chamber of Commerce Crime Commission. If you have any questions, please don't hesitate to contact me or my aide, Diana Rhoades.

Thank you for your cooperation.

JUNEAU OFFICE (During Legislative Session)
P.O. BOX V, JUNEAU, ALASKA 99811 • (907) 465-3892

1990

Anchorage · *Star of the North*
Chamber of Commerce

Crime Commission Legislation

Recriminalization of Marijuana

The Commission continues to support legislation recriminalizing marijuana, particularly passage of SB 18 which is now in the House during this second session of the Legislature. We hold firm and will not compromise on this Bill.

Fingerprinting of Minors

The Crime Commission supports the amendments to A.S. 47.10.097 pertaining to Fingerprinting of Minors recently enacted by the Legislature. This Alaska Statute actually limits the ability of our law enforcement officials to enter fingerprints into the Alaska Automated Fingerprint System.

The Crime Commissions proposed amendments would reinforce the ability to photograph and fingerprint all juveniles with entry into the Alaska Automated Fingerprint System.

This bill is being introduced by Representative Ramona Barnes and C.E. Swackhammer during the second half of the current legislative session.

State Conspiracy Law

State drug enforcement efforts are hampered by Alaska's unique absence of a conspiracy statute. The Conspiracy bill has been modeled after a nationally recognized model act and has been improved to add more safeguards against any police or prosecutor abuse. The proposed bill is limited to felony crimes related to drug trafficking and promotion of prostitution and specifically targets crime kingpins.

The Conspiracy bill, HB 20, has been carried over from the first half of this Legislative session.

Seizure and Foriciture of Property

The Anchorage Crime Commission supports the passage of a bill entitled, "An Act relating to seizure and forfeiture of property in cases involving

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controlled substances, and alcoholic beverage control laws".

This legislation will add an administrative procedure to state law that will allow both the state and municipalities to conduct an administrative proceeding in order to declare seized property forfeited. This was introduced in the first half of this current session by Senator Arliss Sturgulewski. She is continuing to work out technical problems with the Attorney General and Law Enforcement Officials.

Sexual Misconduct Bill

The Anchorage Crime Commission supports the bill entitled "An Act relating to sexual offenses against children" this bill is designed to protect students over the age of consent but still attending secondary school, from sexual abuse and misconduct while under the care of our school system.

Currently, state law does not protect children over 16 years and under 18 years of age from sexual abuse and misconduct while attending secondary school.

this bill will be introduced by Representative Loren Leman.

Drug-Free School Zones

A bill establishing drug-free zones around our state's schools will be introduced by Senator Jan Faiks. The drug-free school zone concept raises the penalties for the possession and sale of drugs in the area around schools.

The proposed bill would make it a class A felony (up to 20 years /$50,000.00 fine) for any person to deliver, or possess with the intent to deliver, any kind of illegal drug within 1000 feet of a school, or on a school bus. In addition, it makes possession of illegal drugs without the intent to deliver a more serious crime when the drugs are possessed within 1000 feet of a school, or on a school bus. Penalties depend on what kind of drug is possessed. Finally, the bill would require the state and municipalities to post street signs around each school declaring the area to be a "Drug-Free School Zone"

ANCHORAGE POLICE DEPARTMENT

4501 SOUTH BRAGAW STREET • ANCHORAGE, ALASKA 99507-1599
TELEPHONE (907) 786-8500

TONY KNOWLES
MAYOR

RONALD L. OTTE
CHIEF

April 23, 1987

Representative Dave Donley
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

RE: CS HB 28 Prostitution Penalties
HB 30 Conspiracy

Dear Representative Donley,

It is my understanding that CS HB 28 and HB 30 will be discussed in hearings on April 24, 1987.

I continue to support these bills, as I did during the Alaska Association Chiefs of Police teleconference in January.

If I can be of any further assistance please do not hesitate to contact me.

Sincerely,

Ronald L. Otte

Ronald L. Otte
Chief of Police

RLO:dl

Alaska Association Chiefs of Police

625 C Street • Anchorage, Alaska 99501

April 23, 1987

Representative Dave Donley
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

RE: CS HB 28 Prostitution Penalties
HB 30 Conspiracy

Dear Representative Donley,

During the January 1987 meeting of the Alaska Association Chiefs of Police, the Association expressed support for CS HB 28. I wanted you to know that we continue to support the bill as I understand it has been scheduled for a hearing on April 24, 1987.

At the January meeting we also identified four legislative priorities for this session. The number two priority for the Association was and continues to be HB 30, the Conspiracy Bill. I understand that it too is scheduled for a hearing in the near future and I wanted to assure you of our continued support.

Sincerely,

Del Smith

By: Del Smith, Vice President
Deputy Chief, Anchorage Police Department

POLICE DEPARTMENT
CITY OF FAIRBANKS
656 7TH AVENUE
FAIRBANKS, ALASKA 99701

907-452-1527

CHIEF OF POLICE

April 22, 1987

The Honorable Dave Donley
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Ref: HB 30

Dear Representative Donley:

I am in total agreement with the Alaska Association of Chiefs of Police and the Alaska Peace Officers Association in their support of House Bill No. 30, relating to the crime of conspiracy. I am certain that I can speak for all commissioned members of the Fairbanks Police Department, who strongly endorse the concept that a person who plans the commission of a crime by another person is also criminally liable for such actions. Even though this bill is limited to crimes related to controlled substances, prostitution, and promotion of prostitution, I believe that it can be amended in future legislative sessions to include all felony statutes.

On behalf of the Fairbanks Police Department and the citizens we serve, I send my support and appreciation for passage of this Bill.

Sincerely,

RICHARD D. CUMMINGS
Chief of Police

RLC:lnh

FEB 9 19

Alaska Association Chiefs of Police

625 C Street • Anchorage, Alaska 99501

February 4, 1987

Representative Dave Donley
Alaska House of Representatives
P.O. Box V
Juneau, AK 99811

Dear Representative Donley,

I wish to thank you for allowing members of the Chiefs Association to address legislative issues via teleconference on January 30, 1987.

I believe your teleconference with the membership is a first. We look forward to providing input based on a professional law enforcement perspective as issues arise.

As was apparent from the testimony by AACOP members we wholeheartedly support HB28 and [redacted]

If I or any of the membership can be of assistance in the future please don't hesitate to call.

Again, thank you for allowing us to participate in the legislative process.

Sincerely,

Patrick M. Shely, President
Chief, Valdez Police Department

Del Smith

By: Del Smith, Vice President
Deputy Chief, Anchorage Police Department

Anchorage Chamber of Commerce

Crime Commission

April 20, 1987

Representative John Sund
Chairman, House Judiciary Committee
Alaska House of Representatives
Pouch V
Juneau, Alaska 99811

RE: HB 30
An Act Relating to the Crime of Conspiracy

Dear Representative Sund:

The Anchorage Crime Commission endorsed the referenced legislation and also identified it as one of its priority legislative items.

Although Alaska presently has an aiding and abetting statute, the passage of a conspiracy statute would provide an additional tool to law enforcement. The requirements under the conspiracy statute are not as stringent as those of the aiding and abetting statute. Prosecution results on the federal level indicate that the use of a conspiracy statute is more efficient as well as cost effective inasmuch as separate trials as required by the aiding and abetting statute are eliminated, therefore, defendants may be charged and tried as a group.

Therefore, since this bill is currently being retained for review by the Judiciary committee which you chair, your prompt reevaluation of this matter and presentation for committee and House review would not only provide the State with an element of the judicial system aligned with other

A Committee of the
Anchorage Chamber
of Commerce

415 F Street
Anchorage AK 99501
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states and federal laws, but also with a very cost conscious procedure benefitting the citizens of the State of Alaska.

Sincerely,

Harold C. Heinze

Harold C. Heinze
Chairman

c: Representative Dave Donley
House Judiciary Committee Members

California Law Review

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The Unnecessary Crime of Conspiracy

Phillip E. Johnson*

The literature on the subject of criminal conspiracy reflects a sort of rough consensus. Conspiracy, it is generally said, is a necessary doctrine in some respects, but also one that is overbroad and invites abuse. Conspiracy has been thought to be necessary for one or both of two reasons. First, it is said that a separate offense of conspiracy is useful to supplement the generally restrictive law of attempts. Plotters who are arrested before they can carry out their dangerous schemes may be convicted of conspiracy even though they did not go far enough towards completion of their criminal plan to be guilty of attempt.[1] Second, conspiracy is said to be a vital legal weapon in the prosecution of "organized crime," however defined.[2] As Mr. Justice Jackson put it, "the basic conspiracy principle has some place in modern criminal law, because to unite, back of a criminal purpose, the strength, op-

* Professor of Law, University of California, Berkeley. A.B., Harvard University, 1961; J.D., University of Chicago, 1965.

1. The most cogent statement of this point is in Note, 14 U. OF TORONTO FACULTY OF LAW REV. 56, 61-62 (1956): "Since we are fettered by an unrealistic law of criminal attempts, overbalanced in favour of external acts, awaiting the lit match or the cocked and aimed pistol, the law of criminal conspiracy has been employed to fill the gap." *See also* MODEL PENAL CODE § 5.03, Comment at 96-97 (Tent. Draft No. 10, 1960); 1 NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 397 (1970) [hereinafter cited as WORKING PAPERS]; Note, *The Conspiracy Dilemma: Prosecution of Group Crimes or Protection of Individual Defendants*, 62 HARV. L. REV. 276, 283-84 (1948).

2. A presidential commission has declared that new substantive criminal laws are not needed to combat organized crime, because "[t]he laws of conspiracy have provided an effective substantive tool with which to confront the criminal groups." PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 200 (1967). In preparing a new Federal Criminal Code, the National Commission on Reform of Federal Criminal Laws considered conspiracy as part of the general problem of dealing with organized crime. *See* 1 WORKING PAPERS, *supra* note 1, at 381.

The other major line of criticism stresses the dangers that conspiracy law raises for first amendment freedoms. Prosecutions of political dissidents, including labor organizers,[8] Communist Party leaders,[9] and contemporary radicals,[10] typically have been conspiracy prosecutions. The law of conspiracy is intended, after all, to make it easier to impose criminal punishment on members of groups that plot forbidden activity. Insofar as it accomplishes this end, it unavoidably increases the likelihood that persons will be punished for what they say rather than for what they do, or for associating with others who are found culpable. Critics who are alarmed at the resulting threat to freedom of speech and freedom of association typically have proposed new constitutional doctrines derived from the first amendment to curtail the use of conspiracy charges in cases having some "political" element.[11]

Unfortunately, the proposals for legislative or constitutional reforms of conspiracy law are inadequate. It will not do simply to reform conspiracy legislatively by removing its most widely deplored overextensions, or to reform it judicially by engrafting new doctrines derived from the first amendment. Such measures are appropriate for improving a doctrine that is basically sound, but in need of some adjustment at the edges. The law of criminal conspiracy is not basically sound. It should be abolished, not reformed.

The central fault of conspiracy law and the reason why any limited reform is bound to be inadequate can be briefly stated. What conspiracy adds to the law is simply confusion, and the confusion is inherent in the nature of the doctrine. The confusion stems from the fact that conspiracy is not only a substantive inchoate crime in itself, but the touchstone for invoking several independent procedural and substantive doctrines. We ask whether a defendant agreed with another person to commit a crime initially for the purpose of determining whether he may be convicted of the offense of conspiracy even when the crime itself has not yet been committed. If the answer to that question is in the affirmative, however, we find that we have also an-

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nized crime provisions was Professor Robert Blakely of Notre Dame Law School, now Chief Counsel to the Subcommittee on Criminal Laws and Procedures

8. The application of criminal conspiracy laws to combinations of workingmen acting to raise their wages or improve their working conditions is discussed at some length in Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922).

9. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951); Yates v. United States, 354 U.S. 298 (1957).

10. The most famous examples are United States v. Spock, 416 F.2d 165 (1st Cir. 1969); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972).

11. *See, e.g.*, Spock v. United States, 416 F.2d 165, 184-92 (1st Cir. 1969) (Coffin, J., dissenting in part); Silvaroff, *Conspiracy and the First Amendment*, 121 U. PA. L. REV. 189 (1972); Note, *Conspiracy and the First Amendment*, 79 YALE L.J. 872 (1970).

swered a number of other questions that would otherwise have to be considered independently. Where there is evidence of conspiracy, the defendant may be tried jointly with his criminal partners and possibly with many other persons whom he has never met or seen, the joint trial may be held in a place he may never have visited, and hearsay statements of other alleged members of the conspiracy may be used to prove his guilt. Furthermore, a defendant who is found guilty of conspiracy is subject to enhanced punishment and may also be found guilty of any crime committed in furtherance of the conspiracy, whether or not he knew about the crime or aided in its commission.

Each of these issues involves a separate substantive or procedural area of the criminal law of considerable importance and complexity. The essential vice of conspiracy is that it inevitably distracts the courts from the policy questions or balancing of interests that ought to govern the decision of specific legal issues and leads them instead to decide those issues by reference to the conceptual framework of conspiracy. Instead of asking whether public policy or the interests of the parties requires a particular holding, the courts are led instead to consider whether the theory of conspiracy is broad enough to permit it. What is wrong with conspiracy, in other words, is much more basic than the overbreadth of a few rules. The problem is not with particular results, but with the use of a single abstract concept to decide numerous questions that deserve separate consideration in light of the various interests and policies they involve.

Although it is true that the confusion that conspiracy introduces into the law has an overall tendency to benefit the prosecution, sometimes it has the opposite effect. Occasionally, use of a conspiracy charge converts a relatively simple case into a monstrosity of conceptual complexity, giving the defense substantial grounds for an appeal. Furthermore, eliminating the substantive crime of conspiracy would not necessarily require the elimination of all the procedural rules that are now associated with it: at most it would require only that the rules be reconsidered on their own merits. In fact, many of these procedural rules are even now applicable in all criminal cases, whether conspiracy is charged or not.[12]

The pages that follow will discuss the many roles of conspiracy in the criminal law[13] and will argue that each of the problems with which

12. Not all the difficulties posed by [the procedural rules associated with conspiracy] are intrinsic to conspiracy as an offense, however much it is believed by prosecutors that it is by virtue of indictment for conspiracy that the advantages are gained. The same rules as to joinder and venue, the same rules of evidence, will normally apply although the prosecution is for substantive offenses, in which joint complicity is charged.

MODEL PENAL CODE § 5.03, Comment at 98 (Tent. Draft No. 10, 1960).

13. This Article does not attempt to discuss the role of conspiracy in civil law or in antitrust law. Although violation of the Sherman Antitrust Act may be a mis-

conspiracy purports to deal could better be resolved by reference to other doctrines and principles. Conspiracy became the monster it now is by a process of judicial improvisation. Whatever may have been the justification for this patchwork process, the problems it meant to remedy can now be resolved by more specific doctrines with a firmer basis in policy. Hence it is particularly disappointing that the proposed Federal Criminal Code, like its predecessor the Model Penal Code, retains a general conspiracy doctrine. Both codes make an attempt at reform,[14] but one may doubt whether these efforts will accomplish very much. The reforms touch mainly upon matters that are of little importance, while the major sources of abuse are left untouched. Moreover, the history of conspiracy to date, which is one of almost constant expansion,[15] gives little reason to hope that any partial retrenchment will be lasting.

An analysis of conspiracy divides naturally into two parts: conspiracy as a set of substantive rules, and conspiracy as a set of procedural rules. The procedural rules associated with conspiracy doctrine are probably more important as a practical matter, although they purport to be no more than adjuncts to the substantive rules. Most of the theoretical discussion of conspiracy and most of the attempts to defend the doctrine, however, center upon the substantive rules.

The following discussion will concern itself primarily with federal law, although the arguments are equally relevant to questions of state law. Conspiracy prosecutions are especially prevalent in the federal courts, and most of the leading appellate cases are federal cases. In addition, the complete revision of the Federal Criminal Code now in progress offers an unusual opportunity to reappraise a basic doctrine that is no longer either necessary or desirable.

I.

THE SUBSTANTIVE DOCTRINES OF CONSPIRACY

The existing law of conspiracy contains several distinct substantive doctrines. Conspiracy is an inchoate crime, supplementing the law of

demeanor, 15 U.S.C. § 2 (1970), a complete discussion of the broad questions of economic and social policy peculiar to antitrust law is beyond the scope of an article on criminal conspiracy. *See Developments, supra* note 5, at 1000-08.

14. The degree to which the proposed Federal Criminal Code rejects the reforms proposed in the Model Penal Code in favor of existing conspiracy laws is discussed *infra* in note 25 and in text accompanying notes 35-37, 46-52, 59-63, 81-82, 98-103, and 107-111.

15. As Mr. Justice Jackson stated, borrowing from Cardozo, the history of conspiracy exemplifies the "tendency of a principle to expand itself to the limits of its logic." Krulewitch v. United States, 336 U.S. 440, 445 (1949) (Jackson, J., concurring).

attempt where more than one person is involved in plotting or preparing a crime. One is guilty of conspiring to commit a particular crime if, with the intention or purpose of furthering its commission,[16] he agrees[17] with some other person to commit it.[18] Some jurisdictions require in addition that one or more of the conspirators have performed some overt act in furtherance of the criminal agreement, but this additional requirement adds little. Practically any act will do, including

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16. Considerable support exists in the case law for the proposition that the intent must be "corrupt" or "wrongful," *i.e.*, that good motives or ignorance of the law might be a defense even if the object of the agreement were criminal. *See* People v. Powell, 63 N.Y. 88, 92 (1875); Commonwealth v. Benesch, 290 Mass. 125, 135, 194 N.E. 905, 910 (1935); Landen v. United States, 299 F. 75, 78-79 (6th Cir. 1924); W. LaFave & A. Scott, Criminal Law § 61, at 468-470 (1972). The degree to which this so-called "corrupt motive" or "Powell doctrine" has won acceptance in the federal courts is uncertain. Judge Learned Hand rejected it in a dictum. Mack v. United States, 112 F.2d 290, 292 (2d Cir. 1940). The Supreme Court has not decided the question. Both the Model Penal Code and the proposed Federal Criminal Code reject it. Model Penal Code § 5.03(1) (Proposed Official Draft, 1962); Model Penal Code § 5.03, Comment at 113-16 (Tent Draft No. 10, 1960); Committee Print, *supra* note 7, at § 1-2A5(a); 1 Working Papers, *supra* note 7, at 387-89.

17. The case law has not been successful in rigorously defining the nature of the forbidden "agreement." Mr. Justice Jackson claimed that "[t]he modern crime of conspiracy is so vague that it almost defies definition." Krulewitch v. United States, 336 U.S. 440, 446 (1949) (Jackson, J., concurring). *See generally Developments, supra* note 5, at 925-35. Because the existence of the agreement need not be proved directly, but may be implied from proof of concerted action by the defendants, it might be more accurate to define the crime in terms of adherence to a joint criminal venture rather than agreement to commit a crime. Hence Mr. Justice Holmes defined a conspiracy as "a partnership in criminal purposes." United States v. Kissel, 218 U.S. 601, 608 (1910). The proposed Federal Criminal Code defines conspiracy as follows:

> A person is guilty of criminal conspiracy if he knowingly agrees with one or more persons *to enter into a relationship* having as its objective or objectives to engage in or cause the performance of conduct constituting, in fact, one or more crimes, and he or one or more of such persons engages in or causes the performance of conduct to effect an objective or objectives of the relationship.

Committee Print, *supra* note 7, at § 1-2A5(a) (emphasis added). The requirement of an agreement here is superfluous; it adds nothing to the concept of knowingly entering into a relationship.

18. Because an agreement requires at least two persons, the case law has enforced a requirement of "plurality." Under this requirement, *A* could not be convicted of conspiring with *B* if *B* for some reason could not be convicted of conspiring with *A*. For example, if *B* merely pretended to agree, never intending to carry out the criminal venture, then *A* had to be acquitted, however serious his own intent. *See Developments, supra* note 5, at 926; W. LaFave & A. Scott, Criminal Law § 62, at 488-94 (1972). Both the Model Penal Code and the proposed Federal Criminal Code reject the plurality requirement. Model Penal Code § 5.04 (Proposed Official Draft, 1962); Committee Print, *supra* note 7, at § 1-2A5(b). Rejection of the plurality requirement can be justified on the ground that it is irrelevant to the culpability of *A* that *B* has some defense peculiar to himself, although it is ironic to find the law reformers taking the position that liability for conspiracy under existing law is not broad

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seemingly innocent conduct that carries the conspiracy no closer to accomplishing its object than the agreement itself. Moreover, an act by one alleged conspirator suffices for all.[19]

Conspiracy is also a device for expanding the substantive criminal law and for enhancing punishment. In theory, at least, the object of a conspiracy need not be a crime: it is criminal to conspire to commit a civil wrong, or to do anything else that is immoral or dangerous to the public health and safety.[20] Even where the object of the agreement is criminal, the penalty for conspiracy may be higher than the penalty for the completed crime; for instance in some jurisdictions conspiracy to commit a misdemeanor is a felony.[21] Furthermore, if conspirators actually carry out the crime they agree to commit, they may be convicted and sentenced for both the conspiracy and for the substantive crime.[22] All these rules are said to be based on the theory that combinations of wrongdoers are more dangerous than individual offenders. Hence, the argument goes, wrongful conduct by such combinations should be criminally punished even when the same acts would be excused if performed by an individual; likewise, group criminal conduct calls for enhanced punishment.[23]

Finally, conspiracy provides a means of expanding the law of complicity in crime. It is difficult to convict leaders of organized

enough.

19. *Developments*, *supra* note 5, at 945-49; W. LAFAVE & A. SCOTT, CRIMINAL LAW § 62, at 476-78 (1972).

20. The doctrine that agreements to accomplish "immoral," "wrongful," or "unlawful" noncriminal objectives are punishable is traced to its historical roots and criticized in Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 395-409 (1922). Although this common law rule has fallen into disuse in modern times, it survives in such statutes as California Penal Code section 182, which punishes those who conspire "to commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws." CAL. PEN. CODE § 182 (West 1970).

21. *See, e.g.*, CAL. PEN. CODE § 182.1 (West 1970). For a list of state statutes, see MODEL PENAL CODE § 5.05, Comment at 176-78 (Tent. Draft No. 10, 1960). Under federal law, if the object of the conspiracy is a misdemeanor, the penalty for the conspiracy may not exceed that for the misdemeanor. 18 U.S.C. § 371 (1970).

22. Callanan v. United States, 364 U.S. 587, 593 (1961).

23. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

Id. at 593-94. This argument is frequently termed the "group danger" or "general danger" rationale. *See* MODEL PENAL CODE § 5.03, Comment at 98-99 (Tent. Draft No. 10, 1960); Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 413-14 (1959); *Developments*, *supra* note 5, at 923-25.

crime because they direct the affairs of the organization from a distance, carefully avoiding direct involvement in the specific acts of unlawful betting, drug selling, or the like from which they derive their income. If their power to direct the entire enterprise can be proved, however, they can be convicted of conspiring to violate the gambling or drug laws without proof that they participated directly in placing bets or selling drugs. Furthermore, each participant in a conspiracy is criminally liable for all the crimes committed by any of the participants in furtherance of the common enterprise, even if he would not otherwise be liable as an accessory.[24] Conspiracy thus permits any member of a large-scale organization to be punished for all the crimes committed by its members.

One rarely sees a defense of existing conspiracy law as it has just been described. For example, no informed body of opinion today supports the rule that a conspiracy may be criminally punishable even if its object is only a civil wrong, or some other form of conduct that would not be criminal if undertaken by an individual.[25] Arguably, some conduct which does not threaten the interests of society when a lone individual engages in it should nevertheless be prohibited when carried on by a group. Indeed, certain forbidden acts, such as agreements by competitors to fix prices, by definition require concerted action. It hardly follows, however, that courts should have the authority to declare concerted activity criminal whenever they find it immoral, wrongful, or violative of some principle of tort or contract law. It seems impossible to reconcile such discretionary criminal liability with the constitutional prohibition against overly broad or vague criminal statutes.[26] Constitutional problems aside, there is simply no need for a modern, comprehensive penal code to place such broad legislative authority in the courts. The legislature can easily enact more specific statutes stating the types of concerted activity to be held criminal.

In federal law, this "unlawful purpose" doctrine has been imple-

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24. Pinkerton v. United States, 328 U.S. 640, 646-47 (1946).

25. The Model Penal Code and the proposed Federal Criminal Code both reject this rule. MODEL PENAL CODE § 5.03 (Proposed Official Draft, 1962); MODEL PENAL CODE § 5.03, Comment at 102-04 (Tent. Draft No. 10, 1960); COMMITTEE PRINT, *supra* note 7, at § 1-2A5(a); 1 WORKING PAPERS, *supra* note 1, at 380-90; W. LAFAVE & A. SCOTT, CRIMINAL LAW § 62, at 471-74 (1972); G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 226 (2d ed. 1961); J. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 441-48 (1959); Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922).

26. In *Musser v. Utah*, the Supreme Court indicated that a Utah statute punishing conspiracies "to commit acts injurious to public morals" would be held unconstitutional unless the Utah courts construed it narrowly. 333 U.S. 95, 97 (1948). After remand, the Utah Supreme Court declined to [illegible] and reversed petitioner's conviction on the ground that it was unconstitutionally vague and overbroad. State v. Musser, 116 Utah 117, 208 P.2d 993 (1949).

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mented in the offense of "conspiracy to defraud the United States."[27] The courts have held that agreements to defraud the government are punishable even when the particular method of fraud contemplated by the conspirators would not have been criminal if committed by a single person.[28] This offense evolved through judicial improvisation in a period when there were few specific federal statutes aimed at fraudulent practices.[29] Today, when there are too many specific prohibitions rather than too few, it is plainly obsolete. The proposed Federal Criminal Code accordingly punishes only agreements to commit or to cause the commission of crimes.[30]

Statutes which punish conspiracy to commit a misdemeanor as a felony, or otherwise punish the agreement to commit a crime more severely than the crime itself, are probably also obsolete. The theory underlying such statutes is the "group danger" rationale: that persons who combine to commit petty crimes are more dangerous than those who commit them individually.[31] The individual prostitute or bettor certainly poses less of a threat to the interests of society than the organizer of a gambling or prostitution business, but a general conspiracy doctrine is an inexcusably clumsy way to provide increased punishment for the latter. Conspiracy makes the individual prostitute or bettor just as much a felon as the professional manager, since both agree to commit the offense in question. Moreover, one does not have to be involved in any continuing criminal activity to be a conspirator. Two boys planning to joyride in an automobile are just as much conspirators as two organized crime chieftains managing a large scale gambling operation. One would expect any modern penal code revision to relate the penalty for conspiracy directly to the penalty for the most serious substantive offense contemplated in the agreement,[32] and to provide in specific sections for increased penalties for persons who

27. If two or more persons conspire either to commit any offense against the United States, *or to defraud the United States, or any agency thereof in any manner or for any purpose*, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 371 (1970) (emphasis added).

28. *See generally* Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959).

29. *Id.* at 440.

30. COMMITTEE PRINT, *supra* note 7, at § 1-2A5; FINAL REPORT, *supra* note 7, at § 1004 & Comment at 71.

31. *See* note 23 *supra*.

32. *See* MODEL PENAL CODE § 5.05(1) (Proposed Official Draft, 1962); COMMITTEE PRINT, *supra* note 7, at § 1-2A5(g). The proposed California Penal Code revision, however, makes conspiracy "to commit misdemeanors involving separate victims" a felony of the fifth degree, punishable by imprisonment of up to three years. SENATE OF CALIFORNIA JOINT LEGISLATIVE COMM. ON REVISION OF THE PENAL CODE, THE CRIMINAL CODE § 735(c) (1971).

organize or direct minor crimes on a continuing basis.[32]

In other respects the substantive rules of conspiracy cannot be so easily dismissed. Conspiracy retains great vitality today as a device for establishing one defendant's complicity in the crimes of another, as a means to obtain enhanced penalties through consecutive sentencing, as an alternative to prosecution for the specific substantive offenses committed by the conspirators, and as an inchoate or preparatory crime. Yet each of these roles of conspiracy could well be abolished without adversely affecting any legitimate law enforcement interests, and with a net gain in the clarity and simplicity of the criminal law.

A. Conspiracy as a Rule of Complicity

One who enters into a conspiratorial relationship is liable for every reasonably foreseeable crime committed by every other member of the conspiracy in furtherance of its objectives, whether or not he knew of the crimes or aided in their commission.[34] The Model Penal Code rejected this rule, leaving one conspirator's responsibility for the criminal conduct of another to its general provision on complicity.[35] Early drafts of the proposed Federal Criminal Code took the same position,[36] but the most current draft provides specifically that "a person may be convicted of an offense based upon the conduct of another person when . . . the offense charged was committed in furtherance of a criminal conspiracy and was a reasonably foreseeable consequence of it."[37]

At first glance, the conspiracy-complicity rule seems to add little to the law of complicity or accessorial liability. No one would question that all the persons who plot together to commit a crime are guilty of the crime if one or more of them commits it. Some authorities limit the accomplice's liability to those crimes of the principal which he intended to assist or encourage.[38] Many other authorities, however, have indulged in the legal fiction that one intends the natural and probably consequences of his acts, and thus have held the

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33. *See, e.g.*, MODEL PENAL CODE § 251.2(2) (Proposed Official Draft, 1962) (promoting prostitution is a felony under certain circumstances); COMMITTEE PRINT, *supra* note 7, at § 2-9F3 (participating in an illegal prostitution business is a felony).

34. Pinkerton v. United States, 328 U.S. 640 (1946); Anderson v. Superior Court, 78 Cal. App. 2d 22, 177 P.2d 315 (1947). *See also Developments*, *supra* note 5, at 994-1000.

35. MODEL PENAL CODE § 2.06 (Proposed Official Draft, 1962). *See also* MODEL PENAL CODE § 2.04, Comment at 20-23 (Tent. Draft No. 1, 1953).

36. FINAL REPORT, *supra* note 7, at § 401 & Comment at 33; STUDY DRAFT, *supra* note 7, at § 401 & Comment at 30.

37. COMMITTEE PRINT, *supra* note 7, at § 1-2.Ab.

38. The Model Penal Code adopts this view. MODEL PENAL CODE § 2.06(3) (Proposed Official Draft, 1962). "Whether or to what extent this position involves a departure from existing law, it is most difficult to say." MODEL PENAL CODE § 2.06, Comment at 24 (Tent. Draft No. 1, 1953).

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accomplice for the crimes of the principal which he should have foreseen but perhaps did not.[39] In any case, the felony murder doctrine imposes liability for unintended consequences in the most common situations: every member of a robbery or burglary gang is liable for any killing committed by any member in the course of the robbery or burglary.[40]

The difficulty lies not in the conspiracy-complicity rule itself, but in the tendency of courts to regard a conspiracy as an ongoing business relationship of indefinite scope and duration, and to consider the conspirators, as one dissenting opinion put it, as "general partners in crime."[41] For example, the defendant in *Anderson v. Superior Court*[42] referred several pregnant women to an abortionist and received a portion of his fees. For this the court held her to have entered into a conspiracy with him to commit abortions generally, and to be liable for subsequent abortions in which she played no part. In the famous case of *United States v. Bruno*,[43] the circuit court of appeals ruled that a single, immense conspiracy to distribute narcotics included smugglers, middlemen, and retail sellers operating in two different parts of the country. Although the defendants were charged only with conspiracy, in theory the holding implied that each smuggler was guilty of every retail sale and each retailer of every act of smuggling, a pyramiding of liability that seems to be justified by no conceivable penological principle.

The fundamental conceptual error that leads to such absurd results, however, is not the conspiracy-complicity rule itself but rather

39. The conflict of authority on this question is ably discussed in W. LaFave & A. Scott, Criminal Law § 65, at 515-17 (1972), and in G. Williams, Criminal Law: The General Part §§ 133-36 (2d ed. 1961). LaFave and Scott observe that "[t]he established rule, as it is usually stated by courts and commentators, is that accomplice liability extends to acts of the principal in the first degree which were 'a natural and probably consequence' of the criminal scheme the accomplice encouraged or aided." W. LaFave & A. Scott, *supra*, at 515-16. Both treatises describe the Model Penal Code position as the better view. W. LaFave & A. Scott, *supra*, § 65, at 517; G. Williams, *supra*, § 136, at 402.

40. *See* W. LaFave & A. Scott, Criminal Law § 65, at 517 (1972). The felony murder rule is more frequently condemned for transforming accidental killings into murders than for imposing accessorial liability for deliberate killings, probably because murder seems such a likely consequence of robbery. *See id.* at § 71. If each robber were not liable for the killings committed by every other, in many cases none of them could be convicted of murder because the prosecution would be unable to prove which one fired the fatal shot.

41. Pinkerton v. United States, 328 U.S. 640, 651 (1946) (Rutledge, J., dissenting).

42. 78 Cal. App. 2d 22, 177 P.2d 315 (1947). The suggestion in the opinion that a conspirator is liable for crimes committed by others before he joined the conspiracy was disavowed in People v. Weiss, 50 Cal. 2d 535, 327 P.2d 527 (1958).

43. United States v. Bruno, 105 F.2d 921 (2d Cir. 1939), *rev'd on other grounds*, 308 U.S. 287 (1939).

the assumption that all the major and minor participants in a criminal enterprise are guilty of the same conspiracy. Once it is established that all participants conspired generally to further all the crimes of the organization, it is not surprising that they each should be held responsible for all of the crimes actually committed in furtherance of that agreement. Reforms which would abolish the conspiracy-complicity rule without also abandoning the principle that all participants in a conspiracy are guilty of the same crime of conspiracy are basically inconsistent. The discussion of *People* v. *Luciano*[44] in the Model Penal Code commentary exemplifies this inconsistency:

> Luciano and others were convicted of sixty-two counts of compulsory prostitution, each count involving a specific instance of placing a girl in a house of prostitution, receiving money for so doing or receiving money for the earnings of a prostitute, acts proved to have been done pursuant to a combination to control commercialized vice in New York City. . . . liability was properly imposed with respect to these defendants, who directed and controlled the combination: they commanded, encouraged and aided the commission of numberless specific crimes. But would so extensive a liability be just for each of the prostitutes or runners involved in the plan? . . . A court would and should hold that they all are parties to a single, large, conspiracy; this is itself, and ought to be, a crime. But it is one crime. Law would lose all sense of proportion if in virtue of that one crime, each were held accountable for thousands of offenses that he did not influence at all.[45]

But if each prostitute and runner is a party to a "single, large, conspiracy," why should each not also be liable for the individual crimes which that conspiracy existed to further? Extended liability of this sort flows from the basic absurdity of considering each of the pawns to be conspiring with the king to play the chess game.

The Model Penal Code commentary does not refer in the passage quoted to the "unilateral" theory of conspiracy adopted by the Code, but such a theory could have been used to limit the liability of the minor participants in the *Luciano* conspiracy. The Code defines conspiracy in terms of one person agreeing with another, rather than two or more persons entering into an agreement.[46] This semantic change

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44. People v. Luciano, 277 N.Y. 348, 14 N.E.2d 433, 1 N.Y.S.2d — (1938), *cert. denied*, 305 U.S. 620 (1938).

45. MODEL PENAL CODE § 2.04, Comment at 21 (Tent. Draft No. 1, 1953).

46. MODEL PENAL CODE § 5.03(1) (Proposed Official Draft, 1962):

> *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 which constitutes such crime or an attempt or solicitation to commit such crime; or

was intended, among other things, to make it possible to find each of the members of a criminal enterprise guilty of a different conspiracy, depending upon what he *individually* agreed to do.[47] For example, a court might find that the individual prostitutes conspired with Luciano only to commit their own acts of prostitution, but that Luciano conspired with all of them to operate the entire business. On the facts of the *Bruno* case, a court might find that the smugglers conspired to commit the retail sales but the retail sellers did not conspire to commit the smuggling.[48] On the other hand, it might very well find that all the parties in the chain of distribution conspired to operate the entire chain, just as it could under the old, "bilateral" or "multilateral" definition of conspiracy. All that would be necessary to justify such a finding is evidence that the parties were aware of the scope of the operation and intended to assist the business as a whole.[49] The approving citation of *Blumenthal v. United States*[50] by the Model Penal Code commentary indicates that such a purpose might not be difficult to find. In *Blumenthal*, a salesman who agreed to sell illegally part of a lot of whiskey was held to have conspired to sell the whole lot because "he knew the lot to be sold was larger and thus that he was aiding in a larger plan."[51]

The proposed Federal Criminal Code does not adopt the unilateral approach of the Model Penal Code. Instead, it defines the act of conspiring as agreeing "to enter into a relationship" having criminal ob-

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(b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

47. Another consequence of this approach "is to make it immaterial to the guilt of a conspirator whose culpability has been established that the person or all of the persons with whom he conspired have not been or cannot be convicted." MODEL PENAL CODE § 5.03, Comment at 104 (Tent. Draft No. 10, 1960).

48. With the conspiratorial objectives characterized as the particular crimes and the culpability of each participant tested separately, it would be possible to find in a case such as *Bruno*—considering for the moment only each separate chain of distribution—that the smugglers conspired to commit the illegal sales of the retailers but that the retailers did not conspire to commit the importing of the smugglers. Factual situations warranting such a finding may easily be conceived: the smugglers might depend upon and seek to foster their retail markets while the retailers might have many suppliers and be indifferent to the success of any single source. The court's approach in *Bruno* does not admit of such a finding, for in treating the conspiratorial objective as the entire series of crimes involved in smuggling, distributing and retailing it requires either a finding of no conspiracy or a single conspiracy in which all three links in the chain conspired to commit all of each other's crimes.

Id. at 121-22.

49. *See id.* at 123-24. *See also* MODEL PENAL CODE § 5.03(2) (Proposed Official Draft, 1962) (quoted at note 108 *infra*).

50. 332 U.S. 539 (1947), cited in MODEL PENAL CODE § 5.03, Comment at 121 (Tent. Draft No. 10, 1960).

51. 332 U.S. at 559.

jectives,[52] thus emphasizing the overall relationship and its objectives rather than the separate culpability of each member.

The difference in the wording of the two codes is of doubtful significance because the unilateral theory is unreliable as a means of limiting the scope of conspiratorial liability. A far better way to determine the scope of one individual's liability for the conduct of another would be to abandon conspiracy altogether, with its notions of business enterprises and general partnerships, and look instead to the policies underlying the specific criminal prohibitions at issue. Of course, smugglers of narcotics necessarily foster and encourage retail sales of the narcotics which they smuggle, but Congress must have been aware of this truism when it set the penalty for narcotics smuggling. Of course, each prostitute contributed to the financial health of the Luciano empire, and each seller of part of a carload of whiskey contributed to the sale of the whole lot. But these elementary propositions of business economics have nothing to do with criminal culpability. Absent the confusing concepts that conspiracy introduces, the courts probably would not even consider holding each participant for the crimes of the entire enterprise.

The outrageous extensions of criminal liability inferrable from such cases as *Luciano*, *Bruno*, and *Blumenthal* only rarely raise practical problems. In none of those cases were minor participants actually sentenced for every misdeed associated with the enterprise; the courts found single large conspiracies in order to legitimate joinder of offenses and offenders under the procedural rules of conspiracy, an issue discussed in Part II of this Article. Even in a case such as *Anderson v. Superior Court*, where liability for substantive offenses was directly at issue, one would like to think that the sentencing judge did not carry the appellate court's theory to its logical conclusion by imposing consecutive sentences for every abortion.[53] But it is no defense of an absurd doctrine to suggest that sensible judges are likely to disregard it in practice.

B. Conspiracy and Cumulative Punishment

At common law, conspiracy, like attempt, was said to "merge" into the completed substantive offense so that conspirators could be convicted either of agreeing to commit a crime or of committing it, but not of both.[54] The modern rule is otherwise. Because collective criminal action is thought to create a greater public danger than indi-

52. *See* note 17 *supra*.

53. The *Anderson* case involved a pretrial challenge to the validity of the indictment. 78 Cal. App. 2d 22, 177 P.2d 315 (1947).

54. *See* Callanan v. United States, 364 U.S. 587, [illegible] (1961); W. LaFave & A. Scott, Criminal Law § 62, at 494 (1972).

vidual crime,[55] the Supreme Court held in *Callanan v. United States*[56] that conspirators may be convicted and sentenced consecutively for both the crime and the agreement to commit it.

The *Callanan* rule is subject to the same objections as the rule which makes conspiracy to commit a misdemeanor a felony. Undoubtedly some criminal combinations are more dangerous than individual criminals, but it takes more than agreement between two persons to create a dangerous combination. The Supreme Court undoubtedly had organized professional criminals in mind when it invoked the group danger rationale to support consecutive sentencing in the *Callanan* case,[57] but its rule is equally applicable to two boys who agree to steal a car.

A legislature revising its penal code today can choose among more discriminating means of providing enhanced punishment for particularly dangerous offenders.[58] Early drafts of the proposed Federal Criminal Code included a specific offense of "Organized Crime Leadership," which punished those who direct or finance "criminal syndicates" or who aid such syndicates in certain specified ways.[59] Providing enhanced punishment in this manner gives the defendant the benefit of a jury trial on the question of whether his own criminal conduct was a part of organized crime. The latest drafts of the Code have dropped the discrete offense of organized crime leadership, providing instead that a sentencing judge may impose "upper-range imprisonment" for any crime upon persons whom he finds to be "dangerous special offenders." This category includes, among other offenders,[60] those who commit a felony "in furtherance of a conspiracy with three or more other coconspirators to engage in a pattern of criminal

55. *See* note 23 *supra*.

56. 364 U.S. 587 (1961). *See also* Pinkerton v. United States, 328 U.S. 640 (1946).

57. The prosecution in *Callanan* was for conspiracy to obstruct commerce by extorting money and for the actual extortion, both violations of the federal Hobbs Anti-Racketeering Act. 364 U.S. at 587-88.

58. Of course, no such device is necessary if the legislature simply sets the penalty for every offense at a level appropriate for the most dangerous offenders, leaving the differentiation between the dangerous and the nondangerous to the unguided and uncontrolled discretion of sentencing judges.

59. The *Study Draft* defines a criminal syndicate as

> an association of ten or more persons for engaging on a continuing basis in crimes of the following character: illicit trafficking in narcotics or other dangerous substances, liquor, weapon[s], or stolen goods; gambling; prostitution; extortion; engaging in a criminal usury business; counterfeiting; bankruptcy or insurance frauds by arson or otherwise; and smuggling.

STUDY DRAFT, *supra* note 1, at § 1005.

60. The category also includes organized criminals, offenders with two prior felony convictions, professional criminals, mentally abnormal aggressive offenders, and offenders who used a firearm or destructive device in the commission of the offense. COMMITTEE PRINT, *supra* note 7, at § 1-401.

conduct," if they "initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct or give or receive a bribe or use force as all or part of such conduct."[61] Leaving this issue to the sentencing process means that the defendant's participation in organized crime may be proved by hearsay evidence and without the safeguards or burdens of a jury trial. The sentencing provisions of the Model Penal Code also provide for extended terms of imprisonment for persistent offenders, multiple offenders, dangerous mentally abnormal offenders, and "professional criminals."[62]

Sentencing provisions of this type do away with the need to allow cumulative punishment for conspiracy and a substantive offense, or even the need to allow any consecutive sentencing at all. When the legislature provides unusually long terms of imprisonment for professional criminals, and takes pains to define that term carefully, it makes nonsense of the whole arrangement to allow the same or greater punishment to be imposed through consecutive sentencing upon a small-time robber who holds up two or three gas stations before he is caught, or upon two small-time robbers who agree to hold up one gas station and do it. Yet the most current draft of the proposed Federal Criminal Code would do just that. It explicitly authorizes consecutive sentences that exceed the maximum "upper-range" punishment for any of the individual crimes, in addition to permitting consecutive punishment for the conspiracy and the completed crime.[63] The drafters of the Code included new sentencing provisions that make conspiracy and consecutive sentencing obsolete as a means of enhancing punishment; but it seems that they could not bear to throw the old tools away.

C. Conspiracy as an Alternative to Prosecution for the Substantive Crime

When a prosecutor does not desire cumulative punishment, he

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61. COMMITTEE PRINT, *supra* note 7, at § 1-3B2(b)(v).

62. MODEL PENAL CODE § 7.03 (Proposed Official Draft, 1962). The court may find an adult offender to be a professional criminal if "the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood" or the "defendant has substantial income or resources not explained to be derived from a source other than criminal activity." *Id.*

63. *See* COMMITTEE PRINT, *supra* note 7, at § 1-4A5, which provides for a "joint sentence" for multiple offenders that "may be for a term which is longer than the longest term that is authorized for any of the offenses but shall not exceed seventy-five per centum of the total of the terms that are authorized for each of the offenses." The National Commission on Reform of Federal Criminal Laws proposed that the code not allow consecutive sentences for a conspiracy and for its completed objective, and that the total of consecutive sentences for substantive offenses be generally limited to the maximum upper-limit term for the most serious offense committed. Apparently, dissenting Commissioners convinced the Senate Subcommittee to reject these proposals. See FINAL REPORT, *supra* note 7, at 1003 & Comment at 240-43, 1003 & Comment at 72-73.

may still charge a defendant with conspiracy as an alternative to prosecution for the substantive offense. He may do so in order to take advantage of the procedural rules associated with conspiracy, the subject of Part II of this Article. He may also, however, feel that the very generality and vagueness of the concept of conspiracy makes a conspiracy conviction easier to obtain than a conviction for complicity in substantive offenses.

Where the prosecution is of organized criminals of the traditional variety, this advantage seems more apparent than real. It is true that the leaders of large gambling or narcotics enterprises are careful to keep their distance from the individual criminal acts of their employees, so that it may be easier to prove their connection with the overall enterprise than their direct participation in any specific criminal act.[64] Once a defendant is shown to be the leader of a criminal enterprise, however, any rational view of the law of complicity would hold him guilty of the narcotics sales or gambling transactions committed under his general supervision, however indirect his participation may have been. Moreover, once it is established that a particular defendant is one of the leaders of a continuing commercial criminal operation, there are inevitably specific criminal acts with which he may be charged. In fact, many of the greatest triumphs of organized crime prosecution have been achieved without the use of a conspiracy charge.[65]

A vague charge of agreement to commit crime, not directly tied to specific criminal conduct, seems most useful to the prosecution in quite another type of case: the political conspiracy. The leaders of a revolutionary political party, or even of a movement involving some degree of civil disobedience, are frequently believed to approve or encourage criminal activity, although the Government may be unsure of exactly what they have done that is illegal. The famous prosecution of Dr. Benjamin Spock and four other opponents of the military draft provides a classic example of this type of case.[66] Spock,

64. *See, e.g.*, United States v. Aviles, 274 F.2d 179 (2d Cir. 1960). In *Aviles*, alleged Mafia leader Vito Genovese was convicted of conspiracy to import and distribute narcotics. The opinion observes:

> Although there is no proof that Vito Genovese ever himself handled narcotics or received any money, it is clear from what he said and from his presence at meetings of the conspirators and places where they met and congregated, that he had a real interest and concern in the success of the conspiracy. We find upon all the evidence that there is ample proof of Genovese's participation in the conspiracy as one of its principal directing heads.

Id. at 188.

65. *See, e.g.*, People v. Luciano, 277 N.Y. 348, 14 N.E.2d 433, 2 N.Y.S.2d — (1938) (Lucky Luciano convicted of 62 counts of compulsory prostitution); Capone v. United States, 56 F.2d 922 (7th Cir. 1932) (Al Capone convicted of income tax evasion); Hoffa v. United States, 385 U.S. 293 (1966) (James R. Hoffa convicted of attempting to bribe jurors).

66. United States v. Spock, 416 F.2d 165 (1st Cir. 1969). *See also* the prose-

Coffin, Goodman and Ferber were convicted of a single conspiracy whose alleged objectives were to counsel and aid other persons to refuse or evade their military obligations, to destroy or discard their draft cards in violation of Selective Service Regulations, and to "unlawfully, willfully and knowingly hinder and interfere, by any means, with the administration of the Universal Military Training and Service Act."[67] The Government's evidence showed that Spock participated in drafting a statement entitled "A Call to Resist Illegitimate Authority," which Coffin and Goodman signed. Goodman published his own statement as well, which like the "Call" could be interpreted as exhorting and encouraging others to refuse to obey the Selective Service Law and Regulations, and he participated with Spock and Coffin at a press conference to publicize the "Call." Ferber organized a "draft card burning and turn-in" in Boston at about the same time (thus establishing venue in Boston for the trial), and brought the turned-in cards to a subsequent demonstration in Washington, D.C., in which all four of the convicted defendants participated. On this occasion more cards were collected, and an unsuccessful attempt was made to present all the cards to the Attorney General.

The Government could have charged the defendants with separate violations of the Selective Service Act for their participation in each statement and demonstration, but it did not. Had it done so, more than one trial would have been necessary, but the issues would have been relatively clear. By charging a general conspiracy to interfere with the draft, and by using the defendants' specific actions primarily as evidence of an underlying agreement to further draft resistance, the Government attempted to make the whole something more than the sum of its parts. It refused to specify what evidence it relied on to establish the requisite illegal purpose, and apparently shifted its position whenever the defendants concentrated their fire on any single element in the evidence. Commenting on the difficulty that so vague a charge must have created for the defendants and for the jury, the court of appeals noted only that "the government's vacillation about which part of the evidence it relied upon cannot, without some special showing, be taken to have prejudiced the defendants. On the contrary, the government is entitled to rely on whatever agreement is shown by the evidence."[68] As a result, the jury may have convicted the defendants of the conspiracy without agreeing on what it was that they agreed to do.

The confusion that the prosecution introduced into the trial by charging conspiracy worked to its disadvantage on appeal. Although

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citions of Communist Party leaders cited in note 9 *supra*.

67. 416 F.2d at 168.

68. *Id.* at 174 n.21.

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the majority found that the "Call" counselled unlawful draft resistance,[69] and that Spock was instrumental in both drafting and promoting it,[70] it concluded that he should have been acquitted because his *other* statements did not explicitly endorse illegal as well as legal methods of draft resistance.[71] The majority also directed Ferber's acquittal because he was not a party to the "Call" or to the press conference that the majority regarded as establishing the agreement.[72] Yet, of all the convicted defendants, Ferber seems to have been most deeply involved in illegal conduct as opposed to speech; to quote the majority's own words, "[h]is activities were limited to assisting in the burning and surrender of draft cards."[73] As one knowledgeable commentator observed, such obscure distinctions among defendants are only to be expected in view of the cloudy doctrines that the court felt it had to apply.[74]

The *Spock* case is a good example of the morass the prosecution creates when it charges a defendant with conspiring to adhere to a vaguely criminal scheme rather than with committing specified criminal acts. Of course, this type of charge is beneficial to the prosecution when the defendant seems to have a general disposition towards unlawful behavior but has not done anything specifically wrong. It is also useful when other persons have committed acts that are clearly criminal, but the defendant's responsibility for those acts is unsubstantiated.

A familiar feature of the current political scene is the demonstration or march in which some participants destroy property, resist arrest, or commit other unlawful acts. After the demonstration, law enforcement officials may wish to prosecute its organizers or prominent spokesmen, who themselves may have engaged in no disruptive activity, on the theory that they plotted and encouraged the destructive acts of others. Because incitement-to-riot statutes reach only explicit incitement of immediate violence,[75] some prosecutors have found a con-

69. *Id.* at 176.

70. *Id.* at 168, 178.

71. *Id.* at 178-79. This conclusion is particularly surprising in view of the majority's earlier conclusion that Spock adopted a "soft sell" approach because direct urging of draft violations would be a "poor psychological practice." *Id.* at 172 n.16.

72. 416 F.2d at 179. The majority reversed the convictions of Goodman and Coffin because the trial judge erred in submitting special interrogatories to the jury rather than leaving it free to return only a general verdict. *Id.* at 180-83. The dissent would have reversed all four convictions on the ground that the Government should not have been permitted to use a conspiracy prosecution against a public combination of amorphous membership advocating both lawful and unlawful actions. *Id.* at 184-92 (Coffin, J., dissenting in part).

73. *Id.* at 179. Destroying one's draft card as a political protest is a punishable act. United States v. O'Brien, 391 U.S. 367 (1968).

74. Nathanson, *Freedom of Association and the Quest for Internal Security: Conspiracy from Dennis to Dr. Spock*, 65 Nw. U.L. Rev. 153, 190-91 (1970).

75. *See, e.g.*, Cal. Pen. Code § 404.6 (West 1972).

spiracy theory more promising as a means of convicting organizers or speechmakers who can be proved to have advocated or encouraged lawbreaking only from a distance or in a vague or ambiguous manner.[76]

It is not my purpose here to add to the literature on the ever-fascinating question of the scope of first amendment protection for those who advocate violence or other criminal behavior, or who lead demonstrations which involve unlawful behavior.[77] My point is rather that wherever one chooses to strike the balance between the values of public order and free political expression, a prosecution for conspiracy has an inherent tendency to confuse the issues. A statute which penalizes advocacy of violence at a demonstration or organizing a disruptive demonstration unmistakably emphasizes first amendment issues. It also evidences a clear legislative choice that can be measured against first amendment standards. When a general conspiracy statute is used to achieve essentially the same result, the prosecutor rather than the legislature makes the initial decision on where first amendment protection ends and criminal activity begins. Moreover, the use of advocacy as circumstantial evidence of an underlying criminal agreement, rather than as the criminal act itself, obscures the fact that it is speech that is being punished. This consideration explains why some judges and commentators feel that special rules should be derived from the first amendment to restrain the use of conspiracy in cases involving political advocacy.[78] But surely it would be better to abolish conspiracy altogether, unless it fills some other important and legitimate function, rather than to add complex restraints to an already complex doctrine.

Every person who with the intent to cause a riot does an act or engages in conduct which urges a riot, or urges others to commit acts of force and violence, or the burning and destroying of property, and at a time and place and *under circumstances which produce a clear and present and immediate danger* of acts of force or violence or the burning or destroying of property, is guilty of a misdemeanor.

Id. (emphasis added).

76. Many examples of such prosecutions reported in the press have not reached the appellate courts. For one that did, see Castro v. Superior Court, 9 Cal. App. 3d 675, 88 Cal. Rptr. 500 (1970), in which the conspiracy issues are thoroughly discussed in the opinions. Use of conspiracy prosecutions in this context was advocated in Note, *Mass Demonstrations and Criminal Conspiracies*, 16 Hast. L. Rev. 365 (1965). Federal prosecutors have used 18 U.S.C. § 2101 (1970), which punishes interstate travel or use of interstate commerce facilities for the purpose of inciting or promoting a riot; they have also charged demonstrators with conspiracy to violate this section. *See* United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972) (the Chicago 8 conspiracy case growing out of the riots at the 1968 Democratic National Convention).

77. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969); Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47 (1919).

78. *See* United States v. Spock, 416 F.2d 165, 182-92 (1st Cir. 1969) (Coffin, J., dissenting in part); *Note, Conspiracy and the First Amendment*, 74 Yale L.J. 922 (1970).

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D. *Conspiracy as an Inchoate Crime*

Conspiracy is also an inchoate or preparatory crime, permitting the punishment of persons who agree to commit a crime even if they never carry out their scheme or are apprehended before achieving their objective. It is in this role that the crime of conspiracy has been most strongly defended. Indeed, almost the only justification offered by the drafters of the Model Penal Code and the proposed Federal Criminal Code for retaining the offense was the need to punish groups which engage in preparatory conduct which cannot be reached by the law of attempt.[79]

The Model Penal Code commentary offers perhaps the most carefully stated justification for a doctrine of conspiracy that "reaches further back into preparatory conduct than attempt":

> *First*: The act of agreeing with another to commit, like the act of soliciting, is concrete and unambiguous; it does not present the infinite degrees and variations possible in the general category of attempts. The danger that truly equivocal behavior may be misinterpreted as preparation to commit a crime is minimized; purpose must be relatively firm before the commitment involved in agreement is assumed.
>
> *Second*: If the agreement was to aid another to commit a crime or it otherwise encouraged its commission, it would establish complicity in the commission of the substantive offense. . . . It would be anomalous to hold that conduct which would suffice to establish criminality, if something else is done by someone else, is insufficient if the crime is never consummated. This is a reason, to be sure, which covers less than all the cases of conspiracy, but that it covers many is the point.
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> *Third*: In the course of preparation to commit a crime, the act of combining with another is significant both psychologically

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79. The Model Penal Code commentary states:

> We have no doubt . . . that in its aspect as inchoate crime—that is, as a basis for preventive intervention by the agencies of law enforcement and for the corrective treatment of persons who reveal that they are disposed to criminality . . . —a penal code properly provides that conspiracy to commit crime is itself a criminal offense.

MODEL PENAL CODE § 5.03, Comment at 97 (Tent. Draft No. 10, 1960). The commentary does not argue so confidently for any other use of conspiracy, although the Code does not strictly confine conspiracy to a limited role in punishing uncompleted crimes. The *Final Report of the National Commission on Reform of Federal Criminal Laws* suggests that the Commission viewed conspiracy solely as an inchoate offense. *See* FINAL REPORT, *supra* note 7, at § 1003 & Comment at 72. Both sets of commentators recognized, however, that conspiracy would continue to have important procedural aspects and would be charged even when the conspirators had achieved all their criminal objectives; hence the care they took in drafting provisions concerning the scope and duration of conspiracies. MODEL PENAL CODE § 5.03, Comment at 135-39 (Tent. Draft No. 10, 1960); FINAL REPORT, *supra* note 7, at § 1004 & Comment at 73.

> and practically, the former since it crosses a clear threshold in arousing expectations, the latter since it increases the likelihood that the offense will be committed. Sharing lends fortitude to purpose. The actor knows, moreover, that the future is no longer governed by his will alone; others may complete what he has had a hand in starting, even if he has a change of heart.[80]

Unfortunately, this entire argument is based on an unsound premise. The commentary seems to be justifying the Code's conspiracy provision not as a supplement to its own attempt section[81] (which is substantially identical to the attempt section of the proposed Federal Criminal Code),[82] but as a supplement to the traditional law of attempt which the Model Penal Code rejected.[83]

One of the most important traditional limitations upon attempt prosecutions has been the proximity doctrine, which requires that one go beyond "mere preparation" and come somewhere near success in order to be guilty of attempting to commit a crime. The proximity doctrine seems to have originated in 1855 in the famous English case of *Regina v. John Eagleton*.[84] Eagleton was a baker who contracted with the guardians of his parish to provide loaves of bread of a certain weight for the "out-door poor." He delivered the loaves directly to the paupers, and received in return from them tickets which he turned in to an officer of the board of guardians. Upon receiving the tickets, the officer credited Eagleton in his account book with the amount due, but the guardians did not actually make payment until some future date specified in the contract. After Eagleton had turned in a number of tickets but before any payment was made, the guardians discovered that he had been delivering underweight loaves, and they caused him to be prosecuted for attempting to obtain money by false promises. Until they actually made full payment in cash, the guardians retained a right to deduct from the total sum any damages for breach of contract. Eagleton's counsel argued to the Court of Criminal Appeal that this reservation made the fact of ultimate payment so contingent or

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80. MODEL PENAL CODE § 5.03, Comment at 97 (Tent. Draft No. 10, 1960). The commentators probably were not wholly convinced by their own argument. Two pages later they quoted Professor Abraham Goldstein on the "group danger" rationale:

> More likely, empirical investigation would disclose that there is as much reason to believe that a large number of participants will increase the prospect that the plan will be leaked as that it will be kept secret; or that the persons involved will share their uncertainties and dissuade each other as that each will stiffen the other's determination.

Id. at 99, quoting Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 413-14 (1959).

81. MODEL PENAL CODE § 5.01 (Proposed Official Draft, 1962).

82. COMMITTEE PRINT, *supra* note 7, at § 1-2A4.

83. *See* text accompanying notes 93-97 *infra*.

84. 169 ENG. REP. 826 (Crim. App. 1855).

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speculative that his client could not be convicted of attempt. Writing for a unanimous court, Baron Parke admitted that the judges had "great doubt on this part of the case," but concluded that the conviction for attempt was proper because the defendant had performed the last act on his part that was necessary to obtain the money. If there had remained anything further for him to do, "as the making out a further account or producing the vouchers to the Board," then his actions would not have been "sufficiently proximate" to the completed crime.[85]

The "last act" rule of the *Eagleton* case never became the law of England, although some authorities have supposed otherwise.[86] Later in the same year, the same court cited *Eagleton* in upholding the conviction for attempted counterfeiting of a man who had obtained dies engraved for manufacturing Peruvian coins, although he had not made any coins or even obtained all the necessary supplies.[87] Since that time, the courts of several nations have spent innumerable hours trying to specify how one can determine when a defendant's actions have gone beyond "mere preparation" and become "sufficiently proximate" to the completed act for conviction of attempt, with the result that considerable confusion has been added to the original uncertainty. The Model Penal Code commentary discerned six formulations in the case law, and proposed a seventh itself.[88] Less important than the various formulations are the results that obtained in some famous cases. An English court held that a jeweler who faked a robbery for the purpose of defrauding his insurer was not guilty of attempting to obtain money by false pretenses, because he had not yet filed a claim.[89] A New York court held that a gang of armed robbers who were apprehended as they drove around the city in search of a particular payroll clerk they intended to rob were not guilty of attempted robbery because they had not yet found the clerk.[90] A California court reversed the conviction for attempted theft of a swindler who tried to induce his victim to withdraw his money from the bank in the course of a "bunco" scheme known as the "Jamaica switch." Because the victim luckily met his wife in the bank and did not withdraw his savings, the swindler's acts amounted only to preparation.[91]

85. *Id.* at 835.

86. *See* MODEL PENAL CODE § 5.01, Comment at 30 & nn. 76 & 77 (Tent. Draft No. 10, 1960).

87. Regina v. Roberts, 169 Eng. Rep. 836 (Crim. App. 1855).

88. MODEL PENAL CODE § 5.01, Comment at 39-48 (Tent. Draft No. 10, 1960).

89. Rex v. Robinson, [1915] 2 K.B. 342.

90. People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (1927).

91. People v. Orndorff, 261 Cal. App. 2d 212, 67 Cal. Rptr. 824 (1968). Readers unfamiliar with the "Jamaica switch" will find it described in the opinion. *Id.* at 214-15, 67 Cal. Rptr. at 825. The result in the case could probably be better

As these cases show, the proximity approach does not consider the dangerousness of the defendant but only how close he came to completing the particular crime. A person carrying a bomb into a public building with the intent to set it off is plainly very dangerous to the community even if by chance he is apprehended before lighting the fuse. The confidence trickster whose scheme is detected before the victim is ready to hand over the money is probably a professional thief. A doctrine that leads to the acquittal of such persons is justifiable only if one views the criminal law to be dominated by the goals of retribution and deterrence. The community's desire for punishment is weaker when the potential criminal does not succeed, or nearly succeed, in completing his crime and inflicting harm upon an identifiable victim. Punishment for attempts is also relatively unimportant in deterring crime, because the would-be criminal ordinarily expects to succeed and is deterred, if at all, by the punishment for success.

Although retribution and deterrence are by no means irrelevant to modern criminal law, today we tend to emphasize the restraint or rehabilitation of dangerous individuals. We see the primary task of law enforcement as the identification and isolation or supervision of those persons who are likely to offend repeatedly unless rehabilitated or at least safely locked away. With this change in emphasis have come discretionary and indeterminate sentences, probation and parole systems, rehabilitative prison programs and a wider law of attempts.[92] The law is conservative enough not to discard the old rules everywhere, but modern statutory reform proposals such as the Model Penal Code have increasingly taken the view that the crucial issue is the clarity and strength of the defendant's criminal purpose rather than the proximity of his actions to the completed crime.

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defended on the theory of voluntary abandonment of an attempt which would otherwise be punishable. Because the case was submitted to the trial judge on the transcript of the preliminary examination, together with testimony by the defendant, the record did not explicitly establish that the scheme was thwarted by the wife's intervention, although it did show that the victim left the bank with his wife and the assistant manager to find the defendant had vanished. The appellate court thought it possible that the defendant had left for some reason other than suspicion that his scheme had been discovered. California, however, probably does not recognize a defense of voluntary abandonment of an attempt that has gone beyond mere preparation. *See* People v. Staples, 6 Cal. App. 3d 61, 85 Cal. Rptr. 589 (1970); *cf.* W. LaFave & A. Scott, Criminal Law § 60, at 450 n.114 (1972).

92. So long as the law was purely deterrent or retributive in its aim, this circumscription of the offense of attempt [by the proximity doctrine] was perhaps justified. At the present day, when courts have wide powers of probation, there is much to be said for a broader measure of responsibility. . . . The rational course would be to catch intending offenders as soon as possible, and set about curing them of their evil tendencies: not leave them alone on the ground that their acts are mere preparation.

G. Williams, Criminal Law: The General Part § 203, at 632 (2d ed. 1961).

Pursued to its logical conclusion, the modern approach would permit the conviction of anyone shown to have had a firm intention to commit a crime, whether or not he had taken any steps towards its commission. The limiting factor, however, is our reluctance to put so much trust in either the omniscience or the benevolence of those who administer the law. It is difficult to determine what someone intends to do before he does it, or at least prepares to do it. Even when an individual has plainly said what he intends to do, there remains the question of how serious or definite his intent is. Many of us at some time contemplate or even talk about committing a crime without ever doing anything to carry out the design. But if we refrain from criminal conduct (including conduct that encourages others to commit crime), we are not dangerous, and the deterrent purposes of the criminal law are fully satisfied.

For this reason the modern codes retain the requirement that a defendant go beyond merely planning or contemplating a crime before he can be convicted of an attempt.[93] He must engage in conduct that is a sufficiently substantial step towards completion of the crime to indicate his firm criminal intent, and to identify him as a dangerous individual who would probably have gone on to complete the crime if his design had not been frustrated. Thus, although the modern formulations of attempt law retain conduct as an element of attempt, they relegate it to a lesser, evidentiary role: the defendant's actions must confirm his intent to commit a criminal act. For instance, the Model Penal Code imposes liability for attempt on anyone who, acting with the culpability required by the definition of a particular crime, purposely commits a "substantial step in a course of conduct planned to culminate in his commission of the crime."[94] The crucial term "substantial step" is defined only negatively: a step is not substantial "unless it is strongly corroborative of the actor's criminal purpose."[95] The

93. *See* MODEL PENAL CODE § 5.01, Comment at 26, 4[illegible] (Tent. Draft No. 10, 1960).

94. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting *a substantial step in a course of conduct planned to culminate in his commission of the crime.*

MODEL PENAL CODE § 5.01(1) (Proposed Official Draft, 1962) (emphasis added).

95. Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not

Code also provides a list of recurring types of preparatory conduct that the trier of fact may find to be a substantial step "if strongly corrobative of the actor's criminal purpose." These include lying in wait for the contemplated victim, reconnoitering the place contemplated for commission of the crime, possession of materials designed for use in the crime, and soliciting an innocent agent to commit the crime.[95] Although the Code does not make the point explicitly, one is led to the conclusion that any form of preparatory conduct is a "substantial step" if it adequately confirms the existence of the actor's criminal purpose. Proximity to success is no longer the crucial issue. The possibility that the actor might change his mind and not complete the crime is dealt with in an affirmative defense of renunciation.[96]

Against the background of a law of attempt dominated by the proximity approach, an independent inchoate crime of conspiracy made sense. Although the defendants in the New York and California cases described previously could not be convicted under traditional attempt law, they could each have been convicted of conspiracy because they

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be held insufficient as a matter of law:

(a) lying in wait, searching for or following the contemplated victim of the crime;

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the crime;

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

(e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

MODEL PENAL CODE § 5.01(2) (Proposed Official Draft, 1962).

96. *Id.*

97. When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.

Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

MODEL PENAL CODE § 5.01(4) (Proposed Official Draft, 1962).

worked with confederates and performed an "overt act" in furtherance of the criminal design.[98] Each of these defendants, however, could also be convicted of attempt under the Model Penal Code or proposed Federal Criminal Code attempt sections. These sections are also adequate to reach the leader of organized crime who hires a professional killer to murder the government's chief witness in an upcoming trial, the example given in the *Working Papers* of the National Commission on Reform of Federal Criminal Laws to justify the need for an independent inchoate crime of conspiracy.[99] If any doubt remains, a provision could simply be added which includes agreement with another person to commit a crime among the enumerated types of conduct which the trier of fact may find to be a substantial step if strongly corroborative of the actor's criminal purpose.[100]

Under the conspiracy sections of the Model Penal Code and proposed Federal Criminal Code, however, the act of agreement *is* the forbidden conduct whether or not it strongly corroborates the existence of a criminal purpose. In justifying this per se rule, the Model Penal Code commentary relied heavily on the argument, quoted previously, that the act of agreeing is so decisive and concrete a step towards the commission of a crime that it ought always to be regarded as a "substantial step."[101] Whether this point is sense or nonsense depends upon how restrictively one defines the term "agreement." Hiring a professional killer to commit murder is an agreement, and surely few would doubt that it is a substantial step toward accomplishing the killing. But the language of the conspiracy sections of both the Model Penal Code and proposed Federal Criminal Code is broad enough to reach conduct far less dangerous or deserving of punishment than letting a contract for murder. As the Model Penal Code commentary concedes, one may be liable for agreeing with another that *he* should commit a particular crime, although this agreement might be insuffi-

98. *See* notes 90 & 91 *supra* and accompanying text. The defendant in *Rex v. Robinson* acted alone and so could not have been convicted of conspiracy. [1915] 2 K.B. at 342-43.

99. For example, suppose that the FBI learned from confidential informants or through some other lawful sources that a "contract" had been let by an organized crime "family" to "hit" a particular person, perhaps the government's chief witness in a trial. Would it really be wise to allow the conspiracy to move forward to the point of an attempt? In this sort of situation, obviously, immediate action must be taken.

1 WORKING PAPERS, *supra* note 1, at 397.

100. The Model Penal Code also defines "solicitation" as a separate crime distinct from attempt, although solicitation of an "innocent agent" (i.e., an idiot or insane person) is an attempt. *See* MODEL PENAL CODE §§ 5.01(2)(g), 5.02 (Proposed Official Draft, 1962); MODEL PENAL CODE § 5.02, Comment at 82-89 (Tent. Draft No. 10, 1960). Although this distinction is analytically defensible, it seems to be unnecessary.

101. *See* text accompanying note 80 *supra*.

cient to establish complicity in the completed offense.[102] Furthermore, neither code would change the well-established rule that the agreement may be tacit or implied as well as express, and that it may be proved by circumstantial evidence.[103] In short, the term "agreement" may connote anything from firm commitment to engage in criminal activity oneself to reluctant approval of a criminal plot to be carried out entirely by others. To be sure, the Model Penal Code also requires that one enter into the agreement with the purpose of promoting or facilitating the crime,[104] but the existence of that purpose need not be substantiated by any conduct beyond the express or implied agreement and performance in some cases of a single overt act by any party to it.[105] This point is of particular importance in conspiracy cases involving political activity or agitation. Members of radical societies may be likely to discuss or even to begin to plan criminal activities that they have no serious intention of carrying through.[106]

In summary, insofar as conspiracy adds anything to the attempt provisions of the reform codes under discussion, it adds only overly broad criminal liability. Like its use in every other area of the substantive criminal law, the use of an independent crime of conspiracy to punish inchoate crimes turns out to be unnecessary. Yet the effect of conspiracy is not limited to the substantive law. Conspiracy is unique among criminal offenses in that conspiracy law incorporates a number of procedural rules that are of great consequence. What remains to be considered is whether these rules are in themselves desirable, and if so, how they might be reformulated if a legislature decided to abolish the substantive law of conspiracy.

II.

THE PROCEDURAL LAW OF CONSPIRACY

Conspiracy doctrines have important procedural consequences in four areas: joinder, venue, the statute of limitations, and the admission of hearsay evidence. Because the Model Penal Code and the proposed

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102. *See* text accompanying note 80 *supra*.

103. *See* FINAL REPORT, *supra* note 7, at § 1004 & Comment at 71-73; MODEL PENAL CODE § 5.03, Comment at 116-17 (Tent. Draft No. 10, 1960).

104. *See* note 46 *supra*.

105. "No person may be convicted of conspiracy to commit a crime, *other than a felony of the first or second degree*, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired." MODEL PENAL CODE § 5.03(5) (Proposed Official Draft, 1962) (emphasis added).

106. For instance, the seven antiwar defendants in the Harrisburg conspiracy case were charged with conspiring to kidnap Henry Kissinger on the basis of evidence that they had discussed such a plan among themselves without committing any overt acts which indicated a firm intent to carry it out. *See* N.Y. Times, Apr. 6, 1972, at 1, col. 2.

Federal Criminal Code are substantive codes, they do not deal systematically with the procedural side of conspiracy. On the other hand, the drafters of both codes acknowledged that the procedural doctrines are extremely important, and that they are directly related to the substantive definition of conspiracy.[107] Accordingly, both codes contain carefully drafted subsections governing the scope and duration of conspiratorial relationships. The proposed Federal Criminal Code, for example, provides:

> If a person knows or could reasonably expect that one with whom he agrees to enter into . . . [a conspiratorial relationship] has agreed or will agree with one or more other persons to enter into a relationship having as its objective or objectives engaging in or causing the performance of such conduct or other reasonably related conduct, he shall be deemed to have entered into the same relationship with such person or persons.[108]

In other words, one may join a large conspiracy without meeting or knowing more than one of its members and be deemed to share the objectives of the entire group. Another subsection states that a conspiracy continues until its objectives are "accomplished, frustrated, or abandoned."[109]

From the viewpoint of the substantive law, the duration and scope of a conspiratorial relationship are not of great significance. It is, of course, true that under existing federal law and under the most current version of the proposed Federal Criminal Code, each member of a conspiracy is liable for the foreseeable crimes committed by every other member of the conspiracy in furtherance of the common purpose,[110] so that enlarging the scope or duration of the conspiracy theoretically enlarges the extent of liability. But only a very unimaginative judge would actually fix the length of a prison term upon so abstract a basis, and in any case, these subsections were originally drafted by a com-

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107. *See* MODEL PENAL CODE § 5.03, Comment at 98 (Tent. Draft No. 10, 1960); 1 WORKING PAPERS, *supra* note 1, at 381-82, 395-400.

108. COMMITTEE PRINT, *supra* note 7, at § 1-2A5(e). *Compare* MODEL PENAL CODE § 5.03(2) (Proposed Official Draft, 1962):

> If a person guilty of conspiracy . . . knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.

109. COMMITTEE PRINT, *supra* note 7, at § 1-2A5(f). The *Committee Print* omits from this subsection a sentence proposed by the Commission which defined the "objectives" of a conspiracy as including "escape from the scene of the crime, distribution of booty, and measures, other than silence, for concealing the crime or obstructing justice in relation to it." FINAL DRAFT, *supra* note 7, at § 1004(3). The Model Penal Code provides that a conspiracy terminates "when the crime or crimes which are its object are committed or the agreement that they be committed is abandoned." MODEL PENAL CODE § 5.03(7) (Proposed Official Draft, 1962).

110. *See* notes 34 & 37 *supra* and accompanying text.

mission which proposed to abolish the conspiracy-complicity rule.[111] Issues of scope and duration are of practical significance only as they affect the resolution of procedural questions. The importance of a preliminary finding that several defendants are members of the same conspiracy rather than different ones is that it enables the prosecution to join them for trial and to use the statements of each against all the others.

In including provisions regarding scope and duration, and in drafting them with such careful attention, the drafters of both the Model Penal Code and the proposed Federal Criminal Code evidently assumed that the substantive definition of conspiracy would continue to govern the procedural issues. This assumption is regrettable, because conspiracy concepts have had as unfortunate an effect upon procedure as upon substance, and for essentially the same reason. Reference to conspiracy tends to lead courts to decide the propriety of joinder and venue, the application of the statute of limitations, and the admissibility of hearsay evidence by invoking a single abstract concept rather than by considering the separate interests and policies involved in each question.

A. Conspiracy and Joinder

Possibly the most important procedural issue affected by conspiracy doctrine is the joinder of defendants for trial. Although some states grant defendants a right to separate trials upon demand,[112] most states and the federal government do not.[113] Rule 8 of the Federal Rules of Criminal Procedure contains the federal standards for joinder of offenses and offenders. Rule 8(a), governing joinder of offenses, provides that two or more offenses charged against a single defendant may be tried together if they are "of the same or similar character" *or* if they are "based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Rule 8(b) allows two or more defendants to be joined for trial when they are charged with participating in "the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Even when joinder is proper under Rule 8, however, the trial court may order a severance under Rule 14[114] if it concludes that justice so requires.

111. *See* note 36 *supra* and accompanying text.

112. *See* Note, *Joint and Simple Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 YALE L.J. 553, 563 n.50 (1965).

113. *See* AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO JOINDER AND SEVERANCE 13-14 (1968) [hereinafter cited as ABA STANDARDS].

114. If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information, or by such

The language of Rule 8 seems to raise more questions than it answers, and the note of the Advisory Committee which drafted it contributes very little to its understanding.[115] Subsequent case law has made clear, as the Advisory Committee did not, that the two subdivisions are mutually exclusive. Subdivision (a) controls only joinder of two or more charges against a single defendant; the permissibility of joining one or more charges against multiple defendants is governed only by subdivision (b).[116] The importance of this distinction is that charges involving separate defendants may not be joined simply because they are "of the same or similar character" for purposes of subdivision (a).[117] If *A* commits one robbery with *B* and also a separate robbery with *C*, *B* and *C* may not be tried together merely because both offenses are of the same character and involve a common defendant. On the other hand, despite differences in language the courts have generally held that the two subdivisions are otherwise parallel. The prosecution may join defendants charged with different criminal acts or transactions if those acts were parts of a common scheme or plan. In other words, separate crimes are "in the same series of acts or transactions" under subdivision (b) if all were committed in furtherance of a common scheme. In the example given in the preceding paragraph, *A*, *B* and *C* may be tried together if both robberies were committed in furtherance of a scheme common to all three defendants.[118]

Because the existence of a common scheme is also the basis of a charge of conspiracy, the law of joinder of defendants is, to a large extent, the law of conspiracy.[119] The prosecution can usually join defend-

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> joinder for trial together, the court may order an election or separate trial of counts, grant a severance of defendants or provide whatever other relief justice requires.

F.R. CRIM. P. 14.

115. The note says only that Rule 8 is substantially a restatement of existing law. The note is reprinted in Moore's *Federal Practice* with the comment that "[t]he terse note of the Advisory Committee has not contributed much to clarifying the Rule." 8 J. MOORE & R. CIPES, FEDERAL PRACTICE ¶ 8.02, at 8-2 (2d ed. 1972).

116. *See* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 144 (1969).

117. *Id.*

118. One possibility would be to read "series" in Rule 8(b) as if it meant the kind of relation more specifically described in Rule 8(a). Thus if acts were part of a common scheme or plan, or connected together, they could be regarded as a series. Such a result would not be inconsistent with the results reached in the cases. Thus joinder is permitted of a conspiracy count and substantive counts arising out of the conspiracy, since the claim of conspiracy provides a common link, and demonstrates the existence of a common scheme or plan. A claim of conspiracy is not essential to joinder, however, if the acts involved are otherwise connected together.

Id. at 322-23 (footnotes omitted).

119. A leading treatise introduces its discussion of joinder of defendants with the observation that "[i]f the ensuing discussion of joinder of defendants sounds like an

ants for trial only when it charges or could have charged a common conspiracy. The formation of the conspiracy is itself a "single transaction" within the meaning of Rule 8(b), and subsequent crimes committed to further it are within "the same series of acts or transactions constituting a crime." The *Standards Relating to Joinder and Severance* proposed by the American Bar Association Project on Minimum Standards for Criminal Justice[120] would make the connection between joinder and conspiracy more explicit. Under the *Standards*, two or more defendants may be joined "when each of the defendants is charged with conspiracy and some of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy."[121] The attached commentary observes that this provision restates existing federal law.[122]

The *Standards* also provide, consistent with existing case law, that the prosecutor need not prove the conspiracy alleged as the basis for joinder. If he fails to produce any evidence of a common plan, the conspiracy charge must of course be dismissed, but the defendants are not entitled to separate trials on the remaining counts unless the court decides that their guilt or innocence cannot otherwise be fairly determined.[123] The purpose of this rule is to promote efficiency, because granting severances after the close of the prosecution's case would require that the entire case be retried. This rule, however, may also encourage a prosecutor to assert the most farfetched or even unfounded theories of conspiracy, comforted by the knowledge that the burden for any misjudgment will probably fall upon the defendants. There is even authority to the effect that, if a retrial becomes necessary on the substantive counts after the conspiracy charge has failed, the defendants can be subjected to a joint retrial even though the original basis for joinder has evaporated.[124]

Most cases in which joinder by conspiracy is disputed reflect a variation or combination of two familiar models, the "wheel" and the "chain." In a wheel conspiracy, various defendants accused of individual criminal transactions are linked together by the fact that one defendant or one group of defendants participated in every transaction. For graphic purposes, the defendant or defendants implicated in every charge are described as the hub of the wheel and those charged

analysis of the conspiracy offense, this is necessarily so." 8 J. Moore & R. Cipes, FEDERAL PRACTICE ¶ 8.06, at 8-31 (2d ed. 1972).

120. *See* note 113 *supra*.

121. ABA STANDARDS, *supra* note 113, § 1.2(b), at 13.

122. *Id.* § 1.2(b), Comment at 15.

123. *Id.* § 2.4, at 43, & Comment at 44-46, adopting the rule of Schaffer v. United States, 362 U.S. 511 (1960).

124. Application of Gottesman, 332 F.2d 975 (2d Cir. 1964); cf. United States v. Granello, 365 F.2d 990, 994-95 (2d Cir. 1966), *cert. denied*, 386 U.S. 949 (1967).

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with individual crimes as the spokes. The United States Supreme Court discovered such a wheel in unusually pure form in *Kotteakos v. United States*.[125] There, a number of persons were convicted of conspiring together to obtain loans from the Federal Housing Authority by means of applications that fraudulently misrepresented the uses to which the borrowed money would be put. The evidence showed eight distinct loan transactions, each involving defendants who had no connection with the other loans. The only connecting element was that all the loans were obtained through the services of a single broker, Simon Brown, who pleaded guilty and testified against all the others. Although the trial court thought that the participation of Brown in every transaction established a single conspiracy among all the defendants, the Government conceded in the Supreme Court that this fact alone could not convert separate conspiracies to obtain particular loans into a general conspiracy to obtain all the loans.[126] It argued only that the defendants were not prejudiced by being tried and convicted on the wrong charge, since the evidence so plainly proved that they were guilty of conspiracy to obtain their own individual loans.

The Supreme Court held that the charge of a single conspiracy prejudiced the defendants because it forced them into a joint trial and because at that trial the jury was instructed that it could consider the entire mass of evidence against every defendant, as it properly could have if there actually had been a single conspiracy.[127] The Court did not say what evidence the prosecution would have had to produce to provide a "rim" to bind the spokes of the wheel together into a single conspiracy, although it indicated that mere knowledge that the hub defendant was doing similar criminal business with others was not sufficient.[128] Subsequently, in *Blumenthal v. United States*,[129] the Court

125. 328 U.S. 750 (1946).

126. *Id.* at 755-56.

127. Although the Court found that the misjoinder caused by the unfounded conspiracy charge was not harmless error on the facts before it, it did not hold that such misjoinder is always harmful. *See id.* at 771-76. The leading treatises argue that misjoinder under Rule 8 (as distinguished from failure to order a discretionary severance where joinder is initially proper) should result in automatic reversal of any ensuing convictions. 1 C. Wright, Federal Practice and Procedure § 144, at 328-29 (1969); 8 J. Moore & R. Cipes, Federal Practice ¶ 8.06(4) (2d ed. 1972). *But see* United States v. Granello, 365 F.2d 990, 995 (2d Cir. 1966) (Friendly, J.):

> We see no reason why the undoubted truth that an appeal claiming misjoinder under Rule 8(b) raises a question of law in the strict sense, whereas an appeal from denial of severance under Rule 14 normally raises only one of abuse of discretion, should carry exemption from the harmless error rule, F.R.Cr.P. 52(a), as a corollary.

128. The Court quoted with approval the statement of the court of appeals that "[t]hieves who dispose of their loot to a single receiver—a single 'fence'—do not by that fact alone become confederates; they may, but it takes more than knowledge that he is a 'fence' to make them such." 328 U.S. at 755.

129. 332 U.S. 539 (1947). Mr. Justice Rutledge was the author of the majority

found a single conspiracy to sell whiskey at unlawful prices in a case involving two salesmen, the distributing company that supplied them, and an unknown person who supplied the whiskey to the distributor. The unifying factor, or the rim of the wheel, was the single lot of whiskey that all aided in distributing. Although each salesman "aided in selling only his part," he "knew the lot to be sold was larger and thus that he was aiding in a larger plan."[130] The Court distinguished *Kotteakos* because in that case "each loan was an end in itself," and, except for the hub defendant Brown, "none aided in any way, by agreement or otherwise, in procuring another's loan."[131] The distinction is unconvincing, because neither of the salesmen in *Blumenthal* assisted, by agreement or otherwise, in selling more than his own part. There was no evidence that the sales by one salesman in any way facilitated or encouraged the sales of the other.

Perhaps the result in *Blumenthal* can best be explained by classifying the case as an example of the other principal model of an extended conspiracy, the "chain." As the name indicates, a chain conspiracy involves the chain of distribution of some commodity, such as narcotics, from the initial manufacture or smuggling to the ultimate consumer. A chain conspiracy is similar to a wheel conspiracy in that the participants at opposite ends of the chain may not know or have any dealings with each other, but the two are different in that the participants in a chain conspiracy all deal with the same goods. A chain may, and frequently does, incorporate one or more subsidiary wheels.[132] Thus in *United States v. Bruno*,[133] the most famous chain case, the conspiracy consisted of smugglers who brought narcotics into New York, middlemen who purchased from the smugglers and resold to retailers, and two groups of retailers, one operating in New York

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opinions in both *Blumenthal* and *Kotteakos*.

130. *Id.* at 559.

131. *Id.* at 558.

132. The distinction between "chain" and "wheel" or "spoke" conspiracies is to some degree artificial.

> As applied to the long term operation of an illegal business, the common pictorial distinction between "chain" and "spoke" conspiracies can obscure as much as it clarifies. The chain metaphor is indeed apt in that the links of a narcotics conspiracy are inextricably related to one another, from grower, through exporter and importer, to wholesaler, middleman, and retailer, each depending for his own success on the performance of all the others. But this simple picture tends to obscure [the fact] that the links at either end are likely to consist of a number of persons who may have no reason to know that others are performing a role similar to theirs—in other words the extreme links of a chain conspiracy may have elements of the spoke conspiracy.

United States v. Borelli, 336 F.2d 376, 383 (2d Cir. 1964) (Friendly, J.), *cert. denied*, 379 U.S. 960 (1965).

133. 105 F.2d 921 (2d Cir. 1939) (per curiam), *aff'd on other grounds*, 308 U.S. 287 (1939).

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and the other in Texas and Louisiana. Neither group of retailers dealt with the smugglers at the other end of the chain, or with the other group of retailers. Although the opinion of the court does not mention it, there seem also to have been two independent groups of smugglers, so that there was a two-spoke wheel at each end of the chain. The per curiam opinion in *Bruno* is not very authoritative as a precedent,[134] but subsequent cases have cited it as establishing that a chain of distribution of a single commodity constitutes a single conspiracy because each member of the chain, however limited his own purposes, contributes to the profitability of the entire venture.[135]

Further discussion of the varieties of chains and wheels and the means of distinguishing one from the other is unnecessary because the weakness of these cases lies not in their details but in their starting point. It is wrong to refer questions of joinder to the law of conspiracy because doing so leads to both bad substantive law and bad procedural law. The implied substantive consequences of cases such as *Kotteakos* and *Bruno* are plainly absurd. Finding eight conspiracies rather than one in *Kotteakos* meant, in theory, that the hub defendant was guilty of conspiring eight times rather than once, although the decision turned entirely upon the prejudice of a mass trial and not on the appropriate penalty for that defendant. One result of allowing joinder in *Bruno* was that each defendant became liable for all the crimes of his codefendants which furthered the distribution of the commodity. Even if these theoretical absurdities may not significantly affect the sentencing process, they indicate the desirability of separating the resolution of procedural questions from the determination of the scope of criminal liability.

A more important objection is that conspiracy theory has led to bad joinder law. Federal Rule 8(b) does not mention conspiracy at all; it permits joinder, subject to severance under Rule 14 for prejudice, when the defendants are accused of participating in "the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."[136] This language leaves considerable latitude for judicial construction, and in interpreting Rule 8 it would be better for the courts to look to the policies and interests that underlie joinder rather than to the substantive law of conspiracy. One might begin by asking why joinder is allowed in the first place, and then proceed to develop rules that carry out the purposes thus uncovered.

The primary purpose for allowing joinder is to promote efficiency in the trial process. It is obviously convenient for the prosecutor, for

134. The decision was reversed by the Supreme Court on other grounds. Bruno v. United States, 308 U.S. 287 (1939).

135. *See, e.g.*, United States v. Borelli, 336 F.2d 376, 383 n.2 (2d Cir. 1962).

136. FED. R. CRIM. P. 14.

the courts, and for witnesses if evidence need be presented at only one trial rather than at several separate trials. The savings are not only in time and money. A criminal trial can be an ordeal for witnesses as well as defendants, and the prosecutor's ability to obtain their cooperation may depend in part upon the number of ordeals involved, particularly if the witnesses are in any degree intimidated by the defendants. Separate trials increase the likelihood of inconsistent verdicts, because different juries may take different views of the same evidence or the same issues, and also because subsequently tried defendants have the advantage of a preview of the prosecutor's case. At times the burden of separate trials may be so great that the choice is between a joint trial and no trial, at least with respect to defendants of lesser culpability. On the other hand, the potential efficiency of a joint trial is not always realized in practice. Some observers have noted a tendency for prosecutors to overtry a case involving many defendants, particularly when conspiracy is charged.[137] It is quite possible for a single joint trial to be as long and drawn out as several separate trials if each defendant separately exercises his right to cross-examine and to put on a defense, or if a large amount of evidence is introduced against some defendants which could not be used against others if they were tried separately.

Joint trials exist to serve the convenience of the prosecutor and the court, and not the convenience of the defendant. This is reason enough for many defendants to resist them, for defendants in general have little to gain by making the process of conviction cheap and efficient for the prosecution. Any obstacle to conviction, or to prompt and easy conviction, may improve a defendant's position in plea bargaining. The defendant at a joint trial may also have to sit with his lawyer through a substantial amount of testimony immaterial to his own case. A trial lasting several weeks can be an enormous burden, financially and otherwise, upon a defendant who may be a comparatively minor participant in an elaborate scheme involving many. In addition, the jury may convict all the joint defendants as a group without considering the evidence against each separately. It is difficult to say how often this happens, just as it is difficult to say how often the jury deals leniently with minor participants in a criminal enterprise because their guilt seems negligible in comparison with that of their co-defendants. In any event, a joint trial often results in the admission against some defendants of evidence which is inadmissible against others, with the probable consequence that the jury will consider it against everyone despite whatever cautionary instructions the court may give.

137. See, e.g., 8 J. Moore & R. Cipes, Federal Practice ¶ 14.03[1], at 14-14 n.3 (2d ed. 1972).

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The normal difficulties of a joint trial for the defense are exacerbated when the defendants or their counsel do not agree on a common strategy. When the best defense for each individual is not the best defense for the group, the defendants may face the choice of either hanging together or hanging separately. The most spectacular examples occur when some defendants attempt to cast the entire blame on others and thereby make the participation of the prosecutor almost superfluous. Even less drastic disharmonies may create major tactical problems. One attorney may direct his cross-examination at bringing out facts that another would prefer to deemphasize, and the other's argument may present a theory that is utterly incompatible with the approach taken by the first. A common contemporary form of this classic dilemma arises in prosecutions of political dissidents. One defendant may choose, for political reasons, to ignore traditional defenses and attack "the system" while another prefers to rest his defense on a less inflammatory point of fact or law.[138] The credibility of each is likely to suffer from proximity to the other.

Federal joinder law generally favors the interests of the prosecution and the courts in obtaining joinder over the interests of defendants in avoiding it. Hence, where joinder is initially correct under Rule 8, a defendant is not entitled to a severance under Rule 14 because other defendants will assert defenses antagonistic to his, or because a substantial amount of evidence inadmissible against him will be introduced against others, or because enduring a protracted trial will put him to considerable expense and inconvenience, or because he may be disadvantaged by being put on trial with others who are far more culpable.[139] A trial court may grant a severance for these reasons, but it need not. The trial court must grant a severance only when the prosecution intends to introduce the confession of one defendant which incriminates other defendants but is inadmissible against them because it is hearsay.[140]

One might well question a judicial policy which apparently favors the convenience of prosecutors and courts over that of defendants, but a more modest criticism can also be made. When the courts resort to the law of conspiracy to determine a question of joinder, they often force defendants to endure the disadvantages of a joint trial without any significant compensating gain in efficiency. Joint trials promote efficiency only when the evidence against two or more defendants substantially overlaps. When the evidence against each defendant is dis-

138. *Cf.* J. MILFORD, THE TRIAL OF DR. SPOCK 82-85 (1969).

139. *See* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 223 (1969); 8 J. MOORE & R. CIPES, FEDERAL PRACTICE ¶ 14.03 [1], at 14-14 (2d ed. 1972).

140. Bruton v. United States, 391 U.S. 123 (1968) (overruling Delli Paoli v. United States, 352 U.S. 232 (1957)).

tinct, trying several defendants together does not save any significant amount of time or money, or further any of the other policies underlying joinder law, regardless of any connection between the defendants' criminal activity.[141]

If the offense of conspiracy were abolished, and if questions of joinder were decided in light of the purposes of joinder rather than by reference to the concept of conspiracy, joinder probably would not be permitted in cases such as *Bruno* and *Blumenthal*, where the basis of the conspiracy charge was that all the defendants participated in selling or distributing the same unlawful commodity. Manufacturers, smugglers, distributors and sellers of such commodities as narcotics each commit their own individual crimes. It is rarely necessary to prove at the trial of a narcotics pusher that the narcotics he sold were brought into the country by a particular smuggler, and the guilt of the pusher is likewise immaterial at the trial of the smuggler. It is quite true that the smuggling would not occur if someone were not willing to distribute the smuggled narcotics to the consumer, and that the retail sales could not be made if some one were not engaged in smuggling. In that sense, each link in the chain of distribution makes a contribution to the profitability of the entire chain. This consideration, however, should have nothing to do with joinder, which is not a question of business economics but rather one of trial fairness and efficiency. If the evidence against the smugglers is substantially distinct from the evidence against the retail sellers, then separate trials for each group imposes no considerable burden upon the administration of justice. Likewise, if the sellers are accused of making separate sales at different times and places, trying them together is unlikely to promote efficiency even if they obtained their narcotics from a single source.

Even in cases in which a substantial part of the evidence against the various defendants is the same, joinder may not promote efficiency. In *Kotteakos*, for example, the indictment disclosed a number of independent criminal transactions, each of which had to be proved independently. Separate trials would have required some repetition, because Brown, the one person involved in every transaction, testified against all the others. Questions regarding his credibility as a witness and his general method of operation would be material at each trial. Any gain in efficiency from allowing Brown to testify to all the transactions at one trial would probably be more than offset, however, by the additional difficulties of a complex trial. It would take time and

141. A view similar to that stated in the text was taken in Ione v. United States, 355 F.2d 700, 704 (1st Cir. 1966): "Where, however, there are no presumptive benefits from joint proof of facts relevant to all the acts or transaction, there is no 'series,' Rule 8(b) comes to an end, and joinder is impermissible."

effort to insure that the jury did not become confused as it heard evidence of many distinct transactions involving many different defendants.

In some situations the reasoning urged here would allow joinder when it would not be permissible under conspiracy theory. For example, in *United States* v. *Granello*[142] the two defendants were charged with failing to file tax returns although they had realized substantial income from the sale of jointly owned shares of stock. Conspiracy charges against them were dismissed because there was no evidence that they agreed to conceal the income, although they unquestionably combined to earn it. Hence the court of appeals held the joinder improper, although it also found the misjoinder to be harmless error.[143] Yet the facts of *Granello* present a persuasive case for allowing a joint trial. The crucial issue as to each defendant was whether and how he earned the income, because the failure to file tax returns was a matter of public record. Had there been two separate trials, virtually identical evidence would have been presented at each. Hence separate trials would have been needlessly inconvenient for the Government and a joint trial would not have been unduly prejudicial to either defendant.

This is not to suggest that joinder of defendants should always be permitted when the evidence at separate trials would substantially overlap. However much joinder might promote efficiency in a particular case, a court still should grant a severance if it seems likely that a joint trial will place a particular defendant at a serious disadvantage. The point of the preceding discussion is rather that a court should never force a defendant to go to trial with others over his objection unless the efficiency of the trial process is thereby increased. Frequently joinder should be allowed where several defendants commit various criminal acts pursuant to a common scheme, because proof of the common scheme itself may constitute a substantial part of the evidence against each participant. It is important not to overlook, however, that it is not the existence of a common plan itself that justifies joinder, but the overlap in the evidence that results from its existence.

B. Conspiracy and Venue

Federal conspiracy defendants may be tried either in the district in

142. 365 F.2d 990 (2d Cir. 1966).

143. The Government had argued that joinder was proper even without a conspiracy to conceal the income. Rejecting this argument, the court noted that Rule 8(b) permits joinder only of defendants accused of engaging in the same act or transaction or series of acts or transactions "constituting an offense or offenses." The court reasoned that the defendants participated jointly in a series of acts to obtain the income, but that this series of acts did not constitute an offense. *Id.* at 993-94. Although this construction of Rule 8(b) is reasonable, it does not concern itself with the basic issue of ensuring fairness to defendants while minimizing the inconvenience of the trial to everyone concerned.

which the unlawful agreement was made, or in any district in which any conspirator committed any overt act in furtherance of the common objective. This broad venue rule originated sixty years ago in the five-to-four decision of the Supreme Court in *Hyde v. United States*.[144] Although the sixth amendment grants defendants a right to trial "by an impartial jury of the State and district wherein the crime shall have been committed," a federal statute has long provided that a crime begun in one district and completed in another "shall be deemed to have been committed in either."[145] The majority in the *Hyde* case reasoned that because an overt act is an essential element in the federal crime of conspiracy, the crime of conspiring is renewed or completed whenever and wherever such an act is committed.[146] *Hyde* invoked specific provisions of federal law in support of its holding, but in fact its venue rule is the same as that applied at common law, and in states which still follow the common law rule that the conspiratorial agreement itself fulfills the overt act requirement.[147]

Within the framework of the existing substantive law of conspiracy, substantial policy arguments can be advanced in support of the *Hyde* doctrine. In a multidistrict conspiracy case, it may be very difficult for the Government to specify the place of the agreement, if only because the agreement in a conspiracy case is more an abstract concept than a distinct event. Even where the Government is able to prove that the conspirators met together at a particular time and place to form the criminal agreement, much of its evidence may concern conduct in furtherance of that agreement which occurred somewhere else. The district in which the agreement was formed may not be the most convenient place of trial for the Government, the witnesses, or even the defendants.

The *Hyde* doctrine permits federal prosecutors enormous discretion in choosing where to file criminal charges, particularly in cases in which individual conspirators have performed unimportant acts in furtherance of the common purpose in far-flung places. The effect of the doctrine is easily exaggerated, however. While conspiracy theory frequently has been invoked to justify a holding that venue in a particular district was proper, venue in the same place could often have been justified using other legal principles, frequently better and simpler ones. *Hyde v. United States* itself presents a classic illustration. The defendants Hyde, Benson, Dimond and Schneider were convicted in the District of Columbia of conspiring to defraud the United

144. 225 U.S. 347 (1912).

145. 18 U.S.C. § 3237 (1970). This section is based on Act of Mar. 3, 1911, ch. 231, § 42, 36 Stat. 1100.

146. Hyde v. United States, 225 U.S. 347, 359-63 (1912).

147. *See Developments*, *supra* note 5, at 975-78.

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States by unlawfully purchasing certain federal lands in Oregon and California. The indictment alleged and the prosecution proved numerous overt acts committed by Dimond and Benson in Washington, D.C., including the filing of fraudulent applications and the payment of bribes to employees of the Federal General Land Office. Hyde himself lived in California and never appeared in the District of Columbia in connection with any business of the conspiracy. When he appealed on grounds of improper venue, the Government conceded that the conspiracy was formed in California and that venue could only be predicated upon the performance of overt acts in the District of Columbia; hence the Court's broad ruling that venue is proper wherever overt acts are performed.[148] Had the Government charged the defendants simply with committing or aiding and abetting specific acts of bribery and fraud, venue in the district in which the bribery and fraud took place would have been far easier to justify. Although early at common law accessories to a crime could be prosecuted only where the accessorial acts took place, modern statutes also permit prosecution in the district in which the principal offense was committed.[149] It is likely that most of the witnesses and evidence will be located in the district in which the ultimate criminal activity took place. Absent conspiracy, the Court in *Hyde* could have found venue in the District of Columbia to be proper without implying that the Government could have brought the prosecution in Iowa if some minor overt act connected with the common scheme had been committed in that state.

In fact, federal venue provisions, independent of any conspiracy doctrine, tend to give the prosecutor enormous discretion in choosing the place of trial. The most important federal venue statute provides that an offense "begun in one district and completed in another, or committed in more than one district" may be prosecuted "in any district in which such offense was begun, continued, or completed."[150] The statute further defines as a "continuing offense" any crime involving the use of the mails or transportation in interstate or foreign commerce, and permits prosecution of such offenses in "any district from, through, or into which such commerce or mail matter moves."[151] Because so many federal offenses involve use of the mails or transportation in interstate commerce, this section frequently gives the federal prosecutor an enormous range of choice that is easily subject to abuse. For example, without any reference to conspiracy doctrines, the Government has convicted pornographers based in southern California on

148. Hyde v. United States, 225 U.S. 347, 357 (1912).

149. *See* Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 U.C.L.A. L. Rev. 751, 811-15 (1962).

150. 18 U.S.C. § 3237(a) (1970).

151. *Id.*

obscenity charges in midwestern federal courts on the theory that they caused obscene literature to be transported into the forum districts.[152]

On the other hand, strict adherence today to the "place of the crime" formula of the sixth amendment may not provide the most convenient place of trial for either the defendant, the Government, or the witnesses. Undoubtedly the framers of the sixth amendment expected that "the district wherein the crime shall have been committed" would also ordinarily be the district wherein the defendant and the witnesses resided. They could hardly have anticipated a society in which individuals move and communicate so freely that a single criminal transaction may routinely involve several districts, and in which the imaginations of criminals and legislators have created innumerable opportunities to offend against the federal criminal law.[153]

Two leading Supreme Court decisions illustrate the defects in a literal interpretation of the sixth amendment's venue clause. In *Travis v. United States*,[154] the Court held that a defendant union officer, charged with filing a false "noncommunist" affidavit with the National Labor Relations Board, could be prosecuted only in the District of Columbia, where the affidavit was filed. His conviction in the federal district court in Colorado was reversed, even though he resided in Colorado and executed and mailed the false affidavit in that state. In *Johnston v. United States*,[155] the Court held that conscientious objectors charged with failing to report for alternative service in hospitals as required by their draft boards could be prosecuted only in the districts in which the hospitals were located. Under this ruling the Government could not bring charges in the district where the defendants resided and where their draft boards were located. The holding in *Johnston* is particularly ironic because the nature of the charge itself assumed that the defendants had *not* committed the relevant acts in the proper place for trial. Both cases illustrate that the place "wherein the crime shall have been committed" depends upon technicalities in the drafting of the substantive offense rather than any realistic considerations of fairness to anyone. For example, if Congress had defined the offense involved in the *Travis* case as mailing a false noncommunist affidavit, venue would have been proper in Colorado.

The interests of the defendant in resisting venue in an inconven-

152. *See* United States v. West Coast News Co., 357 F.2d 855, 861-62 (6th Cir. 1966), *rev'd on other grounds sub nom.* Aday v. United States, 388 U.S. 447 (1967), Reed Enterprises v. Clark, 278 F. Supp. 372 (D.D.C. 1967), *aff'd*, 390 U.S. 457 (1968).

153. For a complete review of the difficulties involved in deciding modern venue issues under the "crime committed" formula, see Abrams, *supra* note 149.

154. 364 U.S. 631 (1961).

155. 351 U.S. 215 (1956).

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ient or hostile district are protected not by the "place of the crime" formula of the sixth amendment and Federal Rule of Criminal Procedure 18,[150] but by Rule 21, governing motions for change of venue. Rule 21 allows the district court to order a transfer to another district if the transfer is necessary to obtain a fair and impartial trial because of prejudice against the defendant in the transferor district or if transfer is necessary or desirable "for the convenience of parties and witnesses, and in the interest of justice."[157] Such discretionary authority is probably the only practical method of protecting the defendant's interests, given the unsatisfactory results that may flow from the "place of the crime" formula. On the other hand, treating venue as a discretionary matter tends to leave defendants (and everyone else involved in the case) at the mercy of the district judges.

Eliminating the *crime* of conspiracy would not require elimination of the conspiracy venue doctrine; venue questions could still be decided by reference to conspiracy theory. If Congress went further and specifically repudiated the conspiracy venue rule of the *Hyde* case, one of the sources of broad prosecutorial discretion in selecting the forum in which to bring the charge would disappear, but much discretion would remain. Even so, one should not belittle this accomplishment, because in some multidefendant cases the conspiracy rule allows the prosecutor to choose among the overt acts of all defendants as a basis for venue, an advantage which he can obtain only by alleging conspiracy. Of greater significance, however, is the effect that abandoning the conspiracy *joinder* doctrine would have on venue issues.

The primary importance of the conspiracy venue rule to prosecutors is not the discretion it gives them to select an inconvenient or hostile forum in which to try defendants, although at times they may abuse the rule in this manner. Primarily, wide venue choice is important to prosecutors because it permits them to achieve joinder. It is of no value to a prosecutor to have the right to join several defendants and offenses for trial unless he can achieve venue for all of them in the same forum. Conspiracy theory provides at one and the same time both the justification for joinder and a venue rule that makes such joinder practical. Moreover, courts tend to look with disfavor upon applications for transfer under Rule 21 if granting the transfer would defeat joinder and require two or more trials instead of one.[158]

156. FED. R. CRIM. P. 18: "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses."

157. FED. R. CRIM. P. 21.

158. "The question of severance . . . is closely tied to a determination of 'the interest of justice.' Thus, transfer has been denied because of the 'inconvenience and

As previously explained, elimination of the conspiracy joinder doctrine would discourage joinder of defendants charged with separate substantive offenses unless those offenses were so closely related as to create a substantial overlap in proof.[159] Defendants could no longer be joined for trial merely because their individual offenses occurred at differing points in the chain of distribution of some forbidden commodity, or because their separate crimes involved some arguably common motive or purpose. Insofar as the occasions for joint or mass trials would thereby be reduced, the need for subordinating defendants' venue interests to those of the prosecution would also be reduced. District judges would no longer feel the need to deny transfers to preserve a joinder that in itself may be questionable. The problems of venue would by no means be solved, but the occasions for abuse would be reduced, and judges could exercise their discretion under Rule 21 without being unduly restrained by dubious policies favoring joinder.

C. *Statute of Limitations*

Of all the procedural doctrines associated with conspiracy, the rule governing the application of the statute of limitations most directly concerns conspiracy as a distinct crime. The period of limitations in a prosecution for conspiracy does not begin to run until the conspiracy is either abandoned or successfully accomplishes its objectives.[160] If conspirators agree to commit a number of crimes over a period of time, prosecution for the overall conspiracy is permitted even if prosecution for some of the earlier substantive crimes is barred by the statute of limitations.[161] Despite the statutory bar, the prosecution may prove these early crimes on the theory that they are overt acts in furtherance of the conspiracy. If Congress were to abolish conspiracy, except in its role as a particular method of committing an attempt, the Government could necessarily prosecute defendants only for the specific crimes in which they participated, and the ordinary rule of limitations would apply.

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duplication of effort in conducting two trials in widely separate jurisdictions.'" 8 J. MOORE & R. CIPES, FEDERAL PRACTICE ¶ 21.04, at 21-22 (2d ed. 1972) (citations omitted).

159. *See* text accompanying notes 141-43 *supra*.

160. Fiswick v. United States, 329 U.S. 211 (1946); United States v. Kissel, 218 U.S. 601 (1910). The statute also begins to run in favor of an individual conspirator when he withdraws from the conspiracy. *See* Hyde v. United States, 225 U.S. 347, 369-70 (1912); MODEL PENAL CODE § 5.03(7) (Proposed Official Draft, 1962); MODEL PENAL CODE § 5.03, Comment at 153-55 (Tent. Draft No. 10, 1960).

161. United States v. Johnson, 165 F.2d 42 (3d Cir. 1947), *cert. denied*, 332 U.S. 852 (1948); Ware v. United States, 154 F. 577 (8th Cir. 1907), *cert. denied*, 207 U.S. 588 (1907). The Government, however, must prove that at least one act occurred during the statutory period. Grunewald v. United States, 353 U.S. 391, 396-97 (1957).

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Under existing law, the use of a conspiracy theory may lengthen the limitations period in certain cases. Frequently the prosecution has argued that any conspiracy to commit a crime includes a subsidiary conspiracy to conceal the crime committed, so that the criminal combination remains alive during the period of concealment after the attainment of the criminal objective. This argument may be used to justify the admission of hearsay statements made by coconspirators after the conspiracy attains all its objectives[162] or to justify a claim that the period of limitations does not begin to run until the termination of the subsidiary conspiracy to conceal. The United States Supreme Court has consistently refused to infer the existence of such a subsidiary conspiracy merely from the fact that the conspirators took steps to conceal their guilt, because such concealment is a feature of most crimes.[163] Where the underlying agreement necessarily contemplated acts of concealment as one of its basic objectives, however, the prosecution's theory has prevailed and the statute of limitations has been found no bar to a delayed prosecution.[164]

The leading case of *Grunewald v. United States*[165] illustrates the hairsplitting approach that such a distinction requires. There the defendants were charged with conspiring to defraud the United States by using improper influence to obtain "no prosecution" rulings from the Bureau of Internal Revenue. The rulings were obtained in 1948 and 1949; the prosecution was brought in 1954. When the defendants urged the three-year statute of limitations as a bar to prosecution, the Government asserted the existence of an implied subsidiary conspiracy to conceal the improper conduct, which had continued to exist for several years after 1949. The Supreme Court held that the mere fact that some of the conspirators had taken active steps after 1949 to conceal their guilt did not establish the existence of such an implied subsidiary conspiracy, because "every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces," and therefore "[s]anctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases."[166] The Court's opinion suggested, on the other hand, that the Government could have prevailed if it had charged and proved that the prime object of the conspiracy was not merely to obtain the "no prosecution" rulings in 1948 and 1949, but to obtain final immunity for the taxpayers from criminal tax prosecution. This larger objective could not have

162. *See* text accompanying notes 169-87 *infra*.

163. Grunewald v. United States, 353 U.S. 391 (1957); Lutwak v. United States, 344 U.S. 604 (1953); Krulewitch v. United States, 336 U.S. 440 (1949).

164. Forman v. United States, 361 U.S. 416, 423-24 (1960).

165. 353 U.S. 391 (1957).

166. *Id.* at 402.

been attained until 1952, when the six-year period of limitations applicable in tax proceedings finally expired.[167] Because the precise object of a particular conspiracy is frequently proved by circumstantial evidence, the same acts of concealment that failed to establish a subsidiary conspiracy to conceal could have been used to establish the enlarged scope of the prime conspiracy and thus to circumvent the bar of the statute of limitations by a slightly different route. The distinction seems to go to the manner in which the indictment was drafted rather than to any substantial rights.

In justification of a rule extending the life of a conspiracy through the concealment phase, one might argue that in certain cases a strict application of the statute of limitations permits organized criminals to escape punishment by concealing their misdeeds for the necessary length of time. Crimes which involve fraud or other concealment arguably should not be subject to the same period of limitations as crimes which occur more openly and can be discovered with due official diligence. This argument, however, really has nothing to do with conspiracy: it reflects a consideration that ought to be taken into account in drafting the statute of limitations itself. The proposed Federal Criminal Code, for example, provides special extensions of the period of limitations for offenses involving fraud, breach of fiduciary duty, or official misconduct.[168]

Exceptions to the normal operation of the statute of limitations should be made in that statute itself, and they ought to be directed to relatively specific situations in which delayed prosecution is likely to be necessary to protect some legitimate public interest. Treating the problem with conspiracy law gives rise to exceptions that are at once too broad and too unreliable. In addition, extending the life of a conspiracy to avoid the statute of limitations automatically extends the period during which the coconspirator hearsay exception operates. It may also lead to increased substantive criminal liability for conspirators whose own activity ceased long before the acts of concealment at

167. *Id.* at 408.

168. COMMITTEE PRINT, *supra* note 7, at § 1-3B1(d):

> Extensions—If the period prescribed in subsection (c) has expired, a prosecution may nonetheless be commenced for:
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> (1) an offense a material element of which is either fraud or a breach of fiduciary obligation within one year after discovery of the offense by an aggrieved person or by a person who has a legal duty to represent an aggrieved person and who is himself not an accomplice in the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years;
>
> (2) an offense based on official conduct in office by a public servant at any time when the defendant is a public servant or within two years after he ceases to be such public servant, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years . . . .

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D. Conspiracy and Hearsay

Perhaps the most famous and controversial of all the procedural doctrines associated with conspiracy is the coconspirator hearsay exception. A hearsay statement of a defendant's alleged coconspirator is admissible against the defendant if the statement was made during the pendency of the conspiracy and in furtherance of its objectives.[169] This exception to the hearsay rule is a particular application of the more general principle that statements of an agent concerning matters within the scope of the agency relationship and made during the existence of that relationship are admissible against the principal.[170]

The justification for admitting these "vicarious admissions" is not altogether easy to grasp. Some authorities have found the analogy to the substantive liability of the principal for his agent's acts compelling. Because the employer is liable for the torts of his servant committed within the scope of the employment, and the conspirator for the crimes of his coconspirator committed in furtherance of the common objective, these authorities have reasoned that the principal should bear the risk of what his agents say as well as the risk of what they do.[171] It

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169. Krulewitch v. United States, 336 U.S. 440, 443 (1949); C. McCORMICK, EVIDENCE 645 (2d ed. E. Cleary ed. 1972) [hereinafter cited as McCORMICK]; RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES rule 801(d)(2)(v) [hereinafter cited as PROPOSED FEDERAL RULES OF EVIDENCE]. (The Rules of Evidence were approved by the Supreme Court and transmitted to Congress on November 20, 1972. Due to congressional opposition, however, the Rules will not take effect as scheduled on July 1, 1973. Pub. L. No. 92-12 (March 30, 1973).)

The laws of some states, the Model Code of Evidence, and the Uniform Rules of Evidence do not require that the statement be made in furtherance of the conspiracy. *See* White v. State, 451 S.W.2d 497 (Tex. Crim. App. 1969); MODEL CODE OF EVIDENCE rule 508(b) (1942); UNIFORM RULE OF EVIDENCE 63(9)(b). Even in the federal courts, the requirement of furtherance often has been neglected. *See* Salazar v. United States, 405 F.2d 74 (9th Cir. 1968); United States v. Annunziato, 293 F.2d 373 (2d Cir. 1968).

The significance of the "pendency" requirement is enormously reduced in those jurisdictions which take the position, rejected in *Krulewitch*, that the conspiracy continues as long as its members conceal their guilt. *See* Dutton v. Evans, 400 U.S. 74, 83 (1970). *See generally* Levie, *Hearsay and Conspiracy: A Re-examination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159 (1954); Comment, *The Hearsay Exception for Co-Conspirators' Declarations*, 25 U. CHI. L. REV. 530 (1958).

170. PROPOSED FEDERAL RULES OF EVIDENCE, *supra* note 169, rule 801(d)(2); McCORMICK, *supra* note 169, at 639-46.

> 171. He who sets another person to do an act in his stead as *agent* is chargeable in substantive law by such acts as are done under that authority; so too, properly enough, admissions made by the agent in the course of exercising that authority have the same testimonial value to discredit the party's present claim as if stated by the party himself.

4 J. WIGMORE, EVIDENCE § 1078 (3d ed. 1940). Judge Learned Hand observed that

does not seem that hearsay statements of agents are admitted because they are regarded as carrying some particular guarantee of trustworthiness. Although there are some suggestions in the literature that an agent is not likely to make statements against his principal's interest unless they are true,[172] the authorities agree that admissions of the agent, like those of the principal himself, are admissible whether or not he thought the statements to be against his or his principal's interest at the time he made them.[173] Following McCormick, the proposed Rules of Evidence for United States Courts and Magistrates classify all admissions, vicarious or otherwise, as non-hearsay rather than as hearsay which is nonetheless admissible.[174] The advisory committee's note explains that the purpose of this classification is to make it clear that such statements are admissible without regard to considerations of apparent trustworthiness.[175] What seems to underlie this view is a feeling that admissions, including those by agents, constitute a category of evidence sufficiently probative in ordinary experience that the logic of the hearsay rule simply should be disregarded in dealing with it.[176]

There are two powerful objections to the application of the vicarious admissions principle in conspiracy law. First, the coconspirator exception is invoked by prosecutors in criminal cases, and in this

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coconspirator declarations "are admitted upon no doctrine of the law of evidence" because such declarations are acts of the conspiracy for which each conspirator is responsible. Van Riper v. United States, 13 F.2d 961, 967 (1926). This rationale applies only to statements which are not introduced for the truth of the matter asserted and hence are not hearsay at all. If *A* and *B* conspire to extort money from *C*, *B*'s statement to *C* ("Pay me or I'll kill you.") is not hearsay at the trial of *A*. The statement is part of the criminal act itself, and its truth or falsity is irrelevant. *B*'s further statement ("If I don't kill you, *A* will, because he is in this too.") is hearsay evidence and not merely an act *insofar as it is used to establish the fact of A's participation*. The co-conspirator exception permits the jury to consider it for the latter purpose. *See* United States v. Littman, 421 F.2d 981 (2d Cir. 1970); People v. Brawley, 1 Cal. 3d 277, 461 P.2d 361, 82 Cal. Rptr. 161 (1969).

172. "The agent is well informed about acts in the course of the business, his statements offered against the employer are normally against the employer's interest, and while the employment continues, the employee is not likely to make the statements unless they are true." McCORMICK, *supra* note 169, at 641.

173. McCORMICK, *supra* note 169, at 630-31; 4 J. WIGMORE, EVIDENCE § 1049, § 1080*a*, at 142 (3d ed. 1940).

174. PROPOSED FEDERAL RULES OF EVIDENCE, *supra* note 169, rule 801(d)(2).

175. Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is a result of the adversary system rather than satisfaction of the condition of the hearsay rule. . . . No guarantee of trustworthiness is required in the case of an admission.

COMM. ON RULES OF PRACTICE AND PROCEDURE, PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES 103 (1971).

176. *See* 4 J. WIGMORE, EVIDENCE § 1080*a* (3d ed. 1940) for a strong statement of this position. In this section of his treatise Professor Wigmore responds to an argument by Professor Morgan that vicarious admissions should be admitted only under the rules governing declarations against interest.

situation hearsay exceptions must meet the standards of the sixth amendment, which grants an accused "the right . . . to be confronted with the witnesses against him." Although it is generally conceded that some hearsay exceptions do not violate the confrontation clause, despite the fact that the declarant is not confronted or cross-examined in court, the importance which the clause assigns to cross-examination arguably implies that only those hearsay exceptions which are based upon the trustworthiness of the evidence in question should be permitted.[177] Second, in cases of group crime the existence of the agency relationship is precisely what the prosecution has to prove. When a trucking company is sued over a highway accident, hearsay statements of its driver are not used to prove that he was employed by the company but that he was responsible for the collision.[178] In criminal conspiracy cases the existence of a criminal agency relationship is likely to be the main point at issue, but the coconspirator statements are admissible only on the premise that this relationship exists. To be sure, there is a requirement that the prosecution produce independent evidence of the existence and membership of the conspiracy in order to obtain the admission of the hearsay testimony, but it need not make this showing beyond a reasonable doubt.[179] The result is that hearsay evidence is often used to prove the validity of the premise upon which it was admitted in the first place.

Despite these weighty objections, the coconspirator exception survives. Doubts as to its constitutionality were seemingly laid to rest by the Supreme Court in *Dutton v. Evans*,[180] and in fact the Supreme

177. This argument was applied to the coconspirator exception in a recent, well-reasoned article. Davenport, *The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1384-91 (1972). Mr. Davenport "reformulates" the coconspirator exception so that it would apply only where the statement was admissible as a declaration against penal interest or as nonhearsay. As he recognizes, this "reformulation" amounts to abolition. *Id.* at 1405-06.

178. "Evidence of the purported agent's past declarations asserting the agency, are inadmissible hearsay when offered to show the relation. If this preliminary fact of the declarant's agency is disputed, the question is one of 'conditional relevancy.'" MCCORMICK, *supra* note 169, at 642. *See also* Murph Auto Parts v. Ball, 249 F.2d 508 (D.C. Cir. 1957).

179. For learned discussions of the quantum of proof that *is* required see United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969) (Friendly, J.); United States v. Ragland, 375 F.2d 471 (2d Cir. 1967) (Waterman, J.).

180. 400 U.S. 74 (1970). *Dutton* held that the admission in a state prosecution of a statement made more than a year after the commission of a crime, at a time when the declarant was already under arrest, did not violate the confrontation clause. It thus approved the coconspirator exception in one of its broadest formulations. On the other hand, the Court embraced this holding with little enthusiasm. Mr. Justice Stewart, writing for the plurality, evidently felt it necessary to add that the statement in question was spontaneous and against the declarant's penal interest, two very dubious makeweights at best. *Id.* at 89. Two justices who concurred in the

Court recently approved the exception as formulated in the proposed Rules of Evidence for United States Courts and Magistrates.[181] The exception's survival is probably due in part to tradition,[182] and in part to the leeway it gives the prosecution in overcoming the formidable difficulties involved in convicting organized criminals.[183] It must also be conceded that if the case for the coconspirator exception is at best dubious, the general hearsay rule to which it is an exception is not itself beyond challenge. Although the coconspirator exception is applicable whether or not the declarant is available to testify in person, in fact the declarant's testimony is usually unavailable because he exercises his privilege against self-incrimination;[184] frequently he is a codefendant at a joint or mass trial.[185] Applying the hearsay rule in

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plurality opinion believed that the testimony about the hearsay declaration was so incredible that the jury must have disbelieved it anyway. *Id.* at 90-93 (Blackmun, J., concurring). Mr. Justice Harlan concurred in the result on the ground that the confrontation clause does not govern the constitutionality of hearsay exceptions and that exclusion of the hearsay in question was not "essential to a fair trial" under the due process clause. *Id.* at 93-100 (Harlan, J., concurring).

181. "A statement is not hearsay if . . . the statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." PROPOSED FEDERAL RULES OF EVIDENCE, *supra* note 169, rule 801(d).

182. There are many logical and practical reasons that could be advanced against a special evidentiary rule that permits out-of-court statements of one conspirator to be used against another. But however cogent these reasons, it is firmly established that where made in furtherance of the objectives of a going conspiracy, such statements are admissible as exceptions to the hearsay rule.

Krulewitch v. United States, 336 U.S. 440, 443 (1949).

183. The reason [for retention and expansion of the coconspirator exceptions] is simple: there is great probative need for such testimony. Conspiracy is a hard thing to prove. The substantive law of conspiracy has vastly expanded. This created a tension solved by relaxation in the law of evidence. Conspirators' declarations are admitted out of necessity.

Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159, 1166 (1954). The problems of proof, however, are not created by the technical requirements of conspiracy law but by the secrecy that normally accompanies a criminal plot. Hence the exception applies whether or not the prosecution charges conspiracy in the indictment. *See* note 187 *infra* and accompanying text.

184. If the declarant is unavailable solely because he asserts the privilege against self-incrimination, the prosecution can obtain his testimony by granting him use immunity. Kastigar v. United States, 406 U.S. 441 (1972). Theoretically, it still can prosecute the immunized witness, but it will bear the "heavy burden" of proving "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.* at 460-61. Thus, in many cases, the actual effect of the coconspirator exception is to relieve the prosecution of the burden of agreeing to a severance and granting immunity.

185. A number of provisions of federal law are designed to encourage joint trials in conspiracy cases. *See* text accompanying notes 112-24, 139-40 & 158 *supra*. One effect of the coconspirators' hearsay exception is to make it much easier to conduct a joint trial of coconspirators when several of them have made out-of-court admissions. Because each defendant's admissions may be used against all the others

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has vastly expanded.
w of evidence. Con-

Co-Conspirators' Exception
. The problems of proof,
conspiracy law but by the
nce the exception applies
indictment. *See* note 187

sserts the privilege against
by granting him use im-
Theoretically, it still can
eavy burden" of proving
timate source wholly inde-
in many cases, the actual
ecution of the burden of

d to encourage joint trials
4, 139-40 & 158 *supra*.
ke it much easier to con-
have made out-of-court
ed against all the others

this situation would prevent the jury from hearing relevant evidence of some probative value because of the possibility that it may be untrustworthy. It is possible that justice would be better served by allowing the jury to hear relevant hearsay and then trusting it to make proper allowance in its deliberations for the fact that the evidence could not be effectively tested by cross-examination.[186]

In any event, what one thinks of the coconspirator hearsay exception depends upon what one thinks of the hearsay rule and its relation to the confrontation clause, not on what one thinks of the crime of conspiracy. The exception is a rule of evidence that applies with equal force whether or not the defendant is charged with conspiracy,[187] and there is no reason to suppose that abolishing the crime of conspiracy would change it in any way. On the other hand, if one were to decide that the criminal code should retain a crime of conspiracy, that decision would not weaken the case for reconsidering the hearsay exception. If the exception results in the admission of unreliable evi-

(assuming that the requirements of pendency and furtherance are satisfied), there is no need for the trial judge to give elaborate limiting instructions. The jury need not be told to consider *A*'s admission only against *A*, and to ignore them when considering the liability of *B*, and so on. More important, *B* cannot demand a severance on the ground that separate trials are necessary because the jury cannot be expected to follow such instructions once it has heard the damaging hearsay. Without the coconspirator exception to the hearsay rule, such a severance would probably be mandatory under the rule of Bruton v. United States, 391 U.S. 123 (1968), because *A*'s admission would be admissible only against *A*. *See* note 140 *supra* and accompanying text.

186. As Wigmore put it (in defending the hearsay exception for vicarious admissions): "[T]he hearsay rule stands in dire need, not of stopping its violation, but of a vast deal of (let us say) elastic relaxation." 4 J. WIGMORE, EVIDENCE § 1080*a*, at 144 (3d ed. 1940). The plurality opinion in *Dutton v. Evans*, quoted with apparent approval the following language from Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434, 1436 (1966):

> Despite the superficial similarity between the evidentiary rule and the constitutional clause, the Court should not be eager to equate them. Present hearsay law does not merit a permanent niche in the Constitution; indeed, its ripeness for reform is a unifying theme of evidence literature. From Bentham to the authors of the Uniform Rules of Evidence, authorities have agreed that present hearsay law keeps reliable evidence from the courtroom. If *Pointer* [Pointer v. Texas, 380 U.S. 400 (1965)] has read into the Constitution a hearsay rule of unknown proportions, reformers must grapple not only with centuries of inertia but with a constitutional prohibition as well.

400 U.S. at 86-87 n.17.

187. Kelley v. United States, 364 F.2d 911, 913 (10th Cir. 1966); People v. Brawley, 1 Cal. 3d 277, 461 P.2d 361, 82 Cal. Rptr. 161 (1969); People v. Niemoth, 409 Ill. 111, 98 N.E.2d 733 (1951); People v. Luciano, 277 N.Y. 348, 14 N.E.2d 433, 1 N.Y.S.2d —, *cert. denied*, 305 U.S. 620 (1938); MCCORMICK, *supra* note 169, at 646. *But see* United States v. Harrell, 436 F.2d 606 (5th Cir. 1970) (no discussion or citation of authority). In *Dutton v. Evans*, the Supreme Court upheld the application of Georgia's broad version of the coconspirator exception, noting in passing that at the time of the trial in that case Georgia did not recognize conspiracy as a separate, substantive criminal offense. 400 U.S. at 83.

dence which cannot be tested by cross-examination and which may therefore lead to the conviction of innocent persons, then it ought to be challenged whether or not agreement to commit a crime is a crime in itself.

CONCLUSION

Conspiracy gives the courts a means of deciding difficult questions without thinking about them. The basic objection to the doctrine is not simply that many of its specific rules are bad, but rather that all of them are ill-considered. The first step towards improving a rule of law is to consider the policies it serves. The specific rules of conspiracy, however, are derived more from the logic of an abstract concept than from any realtistic assessment of the needs of law enforcement or the legitimate interests of criminal defendants. We need to reconsider the problem of group crime without being distracted by the abstractions that the concept of conspiracy always seems to introduce

The current revision of the Federal Criminal Code should have resulted in a reassessment of the usefulness of conspiracy as an independent crime, but it has not. The *Working Papers* of the National Commission on Reform of Federal Criminal Laws suggest that the authors of the initial drafts of the proposed Federal Criminal Code wanted to retain conspiracy only as a inchoate offense similar to attempt,[198] but none of the subsequently published drafts of the Code reflect such a limitation. In any case, given the tendency of conspiracy doctrine to expand into new areas of the law, it is doubtful whether any attempt to retain the doctrine in only a limited role can succeed for very long.

Abolition of conspiracy is not an idea whose time has come, because law enforcement interests erroneously regard the doctrine as a vital weapon against organized crime and because critics of conspiracy have attacked it piecemeal rather than in its entirety. This Article is therefore addressed more to the law reformers of the future than to those of the present, and its aim is not so much to settle an argument as to start one.

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188. *See* 1 WORKING PAPERS, *supra* note 1, at 381.

Chapter 16. Parties to Crime.

Collateral references. — 21 Am. Jur. 2d, Criminal Law, §§ 37-51, 163-174.

22 C.J.S., Criminal Law, §§ 79-99.

Criminal responsibility of one co-operating in offense which he is incapable of committing personally, 5 ALR 782; 74 ALR 1110; 131 ALR 1322.

What amounts to participation in homicide on part of one not the actual perpetrator, who was present without preconcert or conspiracy, 12 ALR 275.

Intent to aid and abet perpetrator, or entering into his design, as necessary to make one, present at homicide without preconcert or conspiracy, criminally responsible, 12 ALR 277.

Responsibility of persons participating in jail delivery for homicide committed by one of their number, 15 ALR 456.

Principal in second degree, or aider and abettor in case of felonious assault, 16 ALR 1043.

Criminal responsibility of one who furnishes instrumentality of a kind ordinarily used for legitimate purposes, with knowledge that it is to be used by another for criminal purposes, 108 ALR 331.

Coercion, compulsion or duress as defense to criminal prosecution, 40 ALR2d 903.

Accessory before fact in manslaughter, 95 ALR2d 175.

Woman upon whom abortion is committed or attempted as accomplice for purposes of rule requiring corroboration of accomplice testimony, 34 ALR3d 858.

Acquittal of principal or his conviction of lesser degree of offense as affecting prosecution of accessory and aider and abettor, 9 ALR4th 972.

Prosecution or conviction of one conspirator as affected by disposition of case against coconspirators, 19 ALR4th 192.

Disciplinary action against attorney for aiding or assisting another person in unauthorized practice of law, 41 ALR4th 361.

Withdrawal of life supports from comatose patient, 47 ALR4th 18.

Criminal responsibility under 18 USCS 2(b) of one who lacks capacity to commit an offense but causes another to do so, 52 ALR Fed. 769.

Sec. 11.16.100. Legal accountability based upon conduct. A person is guilty of an offense if it is committed by the person's own conduct or by the conduct of another for which the person is legally accountable under AS 11.16.110, or by both. (§ 1 ch 166 SLA 1978)

NOTES TO DECISIONS

Former law construed. — See Tarnef v. State, 512 P.2d 923 (Alaska 1973). (Decided under former AS 11.10.010.)

Legal accountability statutes apply to fish and wildlife offenses. Knutson v. State, 736 P.2d 775 (Alaska Ct. App. 1987).

Applied in Kinegak v. State, 747 P.2d 541 (Alaska Ct. App. 1987).

Cited in Dailey v. State, 675 P.2d 657 (Alaska Ct. App. 1984).

Sec. 11.16.110. Legal accountability based upon the conduct of another: Complicity. A person is legally accountable for the conduct of another constituting an offense if

(1) the person is made legally accountable by a provision of law defining the offense;

(2) with intent to promote or facilitate the commission of the offense, the person

(A) solicits the other to commit the offense; or

(B) aids or abets the other in planning or committing the offense; or

(3) acting with the culpable mental state that is sufficient for the commission of the offense, the person causes an innocent person or a person who lacks criminal responsibility to engage in the proscribed conduct. (§ 1 ch 166 SLA 1978)

Cross references. — For solicitation, see AS 11.31.110.

NOTES TO DECISIONS

Editor's notes. — Some of the cases cited in the notes below were decided under former AS 12.15.010.

Distinction between principals and accessories abrogated. — Former AS 12.15.010 abrogated the distinction between principals and accessories. Tarnef v. State, 492 P.2d 109 (Alaska 1971).

By former AS 12.15.010, Alaska abolished the common-law distinction between accessories and principals to a crime. Rice v. State, 589 P.2d 419 (Alaska 1979).

Legal accountability statutes apply to fish and wildlife offenses. Knutson v. State, 736 P.2d 775 (Alaska Ct. App. 1987); Vaden v. State, 742 P.2d 784 (Alaska Ct. App. 1987).

Knowledge of fact of criminality irrelevant. — In order for a defendant to be found liable as an accomplice, the state need only prove that defendant intentionally aided codefendant, knowing of codefendant's criminal purpose. It is not necessary that he know of the criminality of the conduct. Mudge v. State, 760 P.2d 1046 (Alaska Ct. App. 1988).

Abrogation did not apply only to punishment. — The abrogation of the distinction between accessories and principals mandated by former AS 12.15.010 did not apply only to punishment. Scharver v. State, 561 P.2d 300 (Alaska 1977).

To "prosecute" one as a principal includes charging him as a principal. Scharver v. State, 561 P.2d 300 (Alaska 1977).

Aiders and abettors as principals. — Former AS 12.15.010 provided that anyone aiding or abetting the commission of a crime should be prosecuted, tried, and punished as a principal. Tarnef v. State, 492 P.2d 109 (Alaska 1971).

An accused who is indicted as a principal is subject to conviction upon evidence which shows that he only aided and abetted. Scharver v. State, 561 P.2d 300 (Alaska 1977).

One indicted as a principal may be convicted of the crime on evidence which shows that he merely aided and abetted. Ransom v. State, 460 P.2d 170 (Alaska 1969).

"Aid and abet" means to help, assist, or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about, or encourage, counsel, or incite as to its commission. Thomas v. State, 391 P.2d 18 (Alaska 1964); Carman v. State, 602 P.2d 1255 (Alaska 1979); Hensel v. State, 604 P.2d 222 (Alaska 1979).

It can be inferred that the words "aid and abet" are used synonymously with various combinations of the words assist, advise, counsel, procure, encourage, incite and instigate. Tarnef v. State, 512 P.2d 923 (Alaska 1973); Carman v. State, 602 P.2d 1255 (Alaska 1979).

A defendant need not commit every element of an offense to be guilty as a principal under the law, so long as the state proves commission of the whole offense by someone and the aiding or abetting of the offense by the defendant. An-

property or in attempting to escape, rather than in taking property, as element of robbery, 93 ALR3d 643.

Criminal liability of third persons for death of another as result of accused's attempt to kill self or assist another's suicide, 40 ALR4th 702.

Impossibility of consummation as defense to prosecution for attempt, 41 ALR4th 588.

What constitutes attempted bank robbery under 18 USCS §§ 2113(a), making it offense to take or attempt to take, by force, violence, or intimidation, any property, money, or other thing of value from bank, 37 ALR Fed 255.

Criminal responsibility under 18 USCS § 2(b) of one who lacks capacity to commit an offense but who causes another to do so, 52 ALR Fed 769.

Sec. 11.31.100. Attempt. (a) A person is guilty of an attempt to commit a crime if, with intent to commit a crime, the person engages in conduct which constitutes a substantial step toward the commission of that crime.

(b) In a prosecution under this section, it is not a defense that it was factually or legally impossible to commit the crime which was the object of the attempt if the conduct engaged in by the defendant would be a crime had the circumstances been as the defendant believed them to be.

(c) In a prosecution under this section, it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, prevented the commission of the attempted crime.

(d) An attempt is

(1) an unclassified felony if the crime attempted is murder in the first degree;

(2) a class A felony if the crime attempted is an unclassified felony other than murder in the first degree;

(3) a class B felony if the crime attempted is a class A felony;

(4) a class C felony if the crime attempted is a class B felony;

(5) a class A misdemeanor if the crime attempted is a class C felony;

(6) a class B misdemeanor if the crime attempted is a class A or class B misdemeanor.

(e) If the crime attempted is an unclassified crime described in a state law which is not part of this title and no provision for punishment of an attempt to commit the crime is specified, the punishment for the attempt is imprisonment for a term of not more than half the maximum period prescribed as punishment for the unclassified crime, or a fine of not more than half the amount of the maximum fine prescribed as punishment for the unclassified crime, or both. If the crime attempted is punishable by an indeterminate or life term, the attempt is a class A felony. (§ 2 ch 166 SLA 1978; am § 1 ch 102 SLA 1980; am § 10 ch 45 SLA 1982; am § 1 ch 59 SLA 1988)

v. State, 600 P.2d 12 (Alaska Ct. App. 1979).

Conviction and sentence upheld. — See Andrejko v. State, 695 P.2d 246 (Alaska Ct. App. 1985).

Convictions reversed because of erroneous jury instruction. — Convictions for attempted sexual assault in the first degree and kidnapping were reversed because of an erroneous jury instruction on sexual assault in the first degree concerning consent. The correct standard is whether the defendant recklessly disregarded the victim's lack of consent. Laseter v. State, 684 P.2d 139 (Alaska Ct. App. 1984).

Sentence upheld. — See Bowie v. State, 494 P.2d 800 (Alaska 1972); Spearman v. State, 543 P.2d 202 (Alaska 1975); Braham v. State, 571 P.2d 631 (Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978); Johnson v. State, 580 P.2d 700 (Alaska 1978); Ferguson v. State, 590 P.2d 43 (Alaska 1979); Morris v. State, 592 P.2d 1244 (Alaska 1979); Ramil v. State, 619 P.2d 722 (Alaska 1980); Travelstead v. State, 689 P.2d 494 (Alaska 1984); Schnecker v. State, 739 P.2d 1310 (Alaska Ct. App. 1987).

Sentence for attempted first degree murder upheld. — See Staael v. State, 718 P.2d 948 (Alaska 1986).

Conviction of attempted first-degree sexual assault affirmed. — Conviction of attempted sexual assault on the first degree under AS 11.41.410 as it read before the 1983 amendment and this section was affirmed. Sexual charges based on non-consensual genital intercourse do not require proof of a specific sexual intent, and plain error was not established though the prosecutor's expressions which might have been construed as a personal opinion of the guilt of the defendant or an argument relating to a defendant's need for treatment were improper and uninvited. Potts v. State, 712 P.2d 385 (Alaska Ct. App. 1985).

Sentence under former AS 11.41.410(b) and this section held excessive. — See Bolhouse v. State, 687 P.2d 1166 (Alaska Ct. App. 1984).

Sentence held excessive. — See Hansen v. State, 657 P.2d 862 (Alaska Ct. App. 1983).

Applied in Nicholson v. State, 656 P.2d 1209 (Alaska Ct. App. 1982); Patterson v. State, 732 P.2d 1102 (Alaska Ct. App. 1987); Allen v. State, 769 P.2d 457 (Alaska Ct. App. 1989).

Stated in State v. Silas, 595 P.2d 651 (Alaska 1979); Ramil v. State, 619 P.2d 722 (Alaska 1980); Coleman v. State, 621 P.2d 869 (Alaska 1980); Clark v. State, 645 P.2d 1236 (Alaska Ct. App. 1982); Tazruk v. State, 655 P.2d 788 (Alaska Ct. App. 1982); Velez v. State, 762 P.2d 1297 (Alaska Ct. App. 1988).

Cited in Handley v. State, 615 P.2d 627 (Alaska 1980); Walker v. State, 662 P.2d 948 (Alaska Ct. App. 1983); Bell v. State, 668 P.2d 829 (Alaska Ct. App. 1983); Brower v. State, 683 P.2d 290 (Alaska Ct. App. 1984); Hart v. State, 702 P.2d 651 (Alaska Ct. App. 1985); Chief v. State, 718 P.2d 475 (Alaska Ct. App. 1986); Hastings v. State, 736 P.2d 1157 (Alaska Ct. App. 1987); James v. State, 739 P.2d 1314 (Alaska Ct. App. 1987); Stevens v. State, 748 P.2d 771 (Alaska Ct. App. 1988); James v. State, 754 P.2d 1336 (Alaska Ct. App. 1988); Ervin v. State, 761 P.2d 124 (Alaska Ct. App. 1988); Robison v. State, 763 P.2d 1357 (Alaska Ct. App. 1988); Konrad v. State, 763 P.2d 1369 (Alaska Ct. App. 1988); Lawrence v. State, 764 P.2d 318 (Alaska Ct. App. 1988).

Sec. 11.31.110. Solicitation. (a) A person commits the crime of solicitation if, with intent to cause another to engage in conduct constituting a crime, the person solicits the other to engage in that conduct.

(b) In a prosecution under this section,

(1) it is not a defense

(A) that the defendant belongs to a class of persons who by definition are legally incapable in an individual capacity of committing the crime that is the object of the solicitation; or

(B) that a person whom the defendant solicits could not be guilty of the crime that is the object of the solicitation;

(2) it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, after soliciting another person to engage in conduct constituting a crime, prevented the commission of the crime.

(c) Solicitation is a

(1) class A felony if the crime solicited is an unclassified felony;

(2) class B felony if the crime solicited is a class A felony;

(3) class C felony if the crime solicited is a class B felony;

(4) class A misdemeanor if the crime solicited is a class C felony;

(5) class B misdemeanor if the crime solicited is a class A or class B misdemeanor.

(d) If the crime solicited is an unclassified crime described in a state law which is not part of this title and no provision for punishment of a solicitation to commit the crime is specified, the punishment for the solicitation is imprisonment for a term of not more than half the maximum period prescribed as punishment for the unclassified crime, or a fine of not more than half the maximum fine prescribed as punishment for the unclassified crime, or both. If the crime solicited is punishable by an indeterminate or life term, the solicitation is a class A felony. (§ 2 ch 166 SLA 1978; am § 2 ch 102 SLA 1980; am § 11 ch 45 SLA 1982)

Cross references. — For legislative purpose of ch. 45, SLA 1982, see § 1, ch. 45, SLA 1982, in the Temporary and Special Acts; for legal accountability based on the conduct of another and complicity, see AS 11.16.110.

Legislative history reports. — For a report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980, or 1980 House Journal Supplement, No. 79, May 28, 1980.

NOTES TO DECISIONS

Former law construed. — See McConkey v. State, 504 P.2d 823 (Alaska 1972); Cassell v. State, 645 P.2d 219 (Alaska Ct. App. 1982). (Decided under former AS 11.10.070.)

One contracting with another to kill a third person was guilty of attempted first-degree murder, not solicitation. — See Braham v. State, 571 P.2d 631 (Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978).

Quoted in Sullivan v. State, 766 P.2d 51 (Alaska Ct. App. 1988).

Cited in Hoover v. State, 641 P.2d 1263 (Alaska Ct. App. 1982); P.S. v. State, 655 P.2d 1319 (Alaska Ct. App. 1982); Monroe v. State, 752 P.2d 1017 (Alaska Ct. App. 1988).

Sec. 11.31.140. Multiple convictions barred. (a) It is not a defense to a prosecution under AS 11.31.100 or AS 11.31.110 that the crime that is the object of the attempt or solicitation was actually committed pursuant to the attempt or solicitation.

(b) A person may not be convicted of more than one crime defined by AS 11.31.100 or AS 11.31.110 for conduct designed to commit or culminate in commission of the same crime.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

M E M O R A N D U M March 2, 1989

SUBJECT: An Act defining the crime of conspiracy -- sectional analysis HB 20

TO: Representative Dave Donley

FROM: Jack Chenoweth
Legislative Counsel

The accompanying bill, a variant of last session's House Bill 30, applies with reference to offenses in two categories, trafficking in controlled substances through purchase and sale or delivery of illicit drugs, and prostitution and the promotion of prostitution.

* * *

Bill section 1 adds two new sections that together set out the principal substantive provisions of the crime of conspiracy as applicable to the two categories of criminal offense.

*

Proposed AS 11.31.120(a) defines the crime. It follows the Model Penal Code suggestion by basing the definition on a finding that the offender has agreed with at least one other person to engage in or perform the offense. It also incorporates two related requirements, the first that the agreement be communicated, and the second that one of the parties shall have performed an overt act in furtherance of the offense.

*

Proposed AS 11.31.120(b) speaks to the dimension of the crime of conspiracy as it relates to the participating parties. This subsection broadens the conspiracy net to include persons with whom the offender knows that his or her

co-conspirator conspired, although the offender may not know the exact identities of these persons.

*

Following the Model Penal Code's suggested format, proposed AS 11.31.120(c) identifies certain defenses that a person charged as a conspirator may not claim. Specifically enumerated are instances in which the defendant may not claim as a defense the defender's individual incapacity or immunity from criminal responsibility for conduct that constitutes an offense, and instances in which the defendant asserts as a defense a co-conspirator's incapacity or immunity from criminal responsibility for any of the reasons specified in the second paragraph. These provisions are included in recognition of the legal basis for the definition of the conspiracy, that is, the evidence of the defendant's agreement and purpose to commit a crime, notwithstanding a party's legal incapacity or immunity.

*

An ongoing question related to the crime of conspiracy involves its applicability to instances involving crimes that, by their definition, require the efforts of at least two people. (Adultery and bigamy are typically used as examples, but delivery of controlled substances is an equally valid example.) In jurisdictions that follow a common law-based conspiracy provision, the courts have fashioned and typically apply something called the "Wharton Rule." Under the Wharton Rule, a person may not be charged with or convicted of conspiracy if only the minimum number of parties necessary for commission of the substantive offense had agreed to its commission. The effect of the Wharton Rule is to shield from a prosecution for conspiracy both parties to a crime that, by definition, required the concerted action of these two persons.

In conjunction with analysis and discussion of the Wharton Rule, AS 11.31.120(d) exempts from criminal liability for conspiracy a defendant "who would not be legally accountable under AS 11.16.120(b) for the conduct of the person with whom the defendant conspired." The purpose of the provision is to assure that a person who would not be criminally liable as a party if a crime was completed would not be liable for conspiracy when the crime is not completed. The cross-referenced provision, AS 11.16.120(b), states:

> Except as otherwise provided by a provision of law defining an offense, a person is not legally accountable for the conduct of another constituting an offense if
>
> . . .
>
> (2) the offense is so defined that the person's conduct is inevitably incidental to its commission.

As that existing provision may be applied, this office has previously advised that AS 11.16.120(b)(2) would, when read with proposed AS 11.31.120(d), provide a defendant a defense to a prosecution for conspiracy for purchase of a controlled substance. The opinion rested on the finding that the conduct of the purchaser was "inevitably incidental" to the commission of the offense, and thereby brought within that defense. In other words, as with the court-fashioned Wharton Rule, reading the existing statute and proposed AS 11.31.120(d) together, I conclude that one could not be successfully prosecuted, for example, for both the delivery of the controlled substance (under AS 11.71.010 - 11.71.050) and for the conspiracy to deliver a controlled substance. In other words, one could not be convicted for both the criminal object crime and the agreement to commit it.

*

Following the Model Penal Code example, these proposed conspiracy provisions are defined on a "unilateral" basis: that is, the crime is defined with reference to the criminal behavior of the individual, and of that individual's agreement, rather than resting the definition on a mutual decision. Still, a distinguishing element of conspiracy is the presence of an agreement. Proposed AS 11.31.120(e) is intended to set up an affirmative defense to cover the situation in which the individual enters into agreement with only one other person and it is found that the second party is a law enforcement officer or similar person whose involvement in the conspiracy was to obtain evidence of criminal activity. The section is intended to be responsive to your concern that the conspiracy provision not operate when the only second party involvement was that of a law enforcement officer acting consistent with the officer's law enforcement duties.

*

Typically, conspiracy statutes generally define a duration to the conspiracy, and specify the conditions or circumstances under which an offender may withdraw from the conspiracy. Following, generally, the Model Penal Code example, proposed AS 11.31.120(f) serves that purpose. The requirement in this statute is, of course, that the withdrawal shall have been timely communicated to a law enforcement official so that law enforcement authorities, "reasonably acting on the warning," have opportunity to prevent commission of the crime.

*

A chapter of the state's criminal code, AS 11.16, sets out provisions prescribing legal accountability -- individually, for the conduct of another, and for an organization -- and enumerate exemptions by way of affirmative defense. Proposed AS 11.31.120(g) provides that the requirements and exceptions of AS 11.16 are made specifically applicable to ascertain and define the criminal liability of the conspirator as to the offenses that are committed in furtherance of the conspiracy.

*

Proposed AS 11.31.120(h) classifies the crime of conspiracy for purposes of imposition of sentence.

*

Another element bearing upon conspiracy prosecutions is, of course, the statute of limitations applicable to initiation of prosecution under the conspiracy statute. Because conspiracy is defined as a "continuing course of conduct" subject to termination as specified by law, it is often critical to know, and difficult to ascertain with certainty, the time at which a conspiracy ceases. The language provided in proposed AS 11.31.125, based on the Model Penal Code example, is an attempt to specify with a degree of certainty the durational element of the conspiracy.

In context, the events or circumstances specified in the section seem straightforward.

* * *

Bill sections 2 and 3 amend and add to provisions of current law that limit multiple convictions for the inchoate crime and for the related, substantive crime.

Given the generally consistent treatment afforded to conspiracies, attempts, and solicitations, the amendments made in bill section 2 serve the purpose of applying the same limitations to the crime of conspiracy to deliver a controlled substance as are currently applicable to the crimes of attempt and solicitation. These provisions address in turn: denial of a defense in a prosecution for the inchoate crime for completion of the objective crime [subsection (a)]; a limitation on multiple convictions "for conduct" that was "designed to commit or culminate in commission of the same crime" [subsection (b)]; a limitation on conviction predicated on the same course of conduct under the inchoate criminal provision and for successful completion of the object crime [subsection (c)]; and a provision specifically permitting prosecution of multiple counts on a single information or indictment [subsection (d)].

The inclusion of material in bill section 3 stands for the proposition that various offenses that are the product of a continuous relationship between the parties are part of a single conspiracy and should be so treated. This section is predicated on the assumption that multiple criminal objectives do not necessarily presume multiple conspiracies. The provision, critics note, merely codifies existing case law. See Braverman v. United States, 317 U.S. 49, 87 L.Ed. 23, 63 S.Ct. 99 (1942).

JC:kb
WKK2/087

Enclosure

STATE OF ALASKA
1990 LEGISLATIVE SESSION

Bill Version: HB 20
Publish Date: 1/9/89

FISCAL NOTE

REQUEST:

Revision Date:
Agency Affected: Alaska Court System
Title: An Act relating the crime of conspiracy
BRU: Trial Courts
Sponsor: Donley, Gruenberg, Boucher, ...
Components:
Requestor: Judiciary

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel
Phone: 264-8228
Division: Alaska Court System
Date: 01/02/90

Approved by: Stephanie Cole, for Arthur H. Snowden, II, Administrative Director
Date: 01/02/90
Agency: Alaska Court System

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management & Budget
Impacted Agency(ies)

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: HB 20
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: January 9, 1990
Title: "An Act relating to the crime of conspiracy."
Sponsor: Repr. Donley
Requestor: House Judiciary

Agency Affected: Department of Law
BRU: Prosecution
Components: Third Judicial District

EXPENDITURES/REVENUES (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	149.1	153.6	158.2	162.9	167.8	172.8
TRAVEL	10.8	11.1	11.4	11.7	12.1	12.5
CONTRACTUAL	17.4	17.9	18.4	19.0	19.6	20.2
SUPPLIES	11.4	11.7	12.1	12.5	12.9	13.3
EQUIPMENT	17.0	-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	206.2	194.3	200.1	206.1	212.4	218.8
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	206.2	194.3	200.1	206.1	212.4	218.8
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	3.0	3.0	3.0	3.0	3.0	3.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

There are no changes in the Department of Law's fiscal note for HB 20, which was originally transmitted on January 30, 1989, and is herewith attached.

Richard L. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services
Date: January 9, 1990

Richard L. Pegues /FOR/
Approved by Commissioner: Douglas B. Baily, Attorney General
Date: January 9, 1990
Agency: Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 20

This bill makes it a crime for two or more persons to "conspire" together to violate state or municipal laws regarding drugs and prostitution. The bill allows persons to be prosecuted for conspiracy, even though the crime that was the object of a conspiracy was neither attempted nor completed.

Given the limits set by the bill, and the broad authority provided by existing law for the prosecution of persons involved in drug trafficking, enforcement activities undertaken as a result of this bill will be complicated and expensive. The focus of enforcement actions taken under this bill will be on major narcotics rings.

Investigation and prosecution of large-scale drug cases is extremely time-consuming and labor intensive. Major narcotics rings are carefully planned and organized, and it requires at least the same degree of planning and organization to detect, investigate, infiltrate, and ultimately break the rings. A conspiracy law will not decrease the amount of work involved in pursuing drug traffickers, rather conspiracy prosecutions will require the investment of significant time and effort on the part of state prosecutors. In addition, a conspiracy law will not cure the problematic and expensive practice of granting separate trials to co-defendants.

A good example of the complexities involved in prosecuting drug traffickers in the single big drug case that the state was able to pursue in FY85 -- the "Black Gold" heroin ring in Anchorage. the case involved 29 separate individuals (most charged with selling heroin), almost all of whom were granted separate trials, thus creating 29 cases out of a single operation. The "Black Gold" investigation required the "full-time" (12 hours a day, 6 or 7 days a week) direction and legal assistance of two experienced prosecutors for over two months. In addition to obtaining over 25 search warrants, the prosecutors, on a daily (and sometimes hourly) bases, consulted with and guided the efforts of three teams of officers: a "surveillance" team varying from 10-20 officers who kept track of the members of the ring; a "buy" team of 4-8 officers working closely with informants to purchase narcotics; and an "investigation" team of 2-6 officers who compiled telephone records and other evidence in order to discover links between individuals and organizations.

Under a conspiracy law, the scope of enforcement authority would be expanded to include more persons involved in the ring, leading to larger and more complicated investigations and prosecutions. Considering the sophistication of narcotics traffickers, and the efforts that would be necessary to implement a conspiracy law, the Department of Law believes that it will need the dedicated services of at least a full-time attorney, a paralegal, and a secretary in the Anchorage District Attorney's Office.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 20

	Atty IV	P/A II	Leg. Sec. I	Total
71000	73.2	44.3	31.6	149.1
72000	5.4	5.4	-0-	10.8
73000	6.6	6.6	4.2	17.4
74000	4.2	4.2	3.0	11.4
75000	6.5	2.5	8.5	17.5
Total	95.9	63.0	47.3	206.2

Costs beyond FY91 include a 3% annual inflation factor, less one-time equipment costs.

	POSITION TITLE				RANGE/STEP	BARG. UNIT	PAGE/LINE	COV.	APPROV.	DISAPP
1.	Attorney IV				24A	PX				
	TYPE OF POSITION	STAFF MONTHS	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION	ELECTION DISTRICT	LEG.		
2.	PFT	12				EBA-Anchorage	8			

3.	CONTINUATION LEVEL		ADDITION	
4.	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
	PERSONAL SERVICES		
5.	Salary	56,244	
6.	Benefits	8,903	
7.	Supplemental Benefits	3,396	
8.	Fixed Benefits	4,694	
9.	TOTAL PERSONAL SERVICES 01		73,237
10.	Travel 02		5,400
11.	Contractual 03		6,600
12.	Commodities 04		4,200
13.	Equipment 05		6,500
14.	Other		
15.	TOTAL COST		95,937

	RECEIPT CODE	FUNDING SOURCE	
16.		Federal Receipts 1002	
17.		C.F. Match 1003	
18.		General Funds 1004	95,937
19.		I-A Receipts 1005	
20.		Program Receipts 1028	
21.		Other	

FOR B&M USE ONLY
KEY NUMBER - - - - -

JUSTIFICATION:

This is the first of three positions that will be needed to provide prosecution services of defendants who conspire to violate state and municipal laws regarding drugs and prostitution. Investigation and prosecution of large-scale drug trafficking cases and prostitution rings is extremely time consuming and labor intensive and will require a minimum of two attorneys. Allocation to the full-working level of Attorney IV for this position is recommended because of the seriousness of the crimes being prosecuted.

REQUEST FOR NEW POSITION

AGENCY Department of Law

BRU Prosecution

COMPONENT Third Judicial District

Revised Date

FY 91

1.	POSITION TITLE: Paralegal Assistant II				RANGE/STEP: 16A	BARG. UNIT: GGU	PAGE/LINE	GOV.	APPROV.	DISAPP
2.	TYPE OF POSITION: PFT	STAFF MONTHS: 12	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION: EBA-Anchorage	ELECTION DISTRICT: 8	LEG.		
3.	CONTINUATION LEVEL		ADDITION							

4.	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
	PERSONAL SERVICES		
5.	Salary	32,424	
6.	Benefits	5,133	
7.	Supplemental Benefits	2,098	
8.	Fixed Benefits	4,644	
9.	TOTAL PERSONAL SERVICES	01	44,299
10.	Travel	02	5,400
11.	Contractual	03	6,600
12.	Commodities	04	4,200
13.	Equipment	05	2,500
14.	Other		
15.	TOTAL COST		62,999

	RECEIPT CODE	FUNDING SOURCE	
16.		Federal Receipts 1002	
17.		G.F. Match 1003	
18.		General Funds 1004	62,999
19.		I-A Receipts 1005	
20.		Program Receipts 1028	
21.		Other	

FOR B&M USE ONLY
KEY NUMBER - - - - -

JUSTIFICATION:

This is the second of three positions that will be needed to provide prosecution services of defendants who conspire to violate state and municipal laws regarding drugs and prostitution. Investigation and prosecution of large-scale drug trafficking cases and prostitution rings is extremely time consuming and labor intensive and will require the services of a skilled paraprofessional in the preparation of evidence. Allocation to the Paralegal Assistant II, full-working level is recommended.

REQUEST FOR NEW POSITION

AGENCY: Department of Law

BRU: Prosecution

COMPONENT: Third Judicial District

Revised Date

FY 91

1.	POSITION TITLE	Legal Secretary I			RANGE/STEP	BARG. UNIT	PACE/LINE	COV.	APPROV.	DISAPP
					10A	GGU				
2.	TYPE OF POSITION	STAFF MONTHS	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION	ELECTION DISTRICT	LEG.		
	PFT	12				EBA-Anchorage	8			

3.	CONTINUATION LEVEL		ADDITION		
4.	TYPE OF EXPENDITURE				AMOUNT
	1		2		3
	PERSONAL SERVICES				
5.	Salary		22,020		
6.	Benefits		3,486		
7.	Supplemental Benefits		1,425		
8.	Fixed Benefits		4,644		
9.	TOTAL PERSONAL SERVICES			01	31,575
10.	Travel			02	-0-
11.	Contractual			03	4,200
12.	Commodities			04	3,000
13.	Equipment			05	8,500
14.	Other				
15.	TOTAL COST				47,275

	RECEIPT CODE	FUNDING SOURCE		
16.		Federal Receipts	1002	
17.		G.F. Match	1003	
18.		General Funds	1004	47,275
19.		I-A Receipts	1005	
20.		Program Receipts	1028	
21.		Other		

FOR B&M USE ONLY
KEY NUMBER - - - - -

JUSTIFICATION:

This is the third of three positions that will be needed to provide prosecution services of defendants who conspire to violate state and municipal laws regarding drugs and prostitution. Investigation and prosecution of large-scale drug trafficking cases and prostitution rings is extremely time consuming and labor intensive and generates substantial legal documentation, including: search warrants, subpoenas, motions, affidavits and legal memoranda. Consequently, full-time secretarial services will be required. Allocation to the Legal Secretary I level is recommended in view of the heavy documentation load.

REQUEST FOR NEW POSITION

AGENCY Department of Law

BRU Prosecution

COMPONENT Third Judicial District

FY 91

Revised Date

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: HB 20
PUBLISH DATE:

FISCAL NOTE

REQUEST:

Revision Date: 1-8-90
Title: An Act relating to the crime of conspiracy
Sponsor: Representative Donley, etc.
Requestor: House Judiciary

Agency Affected: Public Safety
BRU: Alaska State Troopers
Component: Criminal Investigation Bureau

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not included)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER/PROG RCPT						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Although there may be some increase in law enforcement investigations and prosecutions as a result of this bill, it is anticipated that this impact could be absorbed within the existing workforce.

Prepared by: Francis C. Allan
Division: Alaska State Troopers
Phone: 269-5691
Date: 12/19/89

1/8/90

Approved by Commissioner: Arthur English
Agency: Department of Public Safety
Date: 1-8-90

6-0134M
Chenoweth
3/13/90

Original sponsor(s): REP. DONLEY, Gruenberg, Boucher, Collins, Hudson, Swackhammer, Grussendorf, Leman, Barnes, Zawacki

IN THE HOUSE

CS FOR HOUSE BILL NO. 20 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act amending Rule 8(b) and Rule 14 of the Alaska Rules of Criminal Procedure to facilitate joint trials of multiple defendants and joint charges in criminal prosecutions and amending Rule 404(b)(1) of the Alaska Rules of Evidence as applicable to civil actions and criminal prosecutions."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. PURPOSE. (a) The rules governing joinder of two or more defendants at the same trial are different than the rules for joinder of offenses because joinder is governed by a different section of Criminal Rule 8 of the Alaska Rules of Criminal Procedure. Under Rules 8(b) and 13, defendants may be tried together "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." However, in Greiner v. State, 741 P.2d 662 (Alaska App. 1987), the Alaska Court of Appeals held that evidence that codefendants "were willing to sell drugs and were well-acquainted and cooperated with each other in the individual sale of drugs" was insufficient to show the existence of a conspiracy, joint venture, or common scheme or plan. The amendment of Rule 8(b), Alaska Rules of Criminal Procedure, made by sec. 2 of this Act, overrules Greiner v. State and allows a tacit joint venture to be proven by circumstantial evidence.

(b) Rule 14 of the Alaska Rules of Criminal Procedure vests the trial court with discretion to sever counts if joinder unfairly prejudices the defendant. The Alaska Court of Appeals has held that a defendant is

prejudiced unless the evidence of the joined offenses is completely mutually cross-admissible (that is, the evidence of crime A is admissible at a trial on crime B and the evidence of crime B is admissible at a trial on crime A). Velez v. State, 762 P.2d 1297 (Alaska App. 1988). However, mutual cross-admissibility is not required under federal law. United States v. Harper, 680 F.2d 731, 734 (11th Cir.), cert. denied, 459 U.S. 916, 103 S.Ct. 229, 74 L.Ed.2d 182 (1982); United States v. Jamar, 561 F.2d 1103, 1107 - 1108 n.8 (4th Cir. 1977). This difference in interpretation means that more cases are severed in Alaska courts than in federal courts. The amendment of Criminal Rule 14 made by sec. 3 of this Act expressly provides that a showing that evidence of similar offenses is not completely and mutually cross-admissible is insufficient, by itself, as a reason to grant severance.

(c) State courts treat Rule 404(b), Alaska Rules of Evidence, as a rule of exclusion. Evidence is presumed prejudicial and inadmissible even if it is relevant to an issue at trial. Lerchenstein v. State, 697 P.2d 312, 315, and 318, n.2 (Alaska App. 1985), aff'd., State v. Lerchenstein, 726 P.2d 546 (Alaska 1986); Oksoktaruk v. State, 611 P.2d 521, 524 (Alaska 1980). The amendment of Rule 404(b)(1), Alaska Rules of Evidence, made by sec. 4 of this Act, changes the state court rule applicable in an action or proceeding to make it one of inclusion, and to establish that the nonpropensity purposes listed in the rule are not inclusive and that evidence can be admitted if it is relevant to a purpose not listed in the rule.

* Sec. 2. Rule 8(b), Alaska Rules of Criminal Procedure, is amended to read:

(b) JOINDER OF DEFENDANTS. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or if the

defendants are parties to an express or tacit agreement to aid each other to commit an act or transaction constituting a criminal offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count. The disposition of the indictment or information as to one of several defendants joined in the same indictment or information shall not affect the right of the state to proceed against the other defendants.

* Sec. 3. Rule 14, Alaska Rules of Criminal Procedure, is amended to read:

RULE 14. RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is unfairly prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. A showing that evidence of one offense would not be admissible during a separate trial of a joined offense or a codefendant does not constitute prejudice that warrants relief under this rule. In ruling on a motion by a defendant for severance the court may order the attorney for the state to deliver to the court for inspection in camera any statements or confessions made by the defendants which the state intends to introduce at trial.

* Sec. 4. Rule 404(b)(1), Alaska Rules of Evidence, is amended to read:

(1) Evidence of other crimes, wrongs, or acts is not admissible if the sole purpose for offering the evidence is to prove the character of a person in order to show that the person [HE] acted in conformity therewith. It is [MAY], however, [BE] admissible for other purposes, including, but not limited to, [SUCH AS] proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or

absence of mistake or accident.

6-0134M
Chenowe.h
2/3/90

Original sponsor(s): REP. DONLEY, Gruenberg, Boucher, Collins, Hudson, Swackhammer, Grussendorf, Leman, Barnes, Zawacki

IN THE HOUSE

CS FOR HOUSE BILL NO. 20 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act amending Rule 8(b) and Rule 14 of the Alaska Rules of Criminal Procedure to facilitate joint trials of multiple defendants and joint charges in criminal prosecutions and amending Rule 404(b)(1) of the Alaska Rules of Evidence as applicable to criminal prosecutions."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. PURPOSE. (a) The rules governing joinder of two or more defendants at the same trial are different than the rules for joinder of offenses because joinder is governed by a different section of Criminal Rule 8 of the Alaska Rules of Criminal Procedure. Under Rules 8(b) and 13, defendants may be tried together "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." However, in Greiner v. State, 741 P.2d 662 (Alaska App. 1987), the Alaska Court of Appeals held that evidence that codefendants "were willing to sell drugs and were well-acquainted and cooperated with each other in the individual sale of drugs" was insufficient to show the existence of a conspiracy, joint venture, or common scheme or plan. The amendment of Rule 8(b), Alaska Rules of Criminal Procedure, made by sec. 2 of this Act, overrules Greiner v. State and allows a tacit joint venture to be proven by circumstantial evidence.

(b) Rule 14 of the Alaska Rules of Criminal Procedure vests the trial court with discretion to sever counts if joinder unfairly prejudices the defendant. The Alaska Court of Appeals has held that a defendant is

prejudiced unless the evidence of the joined offenses is completely mutually cross-admissible (that is, the evidence of crime A is admissible at a trial on crime B and the evidence of crime B is admissible at a trial on crime A). Velez v. State, 762 P.2d 1297 (Alaska App. 1988). However, mutual cross-admissibility is not required under federal law. United States v. Harper, 680 F.2d 731, 734 (11th Cir.), cert. denied, 459 U.S. 916, 103 S.Ct. 229, 74 L.Ed.2d 182 (1982); United States v. Jamar, 561 F.2d 1103, 1107 - 1108 n.8 (4th Cir. 1977). This difference in interpretation means that more cases are severed in Alaska courts than in federal courts. The amendment of Criminal Rule 14 made by sec. 3 of this Act expressly provides that a showing that evidence of similar offenses is not completely and mutually cross-admissible is insufficient, by itself, as a reason to grant severance.

(c) State courts treat Rule 404(b), Alaska Rules of Evidence, as a rule of exclusion. Evidence is presumed prejudicial and inadmissible even if it is relevant to an issue at trial. Lerchenstein v. State, 697 P.2d 312, 315, and 318, n.2 (Alaska App. 1985), aff'd., State v. Lerchenstein, 726 P.2d 546 (Alaska 1986); Oksoktaruk v. State, 611 P.2d 521, 524 (Alaska 1980). In Lerchenstein, the court explained that, "The exclusionary provision of Evidence Rule 404(b) represents the 'presumption in our law that the prejudicial effect of introducing a prior crime outweighs what probative value may exist with regard to propensity. No case by case balancing is permitted.'" 697 P.2d at 315. The state courts want evidence of other crimes to fit into the uses specifically set out in Evidence Rule 404(b). If the evidence is not relevant to one of these expressly stated purposes, state courts will generally find it inadmissible. In contrast, federal courts treat the comparable federal rule as a rule of inclusion and are more willing to admit evidence of other charged acts when weighing the probative value of the evidence against the danger of unfair prejudice,

generally allowing admissibility of the evidence for a nonpropensity purpose. The amendment of Rule 404(b)(1), Alaska Rules of Evidence, made by sec. 4 of this Act, changes the state court rule applicable in a criminal action or proceeding to make it one of inclusion and to establish that the nonpropensity purposes listed in the rule are not inclusive and that evidence can be admitted if it is relevant to a purpose not listed in the rule.

* Sec. 2. Rule 8(b), Alaska Rules of Criminal Procedure, is amended to read:

(b) JOINDER OF DEFENDANTS. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or if the defendants are parties to an express or tacit agreement to aid each other to commit an act or transaction constituting a criminal offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count. The disposition of the indictment or information as to one of several defendants joined in the same indictment or information shall not affect the right of the state to proceed against the other defendants.

* Sec. 3. Rule 14, Alaska Rules of Criminal Procedure, is amended to read:

RULE 14. RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is unfairly prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. A showing that evidence of one offense would

not be admissible during a separate trial of a joined offense or a codefendant does not constitute prejudice that warrants relief under this rule. In ruling on a motion by a defendant for severance the court may order the attorney for the state to deliver to the court for inspection in camera any statements or confessions made by the defendants which the state intends to introduce at trial.

* Sec. 4. Rule 404(b)(1), Alaska Rules of Evidence, is amended to read:

(1) In a civil action, evidence [EVIDENCE] of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person [HE] acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In a criminal action or proceeding, evidence of other crimes, wrongs, or acts is not admissible if the sole purpose for offering the evidence is to prove the character of a person in order to show that the person acted in conformity therewith. The evidence is, however, admissible for other purposes, including but not limited to proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

REPRESENTATIVE DAVE DONLEY

ALASKA STATE LEGISLATURE
DISTRICT ELEVEN • SPENARD
SEAT A
HEATHER MEADOWS • NORTHWOOD • SPENARD • THOMPSON • TURNAGAIN • UPPER MIDTOWN • WINDEMERE

3111 "C" STREET, SUITE 450
ANCHORAGE, ALASKA 99503
(907) 561-7629

CHAIRMAN
LABOR AND COMMERCE COMMITTEE

MEMBER
STATE AFFAIRS COMMITTEE
HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE
HOUSING AND BANKING SUBCOMMITTEE
FINANCE BUDGET SUBCOMMITTEE
DEPT OF COMMERCE AND ECONOMIC DEVELOPMENT

April 25, 1989

M E M O R A N D U M

TO: Representative Max Gruenberg, Co-Chair
Judiciary Committee

Representative Peter Goll, Co-Chair
Judiciary Committee

FROM: Representative Dave Donley DD

RE: Scheduling HB 20

I would like to request that you schedule House Bill 20, "an act relating to the crime of conspiracy to commit murder and to deliver certain controlled substances," for a hearing at your earliest convenience.

Alaska is the only state without a conspiracy law. House Bill 20 will create such a conspiracy law directed against the crimes of murder and the delivery of controlled substances. Under existing law, our law enforcement officials have great difficulty in pursuing organizers and financial backers for these crimes. Using a conspiracy law, police officers can effectively pursue a person who has conspired to commit a crime and has taken further steps toward completion of the offense. This bill will allow police officers to apprehend those who insulate themselves from direct involvement but are nevertheless the backbone of such criminal activities.

This legislation has been supported by the Alaska Chiefs of Police Association and the Anchorage Chamber of Commerce Crime Commission. If you have any questions, please don't hesitate to contact me or my aide, Diana Rhoades.

Thank you for your cooperation.

JUNEAU OFFICE (During Legislative Session)
P.O. BOX V, JUNEAU, ALASKA 99811 • (907) 465-3892

6-0134P
Chenoweth
4/5/90

Original sponsor(s): REP. DONLEY, Gruenberg, Boucher, Collins, Hudson, Swackhammer, Grussendorf, Leman, Barnes, Zawacki

IN THE HOUSE

CS FOR HOUSE BILL NO. 20 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act amending Rule 404(b)(1) of the Alaska Rules of Evidence as applicable to civil actions and criminal prosecutions."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. PURPOSE. Rule 404(b)(1) of the Alaska Rules of Evidence is amended to clarify that evidence of other crimes, wrongs, and acts is admissible for nonpropensity purposes. The defendant's knowledge of the victim's lack of consent is added to the list of examples of permissible uses of nonpropensity evidence. The purpose of the amendment made by sec. 2 of this Act is to disapprove the result of Velez v. State, 762 P.2d 1297 (Alaska App. 1988) and Lerchenstein v. State, 697 P.2d 312, 315, 316 (Alaska App. 1985), aff'd., State v. Lerchenstein, 726 P.2d 546 (Alaska 1986).

* Sec. 2. Rule 404(b)(1), Alaska Rules of Evidence, is amended to read:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, <u>including, but not limited to,</u> [SUCH AS] proof of motive, opportunity, intent, preparation, plan, knowledge, identity, [OR] absence of mistake or accident<u>, or a person's knowledge of his victim's lack of consent</u>.