

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
5294 SJUD SB 19 - SB 27

868

2. Other Expenditures:

a) Travel: None.

b) Contractual:

Add additional page to permanent fund dividend booklet \$6.0

Data Processing Chargeback \$5.0

TOTAL Contractual \$11.0

c) Supplies: \$0.2

d) Equipment: Use existing equipment 0.0

TOTAL COST \$39.4

3. Funding: General Fund.

4. Section Cost Analysis: N/A.

Computations: N/A.

Economic Impact: N/A.

Impact on Local Government: N/A.

Suggested Amendments:

It is suggested that P. 3, line 12-16 be amended to read:

"Sec. 37.14.210 CONTRIBUTION TO THE ALASKA CHILDREN'S TRUST FUND. The Department of Revenue shall prepare the permanent fund dividend application to allow an applicant to contribute [ALL OR A PART OF A DIVIDEND] \$5.00 to the Alaska children's trust fund. The department shall pay contributions directly to the fund."

The dollar amount of the contribution is unimportant to the administration of the PFD program, as long as it is fixed in amount and is less than the expected dividend. Allowing applicants to write in a unique dollar amount, or a unique percentage will render the timely balancing of warrant runs almost impossible and will result in errors due to legibility and resultant data capture errors. Due to this likelihood of error and the significant impact of such an error, each application with such a contribution indication will be verified (keyed twice). Offering this type of open choice will have a definite negative effect on the processing of all 540,000 PFD checks.

Attachments: Attachment A: "Summary of DP Needs"

Department of Revenue
Administrative Services Division
Fiscal Note Analysis
SS SB 19
Summary of Data Processing Requirements
3/23/87

Wang data entry processing	75.0 hours
Includes:	Data entry Batch lists Corrections Wang to IBM transfer
IBM Update jobs	30.0 hours
Includes:	Edits Batch listings Log sheets
DMS Online programs for lookup and changes	37.5 hours
Nightly Update of Changes	22.5 hours
Warrant Jobs	90.0 hours
Includes:	Printing warrants with different amounts. Include check stub messages. Modify warrant registers as needed for balancing. Create new program(s) for transferring accumulated contributions to the Alaska Children's Trust Fund, and to account for the reserve necessary due to returned and cancelled PFD warrants.
Miscellaneous	45.0 hours
Includes:	Setting up test files on IBM Systems testing Administrative functions, i.e. paper work required by Admin. DP to add files and programs to tables.
TOTAL HOURS	300.0 hours

SB

27

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

January 22, 1987

SUBJECT: Sectional analysis of SB 27, relating to
conspiracy

TO: Senator Jalmar Kerttula
Chairman, Senate Judiciary Committee

FROM: Keith B. Levy ^{KBL}
Legislative Counsel

The following is a sectional analysis of SB 27, relating to the crime of conspiracy.

Section 1 adds new sections to the law establishing the crime of conspiracy, which is not currently an offense in Alaska. AS 11.31.120(a) sets out the elements of the crime. To be guilty of conspiracy a person must:

- (1) with the intent to promote an offense relating to the delivery of a controlled substance or prostitution;
- (2) agree with one or more persons to engage in that offense; and
- (3) one of the persons must do an "overt act" in furtherance of the conspiracy.

AS 11.31.120(b) provides that if person A conspires with person B to commit a crime knowing that person B has conspired with person C to commit the same crime, person A may be guilty of conspiracy with person C, even though person A did not know the identity of person C.

AS 11.31.120(c)(1) provides that it is not a defense to the crime of conspiracy that the defendant is a person who, by definition, is not legally capable of committing the crime that is the object of the conspiracy. For example, even though a person who agrees to purchase a controlled substance could not be guilty of delivering the substance, that

person could be guilty of conspiring to deliver the substance with the seller. Similarly, AS 11.31.120(c)(2) provides that it is not a defense to conspiracy that the person with whom the defendant conspired is not capable of committing the crime that is the object of the conspiracy. As an example, a person could be guilty of conspiring to sell a controlled substance even though that person had conspired to sell it to an undercover police officer, who could not be guilty of the underlying offense.

AS 11.31.120(d) provides that it is a defense to conspiracy that the defendant would not be legally accountable for the underlying offense because the defendant was a victim of the offense or because the defendant's conduct is "inevitably incidental to the commission of the offense."

AS 11.31.120(e) provides that it is an affirmative defense (one that must be proven by the defendant) to conspiracy that the defendant voluntarily renounced the criminal intent and warned law enforcement officers or took steps to prevent the commission of the crime. However, renunciation by one conspirator does not relieve the other conspirators of criminal liability for conspiracy.

AS 11.31.120(f) provides that the liability of one conspirator for offenses committed in furtherance of the conspiracy is to be determined under AS 11.16, the accomplice liability provisions.

AS 11.31.120(g) sets out the penalties for conspiracy. Conspiracy is

- (1) a class A felony if the object of the conspiracy is an unclassified felony;
- (2) a class B felony if the object of the conspiracy is a class A felony;
- (3) a class C felony if the object of the conspiracy is a class B or class C felony; and
- (4) a class B misdemeanor if the object of the conspiracy is a class A or B misdemeanor or a violation of a municipal ordinance.

AS 11.31.125 sets out the time periods during which a conspiracy is considered ongoing for determining the limita-

Senator Kerttula
January 22, 1987
Page 3

tions of time during which a person may be prosecuted for conspiracy.

Section 2 amends AS 11.31.140(a) to provide that it is not a defense to conspiracy that the underlying crime was actually committed, although a person may not be convicted of both conspiracy and the underlying crime based on the same course of conduct (AS 11.31.140(c)). Moreover, a person may not be convicted of more than one conspiracy for conduct designed to commit the same offense (AS 11.31.140(b)).

Section 3 provides that if a person conspires to commit more than one crime, that person may be charged with only one count of conspiracy if the multiple crimes are the object of the same agreement.

If I may be of further assistance, please advise.

KBL:mkr
m8/039

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

4430 1987

REQUEST: _____

Bill Version: SB 27
Publish Date: _____

Revision Date: _____
Title: "An Act relating to the crime
of conspiracy."
Sponsor: Sen. Rodey
Requestor: Senate Judiciary Committee

Agency Affected: Department of Law
BRU: Prosecution

Components: Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES		207.2	213.4	219.8	226.4	233.2
TRAVEL		16.2	16.7	17.2	17.7	18.2
CONTRACTUAL		24.2	24.9	25.6	26.4	27.2
SUPPLIES		15.6	11.1	11.4	11.7	12.1
EQUIPMENT		11.0	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		274.0	266.1	274.0	282.2	290.7

CAPITAL						
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REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND		274.0	266.1	274.0	282.2	290.7
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		4.0	4.0	4.0	4.0	4.0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see attached analysis.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director

Phone: 465-3672

Division: Administrative Services

Date: Jan. 29, 1987

Ronald W. Lorenson

Approved by Commissioner: Acting Attorney General

Date: Jan. 29, 1987

Agency: Department of Law

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 27

This bill makes it a crime for two or more persons to "conspire" together to violate state or municipal laws regarding drugs and prostitution. Enactment of this bill will permit state attorneys to prosecute conspirators even though the crime that was the object of a conspiracy may not have been completed.

With the limits set by the bill, the major focus of enforcement attention will be upon the major narcotics rings which have appeared in the state during the last few years.

Investigation and prosecution of large-scale drug trafficking cases is extremely time-consuming and labor intensive. Major narcotics rings are carefully planned and organized, and it requires the same degree of planning and organization to detect, investigate, infiltrate, and ultimately break the rings. A good example is the single big drug case that the state was able to pursue in FY 85 -- 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. So far there have been no acquittals, although a few defendants have fled the state and are now fugitives.

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 consulted on a daily, sometimes hourly, basis with and guided the efforts of three teams of officers: a "surveillance" team varying from 10-20 officers to keep 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 compile 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, but leading to more effective enforcement of our drug laws. Effective enforcement of these laws, especially at this point in Alaska's history, is critical. With the opening of the new international wing at the Anchorage airport, there has been an increase in the number of international flights with passengers "off-loading" in Anchorage. With new routes of access to Alaska, and new types of drugs to deal in, traffickers will have a field day. We must try to prevent the infiltration into the state of new organizations intended to fill the void left by the prosecution of the Resek-Marin family (FY 84), the Black Gold ring (FY 85) and, most recently, the Azzarella-Serra organizations (FY 86).

Considering the increase in sophisticated narcotics trafficking, and the efforts necessary to adequately meet this threat,

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 27

the Department of Law believes that it will need the dedicated services of at least two full-time attorneys, a paralegal, and a secretary in Anchorage. Previous fiscal notes on conspiracy legislation have been premised upon the existence of a sufficient capability within the Anchorage District Attorney's Office to adequately handle large scale narcotics prosecutions. However, in recent years, budget cutbacks have resulted in narcotics positions being unfunded and proposed budget cuts for FY 88 will make prosecution of these time-consuming cases impossible. Thus, in order to permit the division to prosecute narcotics conspiracy cases, funding must be restored so that a functioning narcotics unit exists.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 27

Fiscal Summary - SB 27

	<u>Atty IV</u>	<u>Atty III</u>	<u>P/A II</u>	<u>Leg. Sec. I</u>	<u>Total</u>
71000	70.6	62.4	42.5	31.7	207.2
72000	5.4	5.4	5.4	-0-	16.2
73000	6.6	6.6	6.6	4.2	24.0
74000	4.2	4.2	4.2	3.0	15.6
75000	1.5	1.5	1.5	6.5	11.0
	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
Total	88.3	80.1	60.2	45.4	274.0

Costs beyond FY 88 include a 3% annual inflation factor, less one-time equipment costs.

Position Title Attorney IV		No. of Positions 1	Range/Step 24A	Barg. Unit PX
Time Status PFT	Staff Months 12	Location EBA - Anchorage		Election District 8
Type of Expenditure:		Justification		
		This is the first of four 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.		
Amount				
1	2	3		
Salary	56,244			
Benefits	14,310			
Premium Pay				
Other				
Total Personal Services		70,554		
Travel		5,400		
Contractual		6,600		
Commodities		4,200		
Equipment		1,500		
Other				
Total Cost		88,254		
Funding Source for Total Cost				
Federal Receipts	1002			
G. F. Match	1003			
General Fund	1004	88,254		
I-A Receipts	1006			
CIP Receipts	1061			
Other				

**Request For
New Position**

Agency Department of Law
 BRU Prosecution
 Component Third Judicial District

Page 1 of 4
 Revised Date

FY 88

Position Title Attorney III		No. of Positions 1	Range/Step 22A	Barg. Unit PX
Time Status PFT	Staff Months 12	Location EBA - Anchorage		Election District 8
Justification				
<p>This is the second of four 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 Attorney III level is recommended because this position will assist the Attorney IV in the prosecution of serious crimes.</p>				
Type of Expenditure		Amount		
1	2	3		
Salary	49,140			
Benefits	13,264			
Premium Pay				
Other				
Total Personal Services		62,404		
Travel		5,400		
Contractual		6,600		
Commodities		4,200		
Equipment		1,500		
Other				
Total Cost		80,104		
Funding Source for Total Cost				
Federal Receipts	1002			
G. F. Match	1003			
General Fund	1004	80,104		
I-A Receipts	1006			
CIP Receipts	1061			
Other				

Request For
New Position

Agency Department of Law
 BRU Prosecution
 Component Third Judicial District

Page 2 of 4
 Revised Date

FY 88

Position Title Paralegal Assistant II		No. of Positions 1	Range/Step 16A	Barg. Unit CCU
Time Status PFT	Staff Months 12	Location EBA - Anchorage		Election District 8
Justification				
This is the third of four 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.				
Type of Expenditure:		Amount		
1	2	3		
Salary	32,424			
Benefits	10,095			
Premium Pay				
Other				
Total Personal Services		42,519		
Travel		5,400		
Contractual		6,600		
Commodities		4,200		
Equipment		1,500		
Other				
Total Cost		60,219		
Funding Source for Total Cost				
Federal Receipts 1002				
G. F. Match 1003				
General Fund 1004		60,219		
I-A Receipts 1006				
CIP Receipts 1061				
Other				

Request For
New Position

Agency Department of Law
 BRU Prosecution
 Component Third Judicial District

Page 3 of 4
 Revised Date

FY 88

Position Title Legal Secretary I		No. of Positions 1	Range/Step 10B	Barg. Unit CCU
Time Status PFT	Staff Months 12	Location EBA - Anchorage		Election District 8
Type of Expenditure		Amount		
1	2	3		
Salary	23,460			
Benefits	8,192			
Premium Pay				
Other				
Total Personal Services		31,652		
Travel		-0-		
Contractual		4,200		
Commodities		3,000		
Equipment		6,500		
Other				
Total Cost		45,352		
Funding Source for Total Cost				
Federal Receipts	1002			
G. F. Match	1003			
General Fund	1004	45,352		
I-A Receipts	1006			
CIP Receipts	1061			
Other				
Justification				
<p>This is the fourth of four 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.</p>				

**Request For
New Position**

Agency Department of Law
 BRU Prosecution
 Component Third Judicial District

Page 4 of 4
 Revised Date _____

FY 88

BILL NO: SB 27

DATE: 1/23/87

TITLE: "An Act relating to the
crime of conspiracy."

CONTACT: Major Walter J. Gilmour
Acting Director

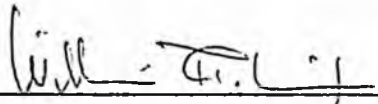
JAN 30 1987

DEPARTMENT OF
PUBLIC SAFETY
/

This legislation adds Sec. 11.31.120 & 125 and amends Sec. 11.31.140 to include the crime of conspiracy in cases involving narcotics and prostitution.

Passage of this bill will provide the criminal justice system with an effective tool in combating criminal enterprises in cases involving controlled substances and prostitution. Under existing statutes, law enforcement agencies are often unable to pursue the financial backers and organizers of these types of criminal activity because such individuals and organizations generally do not get directly involved in the sale of drugs or prostitutes' services. Conspiracy legislation will enable prosecution of these individuals who had previously been able to insulate themselves by using intermediaries to make risks for them.

The Division of Alaska State Troopers is neutral on this legislation.



William R. Nix
Acting Commissioner

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: SB 27
Publish Date: _____

REQUEST
Revision Date: _____ Agency Affected: Public Safety
Title: "An Act relating to the crime of conspiracy." BRU: Alaska State Troopers
Sponsor: Sen. Rodey Components: Detachments & C.I.B.
Requestor: Senate Judiciary Narcotics

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
OPERATING						
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
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUNDS	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact is anticipated.

NR
1/22/87 Prepared by: Francis C. Allan *F.C.A.*
Division: Alaska State Troopers

Phone: 269-5691
Date: 1/16/87

Approved by Commissioner: *[Signature]*
Agency: Public Safety
Distribution (by preparer):

Date: 1/22/87

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

FEB 9 1987

POSITION PAPER
SB27

This bill will make criminal certain types of conduct related to efforts to promote prostitution or distribute illegal drugs.

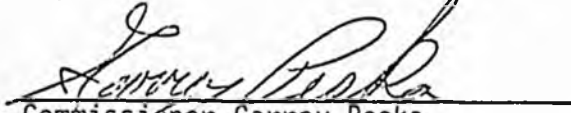
The Alaska Public Defender Agency and the Office of Public Advocacy are not law enforcement agencies and, therefore, are in no position to evaluate the need for this legislation. The fiscal impact of this bill will be determined by the types and frequency of prosecutions initiated by the Department of Law.

The Alaska Public Defender Agency and the Office of Public Advocacy have adopted a neutral position with respect to this legislation.



Brant McGee
Public Advocate
Office of Public Advocacy
Department of Administration

February 2, 1987
Date



Commissioner Garrey Peska
Department of Administration

2/5/87
Date

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: SB 27
Publish Date: _____

REQUEST _____

Revision Date: _____
Title: An Act Relating to the Crime of
Conspiracy . . .
Sponsor: Rodey, et al.
Requestor: Senate Judiciary

Agency Affected: Administration
BRU: Office of Public Advocacy
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
OPERATING						
PERSONAL SERVICES		103.1	107.2	111.5	116.0	120.6
TRAVEL		5.0	5.2	5.4	5.6	5.8
CONTRACTUAL		85.0	88.4	91.9	95.6	99.4
SUPPLIES		2.5	2.6	2.7	2.8	2.9
EQUIPMENT		6.0				
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	201.6	203.4	211.5	222.0	228.7
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	201.6	203.4	211.5	222.0	228.7
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	201.6	203.4	211.5	222.0	228.7

POSITIONS:

FULL-TIME	-0-	2.0	2.0	2.0	2.0	2.0
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary See attached.

Prepared By: Brant McGee, Public Advocate
Division: Office of Public Advocacy

Phone: 274-1684
Date: February 2, 1987

Approved by Commissioner: Garrey Peska
Agency: Department of Administration

Date: _____

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 27

Prepared by the Office of Public Advocacy

This bill is intended to assist Alaskan state law enforcement authorities in combatting the criminal efforts of groups organized for illegal purposes. Senate Bill 27 apparently limits its prescriptions to criminals in drug distribution and prostitution schemes. It must be assumed that numerous prosecutions will be pursued under this statute because of the current frequency of arrests for the substantive offenses involved.

The Public Defender Agency and the Office of Public Advocacy must assume that it will be appointed in a large number of such prosecutions just as it is currently appointed with great frequency in drug and prostitution cases.

Cases filed under conspiracy statutes on the federal level and in other states routinely involve substantial attorney time, particularly for preparation of pre-trial motions. Due to the fact that the Department of Law's investigation activity will probably focus on urban areas, the Office of Public Advocacy is requesting one experienced attorney and a clerk typist to handle representation of clients charged under this bill.

Enactment of this statute is intended to allow the prosecution of multiple co-defendants. The Office of Public Advocacy is responsible by statute for providing legal representation to all indigent defendants with whom the Public Defender Agency has a conflict of interest. While staff attorneys can represent one co-defendant, in a given case the Office of Public Advocacy must contract with private counsel for the representation of all other co-defendants determined to be indigent by the court. It is anticipated that the complexity of this litigation will dictate high contract costs which are estimated at \$15,000 per defendant. The Department of Law has not estimated the number of prosecutions it will initiate during FY 88. The projected \$75,000 in contract costs is thus based on the assumption the Office of Public Advocacy will be responsible for only five defendants for which it cannot provide staff coverage.

SB 27 FISCAL ANALYSIS

<u>Personal Services:</u>	Attorney IV	\$74.8	
	Clerk Typist III	28.3	\$103.1
<u>Travel:</u>	Expert Witnesses, Investigation, etc.		5.0
<u>Contractual:</u>	Contract Attorneys	\$75.0	
	Expert Witnesses, Space, etc.	10.0	85.0
<u>Supplies:</u>	Office, Law Library, etc.		2.5
<u>Equipment:</u>	(One Time) Furniture, Office Machines, etc.		<u>6.0</u>
		Total	\$201.6

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: _____

Bill Version: SB27
Publish Date: _____

Revision Date: January 30, 1987
Title: "An Act relating to the
crime of conspiracy"
Sponsor: Senator Rodey
Requestor: Judiciary and Finance

Agency Affected: Department of Administration
BRU: Public Defender Agency

Components: Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES		147.9	153.8	160.0	166.4	173.1
TRAVEL		5.0	5.2	5.4	5.6	5.8
CONTRACTUAL		10.0	10.4	10.8	11.2	11.7
SUPPLIES		2.5	2.6	2.7	2.8	2.9
EQUIPMENT		6.0				
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	171.4	172.0	178.9	186.0	193.5

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	171.4	172.0	178.9	186.0	193.5
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	171.4	172.0	178.9	186.0	193.5

POSITIONS:

FULL-TIME	-0-	3.0	3.0	3.0	3.0	3.0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

(See attached)

Prepared by: Dana Fabe
Division: Public Defender Agency

Phone: 279-7541
Date: January 30, 1987

Approved by Commissioner: [Signature]
Agency: _____

Date: 2/5/87

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 27

PREPARED BY THE PUBLIC DEFENDER AGENCY

This bill is intended to assist Alaskan state law enforcement authorities in combatting the criminal efforts of groups organized for illegal purposes. Senate Bill 27 apparently limits its prescriptions to criminals in drug distribution and prostitution schemes. It must be assumed that numerous prosecutions will be pursued under this statute because of the current frequency of arrests for the substantive offenses involved.

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Cases filed under conspiracy statutes on the federal level and in other states routinely involve substantial attorney time, particularly for preparation of pre-trial motions. Due to the fact that the Department of Law's investigation activity will probably focus on urban areas, the Public Defender is requesting one experienced attorney, a paralegal and a clerk typist to handle representation of clients charged under this bill.

SB 27 FISCAL ANALYSIS

<u>Personal Services:</u>	Attorney IV	74.8	
	Paralegal II	44.8	
	Clerk/Typist III	28.3	
			147.9
<u>Travel:</u>	Expert Witnesses, Investigation, etc.		5.0
<u>Contractual:</u>	Expert Witnesses, Space, etc.		10.0
<u>Supplies:</u>	Office, Law Library, etc.		2.5
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The Unnecessary Crime of Conspiracy

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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-

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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.

portunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer."³ To deal with such dangerous criminal combinations the government must have the benefit of special legal doctrines which make conviction easier and punishment more severe.

The overbreadth of conspiracy and its potential for abuse have been extensively discussed in the literature. One principal theme of criticism, best illustrated by Mr. Justice Jackson's opinion in *Krulwitch v. United States*,⁴ emphasizes the difficulties which the ordinary criminal defendant may face when charged with conspiracy. The advantages which conspiracy provides the prosecution are seen as disadvantages for the defendant so serious that they may lead to unfair punishment unfairly determined.⁵ Critics taking this approach typically propose to trim conspiracy doctrine just enough to provide protection for defense interests without disturbing those rules deemed genuinely important for effective law enforcement. The leading reform proposal of this type is the conspiracy section of the American Law Institute's Model Penal Code,⁶ some of whose reforms were incorporated in the proposed Federal Criminal Code now before the Senate Subcommittee on Criminal Laws and Procedures of the United States.⁷

3. *Krulwitch v. United States*, 336 U.S. 440, 448-49 (1949) (Jackson, J., concurring).

4. 336 U.S. 440, 445 (1949) (Jackson, J., concurring).

5. *Id.* at 449-58 (Jackson, J., concurring). This point is developed further in Note, *The Conspiracy Dilemma: Prosecution of Group Crimes or Protection of Individual Defendants*, 62 HARV. L. REV. 276 (1948), and in *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959) [hereinafter cited as *Developments*].

6. MODEL PENAL CODE § 5.03 (Proposed Official Draft, 1962).

7. Because the conspiracy provisions of the proposed Federal Criminal Code are a principal focus of this Article, a note on its history is in order. The proposed code was originally drafted by the National Commission on Reform of Federal Criminal Laws, under the chairmanship of Edmund G. Brown, former Governor of California. Proposals originally made to the Commission by its consultants, with extended commentaries, were printed in the two volumes of the Commission's *Working Papers. WORKING PAPERS*, *supra* note 1. The Commission then published a study draft with brief comments. NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE (1970) [hereinafter cited as STUDY DRAFT]. After further consideration, a final report containing a revised draft code and brief comments was transmitted to the President and Congress. NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, FINAL REPORT (1971) [hereinafter cited as FINAL REPORT]. The Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee proceeded to hold hearings on the proposals contained in the *Final Report* and published a committee print of the proposed code, the most current version of the proposed code as of this writing. SUBCOMM. ON CRIMINAL LAWS AND PROCEDURES OF SENATE COMM. ON THE JUDICIARY, 93D CONG., 1ST SESS., CRIMINAL JUSTICE REFORM ACT OF 1971 (1972) [hereinafter cited as COMMITTEE PRINT]. The Commission's Staff Director was Professor Louis B. Schwartz of the University of Pennsylvania Law School. The consultant for the conspiracy and or-

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-

alized crime provisions was Professor [redacted] of Notre Dame Law School
 law Chief Counsel to the Subcommittee on [redacted] Laws and Procedures.

8. The application of criminal conspiracy laws to combinations of workingmen seeking 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) (Coffey, J., dissenting in part); Filvaroff, *Conspiracy and the First Amendment*, 121 U. PA. 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 law¹³ 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-

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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 involved¹ 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 agrees¹⁷ 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

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." *Krulewitsch 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

involved in plotting or preparing to commit a particular crime by aiding its commission,¹⁰ he is liable.¹⁹ Some jurisdictions require conspirators to have performed some act in furtherance of the agreement, but this additional act will do, including

for the proposition that the motives or ignorance of the conspirators were criminal. See *United States v. Benesch*, 290 Mass. 125, 128, 299 F. 75, 78-79 (6th Cir. 1962), at 468-470 (1972). The "well established doctrine" has won acceptance. Hand rejected it in a dictum (1940). The Supreme Court has rejected it and the proposed Federal Criminal Code (Proposed Official Draft, § 5.03 (Tent. Draft No. 10, 1960); *WORKING PAPERS*, *supra* note 7,

thus defining the nature of the crime as one that "[t]he modern crime of conspiracy is defined in *Krulwich v. United States*, 339 U.S. 409, 412. See generally *Developments, supra* note 5, at 945-49; W. LAFAVE & A. SCOTT, *CRIMINAL LAW* § 62, at 476-78 (1972).

usually agrees with one or more persons as to its objective or objective conduct constituting, in fact, a crime. If two or more persons engage in or attempt to engage in a crime or objective of the

crime (as added). The requirement of knowledge is an essential element of the concept of knowingly en-

visions, the case law has concluded that *A* could not be convicted of conspiring with *A* to carry out the crime if *A* was acting on his own intent. See *Developments, supra* note 5, at § 62, at 476-78 (1972). The proposed Federal Criminal Code (Proposed Official Draft, § 5.03) rejects the plurality view that the culpability of *A* is irrelevant to the culpability of *A*. It is ironic to find the law requiring knowledge of the existing law is not broad

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.¹⁰

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-

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 389-90; 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 (1948). On remand, the Utah Supreme Court declined to give the statute a narrowing construction and declared it unconstitutionally vague and overbroad. *State v. Musser*, 118 Utah 537, 223 P.2d 193 (1950).

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LAW, *Conspiracy to Defraud*
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State v. Musser, 118 Utah

ment 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 pro-
hibitions rather than too few, it is plainly obsolete. The proposed
Federal Criminal Code accordingly punishes only agreements to com-
mit 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 organ-
izer 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 conspira-
tors as two organized crime chieftains managing a large scale gam-
bling 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); COM-
MITTEE PRINT, *supra* note 7, at § 1-2A5(g). The proposed California Penal Code re-
vision, however, makes conspiracy "to commit misdemeanors involving separate vic-
tims" a felony of the fifth degree, punishable by imprisonment of up to three years.
STATE OF CALIFORNIA JOINT LEGISLATIVE COMM. FOR REVISION OF THE PENAL CODE,
THE CRIMINAL CODE § 735(c) (1971).

organize or direct minor crimes on a continuing basis.³³

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 probable consequences of his acts, and thus have held the

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 § 1-2A6.

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 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 fore-
seen 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 con-
spirators, 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 por-
tion of his fees. For this the court held her to have entered into a con-
spiracy 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 prin-
ciple.

The fundamental conceptual error that leads to such absurd re-
sults, 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).

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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. The 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

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

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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-

(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 124 (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 pre-trial 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, 589-90 (1961); W. LAFAVR & A. SCOTT, CRIMINAL LAW § 62, at 494 (1972).

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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 § 1-4B2.

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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

61. COMMITTEE PRINT, *supra* note 7, at § 1-4B2(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 § 3204 & Comment at 293-94, § 1004 & Comment at 72-73.

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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, 1 N.Y.S.2d — *cert. denied*, 305 U.S. 620 (1938) (Lucky Luciano convicted of 62 counts of compulsory prostitution); *Capone v. United States*, 56 F.2d 927 (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

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

67. 416 F.2d at 168.

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

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):

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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. 465 (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); *Schenk v. United States*, 249 U.S. 47 (1919).

78. See *United States v. Spock*, 416 F.2d 165, 184-92 (1st Cir. 1969) (Coffin, J., dissenting in part); Note, *Conspiracy and the First Amendment*, 79 YALE L.J. 872 (1970).

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.

Third: In the course of preparation to commit a crime, the act of combining with another is significant both psychologically

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 of Reform of Federal Criminal Laws* suggests that the Commission viewed conspiracy solely as an inchoate offense. See FINAL REPORT, *supra* note 7, at § 1004 & 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.

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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 section⁸¹ (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

80. MODEL PENAL CODE § 5.03, Comment at 97 (Tent. Draft No. 14, 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).

near threshold in arousing the likelihood that the defendant would be able to carry out the purpose. The defendant's actions were governed by his intent, and he had a hand in starting,

based on an unsound premise. The Model Penal Code's conspiracy provision⁸¹ (which is subject to the proposed Federal Code's traditional law of attempt

mitations upon attempt which requires that one be near success in order to be guilty of the crime. The proximity test was used in the famous English case of *Salisbury*,⁸² where a baker who contracted to bake a certain number of loaves of bread delivered only a few loaves directly to the defendant, who then sold the tickets, which he turned in to the defendant, receiving the tickets, and then turned in a number of tickets until some future date. The defendant's guardians discovered this, and they caused him to be released by false promises. The defendant's guardians received damages for breach of contract. The Court of Criminal Appeals affirmed the conviction so contingent or

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 39 & 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

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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.

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).

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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, 47-49 (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 negating 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 corroborative 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.⁹⁶ 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.⁹⁷

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

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).

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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.

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

101. The Model Penal Code also defines "solicitation" as a separate crime distinct from attempt, although solicitation of an "innocent agent" (e.g., 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.

102. 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

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.

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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-

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(c). 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 14¹¹⁴ 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

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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-

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 Justice¹²⁰ 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. 1019 (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

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), *rev'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 ¶ 14.04[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. MITFORD, *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* ¶ 14.04 [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 *King 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."

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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 provision 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, 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 18,¹⁵⁶ 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.

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. 587 (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).

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 statute extending the life of a conspiracy through the concealment phase, commentators argue that in certain cases a strict application of the statute of limitations permits organized criminals to escape punishment by 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:

(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

169. *Krulewicz 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 *Krulewicz*, 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

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, § 1080a, 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 § 1080a (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.

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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 *Murphy 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

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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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.¹⁸⁰

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 § 1080a, 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 realistic 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 an inchoate offense similar to attempt,¹⁸⁸ 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.

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

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*** FINAL TELECONFERENCE STATISTICS ***

DATE: MAY 5TH, 1987
 SITE: ANCHORAGE, ALASKA
 SPONSOR: SENATE JUDICIARY
 SUBJECT: SB 27 - CREATING CONSPIRACY AS A CRIME
 LOCAL MODERATOR: HARRY TRACY MANDREGAN

TESTIFIED:

NAME\REPRESENTING	ADDRESS	PHONE #
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~~APR 28 1987~~

SECTIONAL ANALYSIS
CSHB 30

APR 30 1987

Section 1

AS 11.31.120 Creates the crime of conspiracy to commit the crimes of delivery of a controlled substance or promotion of prostitution which are at least class C felonies.

AS 11.31.120(b) Provides that a person may commit the crime of conspiracy with any of his or her intended co-conspirators regardless of whether the person knows the co-conspirators identity.

AS 11.31.120(c) Provides that it is not a defense to the crime of conspiracy that defendant was not legally capable of, or that his co-conspirator lacked the required mental state to commit the underlying crime.

11.31.120(d) Provides that it is a defense to a charge of conspiracy that the defendant was a victim of the underlying crime or that a conspiracy is an inevitable element of the underlying crime.

11.31.120(e) Provides that a person who renounces his intent to commit the underlying crime and makes a timely effort to prevent the crime is not guilty of a conspiracy.

11.31.120(c) Provides that a conspirator's liability for a crime committed in furtherance of a conspiracy shall be governed by existing law controlling accomplice liability.

11.31.120(g) Provides that a person may not be convicted of conspiracy if the only evidence of that person's guilt is the testimony of an alleged co-conspirator.

11.31.120(h) Provides that the crime of conspiracy shall be classified and punishable at one level below the classification of the underlying offense.

AS 11.31.25 Provides that the statute of limitations does not begin to run for an alleged conspiracy until all the underlying crimes have been completed or there have been acts of abandonment.

Section 2

AS 31.140 Provides that a person may be convicted of either conspiracy, solicitation, attempt or the underlying crime but that a person may not be convicted of more than one of these offenses for a single course of conduct intended to result the commission of the same crime.

Section 3

AS 11.31.140(e) Provides that a person may be convicted of only one count of conspiracy for a single agreement to commit multiple crimes.

5-0198N✓

Levy

4/28/87

Original sponsor: Donley

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 30 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the crime of conspiracy to commit
7 a felony involving delivery of certain controlled
8 substances or promotion of prostitution."

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

10 * Section 1. AS 11.31 is amended by adding new sections to read:

11 Sec. 11.31.120. CONSPIRACY. (a) An offender commits the crime
12 of conspiracy if, with the intent to promote or facilitate a felony
13 offense relating to the delivery of a controlled substance under
14 AS 11.71.010 - 11.71.040 or a felony offense relating to promotion of
15 prostitution under AS 11.66.110 - 11.66.120, the offender agrees with
16 one or more persons to engage in or cause the performance of that
17 offense and the offender or one of the persons does an overt act in
18 furtherance of the conspiracy.

19 (b) If an offender commits the crime of conspiracy and knows
20 that a person with whom the offender conspires to commit a crime has
21 conspired or will conspire with another person or persons to commit
22 the same crime, the offender is guilty of conspiring with that other
23 person or persons to commit that crime, whether or not the offender
24 knows their identities.

25 (c) In a prosecution under this section, it is not a defense

26 (1) that the defendant belongs to a class of persons who by
27 definition are legally incapable in an individual capacity of com-
28 mitting a crime that is an object of the conspiracy; or

29 (2) that a person with whom the defendant conspires could

1 not be guilty of a crime that is an object of the conspiracy because
2 of

3 (A) lack of criminal responsibility or other legal
4 incapacity or exemption;

5 (B) unawareness of the criminal nature of the conduct
6 in question or of the criminal purpose of the defendant; or

7 (C) any other factor precluding the culpable mental
8 state required for the commission of the crime.

9 (d) In a prosecution under this section, it is a defense that,
10 if the criminal objective were achieved, the defendant would not be
11 legally accountable under AS 11.16.120(b) for the conduct of the
12 person with whom the defendant conspired.

13 (e) In a prosecution under this section it is an affirmative
14 defense that the defendant, under circumstances manifesting a volun-
15 tary and complete renunciation of the defendant's criminal intent,
16 gave timely warning to law enforcement authorities or otherwise made
17 proper effort to prevent the commission of the crime that was the
18 object of the conspiracy. Renunciation by one conspirator does not
19 affect the liability of another conspirator who does not join in the
20 renunciation.

21 (f) The liability of a conspirator for offenses committed in
22 furtherance of the conspiracy, including a crime that is an object of
23 the conspiracy, shall be determined under AS 11.16.

24 (g) A person may not be convicted under this section solely on
25 the basis of the uncorroborated testimony of a person with whom the
26 defendant conspired.

27 (h) Conspiracy is a

28 (1) class A felony if the object of the conspiracy is a
29 crime punishable as an unclassified felony;

1 (2) class B felony if the object of the conspiracy is a
2 crime punishable as a class A felony;

3 (3) class C felony if the object of the conspiracy is a
4 crime punishable as a class B felony;

5 (4) class A misdemeanor if the object of the conspiracy is
6 a crime punishable as a class C felony.

7 Sec. 11.31.125. DURATION OF CONSPIRACY FOR PURPOSES OF LIMITA-
8 TIONS OF ACTIONS. For purposes of applying AS 12.10 governing limita-
9 tions of actions, in a prosecution under AS 11.31.120, conspiracy is a
10 continuing course of conduct that terminates

11 (1) when all the crimes related to delivery of controlled
12 substances or promotion of prostitution that are its object are com-
13 pleted;

14 (2) when the agreement is abandoned by the defendant and by
15 the person with whom the defendant agreed; or

16 (3) as to an individual defendant, when the defendant
17 abandons the agreement by advising the person with whom the defendant
18 agreed of the defendant's abandonment or the defendant informs law
19 enforcement authorities of the existence of the conspiracy and of the
20 defendant's participation in it.

21 * Sec. 2. AS 11.31.140 is amended to read:

22 Sec. 11.31.140. MULTIPLE CONVICTIONS BARRED. (a) It is not a
23 defense to a prosecution under AS 11.31.100 - 11.31.120 [AS 11.31.100
24 OR AS 11.31.110] that the crime that is the object of the attempt,
25 conspiracy, or solicitation was actually committed pursuant to the
26 attempt, conspiracy, or solicitation.

27 (b) A person may not be convicted of more than one crime defined
28 by AS 11.31.100 - 11.31.120 [AS 11.31.100 OR AS 11.31.110] for conduct
29 designed to commit or culminate in commission of the same crime.

1 (c) A person may not be convicted on the basis of the same
2 course of conduct of both (1) a crime defined by AS 11.31.100 - 11.-
3 31.120 [AS 11.31.100 OR AS 11.31.110]; and (2) a crime that is an
4 object of the attempt, conspiracy, or solicitation.

5 (d) This section does not bar inclusion of multiple counts in a
6 single indictment or information charging commission of a crime de-
7 fined by AS 11.31.100 - 11.31.120 [AS 11.31.100 OR AS 11.31.110] and
8 commission of the crime that is the object of the attempt, conspiracy,
9 or solicitation.

10 * Sec. 3. AS 11.31.140 is amended by adding a new subsection to read:

11 (e) If a person conspires to commit more than one crime under
12 AS 11.31.120, the person commits only one crime of conspiracy if the
13 multiple crimes are the object of the same agreement.
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