Criminal Conspiracy Law: Time to Turn Back From an Ever Expanding, Ever More Troubling Area

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CRIMINAL CONSPIRACY LAW: TIME TO TURN BACK FROM AN EVER EXPANDING, EVER MORE TROUBLING AREA

by Paul Marcus**

"[C]onsspiracy, that darling of the modern prosecutor's nursery."

Learned Hand¹

"We judges ought to take judicial notice of what every ordinary person knows about juries, and therefore to recognize that the twelve citizens, casually summoned to serve as jurors, are not trained fact-finders and can be easily bewildered. ... The need for safeguarding defendants from misunderstanding by the jury is peculiarly acute in conspiracy trials. ..."

Jerome Frank²

I. INTRODUCTION

Concerns about the crime of conspiracy have been around for a long time. After all, the statements by Judges Hand and Frank were made, respectively, about seventy and fifty years ago. My own concerns regarding conspiracy began to surface almost twenty years ago. It was hard to focus students' direction in this body of the law; it was extremely difficult to explore in class the interplay between the practical, legal and policy issues which surfaced so often in conspiracy cases.

¹ Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).
² United States v. Liss, 137 F.2d 995, 1003 (2d Cir.) (Frank, J., dissenting), cert. denied, 320 U.S. 773 (1943).

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In 1977 I completed a project which involved visits to more than a dozen cities, interviews of over 100 judges and practicing lawyers, and the distribution of questionnaires to thousands of others. The exclusive focus points of this project were the crime of conspiracy and the way in which that crime was prosecuted and defended in the United States. The results of this study were published in the Georgetown Law Journal, and remain today, I believe, the only detailed look at conspiracy law that combines both an analytical framework and an empirical look at the area.

It has now been more than fifteen years since that study was completed. Certainly many of the issues which were vital then have remained so. During this period, however, remarkable activity in the law has occurred concerning criminal conspiracy. No one fifteen to twenty years ago predicted, or could have predicted, the massive and complex "mega-trials" that are common today, the major impact of the drug conspiracy laws, or the dramatic structuring by the Supreme Court of the rules of evidence in conspiracy cases. It is my purpose in this article to consider how far we have traveled during the past two decades in the prosecution and defense of conspiracy cases. The article will consider where we were then, where we are now, and — most significantly — the direction to which we should be turning as we approach the 21st century.

Not only the law has changed during the past two decades. Major changes also have occurred in the opportunity to obtain funding to conduct empirical and analytical research. Thus, unable to obtain funds to duplicate the earlier empirical analysis, I have turned to written communication with judges, attorneys and legal educators to have a more complete sense of the current conditions. Many of these individuals have been kind enough to allow the use of their responses in this article, so that the reader will see not only an author's analysis of the state of the law and the practice, but also the views of some outstanding, seasoned observers and participants in the legal justice system.

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3 Paul Marcus, Conspiracy: The Criminal Agreement in Theory and in Practice, 65 Geo. L.J. 925 (1977) [hereinafter Marcus, Conspiracy]. There had been considerable hope at that time that a proposed revised federal criminal code would become a reality and would dramatically alter and restructure the crime of conspiracy. Alas, reforms in the area have been piecemeal and have moved away from issues such as conspiracy, white collar crime, and entrapment law. See generally Paul Marcus, The Proposed Federal Criminal Code, 1978 U. Ill. L. Forum 379; Louis B. Schwartz, Reform of the Federal Criminal Laws: Issues, Tactics and Prospects, 1977 Duke L.J. 171.


5 That earlier project had been funded jointly by the National Science Foundation and the Program in Law and Society, University of Illinois.
II. CONSPIRACY LAW THEN

A. Bases for the Crime

The rationale given for having the crime of conspiracy has not changed at all during the entire century. "Criminal conspiracy[,]... an agreement between two or more persons formed for the purpose of committing a crime," serves two distinct purposes. The first is inchoate: "It serves a preventive function by stopping criminal conduct in its early stages of growth before it has a full opportunity to bloom." While this purpose is regularly offered to explain the presence of the crime, the earlier survey results support the widely held view that the crime rarely is treated as an inchoate offense. That is, most charged conspiracies involve situations in which an attempted or completed "substantive offense" (the object of the agreement) has taken place. To be sure, in most of these cases the government only finds out about the underlying conspiracy because that object crime has been completed or at least attempted.

The real reason for the conspiracy crime is the belief that serious group danger is present in the usual conspiracy situation. Our system proceeds on the assumption that the law of conspiracy "protects society from the dangers of concerted criminal activity." Stated succinctly, "We punish conspiracy because joint action is, generally, more dangerous than individual action." Although it has been challenged by some,

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6 Marcus, Conspiracy, supra note 3, at 928.
7 United States v. Wallach, 935 F.2d 445, 470 (2d Cir. 1991) (Wallach is the well-known Wedtech prosecution, on appeal). Certainly the inchoate nature of the conspiracy offense could be a major force, as it allows for criminalization of acts well before any other inchoate crime, even attempt. "Every criminal conspiracy is not an attempt. One may become guilty of conspiracy long before his act has come so dangerously near to completion as to make him criminally liable for the attempted crime." Sayre, supra note 4, at 399.
8 As indicated in the 1977 survey, an extremely small number of conspiracy charges would be present not in connection with some other substantive completed (or attempted) offense. See Marcus, Conspiracy, supra note 3, at 936.
9 This is the reason typically given for why conspiracy is treated apart from other offenses so that different rules apply concerning consecutive sentencing, greater punishment for the conspiracy than the completed offense, double jeopardy, and so forth. See generally United States v. Inafuku, 938 F.2d 972, 974 (9th Cir. 1991).
10 Wallach, 935 F.2d at 470.
11 United States v. Townsend, 924 F.2d 1385, 1394 (7th Cir. 1991).
12 The chief critic has been Professor Goldstein of the Yale Law School. In a well-cited article he pointed out the risk of simply believing that this added danger was necessarily present with collective activity:

Though these assumed dangers from conspiracy have a romantically individualistic ring, they have never been verified empirically. It is hardly likely that a search for such verification would end in support of Holdsworth's suggestion that combination alone is inherently dangerous. This view is immediately refuted by reference to our own society, which is grounded in organization and agreement. 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. Most probably, however, the factors ordinarily mentioned as warranting the crime of conspiracy would be found to add to the danger to be expected from a group in certain situations and not in others; the goals of the group and the personalities of its members would make any generalization unsafe and hence require some other explanation for treating conspiracy as a separate crime in all cases.

Goldstein, supra note 4, at 414.
this notion has been fully accepted on many occasions by the Supreme Court and by judges and practicing lawyers throughout the United States.\textsuperscript{13}

Acceptance of the rationale of group danger does not wholly dispose of the concerns regarding the need for this particular crime. That is, assuming criminal group behavior really is more dangerous than individual criminal activity,\textsuperscript{14} is it necessary to have the crime of conspiracy to combat such behavior, or would other offenses be able to deal with the problem? Without question, the vast majority of offenses brought under the conspiracy doctrine could be handled effectively by other, more traditional theories. The Florida Supreme Court stated the matter well:

We recognize that the charge of conspiracy is an excellent tool in combating organized crime, but the use of this charge has been expanded to dragnet proportions in some instances. Of course, the law of criminal attempt is sufficient to protect society against the danger of incipient wrongdoers. Also, if several join in the commission of a criminal act, the prosecutor could rely on the basic rule that one who counsels, commands, induces, procures or aids and abets another in committing a crime is punishable as a principal defendant. These alternatives are available and could be used in lieu of a conspiracy charge.\textsuperscript{15}

\textsuperscript{13} See, e.g., Callanan v. United States, 364 U.S. 587, 593-594 (1961):

\[ \text{Collective criminal agreement -- partnership in crime -- presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group is formed. In sum, danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.} \]

\textit{Id.; see also} United States v. Rabinowich, 238 U.S. 78, 88 (1915):

\[ \text{For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.} \]

\textit{Id.}

As stated by one state prosecutor: "The good reason for having the crime of conspiracy is to get the serious and dangerous planners of crime, when there is more than one person planning the act." Marcus, \textit{Conspiracy, supra} note 3, at 933 (interview with Florence Linn, Assistant Project Administrator, Bureau of Special Operations, Los Angeles County District Attorney's Office (July 16, 1975)).

\textsuperscript{14} This is an assumption about which, after reading literally thousands of conspiracy cases and being involved in both the prosecutions and defenses of numerous such matters, I have very serious doubts. Still, it is the prevailing assumption.

\textsuperscript{15} Goldberg v. State, 351 So.2d 332, 334 (Fla. 1977).
The argument for added danger for conspiracies has never been supported by any sort of empirical data, and thus it is extremely difficult to justify the presence of the crime, at least in situations where other offenses could be charged. Twenty years ago Professor Phillip Johnson, in an incisive article, forcefully argued this view:

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.

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.

The arguments challenging the need for the conspiracy charge may have considerable force. The basis for the charge, however, appears unshaken and unshakable. Professor Johnson, in a recent letter to the author, lamented the current situation by noting that "[t]he outstanding fact is of course that the law has moved in precisely the opposite direction from that which I recommended in my long-ago article." Instead of widespread criticism of the charge or concerns regarding the basis for it, broadly-stated support appears. A case from the Seventh Circuit is a typical example:

"[W]hat makes the joint action of a group of n persons more fearsome than the individual actions of those n persons is the division of labor and the mutual psychological support that collaboration affords." Both the conspiracy and the market transaction are agreements, but only conspiracy poses the added danger of group action. True, aiding and abetting presupposes the existence of more than one actor, but aiders and abettors are already punished as principals. To justify imposing additional criminal liability, there must be some additional evidence that their actions are intended to bring about the object of the conspiracy. Conspiracies, which are really "agreements to agree" on the multitude of decisions and acts necessary to successfully pull off a crime, pose an

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16 And that, of course, is the case in the vast majority of criminal prosecutions in which conspiracy is charged. See Marcus, Conspiracy, supra note 3, at 947-48.
17 Johnson, supra note 4, at 1188.
18 Letter from Phillip E. Johnson, Professor of Law, University of California, to author (Jan. 25, 1991) (on file with author).
additional risk that the object of the conspiracy will be achieved, and so warrant additional penalties.19

B. Impact

The presence of a conspiracy count was in 1970, and is today, of great significance in the criminal justice system. The crime is charged very often; of that there can be little question. Judge Alfred Goodwin of the Ninth Circuit commented that, while he did not actually count the number, he thought that in his circuit the court "see[s] about 100 conspiracy appeals a year."20 If one factors in the many cases in other circuits, the many more cases in the district courts and, of course, the enormous number of cases in the state courts, it becomes clear that the conspiracy crime is an offense of real import.21

In reviewing the many conspiracy cases, one quickly realizes that the charge has an impact on several different aspects of a prosecution, such as evidentiary considerations (particularly relating to co-conspirator declarations),22 sentencing,23 and venue.24 Let us look here, however, to two areas that are greatly affected by the presence of a conspiracy charge: accountability for the crimes of others, and guilt by association. These two issues have been strongly raised for many years, and they continue to be argued today.

In virtually every jurisdiction in the United States, a conspirator can be held responsible for crimes committed by her co-conspirators as long as such crimes were in furtherance of the agreement and were reasonably foreseeable.25 The crimes themselves do not have to have been agreed upon, intended or even discussed. Liability is based upon a simple negligence standard, reasonable foreseeability. This rule of liability was established by the Supreme Court in 1946 in Pinkerton v. United States,26 and is applied in an enormous number of prosecutions.27 According to many experienced criminal

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19 United States v. Townsend, 924 F.2d 1385, 1394 (7th Cir. 1991) (citations and footnote omitted).
20 Letter from Alfred T. Goodwin, Judge, United States Court of Appeals, Ninth Circuit, to author (Feb. 8, 1991) (on file with author).
21 The information in the earlier survey also brought out this point. See Marcus, Conspiracy, supra note 3, at 939 n.53.
22 See infra text accompanying notes 140-68.
23 Because conspiracy is viewed as a truly separate offense, consecutive sentencing for it and for the object crime has been found to be valid. See, e.g., Callanan v. United States, 364 U.S. 587 (1961). Under the new federal sentencing guidelines, the presence of the conspiracy charge can be of great significance in lengthening the term of imprisonment. See, e.g., United States v. Inafuku, 938 F.2d 972, 974 (9th Cir. 1991); United States v. Hodges, 935 F.2d 766, 773-74 (6th Cir. 1991); United States v. Paulino, 935 F.2d 739, 757-58 (6th Cir.), cert. denied, 112 S.Ct. 315 and 112 S.Ct. 323 (1991). See infra text accompanying notes 197-98.
24 Venue is proper in any district in which any act in furtherance of the conspiracy took place. Hyde v. United States, 225 U.S. 347 (1912). In this day of far-flung white collar and drug conspiracies, the venue feature is especially important. See generally United States v. Ahumada-Avalos, 875 F.2d 681 (9th Cir.), cert. denied, 493 U.S. 837 (1989); United States v. Record, 873 F.2d 1363 (10th Cir. 1989); United States v. Meyers, 847 F.2d 1408 (9th Cir. 1988).
26 328 U.S. 640 (1946).
27 There are far too many prosecutions with reported opinions to mention. For a good sampling of the Pinkerton rule in the federal courts, see United States v. Douglass, 780 F.2d 1472, 1475-76 (9th Cir. 1986); United States v. Spudic, 795 F.2d 1334, 1339 (7th Cir. 1986); United States v. Alvarez, 755 F.2d 830, 847 (11th Cir. 1985).
lawyers, this *Pinkerton* doctrine is of vital importance. Jeffrey Weiner, President of the National Association of Criminal Defense Lawyers (with 25,000 members) writes that:

> [T]he *Pinkerton* doctrine permits the government to hold a defendant criminally responsible for all reasonably foreseeable acts of co-conspirators regardless of actual knowledge, intent, or participation. Thus, if the government cannot prove a defendant's guilt or various substantive charges, it need only convince the jury of the defendant's guilt of conspiracy to secure convictions on the otherwise unsupportable substantive charges.  

The other matter particularly linked to conspiracy relates to guilt by association. Here, too, complaints have been asserted for decades. Defense counsel would state the matter in this way: "Juries do not differentiate between individual defendants in large conspiracy cases." While many judges and prosecutors strongly dispute this view, Weiner, again, sharply makes the argument:

Regarding guilt by association, this may well be the most powerful and exploited tool the government has to secure criminal convictions. When the government has one defendant against whom it has a strong case and one or more defendants against whom it has substantially weaker cases, a jury may well convict the defendants against whom the government has little evidence based on its overwhelming belief in the other defendants' guilt and the relationship of the lesser defendants with those individuals. In a case where the defendants against whom the government has its strongest evidence substantially out-number those against whom it has little or weak evidence, the failure of the jury to thoroughly sort out the proof and attribute it individually always works in the government's favor. Additionally, where the government has uncharged acts evidence or other evidence admissible against only one or more defendants but inadmissible against others, the government secures a substantial advantage in the jury's inability to follow instructions directing it to disregard this evidence as to the other

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28 Letter from Jeffrey Weiner, President of the National Association of Criminal Defense Lawyers, to author (Feb. 1, 1991) (on file with author). Weiner is not alone in his criticism. See, e.g., the comments of the Criminal Justice Section of the American Bar Association (policy adopted August 1975) regarding S-1, the proposed Federal Criminal Code, at 5:

The accepted judicial statement of the rule is that a conspirator is liable for substantive offenses committed by another conspirator, if the offense was committed in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiracy.

The Pinkerton Rule represents a form of vicarious criminal liability that, in essence, imposes a liability for negligence. In the form of the rule adopted . . . a person is liable for a co-conspirator's crime which was "reasonably foreseeable"; or, stated another way, the person is criminally liable if he should have known when he agreed to become a part of the conspiracy, that there was a risk that the collateral offense would be committed. This is clearly negligence liability, and should be imposed only if there is strong justification.

We do not support the Pinkerton Rule, which is needed only to punish a conspirator who never agreed to, aided, or participated in, the commission of the collateral offense. It goes too far, and does not easily admit of rational application.

Id.

defendants. Particularly in lengthier and more complicated cases, my experience is that juries typically throw all the evidence in a blender and return with a homogenized set of verdicts finding all defendants guilty.\textsuperscript{30}

III. CONSPIRACY LAW TODAY

Much of conspiracy law has not changed during the past twenty years, or even during the past fifty years. The charge has always been common, particularly in the federal districts. Significant advantages always have flowed from the presence of the charge.\textsuperscript{31} The government may still prosecute the alleged conspirators in any district in which any act is shown, by a preponderance of the evidence, to have been committed. We still punish the convicted conspirator severely, and one conspirator remains responsible for the crimes of co-conspirators. In many fundamental ways, then, the law has remained both predictable and constant. In several other areas, however, tremendous changes have occurred which have greatly affected the way in which the crime is charged and the manner in which defense counsel respond to it. It is to these changes that we now turn.

A. The Far Reach of the Conspiracy Charge

While it is certainly true that in 1952, and even in 1972, one would have had an easy time finding conspiracy prosecutions in all jurisdictions in the United States, what we see today is nothing short of a miracle in terms of the number of conspiracy prosecutions. The charge can be found everywhere. Much of this increase is directly attributable to the sharp increase in drug prosecutions which most often involve conspiracy charges. American Bar Association President John Curtin wrote that "[n]arcotics cases in federal courts increased 229 percent in the last decade and now account for nearly half of all federal criminal trials. In some state courts, two out of every three criminal cases involve drugs. Many more are drug-related."\textsuperscript{32} In a recent letter, Chief Judge Bauer of the Seventh Circuit explained:

\begin{quote}
First, alleging a single conspiracy enables the government to join a group of defendants together for trial, and joint trials almost always prejudice the rights of individual defendants to some degree. Some trade-off between prejudice and efficiency is, of course, necessary for the judicial system to function; otherwise “the slow pace of our court system would go from a crawl to paralysis.”\textsuperscript{33} Second, and particularly apposite to this case, by alleging a single conspiracy, the government may invoke the coconspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E), to admit evidence against defendants that would otherwise be inadmissible. Statements of any of the defendants can be used to establish not only the existence of a conspiracy but also to establish that a particular defendant was a member of the conspiracy.\textsuperscript{34} And third, coconspirators are liable for the substantive crimes committed by members of the conspiracy that are in furtherance of the conspiracy. A finding that a defendant joined a conspiracy therefore exposes that defendant to much more than criminal liability for joining the conspiracy.\textsuperscript{35}
\end{quote}

\textsuperscript{30} Letter from Weiner, supra note 28.

\textsuperscript{31} The varied advantages were cataloged in United States v. Townsend, 924 F.2d 1385, 1388 (7th Cir.).

There has been a substantial increase in the number and complexity of the conspiracy case; most of this trend is reflected in the drug prosecutions which have grown wider and wider as the Department of Justice increases its attention to the "war on drugs." From local conspiracies, we have grown to national and multinational ring conspiracies. The department figures on overall criminal cases filed are: 47,043 in 1971 (the last year I was U.S. Attorney) to 66,341 in 1989. (Those are national figures, of course.) The largest single increase is in the drug prosecutions and the great bulk of those involve conspiracy allegations, including RICO counts.33

This change in the growing number of conspiracy prosecutions34 can be seen in large cities and small cities, in regions throughout the country, in the federal courts and in the state courts. Some excerpts from letters written by several judges make the point clearly. United States Judge Hodges of the Middle District of Florida stated:

I would say that the proliferation of conspiracy prosecutions — or, more accurately, conspiracy counts — has been encouraged during the last twenty years by the simplification and clarification of both the substantive and procedural jurisprudence governing the subject. . . .

In short, as the pleading and proof of conspiracy charges has become both easier and more familiar for prosecutors (and to the Courts), the inevitable has come to pass — the use of a conspiracy count has grown.35

Appellate Judge Frederick Green of the Fourth District of the State of Illinois found: "The only change I have noted in the prosecution of conspiracy cases in the past 20 years is the more frequent use of the theory in drug cases."36 United States District Judge Marvin Aspen from Chicago concluded: "Certainly more conspiracy cases with greater complexity have been filed in the Northern District of Illinois in each year of the successive eleven years I have been on the court."37

Two federal judges from the District of Arizona, sitting in the southern portion of the state, described the situation in forceful terms. Judge Richard Bilby commented: "[There has been] increased use in drug cases, every multi-party drug case, even if it is two mules packing it across the border, contains a conspiracy count."38 The Honorable Alfredo Marquez wrote:

33 Letter from William J. Bauer, Chief Judge, United States Court of Appeals, Seventh Circuit, to author (Jan. 29, 1991) (on file with author).
34 Though the growing number can be directly linked to drug prosecutions, there has been a substantial increase in prosecutions dealing with so-called white collar offenses and gun related offenses, also. See infra note 41.
35 Letter from William Terrell Hodges, Judge, United States District Court, Middle District of Florida, to author (Jan. 28, 1991) (on file with author).
36 Letter from Frederick S. Green, Judge, State of Illinois, Appellate Court, Fourth District, to author (Feb. 1, 1991) (on file with author).
37 Letter from Marvin E. Aspen, Judge, United States District Court, Northern District of Illinois, to author (Feb. 12, 1991) (on file with author).
38 Letter from Richard M. Bilby, Judge, United States District Court, District of Arizona, to author (Feb. 21, 1991) (on file with author).
I worked as a prosecutor for about three years when Morris Udall was County Attorney in the middle 50's. I don't recall that a conspiracy charge was thrown in with every Indictment. Since 1980, when I went on the Federal Bench, I doubt that I have seen many Indictments that did not contain a conspiracy charge. This is true even when the defendant, or defendants, have been arrested after committing the substantive crime. I suspect that the same is true throughout the country. 39

Many of the federal courts, in particular, have seen the increase in conspiracy charges. These courts may see yet another giant increase in the area if the President's position on gun-related cases prevails. Recently the Bush Administration announced that it would seek "to have as many criminal cases as possible prosecuted in Federal courts rather than state courts when the cases involve guns." 40 Because many of the gun cases involve multiple defendants, we can expect that such a policy, code named "Project Triggerlock" by former Attorney General Thornburgh, would result in many more conspiracy charges in the federal courts. 41

B. Complexity of the Conspiracy Prosecutions

Perhaps the most striking change in the conspiracy area during the past two decades has been the enormous number of cases involving many defendants, complex evidentiary issues, and dozens and dozens of complicated charges. While it was not highly unusual twenty years ago to see such big and cumbersome cases, today it is absolutely commonplace. Consider, for instance, this handful of recent and somewhat typical cases:

- *United States v. Casamento*, 42 with twenty-one defendants, 275 witnesses, thousands of exhibits, and 40,000 pages of transcripts; the trial lasted seventeen months.
- *United States v. Ianniello*, 43 lasted more than thirteen months at the trial level; involved eleven defendants.
- *United States v. Accetturo*, 44 twenty-six-defendant trial; lasted fifteen months.

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39 Letter from Alfredo C. Marquez, Judge, United States District Court, District of Arizona, to author (Feb. 20, 1991) (on file with author).
41 As the New York Times article points out, *id.*, the increases in the federal courts have been truly nothing short of the miracle referred to above. From 1980 to 1990 the number of federal prosecutors doubled, to 3900 from 1900, and the number of drug cases increased five-fold, to 16,400 from 3,100. *Id.* Chief Judge Keep of the Federal District for the Southern District of California, based in San Diego, stated in the article that "[p]olicies like Triggerlock will make a bad situation impossible." *Id.* at B11. She noted that the district typically "tries fewer than 50 of the 1,000 civil cases filed each year and spends more than 70 percent of its time on mostly routine drug and gun cases." *Id.* Recognizing that the administration's proposal would "provide for Federal jurisdiction over offenses traditionally reserved for state prosecution," Chief Justice Rehnquist, in his role as presiding officer of the Judicial Conference of the United States, wrote House committee members urging a rejection of this proposal. The Judicial Conference's statement noted that the "expansion of Federal jurisdiction will swamp the Federal courts with routine cases that states are better equipped to handle." Ifill, Chief Justice Urges House Panel to Reject Crime Bill Amendments, N.Y. TIMES, Sept. 21, 1991, at A8.
43 866 F.2d 540 (2d Cir. 1989).
44 842 F.2d 1408 (3d Cir. 1988).
• *United States v. Kopituk*,\(^4\) involved a seven-month trial with twelve defendants, seventy counts, 130 witnesses, and more than 22,000 pages of transcript.

• *United States v. Martino*,\(^6\) with twenty defendants and thirty-five counts; produced a record of almost 100 volumes holding more than 11,000 pages of the testimony of over 200 witnesses, along with five boxes of exhibits.

It is difficult to imagine how a jury goes about sorting the testimony of hundreds of witnesses, or considering evidence it heard more than a year earlier. Indeed, how does a jury begin to apply the reasonable doubt standard when there are more than fifty counts charging more than a dozen different individuals? In today’s world of conspiracy prosecution, however, such a situation — while perhaps not the norm — occurs with great frequency. And the impact on individual defendants can be quite severe. Defense counsel Weiner makes the point well:

The smaller players in a large conspiracy trial will be denied a host of other constitutional rights. They may well be denied bond due to the magistrate being impressed by the evidence against more significant conspirators; they will remain detained pretrial for a far longer period; they will likely be denied a speedy trial due to protracted pretrial proceedings, discovery, and motion practice related only to the more significant players; they will be denied the testimony of co-defendants whose testimony favorable to the lesser alleged conspirator is withheld in the name of self-preservation; they will be denied a speedy appeal and will have less chance to prevail on the merits due to the inertia of the bound-together convictions. Aside from these devastating consequences, as stated above, no matter what precautions a judge or defense attorney takes, every defendant suffers tremendous prejudice as a result of being associated at trial with other culpable defendants.\(^7\)

Judge Mary Schroeder of the Ninth Circuit struck a similar chord when she wrote that: "[t]here appears to be a legitimate concern on the part of defense lawyers that it is easy to convict a defendant of a conspiracy by showing little more than guilt by association, particularly in multi-defendant trials where those less culpable are joined with the ring leader."

With such difficult problems presented by large multi-defendant cases, why then do we see them with such regularity? The answer always has been that judicial economy is served by trying many conspirators at the same time. The United States Supreme Court dismissed the argument that separate trials would be a necessary or even desirable practice:

Joint trials play a vital role in the criminal justice system, accounting for almost one-third of federal criminal trials in the past five years. . . . Many joint trials — for example, those involving large conspiracies to import and distribute illegal drugs — involve a dozen or more co-defendants. Confessions by one or more of the defendants are


\(^7\) Letter from Weiner, *supra* note 28.

\(^8\) Letter from Mary M. Schroeder, Judge, United States Court of Appeals, Ninth Circuit, to author (Feb. 26, 1991) (on file with author).
commonplace — and indeed the probability of confession increases with the number of participants, since each has reduced assurance that he will be protected by his own silence. It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution’s case beforehand. Joint trials generally serve the interests of justice. . . .

Still, the concerns about the impact of multi-defendant trials have been widely expressed. Lest I be accused of overstating the problem, I should hasten to note that joint trials involving complex matters are not a required procedure. Judges certainly have the discretion to grant motions to split trials apart, as to both parties and charges. To be sure, the Federal Rules of Criminal Procedure — and most state rules as well — specifically allow for such severance motions. The fact of the matter is, however, that it is unusual for defense motions to be granted, even in these large complicated cases.

The starting point in terms of severance is the oft-cited proposition that in "conspiracy cases, the general rule is that persons jointly indicted should be tried together." The defense severance motion is granted only with a strong showing of prejudice, and the denial of the motion for severance is reversed only for an abuse of discretion. The Eleventh Circuit recently made clear its reluctance to grant severance motions:

[A] district judge is required to balance the prejudice that a defendant may suffer from a joint trial, against the public's interest in judicial economy and efficiency. In order to establish that a refusal to sever constituted an abuse of discretion, an appellant must demonstrate that he "suffered compelling prejudice against which the trial court was unable to afford protection."

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50 FED. R. CRIM. P. 14, entitled "Relief from Prejudicial Joinder," provides in material part:

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

Id.
51 United States v. Paulino, 935 F.2d 739, 751 (6th Cir.), cert. denied, 112 S.Ct. and 112 S.Ct. 323 (1991) The court went on to write that this rule "is especially true where the offenses charged may be established against all of the defendants by the same evidence resulting from the same series of acts.
Paulino, 935 F.2d at 751.
52 Id.
53 United States v. Cross, 928 F.2d 1030, 1037 (11th Cir. 1991). This heavy burden on the defense for severance is also found with different evidence being offered against the different parties (the so-called "spillover impact"), and in situations in which co-defendants argue that, if they were tried separately, each defendant would provide exculpatory testimony on the other's behalf. See generally Id. at 1037; United States v. Emond, 935 F.2d 1511, 1514 (7th Cir. 1991).
The severance motion generally is not granted even in the situations in which the defendants directly attack one another. It is not enough, said the Sixth Circuit, that the defendants' defenses are prejudicial to one another. Rather, the defenses must be so antagonistic that they "will confuse or mislead the jury."\(^5\) The mere fact that each defendant "points the finger" at his co-defendant is insufficient; a defendant seeking to have a trial severed "must show that antagonistic defenses will confuse or mislead the jury."\(^5\)

The one positive development in this difficult area has been the growing concerns of trial judges both with their capability to manage such cases and with the ability of juries to follow the evidence and satisfy their own obligations under the law. Thus, we are just beginning to see trial judges thoughtfully and courageously move forward to break up these large cases. The prototype for the future may be the actions taken by Judge Marvin Aspen of the Northern District of Illinois in the widely-publicized case of United States v. Andrews.\(^5\) The case involved a "labyrinthine 305-page, 175-count indictment . . . nearly two inches thick and weighing almost four pounds . . . [which named] thirty-eight defendants . . . [as alleged] members or associates of the El Rukns, an infamous Chicago street gang."\(^5\) The charges alleged more than 250 separate criminal acts from 1966 to 1989. The government asked for a single trial of all the parties and counts because each of the criminal acts "was allegedly committed to attain power, control and wealth for the street gang."\(^5\)

Judge Aspen was faced with a serious dilemma. On the one hand, he found that the parties and the counts had been properly joined under Federal Rule of Criminal Procedure 8(b) because the defendants were "'alleged to have participated in the . . . same series of acts' . . . [and because] all members of [a charged] conspiracy are properly joined."\(^5\) Joinder was proper because the defendants were alleged to have been part of a single and unifying conspiracy.\(^5\) On the other hand, Judge Aspen was convinced that serious problems existed for this trial, and one would have to "weigh the public interest in a joint trial of the twenty-two to twenty-nine defendants against the possibility of undue prejudice or confusion arising from such a trial."\(^5\)

The court in Andrews concluded that severance was essential:\(^5\)

Thus, it is clear that a "monster" trial such as the one proposed here presents uniquely significant inefficiencies and hardships. These disadvantages far outweigh any arguable advantages of a joint trial, including the potential reduction in aggregate trial time, which in this

\(^{54}\) United States v. Crottinger, 928 F.2d 203, 206 (6th Cir. 1991). See also United States v. Caporale, 806 F.2d 1487, 1510 (11th Cir. 1986), cert. denied, 483 U.S. 1021 (1987) (severance only required if "the jury will infer that both defendants are guilty solely because of the conflict" between their defenses). The court in Emond stated the matter directly: "Because of the 'strong public interest in having persons jointly indicted tried together', . . . 'hostility and finger pointing during the joint trial . . . alone [are] insufficient to justify granting a severance." Emond, 935 F.2d at 1514.

\(^{55}\) Crottinger, 928 F.2d at 206.

\(^{56}\) 754 F. Supp. 1161 (N.D. Ill. 1990).

\(^{57}\) Id. at 1164. In addition to the "standard" conspiracy charge, one of the counts charged 36 defendants with substantive violations of RICO and listed 128 separate acts of racketeering. Id. at 1165.

\(^{58}\) Id. at 1164.

\(^{59}\) Id. at 1168 (citations omitted).

\(^{60}\) Id. at 1169, being unified under the RICO charge.

\(^{61}\) Id. at 1170.

\(^{62}\) For additional discussion of Judge Aspen's actions see infra text accompanying notes 226-27.
case in any event is doubtful. Accordingly, a strong presumption in favor of a joint trial is not justified in the context of a mega-trial. Indeed, since several separate and shorter trials involving smaller groups of defendants would largely eliminate the disadvantages of such a trial, the public interest supports a strong presumption against a joint mega-trial and in favor of severance.63

Noting that the problems in this case were not atypical,64 the judge developed a severance plan for splitting this huge case into five separate, sequenced trials.65 Such an effort by the trial judge involved meticulous review of the documentation in the case, a willingness to confront strong prosecutorial objections, and an ability to devise a thoughtful and practical solution. Judge Aspen's plan appears to be a well-considered approach which will promote the interests of justice.

C. RICO Emerges

In 1970 Congress enacted the Organized Crime Control Act, containing Title IX, "Racketeer Influenced and Corrupt Organizations," commonly known as RICO.66 The intent of Congress was "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."67 In the early years after its passage, RICO proved to be of limited use in the federal courts, and in the state courts as well.68 Over the past decade, the RICO debate has become intense and has merged with the

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63 Andrews, 754 F. Supp. at 1175 (citations omitted).
64 Unfortunately, prosecutors long have been willing to bring cases of this nature, despite the violence they do to the notion of a fair trial. Indeed, prosecutors generally have demonstrated an increasing "penchant for drawing together evermore complex and extensive conspiracies into a single indictment." This phenomenon can be explained by the fact that prosecutors have significant incentives to bring mass indictments, not the least of which is the consequent ability to procure a large number of convictions in what they perceive to be the shortest amount of time. The regrettable truth, however, is that these incentives carry far greater weight in the charging decision than any concern for a fair and manageable trial. It seems unlikely, then, that the recent increase in mega-trials will soon be curbed at the initiations of the prosecutions. Id. at 1180 (citations and footnotes omitted). As of this writing, the severance plan does not appear to have harmed the government. It has received 33 convictions in the first three trials. See Businessman, 6 Others Guilty in Chicago Street Gang Case, WASH. POST, Sept. 2, 1991, at A4.
65 Andrews, 754 F. Supp. at 1181-82, modified, id. at 1197 and at 1206. Mention should also be made of the important Second Circuit case, United States v. Casamento, 887 F.2d 1141, 1152 (2d Cir. 1989), cert. denied, 493 U.S. 1081 (1990) which adopted a presumption against joint trials when faced with a request for a "mega-trial." The court in that case noted that, if the government estimated that a trial would run more than four months, it should "present a reasoned basis to support a conclusion that a joint trial of all the defendants is more consistent with the fair administration of justice than some manageable division of the case into separate trials for groups of defendants." And if the case involved more than ten defendants, "the prosecutor [should] make an especially compelling justification for a joint trial." See generally Robert O. Dawson, Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices, 77 MICH. L. REV. 1379 (1979).
68 Soon after the federal law was passed, many state legislatures passed their own versions based almost entirely on the federal model. See, e.g., COLO. REV. STAT. 8b: §§ 18-17-101 to -09 (1986); IND. CODE ANN. §§ 35-45-6-1 to -2 (West 1991); N.J. STAT. ANN. §§ 2C:41-1.1 to -6.2, 5:12-125 to -29 (West 1991); R.I. GEN. LAWS § 7-15-1 to -11 (1986).
CRIMINAL CONSPIRACY

controversy surrounding conspiracy law. Before turning to that debate, however, it is important to have a clear understanding of what RICO is and what it can do.

RICO actually does not create any new substantive offense, except to the extent that it ties together existing crimes in an enterprise liability charge. The substantive provisions of RICO make it a crime to conduct a pattern of racketeering activity through involvement in an enterprise. The statute also makes it criminal to conspire to violate the substantive provisions. The argument about RICO has centered on three aspects of the crime: defining the pattern, limiting the scope of the enterprise, and applying the conspiracy crime to the enterprise. The courts have given RICO a broad reading. The Supreme Court in a series of cases has allowed RICO prosecutions to proceed with widely-defined "patterns," has applied the enterprise doctrine to both lawful and unlawful associations, and has allowed the RICO forfeiture provisions to be used liberally.

RICO, combined with conspiracy, has always had the potential to cause serious definition and application problems, especially with large multi-defendant prosecutions. After all, it is hard to imagine two terms more difficult to confine in such cases than "enterprise" and "agreement." Still, the problems with such issues have been seen rather unevenly throughout the country. In some places RICO has had fairly limited impact. Judge Richard Mills of the United States District Court in Springfield, Illinois has reported that he has "had no significant criminal RICO cases." This view has been repeated by the Honorable Thomas Flannery of the District Court for the District of Columbia ("I can't recall having tried a criminal RICO case. . ."). Judge Bilby of Arizona ("Not

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73 These questions are wholly apart from the civil RICO issues where most of the recent controversy has actually been focused. For a good overview of the problem in the civil area, see RICO and its Progeny: Good or Bad Law?, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 369 (1986) (transcript of debate between Judge Abner Mikva and Professor G. Robert Blakey).
74 The problems with the substantive RICO crime continue. See, e.g., United States v. Coonan, 938 F.2d 1553 (2d Cir. 1991); United States v. Busacca, 936 F.2d 232 (6th Cir. 1991), cert. denied, 112 S.Ct. 595 (1991); United States v. Eufrasio, 935 F.2d 553 (3d Cir. 1991); United States v. Sanders, 928 F.2d 940 (10th Cir. 1991). The language of the court in Lange v. Hocker, 940 F.2d 359, 360 (8th Cir. 1991) shows the increasing judicial frustration with RICO:

We are confronted with yet another RICO case asking us to divine what constitutes a pattern of racketeering activity. The efflorescence of RICO's judicial interpretation has not been an uncomplicated progression; indeed, the flowering of the statute's legacy is akin to jungle underbrush run amok. With machete in hand, we attempt to clear a path to reach the case now before us. Having hacked our way through the tangle, we affirm. . . .

Id.
76 Letter from Richard Mills, Judge, United States District Court, Central District of Illinois, to author (Jan. 29, 1991) (on file with author).
77 Letter from Thomas A. Flannery, Judge, United States District Court, District of District of Columbia, to author (May 28, 1991) (on file with author).
enough of these cases have been filed in Tucson to make any kind of an estimate.")\(^\text{78}\), Judge Green of the Illinois Appellate Court ("RICO has not been used very often in cases which reach our court. Our Clerk indicated to me that he could remember only two such cases that we have had. My memory is consistent with this.")\(^\text{79}\), and Judge Schroeder of the Ninth Circuit ("RICO was very popular for awhile, but seems to have faded somewhat. Perhaps this is because we are still not sure what all the words mean.").\(^\text{80}\) In his letter, United States District Judge William Terrell Hodges discussed the RICO question:

My experience has been that RICO counts have not supplanted conspiracy charges; rather, when reasonably available, a RICO count has been added in tandem with a conspiracy charge, under § 1962(d), and the predicate substantive offenses. My impression is that prosecutors are prone to add RICO charges not for the same reasons that prompt the adding of a conspiracy count, but for the reason that RICO is a much more serious charge (20 years imprisonment). . . . See also Section 2E1.1, U.S.S.G. The seriousness of the charge, of course, relates directly to the leverage of the prosecution in plea negotiations especially in white collar offenses.\(^\text{81}\)

In other parts of the country, however, RICO has been charged regularly and often combined with the conspiracy offense. Chief Judge Bauer of the Seventh Circuit was quite blunt about the rise of RICO:

The impact of RICO has been enormous — on the civil cases as well. Just on the criminal side, the forfeiture provisions are so tempting damn near every case with more than one defendant is strained into RICO. RICO accounts for most of the increase in conspiracy prosecutions; again, the drug area is the prime target.\(^\text{82}\)

When RICO is combined with criminal conspiracy, it can create enormous problems. The best such example may be the El Rukn gang case from Chicago, discussed above, United States v. Andrews.\(^\text{83}\) The indictment in that case charged the defendants with conspiracy to violate RICO, asserting that the El Rukn organization was a racketeering enterprise within the meaning of the statute.\(^\text{84}\) The defendants argued that the facts would show that there were truly separate groupings of defendants such that there were a number of conspiracies, not a single overarching pact. The court agreed with the defendants' view but noted the impact of RICO:

With the advent of RICO, Congress significantly broadened the scope of the government's authority to bring defendants together in one indictment. It conferred this broad authority without . . . "radically

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\(^\text{78}\) Letter from Bilby, supra note 38.
\(^\text{79}\) Letter from Green, supra note 36.
\(^\text{80}\) Letter from Schroeder, supra note 48.
\(^\text{81}\) Letter from Hodges, supra note 48.
\(^\text{82}\) Letter from Bauer, supra note 33.
\(^\text{83}\) 754 F. Supp. 1161 (N.D. Ill. 1990).
alter[ing] traditional conspiracy doctrine. . . ." Instead, Congress simply outlawed a particular conspiratorial agreement, the object of which could include the commission of a wide array of separate and distinct offenses. Section 1962(d) of the RICO statute proscribes agreements "to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity."

The court concluded that joinder of all the defendants was proper because they were charged as members of "a single and unifying RICO conspiracy." A case like Andrews demonstrates the broad potential that is available to prosecutors in linking conspiracy with RICO as the charge becomes agreeing to engage in an enterprise, surely one of the least definable concepts in our criminal justice system. Moreover, to prove the RICO conspiracy the government generally does not have to show that the defendant herself committed the racketeering acts or even that she personally agreed to commit those acts. It is sufficient to show her agreement to the objective of a violation of RICO. Professor Johnson noted the problem when he wrote to me that "[a]ll of the opportunities for abuse and excess have been magnified in RICO, as the courts have construed that misleading statute. . . . Broad and vaguely defined offenses, combined with horrendous sentencing possibilities, give the prosecution the power to make an offer which the defense cannot refuse."

85 Andrews, 754 F. Supp. at 1168.
86 Id. at 1169 (emphasis in original). See also United States v. Gallo, 668 F. Supp. 736, 747 (E.D.N.Y. 1987): "If we were to apply pre-RICO concepts of conspiracy to this case, we would likely find that a single conspiracy could not be charged based on these allegations. . . . The limitations on the prosecution's power to charge are virtually eviscerated by the RICO conspiracy device." Id.
87 The most influential RICO conspiracy case in the "early" years is United States v. Elliott, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978). In that case six defendants and more than three dozen unindicted co-conspirators constituted what was described as "a myriopod criminal network, loosely connected but connected nonetheless." Elliott, 571 F.2d at 899. They were alleged to have stolen goods, distributed narcotics, and committed arson. The ultimate proof as to their combined activity was not strong:

The activities allegedly embraced by the illegal agreement in this case are simply too diverse to be tied together on the theory that participation in one activity necessarily implied awareness of others. . . . The enterprise involved in this case probably could not have been successfully prosecuted as a single conspiracy under the general federal conspiracy statute. . . .

Id. at 902. The court found, however, that RICO could "come to the rescue" because of the enterprise and pattern of activity structure: "To be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes." Id. at 903 (emphasis in original).
89 Professor Johnson went on to write that "[a]ll this has accomplished much positive good in the form of successful prosecutions of white collar and organized criminals, but I fear we have created a monster and will live to regret it." Letter from Johnson, supra note 18. See also the rather cryptic remark by Judge Mikva that he "think[s] the existence of a RICO threat has substantially affected the way that criminal charges are drawn, bargained over and tried." Letter from Abner J. Mikva, Chief Judge, United States Court of Appeals, District of Columbia Circuit, to author (Feb. 8, 1991) (on file with author).
Attorney Jeffrey Weiner condemned the use of RICO but offered a possible positive result of its use:

I think the impact of RICO in the area has been two-fold. First, it has provided prosecutors with another tool that is easily abused and places criminally accused at a severe disadvantage. As with conspiracy statutes, RICO statutes permit the government to join together smaller, manageable (from the defense perspective) prosecutions into multi-defendant mega cases that place defendants at the same disadvantage as conspiracy prosecutions. I have seen cases where garden variety misdemeanor charges have been parlayed into major RICO prosecutions carrying far more substantial (and unwarranted) penalties and requiring a much more aggressive and sophisticated defense. On the other hand, because RICO charges are far more complex than many other charges covering similar offenses, they provide the opportunity to develop more creative, technical and legal defenses. The unfairness of prosecuting and trying a small player in a major RICO trial is more obvious than the same unfairness inherent in trying these defendants in large conspiracy trials. However, once a judge has recognized the former situation, she is much more likely to be sensitive to the latter situation. Thus, the government's flagrant abuse of RICO prosecutions may ultimately lead to more judicially imposed fairness in more common conspiracy prosecutions.90

Looking at the criminal RICO cases certainly will give one considerable pause. Still, the problems with the civil RICO cases seem to have engendered far more concern and criticism.91 Moreover, it is also true that the criminal RICO cases are prosecuted quite unevenly throughout the country. Some districts hardly ever seem to see the crime while in others the problems are real and intense. A comment by Judge Goodwin of the Ninth Circuit reflects this point: "My intuition is that criminal RICO was a lot of sound and fury about not much substance. It made Congress feel good to think that it had done something about organized crime."92

D. Proving a True Agreement

One feature of criminal conspiracy law has remained a constant over the past twenty years: a concern that individuals who are not actually members of the group will be swept into the conspiratorial net.93 This feature manifests itself in three important ways.

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90 Letter from Weiner, supra note 28.
91 Certainly most of the discussion concerning reform of the RICO law has focused not on the criminal application, but instead on the civil and forfeiture provisions. See, e.g., Stephen Labaton, House Panel Backs Easing of Civil Racketeering Law, N.Y. TIMES, May 3, 1991, at D8. In the article it is noted that "about 1,000 civil racketeering cases have been filed each year since 1985, up from a total of 270 cases from 1970 to 1985, according to the Administrative Office of the United States Courts." See generally Rhonda McMillion, ABA Seeks End of Civil RICO Abuses, A.B.A. J., Oct. 1991, at 112.
92 Letter from Goodwin, supra note 20.
93 Long ago Clarence Darrow remarked, "If there are still any citizens interested in protecting human liberty, let them study the conspiracy laws of the United States." See CLARENCE DARROW, THE STORY OF MY LIFE 64 (1932).
1. Guilt by Association

Because conspiracy by its very nature is difficult to prove, the government is given broad discretion in offering its case. The agreement may be shown by wholly circumstantial evidence, and the individual's intent to join the agreement can be demonstrated by "[c]ircumstances altogether inconclusive ... [which] may, by their number and joint operation ... be sufficient to constitute conclusive proof." Moreover, individuals can be found guilty of the crime if shown to have conspired with unknown conspirators. Such leeway is deemed to be necessary to combat large criminal projects, because "a conspiracy is seldom born of 'open covenants openly arrived at.'"

Allowing such broad prosecutorial discretion gives rise to the fear that those who associate with conspirators, those who know about the conspiracy, may themselves be convicted of a crime which they have not intended to commit, and may be found to be a part of a group which they never joined. The problem, of course, is accentuated in large, multi-defendant conspiracy trials where it may be difficult to keep matters straight over a six- or ten-month period. This concern was expressed to me by defense lawyers, judges and prosecutors. Federal Judge Bilby from Arizona stated that the major disadvantage for defendants in facing a conspiracy count was "primarily pulling in marginally connected people and then convicting them of the conspiracy and substantive counts — very unfair." A more positive development is a widely-held belief that many courts are beginning to recognize this problem to a far greater extent than ever before. Jeffrey Weiner from Miami, a harsh critic of many of the conspiracy rules, wrote that he has "observed a growing sensitivity in some of the federal appellate courts to the notion that innocent persons who are merely present or in association with others at the time of drug raids do get swept up in the dragnet of conspiracy investigations and are improperly prosecuted (and convicted).... [These] courts have reversed several conspiracy convictions, ... where, though the evidence may have aroused substantial

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96 See United States v. Valles-Valencia, 811 F.2d 1232, 1239 (9th Cir. 1987).
97 United States v. James, 528 F.2d 999, 1011 (5th Cir.) (quoting Lacaze v. United States, 391 F.2d 516 (5th Cir. 1968)), cert. denied, 429 U.S. 959 (1976).
98 This fear becomes intensified when the prosecution occurs in courts which accept the so-called "slight evidence rule." When a conspiracy is shown, "even a slight connection to the defendant will sustain his conviction." United States v. Ocampo, 937 F.2d 485, 489 (9th Cir. 1991); United States v. Candoli, 870 F.2d 496, 511 (9th Cir. 1989); United States v. Coppie, 827 F.2d 1182, 1187 (8th Cir. 1987), cert. denied, 484 U.S. 1073 (1988); United States v. Hamilton, 689 F.2d 1262, 1275 (6th Cir. 1982), cert. denied, 459 U.S. 1117 (1983). This is a highly questionable proposition because it is not clear whether the courts mean to suggest that jurors can be instructed on anything other than the reasonable doubt standard for individual defendants (clearly they cannot be) or whether somehow the government is relieved of its burden to show proof beyond a reasonable doubt. Several cases, recognizing the difficulty with this statement of law, have rejected this "rule." The most prominent to "banish" it are United States v. Durrive, 902 F.2d 1221, 1225 (7th Cir. 1990) (substantial evidence needed to show the conspiracy and the defendant's involvement in it); and United States v. Malatesta, 590 F.2d 1379, 1382 (5th Cir.), cert. denied, 440 U.S. 962 and 444 U.S. 846 (1979).
100 Letter from Bilby, supra, note 38.
suspicion concerning the defendant, it failed to establish more than association and presence.\textsuperscript{101}

A look at some of the cases Weiner cites is instructive in terms of seeing the closer scrutiny that judges appear to be giving to the notion of guilt by association. In \textit{United States v. Villegas},\textsuperscript{102} the evidence clearly showed that one brother had engaged in narcotics trafficking. Against the other brother, however, the evidence was not so clear. He was seen by the officers outside the house of his brother, he looked up and down the street when he exited the house, and he followed his brother to a parking lot where the subject drug transaction took place. The court on appeal reversed the conspiracy conviction, finding that it "hinges on [his] relationship with his brother... Knowing participation in a conspiracy, however, cannot be proved solely by a family relationship or other types of close association."\textsuperscript{103}

A similar treatment of the difficult issues took place in \textit{United States v. Hernandez}.\textsuperscript{104} There the government's case principally was that the defendant drove in the drug dealer's car and was present at the time of the drug delivery. These facts, even coupled with the defendant's flight from the scene (after he had "picked up on something"), were insufficient from the appellate court's view. The court recognized that the government did not have to prove its case by direct evidence and that presence at the scene of the crime "is a material and probative factor which the jury may consider in reaching its decision."\textsuperscript{105} While the court agreed that the defendant's behavior was suspicious, the burden was on the government to show, beyond a reasonable doubt, that the defendant knew of the conspiracy and voluntarily joined it.\textsuperscript{106} This the government had not done "[c]onspiratorial intent cannot exist without knowledge; evidence of knowledge must be clear and unequivocal."\textsuperscript{107}

\textsuperscript{101} Letter from Weiner, supra note 28.

\textsuperscript{102} 911 F.2d 623 (11th Cir. 1990), cert. denied, 111 S.Ct. 1625 (1991).

\textsuperscript{103} Villegas, 911 F.2d at 630. The court discussed the matter further:

Deciding what is or is not sufficient evidence is always a difficult chore and it becomes even more so when the factual backdrop consists of a reprehensible traffic in pernicious narcotics. But the presumption of innocence remains constant, irrespective of the heinous nature of condemned activity, as does the requirement that the government prove its case beyond reasonable doubt, notwithstanding the presence of mere suspicion and speculation.

\textit{Id.} at 630. \textit{But see} the opinion of Judge Roney, dissenting in part:

We have had enough of these cases to know that drug dealers use look-outs. The jury knew this. Assuming Jairo to be a look-out, it is not clear what he would have done that he did not do, or what more evidence one might expect. This Circuit has long ago rejected the mere presence defense when the evidence would indicate that drug dealers would not have tolerated the defendant being present were he not involved.

\textit{Id.} at 633 (Roney, J., dissenting in part).

\textsuperscript{104} 896 F.2d 513 (11th Cir.), cert. denied, 111 S.Ct. 159 (1990).

\textsuperscript{105} Hernandez, 896 F.2d at 518 (quoting United States v. Kincade, 714 F.2d 1064, 1065 (11th Cir. 1983)).

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} \textit{Id.} at 519. \textit{See also} United States v. Hill, 936 F.2d 450, 455 (9th Cir. 1991), \textit{motion for modification of opinion filed}: "The essential elements of conspiracy are an agreement to accomplish an illegal objective, coupled with one or more overt acts in furtherance of the illegal purpose, and the requisite intent necessary to commit the underlying substantive offense." \textit{Id.}
2. The Unilateral Approach

The traditional view of conspiracy law has always been that the added group danger justifying this crime was based upon an agreement linking two or more willing criminal partners together. In many situations, however, only one party may be a willing participant while the other is simply one who feigns agreement. The situation occurs most often, as might be expected, with the undercover police agent who is involved in some sort of sting arrangement. In such a situation, the question arises as to whether the "true" conspirator should be responsible under the conspiracy offense.

The drafters of the Model Penal Code long ago took the position that no actual agreement was needed, and that a unilateral approach to conspiracy should be pursued. The argument follows the notion that the danger issue should focus on the individual’s culpable state of mind, not on the presence of a bilateral agreement:

He has conspired, within the meaning of the definition, in the belief that the other party was with him; apart from the issue of entrapment often presented in such cases, his culpability is not decreased by the other’s secret intention. True enough, the project’s chances of success have not been increased by the agreement; indeed, its doom may have been sealed by this turn of events. But the major basis of conspiratorial liability — the unequivocal evidence of a firm purpose to commit a crime — remains the same.

Many have objected to a unilateral approach to conspiracy, claiming that it destroyed the fundamental basis for the crime, an agreement of multiple parties. Still, the Model Penal Code position held sway with many state legislators, and many of the new criminal codes adopted the unilateral approach. Fifteen years ago, I asked judges and practicing lawyers whether the unilateral approach would have much impact in the criminal justice system. Overwhelmingly, the answer was that the approach would be of

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108 However, this is not always the case, as seen in State v. St. Christopher, 232 N.W.2d 798 (Minn. 1975). In St. Christopher the defendant tried to entice his cousin to join in the murder of his mother. Id. at 799. The cousin pretended to agree but then worked with the police in gathering evidence against the defendant. Id. The court affirmed the defendant’s conspiracy conviction because the state law, following the Model Penal Code, spoke only to the culpability of the defendant, not the agreement between two or more parties. Id. at 803.

109 MODEL PENAL CODE § 5.03 cmt. at 105 (Tentative Draft No. 10, 1960).

110 The unilateral approach makes sense at first blush. The unsuccessful conspirator did try to conspire — his state of mind was clearly criminal — but did he enter into a conspiracy? The conspiracy charge may subject the defendant to criminal liability at an earlier stage than any other inchoate offense and may raise procedural problems at trial. The stated reason for such results is the special danger resulting from group planning. . . . The Supreme Court has stated that "[i]t is impossible in the nature of things for a man to conspire with himself. In California as elsewhere conspiracy imports a corrupt agreement between not less than two with guilty knowledge on the part of each."

Marcus, Conspiracy, supra note 3, at 959-60. See generally Dierdre A. Burgman, Unilateral Conspiracy: Three Critical Perspectives, 29 DePaul L. Rev. 75 (1979); Comment, Conspirators May Go It Alone These Days, 12 Mil. J. Trial Advoc. 549 (1989).

111 After speaking with various legislative groups, I have concluded that the legislators presumably were persuaded that the question here should focus on personal culpability and individual danger rather than the concept of group activity.
minimal significance. At the time, I was skeptical, believing that the use of the unilateral approach could be very important, particularly in drug cases. I was wrong.

While there have certainly been convictions based upon the unilateral approach, relatively few cases go forward where a substantive offense has not been committed (or attempted), or where there have not been multiple parties jointly dealing with the undercover officer. Moreover, some state courts in facing a genuine unilateral approach situation have refused to recognize it as the law of the state. The most prominent case relying on the bilateral approach is People v. Foster. There the Illinois Supreme Court acknowledged that the state legislature indeed had adopted the unilateral approach of the Model Penal Code. The court refused to believe that the legislature understood what it was doing when it had accepted this approach:

The committee comments to section 8-2 detail the several changes in the law of conspiracy that were intended by the 1961 amendment. The comments simply do not address the unilateral/bilateral issue. The State suggests that the new language was so clear on its face that it did not warrant additional discussion. We doubt, however, that the drafters could have intended what represents a rather profound change in the law of conspiracy without mentioning it in the comments to section 8-2.

The court noted that the state solicitation statute "embraces virtually every situation in which one could be convicted of conspiracy under the unilateral theory." Hence, the court was not overly concerned about eliminating that which the legislative body had seemingly passed. Whether or not this view accurately reflects legislative intent, I believe that it squarely supports the correct rationale for the conspiracy offense.

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112 Marcus, Conspiracy, supra note 3, at 960-61.
114 457 N.E.2d 405 (Ill. 1983).
115 The Illinois statute referred only to the person who agrees with another; it deleted the traditional words "two or more persons who agree." Ill. Rev. Stat. ch. 38 para. 8-2 (Smith-Hurd 1989).
116 Foster, 457 N.E.2d at 407 (citation omitted).
117 Id. at 408.
118 The Illinois court does not stand alone in rejecting the unilateral approach, even in states in which legislatures seemingly have adopted it. See also Commonwealth v. Campbell, 390 A.2d 761, 764, aff'd, 399 A.2d 130 (Pa. 1978).
119 The Ninth Circuit stated the position very well:

The rationale behind making conspiracy a crime also supports [the bilateral] rule. Criminal conspiracy is an offense separate from the actual criminal act because of the perception "that collective action toward an antisocial end involves a greater risk to society than individual action toward the same end." In part, this view is based on the perception that group activity increases the likelihood of success of the criminal act and of future criminal activity by members of the group, and is difficult for law enforcement officers to detect. . . . Such dangers, however, are non-existent when a person "conspires" only with a government agent.

United States v. DeBright, 742 F.2d 1196, 1199 (9th Cir. 1984) (quoting Developments in the Law — Criminal Conspiracy, 72 Harv. L. Rev. 920, 923-24 (1959)).
3. Consistency

The unilateral approach, I concede, well may have engendered more expressions of anguish and concern than now appear justified. In those jurisdictions embracing the bilateral approach to conspiracy, however, an analogous and more serious change has taken place over the past decade. For a long time the Rule of Consistency stood as a major obstacle to those who would lessen the requirement of a true multiparty agreement and instead emphasize individual culpability. Under this Rule, a conviction of one charged conspirator could not stand where the only other charged conspirator was acquitted of conspiracy. The Rule adopts the fundamental view that "at least two persons are required to constitute a conspiracy."  

The Rule has its critics, those who believe that it overemphasizes joint criminality and underemphasizes proof of individual intent. The Rule also has a considerable number of exceptions and limitations. The co-conspirator must actually be acquitted, a hung jury is not enough, nor will a plea suffice. The acquittal must occur at the joint trial with the remaining conspirator, and the Rule does not apply if an agreement is actually shown, even if the other conspirators are not named in the indictment. Even with these substantial limitations, the Rule has stood as a strong affirmation of the group danger base for the crime of conspiracy.

Two Supreme Court decisions cast doubts on the continued viability of the Rule, in the minds of a number of judges. In Standefer v. United States, the Court held that a person could be convicted of aiding a principal, even though the principal had been acquitted of the substantive offense. The Court in United States v. Powell went further when it held that a jury could reach inconsistent verdicts as to a single defendant

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123 State v. Morris, 666 S.W.2d 471 (Tenn. 1983).
125 This situation normally occurs when the government charges that the defendant was involved with other persons not then known to the grand jury. See, e.g., United States v. Piccolo, 723 F.2d 1234, 1239 (6th Cir.), cert. denied, 466 U.S. 970 (1983).
126 The court in State v. Robinson, 567 A.2d 1173, 1178 (Conn. 1989) (citations omitted) (emphasis in original) applied the rule in a case in which the co-conspirator had been acquitted in a prior trial. The language of the court is very broad:

It is our view ... that the crime of conspiracy is unique in our criminal justice system in that it is directed at group culpability rather than at individual culpability. It is this qualitative difference from other crimes that prevents us from embracing the view urged by the state ... "The gravamen of the crime of conspiracy is the unlawful combination and act done in pursuance thereof, not the accomplishment of the objective of the conspiracy." ... "The prohibition of conspiracy is directed not at the unlawful object, but at the process of agreeing to pursue that object." Because the essence of conspiracy is the mental confederation of two or more persons, the crime is in every sense indivisible."

Id.

128 The principal in the case was actually acquitted at a separate, earlier trial. Id. at 12-13. Moreover, the jury in the later case was instructed that it could not find for the government unless it concluded, beyond a reasonable doubt, that the principal had committed the offense and that the defendant had aided in its commission. Id. at 13 n.6.
in a trial. These cases, it is argued, demonstrate that the Rule of Consistency would no longer be embraced by the Supreme Court. The leading opinion is United States v. Bucuvalas, where the court wrote that "the acquittal of all conspirators but one does not . . . necessarily indicate that the jury found no agreement to act." The court concluded that the Supreme Court's decisions now hold "that inconsistent verdicts, whether the result of leniency, compromise, or mistake, 'should not be reviewable.'"

I do not share the broad reading given to the Supreme Court's two decisions, nor do I view them as necessarily applicable to the conspiracy charge. On the former point, I note that Standefer involved separate trials for the parties, a situation which itself is excluded from the consistency principle. Moreover, Powell involved a very different fact pattern with multiple charges against a single person. On the latter point, the forceful dissent of Judge Clark in United States v. Andrews is persuasive. He looked to the unique aspects of the crime of conspiracy and the violence this broad treatment does to the concept. Quoting an earlier court decision, he wrote:

A conspiracy cannot be committed by a single individual acting alone; he must act in concert with at least one other person. The acquittal of one conspirator would thus be immaterial where there are several other named conspirators, or other conspirators charged but unknown to the jury. But where all but one of the charged conspirators are acquitted, the verdict against the one will not stand.

130 The defendant in Powell was convicted of facilitating felonies but was acquitted of the same underlying offenses. Though finding that the verdicts were inconsistent, the Supreme Court allowed the convictions because "[one cannot] necessarily assume[] that the acquittal . . . was proper — the one the jury 'really meant.'" Id. at 68.
131 909 F.2d 593 (1st Cir. 1990).
132 Id. at 596.
133 Id. at 597. The court in United States v. Velasquez, 885 F.2d 1076, 1091 n.13 (3d Cir. 1989) (citation omitted), further explained the rationale behind the Supreme Court's decisions:

Significantly, in both Standefer and Powell the Supreme Court relied on the fact that in reality, inconsistent jury verdicts are often a product of jury leniency. Thus, the Court recognized that the jury has an "historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch." An acquittal on one count, the Court therefore reasoned, does not necessarily indicate that the jury did not find there to be sufficient evidence of guilt on that charge. Thus, the acquittal should not mandate reversal of a finding of guilt on another charge which is dependent on the same factual allegations.

Id.
135 Andrews, 850 F.2d at 1571 (quoting Herman v. United States, 289 F.2d 362, 368 (5th Cir.), cert. denied, 368 U.S. 897 (1961)). He went on to write:

[Allowing inconsistent verdicts in conspiracy cases presents an unparalleled opportunity for the jury blatantly to treat equal participants unequally. . . . Conspiracy is already defined by a single element — an agreement to do something illegal — that is virtually always proven entirely by circumstantial evidence. Surely some limits are necessary to keep it from becoming any more nebulous. . . . [A] defendant cannot be convicted of conspiracy if the same jury has acquitted all of the defendant's alleged co-conspirators. I would do so not in an effort to speculate on what the jury's verdict meant, but in the interests of equal justice under the law and reserving the law of conspiracy for those situations where there truly has been group action.

Id.
It is inconceivable that the Supreme Court meant to say that a jury could convict one of only two alleged conspirators while finding the other charged individual not guilty. Could the Court genuinely have meant that it was willing to discard the fundamental basis for the crime of conspiracy, a basis which it has repeatedly cited over the past seventy years? Whatever else may be found in these cases, surely it is not a conspiracy which looks to the notions of group danger, multiple parties, and joint endeavors. Only the future will tell whose reading of the Court’s opinions is correct and whether we shall see a renewed attack on the bilateral requirement for the conspiracy offense.

4. The Evidentiary Advantages

Many advantages for the government are associated with the conspiracy charge. Venue is proper in any jurisdiction in which an overt act, any overt act, took place; joinder is proper of many parties committing many crimes over a long period of time; and — as we shall see — a single conspiracy can in certain circumstances be divided up to produce multiple terms of imprisonment for the single agreement. Certainly, these advantages are important and in some cases are crucial to the ultimate determinations of guilt or innocence, and sentence, for particular individuals. Nevertheless, the chief evidentiary advantage remains what it has always been, the rule regarding declarations by co-conspirators. In 1977, lawyers and judges referred to this as the principal advantage for the crime. This table, earlier published, chronicles the response to the question of doing away with the co-conspirator declaration rule:

Question 10. What would be the result of eliminating the hearsay exception in cases where conspiracy is charged or where it is the uncharged basis for the charged crime?

136 It has repeated this basis, and so has virtually every other American court. See, e.g., Commonwealth v. Hunter, 360 A.2d 702, 706 (Pa. 1976) (quoting Commonwealth v. Salerno, 116 A.2d 87, 89 (Pa. 1955)) (citations omitted):

In a charge for conspiracy the Commonwealth must prove that two or more are guilty. Where, therefore, there are only two conspirators and one is acquitted, the other cannot, of course, be tried or convicted. Where one of the two conspirators is acquitted, then there is a legal determination that one is innocent and thus there cannot be two guilty conspirators.

Id.

137 In responding to a question about the advantages of a conspiracy charge, United States District Judge Hodges of Tampa wrote, “I assume this means advantages to the prosecution since I can’t think of any ‘advantages’ offered to the defendant(s) or the judge.” Letter from Hodges, supra note 35. See also the comment made by United States District Judge Thomas Flannery of the District of Columbia: “The advantages in conspiracy charges seem to be all in favor of the prosecutor. I can think of no real disadvantage for the prosecutor who brings a conspiracy prosecution, assuming he has the necessary evidence for a successful prosecution. The disadvantages are all with the defendant.” Letter from Flannery, supra note 77.


139 See supra text accompanying notes 42-49.

140 See infra text accompanying notes 199-211.
The rule, in substance, has remained constant during the last fifty years or so. The basis for this special hearsay rule is not rooted in traditional notions of evidentiary reliability, but rather in the belief that the parties act as agents of one another and, therefore, should be held responsible for the statements of one another. The statement of one conspirator will be substantive evidence against the others if "there is substantial, independent evidence of the existence of the conspiracy . . . ; that the defendant and declarant were both members of the conspiracy; and the statements were made in the course of and in furtherance of the conspiracy." This statement of the law has changed little, and so has the view that the rule remains of great significance. Former Assistant United States Attorney David Nimmer of Los Angeles wrote that "the lingering thought that remains with me is that just about the most significant feature of conspiracy is the hearsay exception. . . ." Federal District Judge Hodges of Florida indicated that the proliferation of conspiracy counts has been encouraged by the "simplification and clarification of both the substantive and procedural jurisprudence governing the subject. I have in mind the Federal Rules of Evidence in 1975, especially Rule 801(d)(2)(E) (the co-conspirator declaration section), and the more recent Supreme Court decisions [in the area]."

141 Marcus, Conspiracy, supra note 3, at 940.

142 While the Federal Rules of Evidence refer to the declaration matter as a nonhearsay offering, there is little question that in fact this is hearsay, though coming within the guise of an exception. After all, as with other forms of hearsay, these are statements which are offered for the truth of the matter asserted. The court in United States v. Buettner-Janusch, 500 F. Supp. 1285, 1292 (S.D.N.Y. 1980), aff'd, 646 F.2d 759 (2d Cir.), cert. denied, 454 U.S. 830 (1981), directed its attention to this matter:

"We note in passing that . . . the Federal Rules of Evidence became effective on July 1, 1975. In that new code, the admissibility of the hearsay statements of a co-conspirator was codified, by a legislative finding that such statements are not hearsay. Like Humpty Dumpty in "Through the Looking Glass," a legislative body, when it uses a word such as "hearsay," can make that word mean what it wants to mean."

500 F. Supp. at 1292.


145 Letter from Hodges, supra note 35. Judge Hodges correctly noted that, while a conspiracy offense need not be charged in order to have the evidence considered under the Federal Rules regarding co-conspirator declarations, "many judges, including this one, are necessarily influenced by the framework of the indictment in making evidentiary rulings, especially early on in the trial." See also the statement of District Judge Marquez: "Another advantage, of course, is that the government can introduce any statements made in furtherance of the conspiracy, during the conspiracy, and they probably would not be able to introduce the statements if the conspiracy charge was not in the Indictment." Letter from Marquez, supra note 39.
While the substance of the evidence law has remained the same in recent years, many of the difficult questions of application which formerly were present have been answered, almost entirely to the great satisfaction of the government. Even as recently as ten years ago it was not at all certain: who applied the rules regarding the hearsay exception, judge or jury; what the standard of proof was to be; whether the statements themselves could be used to resolve the underlying evidentiary issue; and what the link was to confessions made by co-conspirators under the Bruton case. In four United States Supreme Court decisions of the 1980's the answers to these questions were given.

The first of the Court's opinions dealt with a narrow but important issue, the unavailability of the nontestifying co-conspirator. In United States v. Inadi, the trial judge admitted against the defendant statements which had been made by a co-conspirator. The statements were offered under the traditional hearsay exception discussed above. The defendant objected because, he claimed, the Confrontation Clause of the Sixth Amendment was violated absent a showing that the co-conspirator was unavailable to testify at trial. The Court recognized that the unavailability requirement existed with respect to other forms of testimony, particularly relating to prior testimony. It would not, however, extend this requirement to the co-conspirator declaration situation. In refusing to extend the requirement, Justice Powell discussed the unique significance of co-conspirator declarations: "[C]o-conspirator statements derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence." Hence, to exclude the statements without a showing of unavailability would be "clear folly." While the Court's position was stated over vigorous dissent, its holding clarified the law greatly and allowed for the government to proceed without making any effort at all to produce the original declarant.

The case which has had the greatest impact on conspiracy trials is Bourjaily v. United States. The Court resolved in that case a host of matters surrounding the co-conspirator declaration rule. Initially Chief Justice Rehnquist wrote that determinations

148 The trial judge specifically found that, as the statements were made during the course of and in furtherance of the conspiracy, Rule 801(d)(2)(E) was satisfied. Id. at 390.
149 The government's efforts to produce the declarant were limited at best. It subpoenaed him, but he failed to appear, saying that he had had car trouble. Id.
150 In Ohio v. Roberts, 448 U.S. 56 (1980) the Court construed the Confrontation Clause in the area of prior testimony to require a searching inquiry into the unavailability of the declarant. See id. The Court in Inadi wrote that "Roberts cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable," thus limiting the holding in Roberts to cases involving prior testimony. Inadi, 475 U.S. at 394.
151 Inadi, 475 U.S. at 395-96.
152 Id. at 396.
153 Justice Marshall, joined by Justice Brennan, dissented. He contended that the Confrontation Clause did require such a showing of unavailability, particularly in light of the necessarily unreliable nature of many co-conspirator declarations. He concluded that the Court's decision rested upon a judgment "that a defendant's constitutional interest in subjecting the extrajudicial declarations of co-conspirators to the cross-examination that has traditionally been the primary guarantee of reliability in trials must be subordinated to considerations of prosecutorial efficiency." Id. at 411 (Marshall, J., dissenting).
154 Many of the lower courts earlier had held that such showings of unavailability were necessary; indeed the Third Circuit in Inadi found that the Roberts case established a constitutional rule which would be applicable to all out-of-court statements. United States v. Inadi, 748 F.2d 812, 818 (3d Cir. 1984).
concerning the rule\textsuperscript{156} were to be made by the trial judge, not the jury.\textsuperscript{157} This
decision was important, but was to pale in comparison to the other decisions yet to be
made. Connected to the question of who was to make these determinations was the matter
of the standard of proof to be used. The Court settled on the tried and true, a
preponderance of the evidence test.\textsuperscript{158} These issues were undoubtedly important, but not
tremendously controversial. The Court, however, had not finished.

In \textit{Glasser v. United States}\textsuperscript{159} the Supreme Court discussed the co-conspirator
declaration rule and found that such a declaration by a co-conspirator would only be
allowed if there was "proof \textit{aliunde} that he is connected with the conspiracy. . . .
Otherwise, hearsay would lift itself by its own bootstraps to the level of competent
evidence."\textsuperscript{160} Most courts viewing \textit{Glasser} had written that it meant that the hearsay
statements themselves could not be considered in deciding the necessary facts under the
component declaration rule. The Court in \textit{Bourjaily} disagreed. Looking to the language
of the Federal Rules of Evidence,\textsuperscript{161} and also to the legislative history,\textsuperscript{162} the Court
held that the co-conspirators' statements could be used, as they could "be probative of the
existence of a conspiracy and the participation of both the defendant and the declarant in
the conspiracy."\textsuperscript{163} While the Court carefully chose not to decide whether the trial judge
could rely \textit{solely} on the hearsay statement,\textsuperscript{164} it allowed the statement to be considered
along with other evidence.\textsuperscript{165}

\begin{footnotes}
\footnotetext[156]{The determinations, of course, went to whether the statement had been made by a member of the
crime and during the course and in furtherance of the crime.}
\footnotetext[157]{This cleared up an enormous amount of confusion regarding the interpretation of Rules 104(a) and
104(b) as to the proper function of trial court and jury dealing with preliminary questions. See Lawrence
Kessler, \textit{The Treatment of Preliminary Issues of Fact in Conspiracy Litigations: Putting the Conspiracy
Back in the Co-Conspirator Rule}, 5 \textit{Hofstra L. Rev.} 77 (1976); Paul Marcus, \textit{Co-Conspirator Declar-
ations: The Federal Rules of Evidence and Other Recent Developments, From a Criminal Law Perspective}, 7
\textit{Stan. L. Rev.} 271 (1975).}
\footnotetext[158]{\textit{Bourjaily}, 483 U.S. at 175.}
\footnotetext[159]{315 U.S. 60 (1942).}
\footnotetext[160]{\textit{Id.} at 74-75 (citation omitted).}
\footnotetext[161]{FED. R. EVID. 104(a) provides: "Preliminary questions concerning . . . admissibility of evidence
shall be determined by the court . . . In making its determination it is not bound by the rules of evidence
except with those with respect to privileges." \textit{Id.} It was this last sentence which Chief Justice Rehnquist
referred to in deciding that the Rules of Evidence had altered the traditional views concerning the hearsay
determination. \textit{Bourjaily}, 483 U.S. at 175.}
\footnotetext[162]{The Advisory Committee Notes show that the Rule was not adopted in a fit of absent-
mindedness. The Note to FED. R. EVID. 104 specifically addresses the process by
which a federal court should make the factual determinations requisite to a finding of
admissibility:

"If the question is factual in nature, the judge will of necessity receive evidence pro
and con on the issue. The rule provides that the rules of evidence in general do not
apply to this process. . . . Sound sense backs the view that the judge should be
empowered to hear any relevant evidence, such as affidavits or other reliable hearsay.""

\textit{Id.} at 178 n.2 (quoting E. Cleary, \textit{McCormick on Evidence} § 5 n.8 (3d ed. 1984)).}
\footnotetext[163]{\textit{Id.} at 180.}
\footnotetext[164]{\textit{Id.}}
\footnotetext[165]{Justice Blackmun, joined by Justices Brennan and Marshall, sharply disagreed with the majority's
reading of the Federal Rules along with the policy rationale given by the Court:

Thus, unlike many common-law hearsay exceptions, the co-conspirator exemption from
hearsay with its agency rationale was not based primarily upon any particular guaran-
tees of reliability or trustworthiness that were intended to ensure the truthfulness of the}
The final question before the Court in *Bourjaily* was an important one: did the admission of the statement under the Federal Rules also satisfy the dictates of the Confrontation Clause? The majority gave a resounding affirmative answer to this question, finding that the requirements for the Rules and the Clause are identical. The issue focused on the purported need of the government to offer independent "indicia of reliability," apart from the statement itself. The Court stated that hearsay rules and the Confrontation Clause are designed to promote similar values and that if the evidence "falls within a firmly rooted hearsay exception," no additional evidence or inquiry would be needed. Because the "co-conspirator exception to the hearsay rule is steeped in our jurisprudence," the question essentially answered itself.

For the majority, the conclusion regarding the Confrontation Clause was easily reached. For the dissenting Justices, however, the matter was not so simple. Justice Blackmun, writing for himself and Justices Brennan and Marshall, challenged the majority’s basic premises, noting that "under common law, the reliability of the co-conspirator’s statement was never the primary ground justifying its admission." Moreover, Blackmun argued that the majority could not justify eliminating the reliability inquiry when it had also eliminated the need for the courts to consider only non-hearsay evidence:

Because the "firmly rooted hearsay exception" is defined in terms of its "indicia of reliability" for Confrontation Clause purposes, a removal of one of these "indicia" significantly transforms the co-conspirator exemption in a relevant respect. In addition, this change takes away from the exemption any weight that experience with its use by courts may have given it, thus undermining its "firmly rooted" status. In sum, the Court cannot have it both ways: it cannot transform the exemption, as it admittedly does, and then avoid Confrontation Clause concerns by conjuring up the "firmly rooted hearsay exception" as some benign genie who will extricate the Court from its inconsistent analysis.

admitted statement and to compensate for the fact that a party would not have the opportunity to test its veracity by cross-examining the declarant.

*Id.* at 189 (Blackmun, J., dissenting).

*Id.* at 182.

*Id.* at 183 (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

*Id.*

The admissibility of co-conspirators’ statements was first established in this Court over a century and a half ago . . . and the Court has repeatedly reaffirmed the exception as accepted practice. . . . To the extent that these cases have not been superseded by the Federal Rules of Evidence, they demonstrate that the co-conspirator exception of the hearsay rule is steeped in our jurisprudence. . . . We think that these cases demonstrate that co-conspirators’ statements, when made in the course and in furtherance of the conspiracy, have a long tradition of being outside the compass of the general hearsay exclusion.

*Id.*

*Id.* at 190. Justice Blackmun continued his attack on the majority’s reliability focus: "The Advisory Committee [on the Federal Rules of Evidence] explained that the exclusion of admissions from the hearsay category is justified by the traditional ‘adversary system’ rationale, not by any specific ‘guarantee of trustworthiness’ used to justify hearsay exceptions." *Id.* at 192.

*Id.*

*Id.* at 201.
The Supreme Court also reviewed an area related to the declaration problem discussed above, but in the situation in which the co-conspirator’s statement would not be admissible against the defendant. This involves the confession or other incriminating statement which is made not during the conspiracy or in furtherance of it. The statement is not part of the conspiracy, so it cannot be admitted under the hearsay exception. Because it may be incriminating to all the parties, the statement can only be admitted against the declarant. The difficulties in this area arose as a result of the Supreme Court’s decision in Bruton v. United States. The majority in that case reiterated the key point that the co-conspirator’s statement could not be used against the defendant; such use would violate the Confrontation Clause. The question, however, was whether in a joint trial the statement could be read to the jury if the jury was instructed that it could use the statement only against the declarant, and not against the other persons incriminated in the statement. Justice Brennan, in a strong opinion for the Court, rejected the government argument that limiting instructions would suffice under the Constitution:

[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect.

One key question surfaced soon after the decision in Bruton: would the rule apply if the defendant made her own statement and this statement tracked part of the co-defendant’s statement? In an earlier opinion on point, the Court deadlocked with regard to the impact of this so-called "interlocking confession." The matter was resolved in Cruz v. New York. In an opinion written by Justice Scalia, the Court held that Bruton would apply in this situation and rejected the prosecution’s argument that the defendant’s own statement would be so devastating to her case that the co-defendant’s statement simply did not matter:

In fact, it seems to us that "interlocking" bears a positively inverse relationship to devastation. A codefendant’s confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant’s alleged confession. It might be otherwise if the defendant were standing by his confession, in which case it could be said that the codefendant’s confession does no more than support the defendant’s very own case.

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173 Id. at 135-36.
174 Id.
175 In Parker v. Randolph, 442 U.S. 62 (1979), four members of the Court took the view that Bruton would always be inapplicable in the situation involving interlocking confessions. Four other Justices rejected this stringent rule and instead considered that the matter should be decided on a case-by-case basis. Id.
But in the real world of criminal litigation, the defendant is seeking to avoid his confession — on the ground that it was not accurately reported, or that it was not really true when made.\(^{177}\)

A more intense debate concerned the other Bruton issue. Richardson v. Marsh\(^{178}\) brought this matter to the Court. In that case the references to the defendant in the co-defendant’s statement had been dutifully redacted. The defendant, however, argued that the jury would know to whom the confession referred, based upon other evidence heard by the jury which tied the two defendants together. Justice Scalia again wrote for the majority, but this time his view was considerably less sympathetic to the defense position. He disputed the contention that jurors would necessarily realize that the defendant was being incriminated in the redacted co-defendant’s statement and would necessarily not follow the instruction to apply the statement only to the declarant. He distinguished Bruton\(^{179}\) because in that case the statement expressly implicated the defendant. In Richardson, however, "the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial. . . . Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence."\(^{180}\)

Once again, the majority’s opinion drew a sharp response, here in the form of Justice Stevens’ dissent.\(^{181}\) He could not understand why the jurors would be more likely to follow the trial court’s limiting instruction if the co-defendant’s statement did not directly implicate the defendant, as opposed to what had taken place in Bruton.\(^{182}\) He referred to the majority’s holding as an “illogical result [which] demeans the values protected by the Confrontation Clause.”\(^{183}\) For Stevens, the problem in this area was the government’s insistence that the two defendants be tried together. The solution, then, was simple, severance:

The facts that joint trials conserve prosecutorial resources, diminish inconvenience to witnesses, and avoid delays in the administration of criminal justice have been well known for a long time. It is equally well known that joint trials create special risks of prejudice to one of the defendants, and that such risks often make it necessary to grant

\(^{177}\) Id. at 192 (emphasis added). Justice White in dissent (joined by the Chief Justice and Justices Powell and O’Connor) could not understand why Bruton would apply when the defendant herself made an incriminating statement. He cited his earlier opinion in Bruton:

> The defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him. Though itself an out-of-court statement, it is admitted as reliable evidence because it is an admission of guilt by the defendant and constitutes direct evidence of the facts to which it relates. Even the testimony of an eyewitness may be less reliable than the defendant’s own confession. An observer may not correctly perceive, understand, or remember the acts of another, but the admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.


\(^{179}\) Id. at 208.

\(^{180}\) Id. See generally United States v. Williams, 936 F.2d 698, 700-01 (2d Cir. 1991).

\(^{181}\) He was joined by Justices Brennan and Marshall. Richardson, 481 U.S. at 211.

\(^{182}\) Id. at 211-12.

\(^{183}\) Id. at 212.
severances. The Government argues that the costs of requiring the prosecution to choose between severance and not offering the codefendant's confession at a joint trial outweigh the benefits to the defendant. On the scales of justice, however, considerations of fairness normally outweigh administrative concerns.\textsuperscript{184}

The line of Supreme Court decisions during the last decade has dramatically changed the practice in terms of hearsay evidence offered at conspiracy trials. The principles with respect to the Federal Rules of Evidence and the Confrontation Clause are now quite clear. While not all uncertainties are behind us,\textsuperscript{185} the strong direction of the Court unquestionably encourages even greater use of co-defendant declarations in joint conspiracy trials.\textsuperscript{186} United States District Judge Thomas Flannery of the District of Columbia, himself a former United States Attorney, stated the matter well: "The prosecutor has an easy task in introducing damaging evidence against co-conspirators because of the relaxed rules in conspiracy cases."\textsuperscript{187}

5. Punishment for the Conspiracy

Punishment for the completed conspiracy crime has always been stiff. Because the crime is viewed as substantively apart from the object, a completed (or attempted)

\textsuperscript{184} Id. at 217 (citations omitted).

\textsuperscript{185} I think here of two key open questions: Under \textit{Bourjaily} can the sole evidence to demonstrate a conspiracy be the hearsay statement itself (the Court clearly left this question open); and, under \textit{Richardson}, would there be any instances in which a redaction would be ineffective under the Confrontation Clause? On the former question, see United States v. Chestang, 849 F.2d 528, 531 (11th Cir. 1988); United States v. Gordon, 844 F.2d 1397, 1402 n.2 (9th Cir. 1988). The Ninth Circuit in United States v. Silverman, 861 F.2d 571, 578 (9th Cir. 1988) went even beyond this question: "Because of this presumptive unreliability, a co-conspirator's statement implicating the defendant in the alleged conspiracy must be corroborated by fairly incriminating evidence. Evidence of wholly innocuous conduct or statements by the defendant will rarely be sufficiently corroborative of the co-conspirator's statement to constitute proof." On the latter question, see United States v. Long, 900 F.2d 1270, 1279-80 (8th Cir. 1990); United States v. Espinoza-Seqanez, 862 F.2d 526, 534-35 (5th Cir. 1988). In Foster v. United States, 548 A.2d 1370, 1378 (D.C. Cir. 1988) (citations omitted) the court remarked:

It appears to us that somewhere along the continuum from \textit{Bruton} to \textit{Richardson v. Marsh}, one reaches a point where one cannot have the requisite degree of assurance that the jury will not improperly consider the evidence in deciding the guilt of the defendant against whom the evidence is not admissible despite a proper limiting instruction. . . . We hold that a properly and effective redacted statement substituting neutral references for names (including nicknames and the like) and/or descriptions (such as "the white guy" . . . or "the thin man") may be admitted into evidence at a joint trial (when coupled with proper limiting instructions) unless a "substantial risk" exists that the jury will consider that statement in deciding the guilt of the defendant.

\textsuperscript{186} Justice Stevens, in \textit{Richardson}, discussed the high number of joint-defendant cases in the criminal courts, noting that during the five-year period before the case was decided almost 11,000 federal criminal trials involved more than one defendant. That number accounted for almost one-third of all federal criminal trials in the United States. \textit{Richardson}, 481 U.S. at 218.

\textsuperscript{187} Letter from Flannery, supra note 77.
offense, it does not usually merge into that other offense. As a result, the convicted conspirator may receive consecutive sentences for the two crimes and even may receive a greater offense for the conspiracy than for the completed crime. One viewing this system of punishment might conclude that the problem is one of serious and widespread nature. Actually, relatively few individuals receive consecutive sentences for the conspiracy and for the completed offense, and virtually no one in recent years has received more time of imprisonment for the conspiracy than for the completed crime.

In recent times developments have occurred which promise to figure prominently in the resulting punishment for the conspiracy. Two, in particular, are worthy of special note. The first is a double jeopardy decision of the Supreme Court, Grady v. Corbin. The Court held that the government would be barred from bringing a later prosecution if, to do so, it would have to "prove conduct that constitutes an offense for which the defendant has already been prosecuted." This development may be enormous, requiring, in the words of dissenting Justice Scalia, "that all charges arising out of a single occurrence must be joined in a single indictment." Because a large overriding conspiracy might be viewed as just such a "single occurrence," the Court's ruling may affect the ability of the government to bring multiple conspiracy charges relating to one agreement, at least in certain circumstances. It is too early, however, to see whether the impact will be as great as seems possible; the lower courts are grappling with the matter at this time.

The other development which certainly will have great impact is the adoption of the Federal Sentencing Guidelines. Under the Guidelines the facts of the conspiracy, and

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188 The Supreme Court in Pinkerton v. United States, 328 U.S. 640, 644 (1946) said that the two offenses were separate: "If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it." Id.

189 "[It is] the general principle that a conspiracy and the substantive offense that is its immediate end are discrete crimes for which separate sanctions may be imposed." Iannelli v. United States, 420 U.S. 770, 771 (1975). Some states by statute require that the conspiracy merge into the completed crime. See, e.g., Ga. Stat. Ann. § 16-4-8 (Mitchie 1988).

190 "It has long been the rule that Congress has the power to provide for persons convicted of conspiracy a punishment more severe than that provided for persons actually committing the act." United States v. Cattle King Packing Co., 793 F.2d 232, 242 (10th Cir.), cert. denied, 479 U.S. 985 (1986) (citation omitted). The rationale for such a proposition is difficult to understand, as it is hard to justify punishing the agreement to commit an offense in a more severe fashion than the offense which was the object of that agreement. See Note, The Conspiracy Dilemma: Prosecution of Group Crime or Prosecution of Individual Defendants, 62 Harv. L. Rev. 276 (1948).

191 The earlier survey demonstrated that relatively few cases involve consecutive sentencing for both the conspiracy charge and the substantive crime. One question asked how often a defendant would receive consecutive sentencing for the two, and well over 70% of the respondents (over 80% of the prosecutors) indicated that such an event took place less than 10% of the time. Marcus, Conspiracy, supra note 3, at 938.

192 Almost no reported cases are present which apply this dubious doctrine. Moreover, some courts go out of their way to ensure that the doctrine will not be applied. See, e.g., the court's refusal to extend the state's "lifer law" to conspirators in People v. Jahner, 446 N.W.2d 151 (Mich. 1989). See also People v. Agriesti, 548 N.E.2d 42 (Ill. 1989).


194 Id. at 510.

195 Id. at 527 (Scalia, J., dissenting).

an individual’s role in it, must be factored into the sentence equation by the trial
judge. 197 We already are seeing much litigation at the sentencing stage concerning the
nature of the conspiracy and the role of the conspirators. 198

With these two developments, the law is moving rapidly, but it is still too soon
to determine how rapidly. While the potential is tremendous, the number of cases in
which significant holdings have occurred is still quite limited. In one area, however, the
impact on punishment has become clear, and that impact already has been substantial. I
refer here to the situation in which the government charges violations of multiple
conspiracy statutes based upon a single agreement. The case of consequence is Albernaz
v. United States. 199 The story begins, however, forty years before that 1981 case.

In 1942 the Supreme Court decided Braverman v. United States. 200 The
government in that case charged the defendants with multiple crimes, based on their single
agreement which had multiple objectives. The government argued that each crime was a
different violation of a single conspiracy statute. The government conceded, though, that
"only a single agreement to commit the offenses alleged was proven." 201 Without clearly
identifying the basis for its holding, 202 the Court strongly disapproved of the
prosecution. The Court unanimously found that the criminal activity was the single
agreement, an agreement which could not be carved up to accommodate multiple
conspiracy charges:

For when a single agreement to commit one or more substantive crimes
is evidenced by an overt act, as the statute requires, the precise nature
and extent of the conspiracy must be determined by reference to the
agreement which embraces and defines its objects. Whether the object
of a single agreement is to commit one or many crimes, it is in either
case that agreement which constitutes the conspiracy which the statute
punishes. The one agreement cannot be taken to be several agreements
and hence several conspiracies because it envisages the violation of
several statutes rather than one. 203

197 The issues here are principally definitional, such as who is a "minor" participant as opposed to
being a leader or organizer. See United States v. Ocampo, 937 F.2d 485 (9th Cir. 1991); United States v.
Caballero, 936 F.2d 1292 (D.C. Cir. 1991).

198 The cases in the area already are legion. See, e.g., United States v. Puma, 937 F.2d 151 (5th Cir.
1991); United States v. Perrone, 936 F.2d 1403 (2d Cir. 1991); United States v. Audelo-Sanchez, 923 F.2d
129 (9th Cir. 1991); United States v. Pregler, 925 F.2d 268 (8th Cir. 1991); United States v. Cagle, 922 F.2d
404 (7th Cir. 1991); United States v. Sanchez, 917 F.2d 607 (1st Cir.), cert. denied, 111 S.Ct. 1625 (1990);
United States v. Cardenas, 917 F.2d 683 (2d Cir. 1990); United States v. Hester, 917 F.2d 1083 (8th Cir.
1990).


200 317 U.S. 49 (1942).

201 Id. at 52.

202 Several possibilities come to mind, including the question of legislative intent as well as the
constitutional problem of violations of the Double Jeopardy Clause.

203 Braverman, 317 U.S. at 53.
For a time, *Braverman* was applied broadly and stood for the principle that one agreement could not be used as the basis of multiple conspiracy convictions. The holding in *Albernaz*, however, greatly limited this principle. The agreement there violated two specific drug conspiracy sections found in Title 21 of the United States Code, sections 846 and 963. Some judges took the view that the presence of the multiple conspiracy sections should not affect the outcome because *Braverman* required the dismissal of all but one conspiracy charge if only a single agreement had been shown. The Chief Justice disagreed. He began by finding a Congressional intent to impose separate punishment for the violations of two specific conspiracy statutes. "Sections 846 and 963 specify different ends as the proscribed object of the conspiracy — distribution as opposed to importation — and it is beyond peradventure that 'each provision requires proof of a fact [that] the other does not.'"

Regarding the constitutional claim that multiple conspiracy charges would violate the Double Jeopardy Clause, the Court was not persuaded. It viewed the constitutional inquiry narrowly: "The 'dispositive question' [is] whether Congress intended to authorize separate punishment for the two crimes. This is so because the 'power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress.'"

The *Albernaz* holding, allowing multiple sentences for a single agreement, has been used in a host of cases during the last ten years, and can be expected to be used even more extensively in connection with the declared war on drugs. This principle must be questioned, however, and not simply on the ground that it appears to conflict with

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204 See, e.g., United States v. George, 752 F.2d 749 (1st Cir. 1985); United States v. Corral, 578 F.2d 570 (5th Cir. 1978); United States v. Mori, 444 F.2d 240 (5th Cir.), cert. denied, 404 U.S. 913 (1971).

205 Of course, the conspirators could be convicted of having participated in multiple substantive offenses if such statutory sections were, in fact, violated. The focus here is entirely on violations of conspiracy statutes.

206 At least where the evidence on both was identical.

207 See United States v. Rodriguez, 612 F.2d 906, 926 (5th Cir. 1980) (Rubin, J., dissenting) (citations omitted) (emphasis in original):

    My brethren acknowledge the authority of *Braverman* but make an effort to distinguish it, saying that it limits only "the Government's ability to fragment a single conspiracy under the general conspiracy statute." This is not an adequate basis for reaching a different result from the one determined in *Braverman*. Here there was but one conspiracy regardless whether it is declared illegal by what my brethren consider two discreet laws . . . or by one law . . . . However, whether there was one statute or two, there was one agreement and, as the Court said in *Braverman*: "The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." I see little difference between fragmenting a conspiracy according to the number and diversity of its objectives in order to charge several violations of a single statute, and using the same technique to charge violations of two statutory provisions. The teaching of *Braverman* is that a conspiracy cannot be so fragmented.

208 United States v. Albemaz, 450 U.S. 333, 339 (1981). Chief Justice Rehnquist was making reference here to the earlier double jeopardy opinion in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), in which the Court found that the test to determine whether there were two offenses or one "is whether each provision requires proof of a fact which the other does not." *Id.*

209 *Albernaz*, 450 U.S. at 344.

earlier Supreme Court precedent. The conclusion remains inescapable that individuals are being punished more than once for having engaged in a single criminal venture, the conspiratorial agreement. Apart from the presumed legislative intent on point, surely such punishment must raise extremely troublesome issues of jeopardy and questions about the reach of legislative action. The very real possibility of such a multiple sentencing scheme leaves little doubt that conspirators now will be even more likely to seek the comfort zone of a negotiated plea agreement.\textsuperscript{211}

IV. WHERE ARE WE GOING?

The law of conspiracy has developed over a long and twisted path toward the broad and powerful doctrine that is currently applied. What may be most troubling, though, are the grave concerns present on the road yet to be traveled.

A. Mega-trials

"As a general rule, defendants who have been jointly indicted should be tried together, particularly in conspiracy cases."\textsuperscript{212} This view has been the foundation for multiple-defendant conspiracy trials for most of this century. When combined with the traditional reluctance of trial judges to grant severance motions\textsuperscript{213} it insures that many joint trials will appear in the criminal justice system. Looking to the joint trials during the recent past,\textsuperscript{214} there is much concern over the complexity of future joint trials. Judge Hodges referred to the "proliferation of conspiracy prosecutions — or, more accurately, conspiracy counts\textsuperscript{215} during the last twenty years. Judge Hodges carefully chose his words: there truly has been a proliferation of trials involving large numbers of defendants and charges.\textsuperscript{216}

With these large trials, dubbed "mega-trials" by many, serious questions have been raised about whether individual defendants can receive fair and thorough treatment from jurors. The language of Chief Judge Bauer of the Seventh Circuit is striking:

The trial can become — and frequently does — vastly complicated and damned near impossible to understand. The length of trials can be measured in months with dozens and dozens of witnesses and hundreds of documents. The result has been an increasing unease as to whether all the defendants are securing a fair trial and a real wonder as to whether the jurors can, as well, follow either the evidence or the complicated instructions necessary in such an endeavor.

\textsuperscript{211} In the earlier survey, when asked what motivated prosecutors to bring a conspiracy charge where the object offense had already been completed or attempted, significant numbers of individuals (more than 35\% of the prosecuting and defense attorneys) indicated that the presence of a conspiracy charge created advantages in connection with plea bargaining. Marcus, Conspiracy, supra note 3, at 942.

\textsuperscript{212} United States v. Cross, 928 F.2d 1030, 1037 (11th Cir. 1991).

\textsuperscript{213} See supra text accompanying notes 51-55.

\textsuperscript{214} The large cases are not only of very recent vintage. See, e.g., Capriola v. United States, 61 F.2d 5 (7th Cir.) (59 defendants), cert. denied, 287 U.S. 671 (1932); Allen v. United States, 4 F.2d 688 (7th Cir.) (75 defendants), cert. denied, 267 U.S. 597 (1924).

\textsuperscript{215} Letter from Hodges, supra note 35.

\textsuperscript{216} Long complex trials during the past ten years have involved drugs, bonds, securities frauds, commodities matters, currency exchanges, weapons, and banking and savings industry issues.
Recently in a trial before Judge George Marovich of the Northern District of Illinois, the government spent twelve weeks putting on its case, the defendant spent two weeks, and the jury was out for nearly a month before returning verdicts on 320 counts, including conspiracy and RICO counts. The original indictment was over 700 counts but His Honor managed to shave it down by pretrial rulings.\textsuperscript{217}

Can jurors truly understand the evidence and sort it out when the trials take months, involve dozens of defendants and hundreds of charges allegedly occurring over many years? One must be skeptical. Judge Aspen of Chicago refused to accept the traditional view of the need for large joint trials in the El Rukn proceedings\textsuperscript{218} when he saw the serious potential for harm to individual defendants:

It has long been assumed that the advantages referred to above adequately support a strong presumption in favor of joint trials and against severance. Thus, to prevail in a motion for severance, a defendant ordinarily "must show that she could not possibly have a fair trial without a severance." However, the recent proliferation of complex, multi-defendant trials in this district and others, prompted in large part by RICO, has raised doubts about the foundations of this onerous burden. Some courts, when faced with a multitude of defendants indicted together under the expansive RICO umbrella, have questioned the wisdom of blindly embracing the purported advantages of a joint trial while, at the same time, disregarding the manifest difficulties presented by what is commonly called a "mega-trial." . . . Accordingly, a strong presumption in favor of joint trials is not justified in the context of an inordinately complex mega-trial like the one proposed here, where the principal nexus between the charges is that the defendants allegedly were associated with the same criminally-oriented gang.\textsuperscript{219}

The threat to defendants is seen by experienced trial lawyers as an intense and troubling problem. Jeffrey Weiner of Miami has worked as a lawyer exclusively in the criminal justice area for the past fifteen years. He wrote of his experience:

The major change I have witnessed over the last two decades concerning the prosecution of conspiracy cases is the recent recognition by a growing number of federal judges that massive, mega-conspiracy trials deny defendants essential constitutional rights (i.e., right to counsel, right to due process) and take an undue toll on the judiciary and criminal justice system. Criminal defense attorneys have voiced urgent complaints in routine severance motions about this pernicious practice over the last two decades as this governmental tactic has grown. However, these complaints have largely gone unanswered by the federal judges. The problem was, perhaps, first brought to the forefront during the pendency of the New York Pizza-connection case, a multi-defendant, mega conspiracy trial that lasted in excess of 18 months and

\textsuperscript{217} Letter from Bauer, supra note 33 (emphasis in original).
\textsuperscript{218} United States v. Andrews, 754 F. Supp. 1161 (N.D. Ill.), severance order revised, id. at 1197 (1990).
\textsuperscript{219} Id. at 1171-72 (citations omitted).
resulted in the heart attack of an NACDL member representing one of the co-defendants. During the lawyer's absence for several months, his client's name was not even mentioned.\footnote{220}

If the number of large, complex trials is high, and if the tradition of resisting severance requests remains,\footnote{221} what, then, will happen in the future? The first, and easy, prediction, is that there will continue to be more of the same, many complicated and long trials. This prediction, though, may be too facile and itself may be open to serious question. Dan Webb is the former United States Attorney for the Northern District of Illinois and is currently a partner in a prominent Chicago law firm. In discussing his concerns, he expressed his belief that changes may occur because prosecutors will come to realize that these large trials may not be to their advantage:

As a prosecutor, Webb "convicted everybody" in the trial involving 23 Chicago police officers in the 1970s. But, he said, the facts were relatively simple.

"A year later, in the Teamster Pension Fund case, . . . a complicated fraud case, I lost every defendant," Webb said. "They were not guilty on over 100 charges. What I learned and what is re-emphasized with the yen and Swiss franc cases is that the government has enormous difficulty in winning the complex financial fraud cases when it's a mega-defendant trial."

When jurors become confused, "they react against the government, and they penalize the government and find the defendants not-guilty or get hung," Webb said. "Jurors are the best form of street justice. They are punishing the government for having done wrong for indicting so many people. The government is hoisted on its own petard.\footnote{222}"

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\footnote{220} Letter from Weiner, \textit{supra} note 28. The court in United States v. Salerno, 937 F.2d 797, 799 (2d Cir. 1991) (citations omitted) was candid in its discussion:

For better or for worse, our circuit in recent years seems to have been the locus for "megatrials". ("This appeal stems from what can only optimistically be called an aberration in the federal judicial system — the RICO megatrial."); ("The [RICO pattern] problem is of serious consequence because a RICO trial often becomes a 'megatrial' with large numbers of unrelated defendants -- charged with unconnected wrongs — tried together under the rubric of a single conspiracy.").

Defendants are often heard to complain that the government benefits from the ambiguity and confusion which accompanies these gargantuan indictments; despite the complaints, we have responded, sometimes grudgingly, by affirming the lion's share of the convictions in spite of our concerns about the unruliness of such cases.

Similarly, defendants often complain that, because of the diversity of proof admissible in such an enormous case, they suffer not only from "prejudicial spillover," such as occurs "where a minor participant in one conspiracy was forced to sit through weeks of damaging evidence relating to another," but also from prejudice transferred across the line separating conspiracies, or defendants, "so great that no one really can say prejudice to substantial right has not taken place."

\textit{Id.}

\footnote{221} This tradition is beginning to change in some important ways. \textit{See infra} text accompanying notes 226-33.

\footnote{222} Donna Gill, \textit{Megatrials: Take-a-Number Justice}, CHI. LAW., May 1991, at 1, 55. Some prosecutors will still resist severance under any circumstances. Note the exasperation expressed by the judge in the \textit{Andrews} case:
Defense counsel will certainly continue to push for smaller and more compact trial groupings. Prosecutors may have the incentive in some matters to charge in smaller numbers. Other pressures may also become pronounced as experience with these "mega-trials" becomes more publicized and more controversial. The most striking development in recent times, and one which can be expected to be repeated, is action taken by trial judges to split apart these large cases. Trial judges have begun, in Judge Bauer's words, "sua sponte requiring the prosecution to make elections and severing both counts and defendants." Even critic Weiner shares this perception. "[Recently] several enlightened district court judges have granted severances citing fairness to the defendants and the intolerable burden to the criminal justice system produced by these mega-trials."

Among the most prominent judges acting to limit the size and scope of trials was Judge Aspen of Chicago in the El Rukn case discussed above. There, in ordering severance, he wrote:

It is fanciful to believe that any jury would be able, or even willing, to intelligently and thoroughly deliberate over the enormous volume of evidence expected at a single trial of this action. In its present form, the

Because at this stage of the proceedings the government is the only party with complete knowledge of the evidence that it will present in this case, it is in the best position to suggest an efficient and effective severance plan. However, unfortunately, it has declined our previous requests to participate in the formulation of such a plan. On two separate occasions we gave the government an opportunity to set forth a scheme to sever this unwieldy indictment. . . . Unfortunately, on both of these occasions the government refused and instead insisted that the case could only be tried as indicted.

Andrews, 754 F. Supp. at 1181 (footnote omitted).

Some, including Judge Aspen, are not encouraged with respect to involvement by the appellate courts in this area: "After a lengthy trial resulting in conviction, the denial of severance is, understandably, rarely overturned. . . . Simply put, appellate courts, by virtue of their role in the judicial system, are not in a position to effectively deter the mega-trial."


A district court's denial of a motion to sever "is addressed to the discretion of the trial court and should not be reversed without a strong showing of prejudice." We will reverse only if that discretion is abused, denying the defendant a fair trial and resulting in a miscarriage of justice.

Id.; see also United States v. Greer, 939 F.2d 1076, 1095-96 (5th Cir. 1991). There are cases, however, which show the more assertive nature of appellate courts in this area. See, e.g., United States v. Davidson, 936 F.2d 856, 861 (6th Cir. 1991), in which the court concluded that the defendant was denied a fair trial. In Davidson, a co-defendant was tried in absentia and evidence offered against that co-defendant had a "spillover effect" on the defendant. Id.; see also United States v. Nicely, 922 F.2d 850, 860-61 (D.C. Cir. 1991):

The government overreached in joining these two conspiracies in a single indictment. While reviewing courts can and do indulge a presumption in favor of joinder to serve the interests of judicial economy, we cannot condone the government's sloppy assimilation of charges that have no logical relationship to one another and whose joinder infringes on defendants' constitutional rights to a fair trial. "Symbiosis" is no substitute for an articulable connection between otherwise disparate conspiracies.

Id.

Letter from Bauer, supra note 33.
Letter from Weiner, supra note 28.
See supra text accompanying notes 56-65.
trial would involve twenty-two to twenty-nine defendants accused of over 150 factually separate criminal acts spanning a period of over twenty years and involving at least twenty-five different provisions of the state and federal penal codes. The government concedes that the volume of evidence at such a trial would be "massive," and we find that solely by virtue of its volume the evidence would be equally "complex." After this long and arduous trial, the jury would be required to sift through a virtual warehouse of evidence to determine what items were presented against which defendant and as to which criminal act. It would then be obliged to resolve a plethora of difficult factual issues and to strictly apply the detailed and complex law as provided by hundreds of pages of jury instructions. The inevitable length of such a trial dramatically increases the difficulty of this Herculean task. Both common sense and scientific study dictate that as the volume of evidence and corresponding length of trial increases, the degree and quality of jury comprehension decreases proportionately. To expect any jury to accurately recall and appraise the vast amount of detailed testimonial and documentary evidence it heard many months or even a year earlier is unrealistically optimistic.\footnote{Andrews, 754 F. Supp. at 1176 (citations and footnotes omitted).}

The ruling of New York Federal Judge Weinstein in United States v. Gallo\footnote{668 F. Supp. 736 (E.D.N.Y. 1987).} received widespread attention. In that case the government charged sixteen individuals with organized crime acts over two decades.\footnote{In another major organized crime case in the Second Circuit the court on appeal affirmed the denial of the severance motions but developed specific rules regarding these large cases. The court discussed its "misgivings about trials of this magnitude."} Judge Weinstein wrote that the case was

\begin{itemize}
  \item \textit{United States v. Casamento, 887 F.2d 1141, 1151-52 (2d Cir. 1989), cert. denied, 493 U.S. 1081, 495 U.S. 933, and 495 U.S. 958 (1990).} The Second Circuit is hardly the first court to raise these concerns on appeals. More than 60 years ago the Tenth Circuit in Marcante v. United States, 49 F.2d 156, 158 (10th Cir. 1931) (23 defendants had been tried at the same time) wrote:

Furthermore, the practice of submitting to a jury, in one trial, the question of the guilt of thirty or fifty citizens, where the testimony as to each is different, is not to be encouraged. It is extremely difficult for an experienced trial judge to trace the skeins of scattered testimony to so many individuals; with inexperienced jurors, such complicated testimony is too apt to become but a confused jumble, and a verdict too apt to
of a complex and "labyrinthian nature." He remarked that "[a]s the number of counts and defendants in an indictment increases, 'it is obvious' that the resultant complex trial record makes it more difficult for a jury to keep straight the specific evidence and charges against each defendant." As a result, he ordered the massive trial broken into separate trial segments. This judicial behavior must be applauded. Undoubtedly there will be cases in which jurors can sort the evidence against the many defendants. Still, when there will be months and months of testimony against many various defendants, judges and prosecutors should retain a healthy degree of doubt concerning the ability of jurors to achieve true justice.

Thank God occasionally a jurist will say . . . "Enough is enough, and justice requires a severance."[234]

represent an impression that the defendants are guilty of something, with little reference to the crime with which they are charged.

Id.

Gallo, 668 F. Supp. at 739.

Id. at 749.

Trials in these "monster" cases have constituted an enormous burden on the courts, as well as on defendants, the defense bar, jurors, and even prosecutors. The court must coordinate the schedules of scores of persons for months on end. The absence of one juror, one defendant, one defense attorney, one prosecutor, or even some witnesses, can throw a clog into the trial that brings it to a halt. Some of these trials are now continuing for well over one year, with comparable time spent on pre-trial matters.

Id. at 754 (citation omitted).

Id. at 758-60. His order carefully severed the case based upon the parties, the time frame, and the evidence to be offered against individuals.

Some of the cases currently being tried must raise tremendous questions about the ability of an individual defendant to get a fair trial. Judge Weinstein in the Gallo case referred to three. One involved a 17-month trial where over three years had gone by between indictment and verdict; another was a trial which was still going on more than four years after the indictment had been returned; and a third trial took four months for jury selection and was estimated to run for over a year. Id. at 754. Judge Aspen in the Andrews case also discussed some of these incredibly difficult cases, such as United States v. Phillips, 664 F.2d 971 (5th Cir. 1981) (only 120 pages of a 12,000 page transcript related to the defendant's activities), cert. denied, 457 U.S. 1136 and 459 U.S. 906 (1982); United States v. Morrow, 537 F.2d 120 (5th Cir. 1976) (25 pages of testimony related to the defendant out of a total record of more than 50 volumes); United States v. Kelly, 349 F.2d 720 (2d Cir.) (in a nine-month trial the defendant's name was first mentioned three months into the case and then only briefly thereafter), cert. denied, 384 U.S. 947 (1965). United States v. Andrews, 754 F. Supp. 1161, 1172 (N.D. Ill. 1990). See also this statement by former trial judge and now United States Circuit Judge Patrick Higginbotham:

I see little justification for multiple indictments with counts numbering in the hundreds. Of course, the decision to prosecute, as well as much of the composition of the charges themselves, is within the constitutionally fenced preserve of the Executive Branch of government. Once the indictments are signed and filed, however, I take the view that the matter of prosecution becomes a shared responsibility between the Article 2 and 3 branches of the government. [As a trial judge] I have had some success in severing out and sequencing trials to overcome the problems of the unduly lengthened indictment.


Defense attorney Harvey Silets, quoted in Gill, supra note 222, at 55.
B. What is the Point of this Crime?

Some time ago, in an influential article, Professor Phillip Johnson asked whether the criminal conspiracy doctrine served any useful purpose in our justice system. The title of the article gives his answer, "The Unnecessary Crime of Conspiracy." Other theories — accomplice liability, the crime of solicitation, completed crimes — would, Johnson argued, handle the vast majority of matters that would otherwise be prosecuted as conspiracies. Other commentators, including this writer, agreed in principle with Johnson but felt that the conspiracy crime served an important purpose in the relatively small number of cases involving large-scale agreements spanning the country (and, increasingly, the world). Judge Thomas Flannery of the District of Columbia stated the proposition nicely:

Conspiracy charges should be utilized in prosecutions against major criminals and those law breakers who are engaged in sophisticated criminal endeavors involving violation of the public trust such as, the savings and loan scandals, bank fraud and other crimes involving defendants who had planned and committed very serious crimes.

Viewing the manner in which conspiracy cases are actually charged must give serious pause to Johnson's critics; we must ask the question, do we really need the crime of conspiracy in today's world? At one end of the spectrum, in support of Johnson's view, is the way in which conspiracy crimes are brought. Conspiracy is charged in many cases in which simpler and narrower crimes would handle the legislative goals quite nicely. The point was made by Judge Flannery: "I have had cases brought in my court charging two defendants in a conspiracy count involving three or four sales of narcotics where the alleged duration of the conspiracy was several weeks. This to me is an example where the use of the conspiracy charge is abused." In such cases, it can hardly be said that the government is going after sophisticated criminal endeavors, arguably the basis for the retention of conspiracy law.

At the other end of the spectrum, where the government really prosecuted large criminal groupings, the conspiracy doctrine traditionally worked well as a tool — actually the only tool — to join individuals and crimes in a manner comprehensible to jurors. Increasingly, however, the federal and state RICO statutes take that role. With a broadened scope of enterprise liability, as opposed to agreement responsibility, the government can prosecute people and offenses which it could not prosecute under the relatively narrower conspiracy doctrine. Judge Aspen in the Andrews case explained the breadth of the RICO doctrine in terms of the rules regarding joinder of parties and defendants:

235 Johnson, supra note 4, at 1137.
236 Without the attendant and — it is believed by many — undue advantages for the government, such as the rules of venue, the co-conspirator declaration doctrine, consecutive sentencing, and the wide complicity rules.
237 Marcus, Conspiracy, supra note 3, at 966.
238 Letter from Flannery, supra note 77.
239 Id.
240 See supra notes 70-75.
241 The advantages for the RICO prosecutions are many, including the breadth of enterprise liability, forfeiture rules, and the basic notion that a convicted defendant — even in a relatively minor white collar endeavor — will be viewed as a racketeer.
This case provides a vivid example of the broad charging authority that RICO has conferred to the government. Prior to RICO, the scope of a proper indictment under Rule 8(b) was largely restricted to the number of individuals who could conspire to commit a single substantive crime. RICO removes this natural "ceiling" by making it a crime to agree to the commission of a "pattern of racketeering," which can include a limitless number of substantive crimes and, consequently, a limitless number of conspirators. Thus, RICO evades the practical limitations of group conduct that Rule 8(b) places on the scope of an indictment. 

"[T]he government, through its ability to craft the indictment, is the master of the scope of the charged RICO conspiracy. . . . [I]t can be broad or narrow depending on the number of predicate crimes within the scope of the agreement that the government chooses to identify."

Here, for example, the government could have indicted an additional 21 alleged El Rukn conspirators who were indicted separately in another case in this district. The defendants there include those who allegedly were the drug suppliers to the organization and El Rukn members who held positions as "ambassadors," the organization's fourth level of command. The indictment here could also have included a multitude of named unindicted co-conspirators. Further, if the breadth of the alleged El Rukn enterprise is as expansive as the government suggests, the defendants indicted here could number in the hundreds, or, theoretically, even in the thousands. Such an indictment would presumably comply with Rule 8(b) as long as each of the defendants allegedly agreed to the "overall objective," a violation of RICO.242

Having concluded that conspiracy need not be seen as a vital force in terms of the ordinary street crime situation or even the large scale joint criminal endeavors, am I suggesting that the crime of conspiracy will disappear soon? Not at all. Conspiracy is an effective and logical way to present a large case involving many defendants and multiple counts. Moreover, in many jurisdictions the government does not use RICO often, and many people perceive that it may be "overkill" in cases other than the most serious endeavors.243 No, the crime of conspiracy will survive for the foreseeable future. Indeed, virtually all respondents view conspiracy as a major weapon in the government arsenal244 and believe that it will continue as such. District Judge Bilby of Arizona stated that conspiracy "is a tool that is overused and I predict will be used even more in the future."245 Judge Mikva of the United States Court of Appeals for the District of Columbia Circuit wrote, "I think that the use of the conspiracy tool will ebb and flow as the society gets more or less concerned about white collar crime, organized crime and organized violent crime."246 Judge Schroeder of the Ninth Circuit was able to "foresee

243 See supra text accompanying notes 76-80.
244 Robert Brosio, then Chief Assistant United States Attorney in Los Angeles, now head of the Federal Drug Enforcement Agency, commented that "[i]n virtually every multiple defendant case there is a conspiracy charge, except those cases where the substantive offense does not involve any serious conspiracy, such as bank robbery or check theft." Marcus, Conspiracy, supra note 3, at 947 n.74.
245 Letter from Bilby, supra note 38. Judge Bilby stated the matter succinctly: "[T]he conspiracy offense will undoubtedly be used more frequently; the obvious evidentiary advantages make it too attractive not to be used." Id.
246 Letter from Mikva, supra note 89.
conspiracy to remain a major tool in the future for the prosecution of white collar, violent and organized crime." Judge Flannery's thoughts complete the predictions:

It seems to me that prosecutors will use conspiracy as the basis for bringing such prosecutions with increasing frequency. The advantages in bringing such prosecutions are heavily weighted in favor of the prosecutors and I can perceive no reason why prosecutors will use this powerful and effective tool with less frequency in the future.

V. CONCLUSION: REINING IN CONSPIRACY

Standing alone, the criminal conspiracy doctrine casts a very wide net, indeed. Increasingly, though, it does not stand alone, but instead it becomes an even more potent force when combined with substantive crimes and new statutory devices such as RICO. RICO raises special concerns because, when joined with traditional conspiracy doctrine, it creates a remarkably broad and vague new offense, agreeing to engage in enterprise activities.

In a recent drug case Judge Jones of the Sixth Circuit discussed his fear of the wide conspiracy net, though this fear would be just as applicable to other commonly charged conspiracy matters, such as fraud, weapons, or financial claims:

Furthermore, I have a growing fear that casting a conspiracy net will become a catch-all method charging anyone caught in the vicinity of illegal drugs. Such a catch-all could then be used to convict purely innocent persons, albeit unintentionally. The government's burden of proof is not lessened when cocaine is involved.

Judge Jones' uneasiness, while important, has been with us for many years. Certain features today, however, make the conspiracy offense a matter of intense concern. The crime now is charged quite often. It allows for joinder of offenses and parties into giant "mega-trials." To some it now appears easier to gain convictions of individual, non-essential parties. And the punishment for the convicted conspirator has become severe in terms of both the agreement itself and other crimes allegedly committed in furtherance of it.

247 Letter from Schroeder, supra note 48.
248 Letter from Flannery, supra note 77.
249 In almost no major RICO case involving more than one defendant (by the very terms of RICO there must be multiple parties) would the RICO charge stand alone; at least one conspiracy charge and sometimes many more would be present. See, e.g., United States v. Coonan, 938 F.2d 1553 (2d Cir. 1991) (the well-publicized prosecution of the "Westies" gang in New York).
251 Reading the cases, one is struck by the broad language that the courts use to affirm convictions of individuals who make claims based upon their own respective, individual culpabilities. See, e.g., United States v. Keats, 937 F.2d 58 (2d Cir.), cert. denied, 112 S.Ct. 399 (1991) (allowed for conspiracies based upon the defendants' link with unknown co-conspirators); United States v. Juarez-Fierro, 935 F.2d 672, 677 (5th Cir. 1991) (held that all elements may be shown by circumstantial evidence and that even "circumstances altogether inconclusive, may, by their number in joint operation . . . be sufficient to constitute conclusive proof"); United States v. Jackson, 935 F.2d 832, 844 (7th Cir. 1991) (held that individual conspirators do not need to know or participate in "every detail of the conspiracy, or to know all the conspiracy's members").
It is time to refocus attention on the crime of conspiracy, particularly on the reason for having such a joint endeavor offense. The offense exists, as the Supreme Court and many others have stated repeatedly, because of a deep concern with the danger created by the joint activity of serious and determined criminals. To that end, let us go beyond the somewhat trivial arguments concerning individual culpability and responsibility with theories such as the unilateral approach and the elimination of the consistency rule; instead let us concentrate on deterring and punishing group conduct. Let us develop a heightened need for government showings of intent for individuals to join together and of combined efforts of individuals to become a true danger to the community. The Seventh Circuit in United States v. Townsend stated the point concisely and well:

Learned Hand described the conspiracy charge as the "darling of the modern prosecutor's nursery." Its attraction has not diminished with the passage of years; nor, consequently, has the need for courts to harken back to the basic principles underlying conspiracy liability when reviewing closely the evidence supporting such charges.

The conspiracy offense should be used to punish groups of people for joining together to commit crimes. This seems a basic and somewhat modest proposition. This goal can be achieved best by insuring that defendants receive careful attention individually and not as part of a set of twenty to fifty defendants. It can also be achieved if it is the conspiracy which is punished and not other crimes, albeit related. For those other crimes ample mechanisms exist for punishment, including traditional accountability principles and other substantive offenses. It is time to rein in the conspiracy crime so that it serves its true purpose and does not become a basis for challenging the fairness and process of our criminal justice system.

252 The trial judge in United States v. Lopez, 937 F.2d 716, 725 (2d Cir. 1991) (citation omitted) was so taken with the group danger notion that he instructed the jury about it:

In the portion of the conspiracy charge to which the defendants object, the district judge stated that conspiracy poses "a greater potential threat to the public interest than the illegal activity of a single individual since it often makes possible the attainment of ends more complex than those which an individual acting alone could accomplish." Defendants claim that this statement biased the jury against them. However, it was well within the district judge's discretion to attempt to clarify the meaning of conspiracy for the jury, and the district court's definition is almost identical to a description of conspiracy given by the Supreme Court.

Id. 253 924 F.2d 1385 (7th Cir. 1991).

254 Id. at 1416 (citation omitted) (quoting Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925)).