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# CONSPIRACY: THE CRIMINAL AGREEMENT IN THEORY AND IN PRACTICE\*

PAUL MARCUS\*\*

*Professor Marcus combines empirical research and theoretical analysis in this comprehensive study of the conspiracy doctrine. The article shows that the theoretical reasons for the conspiracy doctrine are inapplicable to most actual conspiracy prosecutions and that the practical reasons for conspiracy charges are often unacceptable prosecutorial shortcuts. Although ultimately concluding that the conspiracy doctrine is needed in some limited instances, Professor Marcus indicates that prosecutors should bring conspiracy charges only when justified by proper reasons and that courts should consider such charges more carefully.*

[C]ollective 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 was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

Justice Felix Frankfurter<sup>1</sup>

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1. Callanan v. United States, 364 U.S. 587, 593-94 (1961) (Frankfurter, J.).

If there are still any citizens interested in protecting human liberty, let them study the conspiracy law of the United States.

Clarence Darrow<sup>2</sup>

## INTRODUCTION

Throughout this century, judges, practicing attorneys, and scholars have had a love-hate affair with the concept of a crime of conspiracy. Few criminal law doctrines have generated as much analysis. One need only look to the wealth of law review articles<sup>3</sup> and reported cases<sup>4</sup> discussing conspiracy doctrine to realize the impact of conspiracy law on American jurisprudence. These discussions, along with the widespread assumption that prosecutors utilize conspiracy as an effective tool against serious crime,<sup>5</sup> make the law of conspiracy most controversial.<sup>6</sup> This controversy has thrust the law of conspiracy

2. C. DARROW, *THE STORY OF MY LIFE* 64 (1932).

3. See, e.g., Arens, *Conspiracy Revisited*, 3 BUFFALO L. REV. 242 (1954); Filvaroff, *Conspiracy and the First Amendment*, 121 U. PA. L. REV. 189 (1972); Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959); Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624 (1941); Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137 (1973); O'Dougherty, *Prosecution and Defense Under Conspiracy Indictments*, 9 BROOKLYN L. REV. 263 (1940); Pollack, *Common Law Conspiracy*, 35 GEO. L.J. 328 (1947); Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922); *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959); Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276 (1948).

4. The important Supreme Court decisions alone are numerous. See, e.g., *Iannelli v. United States*, 420 U.S. 770 (1975) (Wharton's rule); *United States v. Feola*, 420 U.S. 671 (1975) (intent element); *Callanan v. United States*, 364 U.S. 587 (1961) (liability for conspiracy, substantive offenses); *Yates v. United States*, 354 U.S. 298 (1957) (first amendment and conspiracy); *Grunewald v. United States*, 353 U.S. 391 (1957) (scope, duration of conspiracy); *Lutwak v. United States*, 344 U.S. 604 (1953) (elements, duration, evidence of conspiracy); *Krulewitch v. United States*, 336 U.S. 440 (1949) (evidence of conspiracy); *Blumenthal v. United States*, 332 U.S. 539 (1947) (evidence, number of conspiracies); *Kotteakos v. United States*, 328 U.S. 750 (1946) (number of conspiracies); *Pinkerton v. United States*, 328 U.S. 640 (1946) (liability for conspiracy, substantive acts).

5. See *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (L. Hand, J.) (conspiracy is the "darling of the modern prosecutor's nursery"); *United States v. Kissel*, 173 F. 823, 823-28 (C.C.S.D.N.Y. 1909) (increasing tendency to indict for conspiracies when crimes committed), *rev'd*, 218 U.S. 601 (1910); Note, *supra* note 3, at 276.

6. A recent, dramatic use of criminal conspiracy charges was the Watergate trial. The three primary defendants, John N. Mitchell, H.R. Haldeman, and John D. Ehrlichman, were convicted of conspiracy, obstruction of justice, and perjury. See generally *United States v. Haldeman*, \_\_\_\_ F.2d \_\_\_\_, No. 75-1381 (D.C. Cir. Oct. 12, 1976) (per curiam) (en banc), *petition for cert. filed*, 45 U.S.L.W. 3437 (U.S. Dec. 21, 1976) (No. 76-793).

into the debate on the role and purposes of our criminal justice system.<sup>7</sup>

A careful analysis of the conspiracy offense requires an orientation in both theory and practice. Consequently, this article includes both a traditional critique of criminal conspiracy and an analysis of the questions and answers that prosecutors and defense counsel raise.<sup>8</sup> The research for this article was conducted during 1975 and 1976. It consisted, in part, of interviews with prosecutors and defense attorneys from New York, Washington, D.C., Baltimore, Boston, New Orleans, St. Louis, Indianapolis, Chicago, Houston, Albuquerque, San Diego, Los Angeles, Oakland, and San Francisco.<sup>9</sup> In addition, a questionnaire dealing with issues of criminal conspiracy was distributed in the spring of 1976 to 1,620 persons:<sup>10</sup> federal district and circuit court judges; supreme court justices from California, Texas (Court of Criminal Appeals), Ohio, Illinois, and New York (Court of Appeals); 150 criminal law professors; all 94 United States attorneys; and a large sample of the membership of the National District Attorneys Association and the National College of Criminal Defense Lawyers and Public Defenders.<sup>11</sup> Eight hundred and twenty-two persons, half of those surveyed, responded substantively to the

7. Perhaps the leading component sharpening the debate is the proposed recodification of the federal criminal code. See Criminal Justice Reform Act of 1975, S. 1, 94th Cong., 1st Sess. (1975). See generally Schwartz & Blakey, *Introductory Memorandum and Excerpts From Consultant's Report on Conspiracy and Organized Crime: Sections 1004 and 1005*, in 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 381 (1970).

8. Professor Alschuler used a similar approach to analyze plea bargaining. See Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975).

9. The interviewing outline is reprinted in Appendix A.

10. The questionnaire is reprinted in Appendix B.

11. The geographic mix of the persons responding was quite good.

Population	Percentage of respondents
More than 500,000	33.3
100,000 - 500,000	17.7
Less than 100,000	14.6
Primarily rural	34.4

Almost half of the respondents had practiced law for more than 10 years, more than a quarter for 5 to 10 years, and the rest for less than 5 years. Approximately three-fourths of the respondents practiced primarily in state jurisdictions and about one-fourth specialized in federal practice.

Lawyers from all states, except Alaska, and from Guam, the Canal Zone, and Toronto submitted substantive responses. The response rates of judges and law professors were somewhat lower than that of the practicing attorneys. Information in this survey comes from: all federal circuit courts; federal district courts of numerous areas including the metropolitan areas of Boston, New York, Brooklyn, Philadelphia, Pittsburgh, Norfolk, New Orleans, Miami, Cleveland, St. Louis, Kansas City, Chicago, Denver, San Francisco, and Los Angeles; and state

questionnaire after two mailings and a telephone followup by the Survey Research Laboratory of the University of Illinois at Urbana-Champaign.<sup>12</sup> The research—interviews and survey—shows significant problems faced on a daily basis by criminal justice professionals and provides a basis in reality for theoretical discussions of conspiracy law.

## THE CRIME OF CONSPIRACY

### THE BASIC DEFINITION

Criminal conspiracy is an agreement between two or more persons formed for the purpose of committing a crime.<sup>13</sup> The basic definition is straightforward enough.<sup>14</sup> Legitimate protest goes not to the definition of the crime, but, as will be seen, to its application and to the evidence necessary to prove the existence of the agreement. Nevertheless, the bare definition raises more questions than it answers, both on a theoretical level and a practical level: What is an agreement? Can someone be guilty of conspiracy if one of the conspirators is legally unable to enter into an agreement? Can one become a conspirator after the object crime is completed? The answers to these questions depend on the reasons for the crime of conspiracy.

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courts in Ohio, Illinois, California, New York, and Texas. In addition, professors at law schools in virtually every part of the country submitted replies.

12. The breakdown in substantive replies by category of respondents is:

Category	Number of respondents
Prosecutors (federal and state)	366
Defense attorneys	267
Federal trial judges	67
Federal and state appellate judges	53
Law professors	69
Total	822

Another 160 persons responded, but did not possess the data to enable them to answer the questionnaire.

13. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946); *see, e.g.*, 18 U.S.C. §371 (1970). Whether the object of the conspiracy must be a crime is still an open question. *See* text accompanying notes 145-62 *infra*.

14. Others have disagreed in the past: "In the long category of crimes there is none, not excepting criminal attempt, more difficult to confine within the boundaries of definitive statement than conspiracy." Harno, *supra* note 3, at 624.

## THEORETICAL PURPOSES

Criminalization of conspiracy performs two functions. The first function is that performed by any inchoate offense—the interruption of criminal activity prior to its completion. At least in theory, conspiracy subjects the defendant to criminal sanctions at a stage earlier than any other offense, even attempt. “[E]very 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.”<sup>15</sup> The courts rarely have stated the rationale for this early sanction, although a few commentators have offered justifications for it, arguing that individuals who band together have expressed, immediately upon their agreement, a clear intent to violate society’s laws.<sup>16</sup> Also, it is argued that when more than one person agrees to engage in the criminal activity, the likelihood of the accomplishment of the crime is increased.<sup>17</sup>

The second function is protection against group criminality; many have argued that a conspiratorial agreement itself creates grave dangers for society that should give rise to criminal sanctions. Justice Gibson of the Supreme Court of Pennsylvania stated in 1821:

The effort of an individual to disturb this equilibrium can never be perceptible, nor carry the operation of his interest on that of any other individual, beyond the limits of fair competition; but the increase of power by combination of means, being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous, that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual.<sup>18</sup>

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15. Sayre, *supra* note 3, at 399.

16. Wechsler, Jones, & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy* (pt. 2), 61 COLUM. L. REV. 957, 965 (1961); see Marcus, *Criminal Conspiracy: The State of Mind Crime—Intent, Proving Intent, Anti-Federal Intent*, 1976 U. ILL. L.F. 627, 628-29.

17. *Developments in the Law—Criminal Conspiracy*, *supra* note 3, at 924 (“[c]ollaboration magnifies the risk to society both by increasing the likelihood that a given quantum of harm will be successfully produced and by increasing the amount of harm that can be inflicted. A conspirator who has committed himself to support his associates may be less likely to violate this commitment than he would be to revise a purely private decision.”).

18. *Commonwealth ex rel. Chew v. Carlisle*, 1 Bright. N.P. 36, 41 (Pa. 1821).

*The Inchoate Offense.*

Those who argue that conspirators have evidenced an early intent to commit a crime, upon agreement, can point to no statistical evidence in support of their view. Nevertheless, no statistical evidence can be raised on behalf of the opposing view. Thus, we must content ourselves with asking only the practical question: Do prosecutors need to rely on the possibility of early intervention through conspiracy charges, or would attempt charges handle inchoate conspiratorial group activities without the accompanying evidentiary and practical problems for defendants? In theory, attempt could not handle all these activities. Conspiracy is a crime at the moment the agreement is formed, or at the moment some minor act is taken in furtherance of that agreement.<sup>19</sup> This is an earlier stage of criminal activity than is required for attempt, which usually involves either a substantial step toward the commission of the contemplated crime,<sup>20</sup> or else "conduct that, in fact, amounts to more than mere preparation for, and indicates . . . intent to complete, the commission of the crime."<sup>21</sup> Regardless of whether attempt could handle the inchoate conspiracy activities in theory, or whether it would be desirable,<sup>22</sup> attempt would seem to be able to handle those situations in which prosecutors actually charge conspiracy.<sup>23</sup> Conversations with prosecutors confirmed this. One stated that "[n]o one will prosecute a case without an overt act; generally there is at least an attempt unless you have an informant which is the rare situation, for you find out about the conspiratorial relationship from the overt act."<sup>24</sup> Another said that "[m]ost conspiracies [charged] do usually involve substantial steps."<sup>25</sup> Finally, in the words of former Attorney General Ramsey Clark: "We don't

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19. See *Developments in the Law—Criminal Conspiracy*, *supra* note 3, at 945-46 (statutes commonly add overt act element to common law conspiracy).

20. *E.g.*, *State v. St. Christopher*, 232 N.W.2d 798, 804 (Minn. 1975) (attempt requires substantial step; preparation sufficient for conspiracy); ILL. ANN. STAT. ch. 38, § 8-4(a) (Smith-Hurd Supp. 1976).

21. Criminal Justice Reform Act of 1975, S. 1, 94th Cong., 1st Sess. § 1001 (1975).

22. Many of the attorneys I spoke with believed that attempt was a preferable way of handling the inchoate conspiracy activities: "Attempt is a much more rational approach in handling the inchoate offense aspect of the conspiracy case; too often conspiracy is used as a political charge or in connection with informers." Interview with Thomas Decker, then Deputy Director of the Federal Public Defender Project, Chicago, Ill. (Nov. 6, 1975).

23. Johnson, *supra* note 3, at 1162-63.

24. Interview with Dan Webb, then Chief of Special Prosecutions, United States Attorneys' Office, Chicago, Ill. (Nov. 7, 1975).

25. Interview with Warren Reese, Chief Assistant United States Attorney, San Diego, Cal. (July 23, 1975); *accord*, Interview with David Harlan, Chief of Criminal Division, United States Attorneys' Office, St. Louis, Mo. (Oct. 23, 1975) (proof of overt act normally involves showing of "substantial step toward completion of the crime").

need conspiracy. It's not effective against organized crime, and we could handle the [inchoate] offense through the use of attempt."<sup>26</sup>

The results from the survey also indicate that the crime of attempt could deal with most situations in which conspiracy currently is charged.

*Question 1: What would be the impact of doing away with conspiracy and utilizing attempt crimes in its place?*<sup>27</sup>

	Great reduction in convictions	Some reduction in convictions	Little or no effect on convictions	Some increase in convictions	Great increase in convictions
Prosecution	18.8	45.6	28.4	6.3	0.9
Defense attorneys	21.0	49.2	20.6	8.5	0.8
Appellate judges	16.7	62.5	18.8	2.1	—
Trial judges	16.9	52.3	30.8	—	—
Law professors	24.2	66.1	9.7	—	—
Average for all respondents	19.7	50.2	23.8	5.7	0.7

Thus, only about one-fifth of each group responding to the survey thought there would be a significant reduction in the number of convictions. The indication that prosecutors generally do not charge conspiracy in the purely inchoate situations is shown further by the prevailing view that requiring a substantial overt act would cause no more than a small reduction in the number of convictions.

*Question 2: What would be the effect of requiring, for purposes of the overt act, a "substantial step" toward commission of the crime?*

	Significant reduction	Small reduction	No effect
Prosecutors	37.5	32.2	30.3
Defense attorneys	48.8	38.7	12.5
Appellate judges	29.2	39.6	31.3
Trial judges	24.2	39.4	36.4
Law professors	25.4	55.6	19.0
Average for all respondents	38.7	37.5	23.9

26. Interview with Ramsey Clark, former Attorney General of the United States, in Champaign, Ill. (Oct. 2, 1975).

27. The survey results are not presented here in the same order in which the questions were asked. Questions have been renumbered here for ease of reference. All of the tables show percentages of respondents in each category. The original survey is reprinted in full in Appendix B.

Some prosecutors with whom I spoke expressed concern about requiring a substantial overt act,<sup>28</sup> but they do not believe that many conspiracy charges involve insignificant overt acts. Consequently, it would seem that a general attempt statute could readily handle the inchoate aspect of most conspiracy offenses. One possible explanation for the heavy use of conspiracy in the federal system is the lack of a general attempt section in the United States Code.<sup>29</sup> Although the proposed revised federal criminal code would include such a section,<sup>30</sup> few prosecutors or defense attorneys foresee immediate changes in the use of conspiracy in connection with the inchoate function.

*Group Danger.* "When you have persons getting together and agreeing to commit a crime, it usually does lead to the commission or attempted commission of that crime. It takes no genius to conclude that group criminal activities are very dangerous."<sup>31</sup> Although the inchoate aspect of conspiracy is important, the chief rationale for the use of the crime concerns the group danger that the offense combats. The argument that group activities are far more dangerous to society than individual criminal activities has found repeated expression in the Supreme Court, with its best statement on the subject being one of its earliest:

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,

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28. "The agreement is the evil act; if we change the overt act requirement, then conspiracy as an agreement offense is no longer distinct." Interview with Robert Habans, Jr., Chief of the Criminal Division, United States Attorneys' Office, New Orleans, La. (Nov. 28, 1975).

29. See *United States v. Rosa*, 404 F. Supp. 602, 607 (W.D. Pa. 1975) (attempt to commit federal offense is itself offense only when specific statute includes attempt), *aff'd*, 535 F.2d 1248 (3d Cir. 1976) (unpublished per curiam opinion). There are specific attempt statutes governing certain crimes. *E.g.*, 21 U.S.C. §846 (1970) (drug offenses).

30. The Criminal Justice Reform Act of 1975, S. 1, 94th Cong., 1st Sess. §1001 (1975) provides: "A person is guilty of an offense if, acting with the state of mind required for the commission of a crime, he intentionally engaged in conduct that, in fact, amounts to more than mere preparation for, and indicates his intent to complete, the commission of the crime."

31. Interview with Robert Ward, Assistant United States Attorney, San Francisco, Cal. (Dec. 12, 1975).

requiring more time for its discovery, and adding to the importance of punishing it when discovered.<sup>32</sup>

The lower federal courts<sup>33</sup> and the state courts<sup>34</sup> have accepted this principle wholly, as have most commentators.<sup>35</sup> No state or federal prosecutors with whom I spoke would question this rationale. Prosecutors insisted that group activity does pose a greater danger: "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."<sup>36</sup> "Any crime committed by means of a conspiracy shows premeditation, an intent to break the public peace;

32. *United States v. Rabinowich*, 238 U.S. 78, 88 (1915). Even as vociferous a critic of certain conspiracy practices as Justice Jackson adopted the rationale. See *Krulewitch v. United States*, 336 U.S. 440, 448-49 (1949) (Jackson, J., with Frankfurter & Murphy, JJ., concurring) (sharply criticizing prosecutorial practices but admitting that "the basic conspiracy principle has some place in modern criminal law, because to unite, back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer").

33. *E.g.*, *United States v. Isaacs*, 493 F.2d 1124, 1152 (7th Cir.) (conspiracy separate from and perhaps more reprehensible than substantive crime), *cert. denied*, 417 U.S. 976 (1974); *United States v. Boyle*, 482 F.2d 755, 766 (D.C. Cir.) (conspiracy increases power to do wrong, difficulty of proof, and likelihood of terror), *cert. denied*, 414 U.S. 1076 (1973); *United States v. Greer*, 476 F.2d 1064, 1071 (7th Cir. 1972) (society harmed by "conspiracy's very existence which the law regards as making attainment of unlawful objectives more likely"), *cert. denied*, 410 U.S. 929 (1973).

34. *E.g.*, *State v. Westbrook*, 79 Ariz. 116, 119, 285 P.2d 161, 163 (1954) (conspiracy more difficult to detect; punishment more important); *Steele v. State*, 52 Del. 5, 7, 151 A.2d 127, 131 (1959) (conspiracy more difficult to prove, often intended to prepare for future crimes; justifies harsher sentence than object crime); *Lane v. State*, 259 Ind. 468, \_\_\_, 288 N.E.2d 258, 260 (1972) (conspiracy is often more serious offense than commission of the contemplated crime and a more severe penalty may be justified).

35. *E.g.*, King, *The Control of Organized Crime in America*, 4 STAN. L. REV. 52, 59-61 (1951); Norton, *Conspiracy as a Military Offense*, 1964 JAG J. 309, 310; Note, *supra* note 3, at 283-84; Comment, *Criminal Conspiracy*, 16 ST. LOUIS U. L. REV. 254, 257 (1971); Comment, *Conspiracy in the Proposed Federal Criminal Code: Too Little Reform*, 47 TUL. L. REV. 1017, 1019 (1973). *Contra*, Goldstein, *supra* note 3, at 414. Goldstein strongly challenged the assumption that conspiracy involves increased danger to society:

Though these assumed dangers from conspiracy have a romantically individualistic ring, they have never been verified empirically. . . . 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 others' determination. . . . [T]he 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.

*Id.*

36. Interview with Florence Linn, Assistant Project Administrator, Bureau of Special Operations, Los Angeles County District Attorney's Office (July 16, 1975).

this is not the average criminal. An armed robber by himself is not as dangerous as an armed robber conspiring with someone else."<sup>37</sup>

Discussions of the group danger problems with prosecutors left a nagging question. The group danger argument is correct in many cases, but is the danger always or even usually present? Despite the almost casual assurances of the added danger, that danger was not very strongly reflected in the responses to the survey.

*Question 3: With which one of the following statements are you the most in agreement?*

*There is a greater danger in conspiracy because of the encouragement and aid that conspirators give each other.*

*There is less danger in conspiracy because of the possibilities of infiltration by undercover officers and disagreement among conspirators.*

*Neither of the above, depends on the fact situation.*

	Greater danger	Less danger	Neither, depends on facts
Prosecutors	28.3	2.7	69.0
Defense attorneys	10.5	5.5	84.0
Appellate judges	18.8	—	81.3
Trial judges	12.3	1.5	86.2
Law professors	28.4	1.5	70.1
Average for all respondents	20.5	3.2	76.3

One may question whether the broad rationale of group danger supports the need for conspiracy to prosecute all group criminal activities. What one cannot question, however, is that some conspiracies are extremely dangerous and that a strong doctrine is needed to combat them.<sup>38</sup> As to such dangerous groups, is the use of

37. Interview with Frederick Whisman, Assistant District Attorney, San Francisco, Cal. (Dec. 12, 1975).

38. Whether or not group action is per se more dangerous than individual activity, many conspiracies pose serious threats because they involve large criminal enterprises. Organized crime is said to be the world's largest business, taking profits of 7 to 10 billion dollars annually. *Organized Crime Control, Hearings on S.30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 78 (1970) (statement of Representative McCulloch); see Letter from the Honorable J. Edward Lumbar, Judge, United States Court of Appeals for the Second Circuit, to the author, at 1 (Apr. 12, 1976) (copy on file at the *Georgetown Law Journal*) ("The more efficient means of travel and communication available today to lawbreakers has spawned many criminal endeavors which are operated by larger organized

the conspiracy charge the way to stop them? Prosecutors certainly believe so. They constantly made the point that they need a conspiracy statute to go after these group danger activities because nothing else would do the job adequately:

We need conspiracy. I know there is strong reaction from the defense bar, but I always argue that but for the conspiracy statute some serious inchoate offenders would be going free, and these are dangerous individuals. I know these cases may be difficult, perhaps more difficult than they should be, to defend, but I don't accept the notion that we ought not to have conspiracy.<sup>39</sup>

One viewed conspiracy as a means to get "fringe types" by broadening the scope of the offense.<sup>40</sup> To another,

[i]t is important to retain the conspiracy offense as . . . with a network conspiracy it allows the jury to see the whole story. For instance, in the C. Arnholt Smith prosecution there were 1000 counts of conspiracy so it was necessary for the trier of fact to understand the full implications of the case.<sup>41</sup>

Most defense counsel are unwilling to challenge the underlying assumption that group criminal actions are more dangerous than individual acts. Many, however, are quite willing to challenge the view that prosecutors need conspiracy to combat such group activity.<sup>42</sup> They feel "that the prosecution just does not need conspiracy, as long as they can use the underlying theory of conspiracy for getting evidence in,"<sup>43</sup> or that "inchoate and substantive offenses take care of all the dangers involved in the so-called conspiracy situations."<sup>44</sup>

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groups than was the case years ago."). I am indebted to Judge Lumbard, who, in addition to responding to the questionnaire, wrote to set forth "several important considerations which it is not possible to emphasize sufficiently in such answers [to the questionnaire]." *Id.*

39. Interview with Jeffrey White, Assistant United States Attorney, Baltimore, Md. (Nov. 29, 1975).

40. Interview with Ralph Capitelli, Deputy District Attorney, New Orleans, La. (Nov. 26, 1975).

41. Interview with Warren P. Reese, Chief Assistant United States Attorney, San Diego, Cal. (July 23, 1975); *accord*, Interview with Terry Knoepp, District Attorney's Office, San Diego, Cal. (July 23, 1975) ("In order to get the true planned crime, we need conspiracy to show the scope of the offense.").

42. See notes 31-41 *supra* and accompanying text.

43. Interview with John Cleary, Federal Public Defender, San Diego, Cal. (Dec. 22, 1975).

44. Interview with George Cotsirilos, defense attorney, Chicago, Ill. (Nov. 7, 1975).

The conflicting comments from the two sides raise the difficult question whether prosecutors actually need the conspiracy charge generally. This question ought not to be asked rhetorically, however, for prosecutors use the conspiracy charge in a manner that adds fuel to the position of the defense counsel. In many, if not most, cases in which criminal conspiracy is charged, the defendants either have committed or have attempted a substantive offense. In the interviews, both prosecutors and defense counsel agreed upon this and to a degree the survey substantiated their agreement. Less than 10% of the respondents believe that conspiracy charges are not coupled with a charge on a substantive offense in the vast majority of cases.<sup>45</sup> Even in the cases in which conspiracy alone is charged, many prosecutors and half of the trial judges believe that the defendants had completed or attempted the object crime.<sup>46</sup>

45. *Question 4: What percentage of conspiracy charges is for conspiracy only and not in conjunction with a substantive or completed offense?*

	0 - 10 percent	11-25 percent	26-50 percent	51-75 percent	76-90 percent	91-100 percent
Prosecutors	83.7	6.4	4.1	1.5	1.2	3.2
Defense attorneys	75.3	16.9	4.7	0.8	0.4	2.0
Appellate judges	77.3	15.9	6.8	--	--	--
Trial judges	73.8	21.5	4.6	--	--	--
Law professors	50.0	30.8	15.4	--	3.8	--
Average for all respondents	77.3	13.4	5.3	0.9	0.9	2.1

46. *Question 5: In what percentage of cases where conspiracy alone was charged had the object crime been completed or attempted?*

	0 - 10 percent	11 - 25 percent	26 - 50 percent	51 - 75 percent	76-90 percent	91- 100 percent
Prosecutors	62.7	5.8	5.5	3.7	6.7	15.6
Defense attorneys	48.8	11.0	8.9	5.7	9.8	15.9
Appellate judges	31.6	2.6	15.8	10.5	18.4	21.1
Trial judges	24.2	6.5	9.7	9.7	24.2	25.8
Law professors	27.1	16.7	14.6	8.3	20.8	12.5
Average for all respondents	50.6	8.2	8.2	5.5	10.8	16.6

This table is puzzling. For example, it is hard to explain why one-fourth of the trial judges believe that the substantive offense almost always had been completed or attempted and one-fourth believe it almost never had. One explanation is that prosecutorial practices may vary widely across the country: some prosecutors' offices may never charge conspiracy unless there is at least a substantial overt act; others may not charge conspiracy at all if they can charge the substantive offense or attempt.

That prosecutors often do, or could, charge conspiracy along with other offenses should not be surprising. Unless there is an informant or wiretap, the government often does not discover the conspiracy until some criminal act has occurred. Yet, if the group has committed or attempted a substantive offense, the need for using a conspiracy charge against the group is unclear. Any conspirator who has helped plan the crime would be responsible for the completed offense under an accountability theory.<sup>47</sup> Moreover, every person whom the prosecution could charge as a conspirator could be brought to trial for the completed or attempted crime and the prosecution could have the full scope of the endeavor explained to the jury. The conclusion is unavoidable that no persuasive rationale generally supports charging a conspiracy when another offense is available, and no attorney with whom I spoke articulated any rationale.<sup>48</sup> To be sure, the comments I heard ran along the lines of: "I can see no reason at all to have conspiracy when there is a substantive offense;"<sup>49</sup> or "[i]f the substantive offense has been completed, I see no need for the crime of conspiracy."<sup>50</sup>

The traditional premise for convicting a defendant of both conspiracy and the completed or attempted crime is that the agreement to commit the crime, in and of itself, is a significant danger to society. Society, however, should not fear the agreement per se, but rather the likelihood that a completed or attempted crime will result. If the group has attempted or completed the crime that is the object of the conspiracy, the basis for prosecution and punishment for the agreement is destroyed because society can punish the conspirators for the attempted or completed crime.<sup>51</sup> Moreover, even if there were

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47. 18 U.S.C. § 2(a) (1970) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.").

48. *But see* Letter from the Honorable J. Edward Lumbard, *supra* note 38, at 2. Judge Lumbard stated:

In any event, I do not see how anyone can seriously argue that it is overreaching or any sort of abuse of prosecutorial power to add the charge of conspiracy in such cases, or for that matter, in any case where it can be shown that two or more persons acted together in committing, or planning to commit a crime. The fact that certain prosecutors have used bad judgment in how certain cases, such as the Chicago Seven case, were handled should not blind us to the proper advantage of conspiracy prosecutions and the public interest which may be so served.

*Id.*

49. Interview with Tom Decker, then Deputy Director of the Federal Public Defender Project, Chicago, Ill. (Nov. 6, 1975).

50. Interview with Robert Thompson and David Rinstitt, Office of the Prosecuting Attorney, Marion County, Indianapolis, Ind. (Oct. 30, 1975).

51. Illinois provides that a defendant cannot be convicted of both conspiracy and the object crime. ILL. ANN. STAT. ch. 38, § 8-5 (Smith-Hurd 1972).

some theoretical justification for the double prosecution view, there is little practical justification. Virtually no one convicted of both the conspiracy and the object offense is punished separately for each offense.<sup>52</sup> Not a single person whom I interviewed could recall more than a rare case in which consecutive sentencing was ordered. The responses to Question 6 also show that consecutive sentencing is rarely employed.

*Question 6: When a defendant is convicted on both the conspiracy charge and the substantive charge, what percentage of the time is consecutive sentencing employed?*

	0-10 percent	11-25 percent	26-50 percent	51-75 percent	76-90 percent	91-100 percent
Prosecutors	81.9	5.1	2.7	2.0	2.0	6.1
Defense attorneys	77.3	10.5	2.9	1.7	3.8	3.8
Appellate judges	71.7	6.5	4.3	4.3	2.2	10.9
Trial judges	78.8	6.1	1.5	3.0	1.5	9.1
Law professors	73.3	8.9	6.7	4.4	2.2	4.4
Average for all respondents	78.8	7.4	3.1	2.3	2.6	5.8

#### PRACTICAL PURPOSES

If the theoretical basis for convicting persons of both the substantive offense and the conspiracy is not supportable, and if in practice the conspirator rarely receives consecutive sentences, why do prosecutors charge and attempt to prove two offenses at trial? Surely there must be an advantage to counteract the disadvantages of time consumption and confusion engendered by more complex jury instructions. According to defense counsel, the advantage is higher conviction rates. Although few prosecutors say that the chance of conviction improves when an indictment includes more than one count against the conspirator, the survey supports the defense view.

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52. Unlike statutes in some states, federal law allows consecutive sentencing, and the Supreme Court has upheld consecutive sentencing for conspiracy and the object offense. *Pinkerton v. United States*, 328 U.S. 640, 643 (1946). The proposed revision of the federal criminal code codifies consecutive sentencing. Criminal Justice Reform Act of 1975, S. 1, 94th Cong., 1st Sess. §2304(a) (1975).

The responses indicate that the conviction rate goes up, to some degree, on each count if both go to the jury.<sup>53</sup>

*Question 8: How does the conviction rate for a conspiracy charge change when charged and tried along with a substantive count?*<sup>54</sup>

	Much greater	Somewhat greater	Same	Somewhat less	Much less
Prosecutors	13.9	28.3	48.3	5.6	3.9
Defense attorneys	27.6	39.5	23.2	4.9	4.9
Appellate judges	14.7	23.5	47.1	2.9	11.8
Trial judges	16.4	27.3	52.7	3.6	—
Law professors	21.1	52.6	13.2	7.9	5.3
Average for all respondents	19.9	33.9	36.6	5.1	4.5

53. This situation arises fairly often when two or more persons are brought to trial:

*Question 7: When two or more persons are brought to trial for a substantive felony, what percent of the time are they also brought to trial on a conspiracy charge?*

	0 - 10 percent	11 - 25 percent	26 - 50 percent	51 - 75 percent	76 - 90 percent	91 - 100 percent
Prosecutors	88.1	5.0	3.6	0.8	1.1	1.4
Defense attorneys	61.7	11.5	8.4	5.7	8.0	4.6
Appellate judges	31.0	26.2	19.0	11.9	9.5	2.4
Trial judges	16.9	26.2	21.5	15.4	12.3	7.7
Law professors	60.0	16.0	6.0	12.0	6.0	--
Average for all respondents	68.5	10.8	7.7	5.0	5.1	2.9

A higher frequency is reflected in the responses of the more experienced conspiracy lawyers, the federal practitioners:

	0 - 10 percent	11 - 25 percent	26 - 50 percent	51 - 75 percent	76 - 90 percent	91 - 100 percent
Prosecutors	33.3	33.3	16.7	10.0	3.3	3.3
Defense attorneys	8.8	8.8	11.8	17.6	26.5	26.5

54. The figures in the response table do not include 29.3% (221) of the respondents, who were uncertain.

*Question 9: How does the conviction rate for a substantive count change when charged and tried along with a conspiracy count?*<sup>55</sup>

	Much greater	Somewhat greater	Same	Somewhat less	Much less
Prosecutors	3.1	29.2	63.0	4.7	—
Defense attorneys	30.4	32.6	31.0	3.8	2.2
Appellate judges	2.8	33.3	58.3	2.8	2.8
Trial judges	6.9	32.8	58.6	1.7	—
Law professors	13.2	34.2	42.1	10.5	—
Average for all respondents	14.2	31.5	49.0	4.3	1.0

A conspiracy count therefore may strongly aid the prosecution's case. For example, statements of a conspirator made during the course of and in furtherance of the conspiracy are excepted from the definition of hearsay and are admissible against all conspirators.<sup>56</sup> Venue for a federal conspiracy trial may lie in any district in which the

55. The figures in the response table do not include 27.3% (224) of the respondents, who were uncertain.

56. FED. R. EVID. 801(d)(2)(E); Note, *The United States Courts Of Appeals: 1975-1976 Term Criminal Law and Procedure*, 65 GEO. L.J. 201, 428 & n.1467 (1976). The out-of-court declaration of a coconspirator may be used as substantive evidence against the defendant as long as the declaration was made during the course of the conspiracy and in furtherance of it. *Anderson v. United States*, 417 U.S. 211, 218-19 (1974). The rationale for this exception to the hearsay rule is that the coconspirators are agents of one another, and any such statement by one is the statement of all. *Id.* at 218 n.6; *Van Riper v. United States*, 13 F.2d 961, 967 (2d Cir.) (L. Hand, J.), *cert. denied*, 273 U.S. 702 (1926). The significant impact of the hearsay exception on convictions is almost universally accepted.

*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?*

	Significant reduction in convictions	Small reduction in convictions	No effect
Prosecutors	61.7	24.4	14.0
Defense attorneys	72.1	22.7	5.2
Appellate judges	56.5	32.6	10.9
Trial judges	42.4	49.2	8.5
Law professors	51.8	42.9	5.4
Average for all respondents	62.6	27.8	9.6

conspiracy began, continued, or ended.<sup>57</sup> The survey shows that these advantages are important, but it also establishes that other reasons encourage prosecutors to charge conspiracy: the reaction of the jury or judge to the alleged danger of group activity, jurors' confusion that may lead them to convict all defendants, longer sentences, and improved plea bargaining positions.<sup>58</sup> Other less frequently mentioned advantages include easier joinder of defendants and offenses, incentives for certain defendants to turn state's evidence, and time and expenses saved. Question 12 was directed to past and present prosecutors.

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57. *Hyde v. United States*, 225 U.S. 347, 359-60 (1914); 18 U.S.C. §3237(a) (1970). The prosecution of Harry Reems on obscenity charges shows the way in which a conspiracy charge can help a prosecutor find a receptive forum for prosecuting unpopular crimes. Reems starred in the movie "Deep Throat," and was prosecuted in Memphis, Tennessee, although he was paid little for his performance and allegedly did not know that others would distribute the film in Memphis.

58. *Question 11: What do you feel is the greatest advantage(s) for the prosecution in conspiracy trials involving more than one defendant? (Circle all that apply.)*

	Admissibility of hearsay evidence	Admissibility of acts of coconspirators	Reaction of trier of fact to group danger	Confusion of trier of fact	Venue	Other
Prosecutors	45.1	77.2	24.1	4.0	9.9	14.5
Defense attorneys	65.0	76.8	31.9	53.1	5.9	10.2
Appellate judges	38.8	81.6	16.3	18.4	2.0	10.2
Trial judges	48.5	81.8	13.6	10.6	3.0	4.5
Law professors	67.7	73.8	46.2	49.2	20.0	16.9
Average for all respondents	53.6	77.4	27.2	25.9	8.3	12.1

Some lawyers did question whether there was any special advantage for the prosecution in conspiracy trials. One United States attorney argued that asking questions about prosecutorial advantages misses the point of conspiracy charges.

The advantages to the prosecution are the same as those to the cause of justice and its administration—the prosecution in a single trial of persons engaged in a joint criminal venture. To do otherwise would be to subject the courts to a succession of repetitive trials using the same witnesses with an ever-expanding supply of previous testimony for cross-examination.

*Question 12: What motivated you to bring a conspiracy charge where the object offense had been completed or attempted? (Circle all that apply.)*

	Evidentiary advantages	Venue considerations <sup>59</sup>	Possibility of greater sentence	Advantages in connection with plea bargaining	Other <sup>60</sup>
Prosecutors	62.8	12.7	17.5	35.3	26.3
Defense attorneys	67.8	4.4	17.8	35.6	28.9
Appellate judges	68.8	12.5	—	6.3	37.5
Trial judges	78.3	17.4	8.7	13.0	21.7
Law professors	59.1	4.5	27.3	22.7	50.0
Average for all respondents	64.5	11.0	17.0	32.8	28.0

59. The responses to specific questions indicate further that venue is neither a great advantage to the prosecutor nor a great disadvantage to the defendant in most cases:

*Question 13: What would be the impact, in a multidistrict conspiracy, of allowing prosecution only in the district where the agreement was made as opposed to allowing prosecution where any overt act occurred?*

	Severely limit prosecution	Hamper prosecution to some extent	No effect
Prosecutors	34.9	44.9	20.2
Defense attorneys	12.0	53.9	34.0
Appellate judges	17.4	52.2	30.4
Trial judges	20.6	50.8	28.6
Law professors	17.2	50.0	32.8
Average for all respondents	23.5	49.3	27.2

*Question 14: How often does the ability of prosecution to establish venue in places other than where the agreement was formed actually disadvantage defendants?*

	Often	Sometimes	Seldom	Never
Prosecutors	4.7	36.9	40.7	17.6
Defense attorneys	22.9	44.1	24.6	8.5
Appellate judges	4.4	42.2	51.1	2.2
Trial judges	3.6	36.4	52.7	7.3
Law professors	19.3	52.6	28.1	--
Average for all respondents	12.1	41.0	35.8	11.2

60. The additional reasons most often given were that the object crime could not necessarily be proven at trial and that, as one United States attorney remarked in a letter responding to the survey, "the overriding consideration in bringing a conspiracy charge [is] that the evidence available to the prosecution which will best [elucidate] for the jury the alleged criminal conduct is a conspiracy charge." Finally, a number of prosecutors answered this question by saying that conspiracy was charged because the legislature has made conspiracy a crime. In light of prosecutorial discretion and the rare use of consecutive sentencing, these responses are rather curious.

"Beware! Anyone charged with participation in a conspiracy will be faced with a 'drag-net' capable of 'great oppression.'"<sup>61</sup> The commentator who made that statement characterized the defense position that joint conspiracy trials<sup>62</sup> sometimes result in unjust verdicts. The survey indicates that juries do not often acquit some defendants in large joint trials if they find others guilty.

*Question 15: In what percent of cases does the jury convict some but not all of the alleged conspirators?*

	0-10 percent	11-25 percent	26-50 percent	51-75 percent	76-90 percent	91-100 percent
Prosecutors	66.9	15.9	10.3	3.8	2.1	1.0
Defense attorneys	43.5	25.7	21.7	5.7	3.0	0.4
Appellate judges	30.8	15.4	41.0	12.8	—	—
Trial judges	24.2	38.7	22.6	6.5	8.1	—
Law professors	9.5	40.5	33.3	7.1	9.5	—
Average for all respondents	49.0	22.9	18.7	5.4	3.3	0.6

Of course, one can explain the responses as only reflecting the prosecutor's care in not charging innocent people with conspiracy, but many defense counsel made the point that in large conspiracy cases if the prosecution shows some evidence of a conspiracy, juries have a difficult time distinguishing defendants, and juries occasionally make erroneous judgments as to particular defendants.<sup>63</sup> These points have

61. Klein, *Conspiracy—The Prosecutor's Darling*, 24 BROOKLYN L. REV. 1, 3 (1957) (citing *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.) (L. Hand, J.), *aff'd*, 311 U.S. 205 (1940)).

62. The general rule is that persons jointly indicted should be tried together, especially in conspiracy cases. *United States v. Perez*, 489 F.2d 51, 65 (5th Cir.), *cert. denied*, 417 U.S. 945 (1973); *United States v. Kulp*, 365 F. Supp. 747, 765 (E.D. Pa. 1973), *aff'd per curiam*, 497 F.2d 921 (3d Cir. 1974).

63. *Question 16: Do you agree or disagree with this statement: As the number of defendants in a joint conspiracy trial increases, there is a greater chance that all of the defendants will be convicted.*

	Agree	Disagree
Prosecutors	25.3	74.7
Defense attorneys	48.2	51.8
Appellate judges	29.2	70.8
Trial judges	18.5	81.5
Law professors	35.6	64.4
Average for all respondents	33.7	66.3

Confusion in the minds of the jurors causing them to convict all defendants was thought to be a major advantage in prosecuting conspiracy cases by 25.9% of the respondents. See Survey Question 11, *supra* note 58.

been made before.<sup>64</sup> Indeed, great concern was expressed over fifty years ago by the Conference of Senior Circuit Judges.<sup>65</sup>

More importantly, the interviews consistently indicated that the mechanics of large conspiracy cases result in disruptive trials that cast doubt on the integrity of the whole system of criminal justice. Although few cases tried today involve thirty or more defendants, as was common not so long ago,<sup>66</sup> large trials still often occur.<sup>67</sup> Wholly apart from the huge joint trials of the past, most attorneys with whom I spoke felt that having five or six defendants in a single trial creates significant mechanical problems.

Recognition of these problems has led many prosecutors and trial judges to sever cases *sua sponte*, but virtually every prosecutor I met challenged the defense attorneys' general conclusion; indeed, some prosecutors feared just the opposite result. Jeffrey White, Assistant United States Attorney in Baltimore, said: "If six defendants out of twenty-five go to trial, it's a lot. If many more we probably would want

64. The Supreme Court has noted the concerns and pledged to "view with disfavor any attempt to broaden the already pervasive and wide sweeping net of conspiracy prosecution." *Grunewald v. United States*, 353 U.S. 391, 404 (1957). Justice Jackson argued almost 30 years ago that "loose practice as to this offense constitutes a serious threat to fairness in our administration of justice." *Krulewitch v. United States*, 336 U.S. 440, 446 (1948) (Jackson, J., with Frankfurter & Murphy, JJ., concurring).

65. We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony; and we express our conviction that both for this purpose and for the purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused.

. . . We observe so many conspiracy prosecutions which do not have the substantial base that we fear the creation of a general impression very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly.

[1925] *ATTY GEN. ANN. REP.* 5-6.

66. See, e.g., *Butler v. United States*, 317 F.2d 249, 251 (8th Cir.) (30 defendants in mail fraud), *cert. denied*, 375 U.S. 838 (1963); *Capriola v. United States*, 61 F.2d 5, 6 (2d Cir. 1932) (59 defendants in conspiracy to violate Prohibition Act), *cert. denied*, 287 U.S. 671 (1933); *People v. Heidt*, 312 Mich. 629, 633, 20 N.W.2d 751, 752 (1945) (69 defendants in conspiracy to obstruct justice); *People v. Roxborough*, 307 Mich. 575, 588, 12 N.W.2d 466, 471 (1943) (61 defendants in conspiracy to obstruct justice), *cert. denied*, 323 U.S. 749 (1944).

67. *Question 17: Have the majority of joint conspiracy trials that you are aware of had . . .*

	Less than 5 defendants	5-10 defendants	More than 10 defendants
Prosecutors	92.1	7.2	0.7
Defense attorneys	76.6	21.8	1.6
Appellate judges	77.8	22.2	--
Trial judges	74.2	25.8	--
Law professors	79.6	18.5	1.9
Average for all respondents	83.2	15.8	1.0

a severance; there would be too much confusion for everyone, and frankly I would have a fear of wholesale acquittal in that sort of situation.”<sup>68</sup> Most prosecutors stated that they believe that juries can differentiate among defendants and charges.<sup>69</sup> Some defense counsel reply that the examples of cases in which juries distinguished defendants involved outrageously misplaced defendants. The opinion of Robert Kasanof of New York, a former teacher of criminal law and the head of a legal aid office, is that:

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*Question 18: What is the largest conspiracy trial, insofar as number of defendants in a joint trial, that you have handled or know of from personal knowledge?*

	2-10 defendants	11-20 defendants	21-30 defendants	31-40 defendants	More than 40 defendants
Prosecutors	90.7	7.6	1.7	--	--
Defense attorneys	68.0	19.6	8.0	2.0	2.4
Appellate judges	41.7	29.2	14.6	6.3	8.3
Trial judges	35.8	37.3	16.4	3.0	7.5
Law professors	54.7	24.5	7.5	5.7	7.5
Average for all respondents	71.4	17.4	6.6	1.8	2.7

The figures reflect only the defendants who actually go to trial; normally, the number is higher because many defendants will enter into plea bargaining agreements. Interview with Robert Brosio, Chief Assistant United States Attorney, Los Angeles, Cal. (Dec. 16, 1975). *See also* United States v. Verdoorn, 528 F.2d 103, 107 (8th Cir. 1976) (rejecting claim that Government's offers during plea bargaining should be admitted to show weakness of Government's case).

The interviews also showed that large trials remain commonplace. Attorneys in most large cities recalled recent cases involving a dozen or more defendants.

68. Interview with Jeffrey White, Assistant United States Attorney, Baltimore, Md. (Nov. 29, 1975).

69. *E.g.*, Interview with Robert Habans, Chief of the Criminal Division, United States Attorneys' Office, New Orleans, La. (Nov. 28, 1975). *See generally* Letter from the Honorable J. Edward Lumbard, *supra* note 38, at 2. Judge Lumbard stated:

Whether or not juries can determine the guilt or innocence of particular defendants in multi-defendant cases depends on the competence of counsel and most of all on the trial judge. In the cases coming before us for review we have found that the jurors are discriminating and that they exercise great care. Just last Friday, in the SDNY, Judge Duffy finished a nine-weeks conspiracy trial of 12 defendants on narcotics charges. The jury deliberated from Monday until Friday evening, sending 43 communications to the judge regarding testimony as to various defendants. The jury convicted seven defendants for conspiracy and various substantive crimes, and at the same time some of the seven were acquitted of one or more substantive offenses. One defendant was acquitted, and the jury disagreed as to the guilt of four defendants. Such a trial and such an outcome are not the exception.

*Id.*

Large numbers of defendants at trial make for a ridiculous situation. Even with eight or nine defendants at a conspiracy trial involving a long-term conspiracy, the case could run for three months or more. No attorney will be able to remember all the evidence. The notion that the jurors will sort out that evidence against each defendant as to acts that he agreed to is ridiculous. What can you hope for? Who is kidding whom? In all the jury cases I have had with conspiracy, the jury, after about an hour of deliberation, always asks for the conspiracy instruction again; they don't really understand the conspiracy.<sup>70</sup>

This statement echoes one made by Judge Jerome Frank decades ago:

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. . . .<sup>71</sup>

Despite the criticisms, little has changed over the years.

Although the prosecutors' position that juries can and regularly do distinguish between defendants is true, a dragnet effect does taint some trials. Guilt by association is a justified fear. It is hard to believe that in a four-month trial involving many defendants the jury can sift all the evidence and differentiate between the defendants. Having explored this possible dragnet effect and other practical reasons for prosecutors to charge conspiracy, why and when federal prosecutors charge conspiracy is somewhat predictable.

#### THE PROSECUTOR'S DARLING?

For years it has been widely assumed that criminal conspiracy is charged very often throughout the United States. This assumption, at least on the federal level, appears to be basically correct. Neither the

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70. Interview with Robert Kasanof, former teacher of criminal law and head of a legal aid office, in New York City (Jan. 19, 1976).

71. *United States v. Liss*, 137 F.2d 995, 1003 (2d Cir.) (Frank, J., dissenting), *cert. denied*, 320 U.S. 773 (1943).

Department of Justice nor the Federal Judicial Center keeps complete statistics on how often conspiracy is charged,<sup>72</sup> but what statistics are available indicate that it is one of the most commonly charged crimes.<sup>73</sup> Many prosecution and defense attorneys stated that federal prosecutors generally will include a conspiracy charge whenever a case involves multiple defendants.<sup>74</sup> Prosecutors in some federal jurisdictions charge conspiracy considerably more often than do others. San Diego, a focal point for narcotics smuggling and immigration violations, probably has as many conspiracy prosecutions as any federal district in the country.<sup>75</sup> Considering the practical benefits of charging conspiracy, it is not surprising that federal prosecutors charge it so often. What is surprising, however, is that federal prosecutors charge conspiracy so much more often than do their state counterparts.

*Question 19: What percentage of felonies charged in your district is for the crime of conspiracy?*<sup>76</sup>

	0-10 percent	11-20 percent	21-30 percent	31-40 percent	41-50 percent	50+ percent
Federal lawyers:	39.0	18.6	11.9	6.8	15.3	8.5
State lawyers:	90.0	6.9	1.7	0.8	0.4	0.4

72. Interview with Richard Thornburgh, Assistant Attorney General (Criminal Division), in Washington, D.C. ("Statistics just are not available to determine how often the crime of conspiracy is charged, primarily because we do not regard the crime as unique in any form.").

73. U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS' OFFICES STATISTICAL REPORT—FISCAL YEAR 1975 Table 3 (842 conspiracy cases with 2,186 defendants filed in fiscal 1975; 16th largest category of offense).

74. *E.g.*, Interview with Robert Brosio, Chief Assistant United States Attorney, Los Angeles, Cal. (Dec. 16, 1975) ("In 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.").

75. Interview with Warren P. Reese, Chief Assistant United States Attorney, San Diego, Cal. (July 23, 1975).

76. The breakdown between prosecution and defense continues to reflect the different perceptions of the two groups on the frequency of conspiracy charges.

	Federal					
	0-10 percent	11-20 percent	21-30 percent	31-40 percent	41-50 percent	50+ percent
Prosecution	60.7	28.6	3.6	--	7.1	--
Defense	19.4	9.7	19.4	12.9	22.6	16.1

Thus, although 90% of the state practitioners believed that a conspiracy charge was present less than 10% of the time, more than 40% of the federal practitioners thought conspiracy charges accounted for at least one-fifth of all the felonies charged.<sup>77</sup>

The contrast between state and federal practices is also demonstrated by the responses to a survey question concerning the likelihood that two or more persons charged with a substantive offense would also be charged with conspiracy. Ninety-three percent of the state prosecutors believe that this happens less than 10% of the time, but two-thirds of the federal prosecutors believe it occurs more than 10% of the time. Half of the federal defense attorneys believe it occurs more than three-fourths of the time.<sup>78</sup>

The survey and conversations across the country make it clear that state prosecutors rarely charge conspiracy.<sup>79</sup> Although no procedural

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	State					
	0-10 percent	11-20 percent	21-30 percent	31-40 percent	41-50 percent	50+ percent
Prosecution	96.9	1.8	0.9	--	--	0.3
Defense	78.8	14.9	2.9	1.9	1.0	0.5

77. This pattern is also reflected in the responses from the judges. All of the state judges who responded to this question believed that conspiracy was charged in less than 10% of all felony cases, but the federal judges had a different experience:

	0-10 percent	11-20 percent	21-30 percent	31-40 percent	41-50 percent	50+ percent
Appellate judges	23.1	42.3	15.4	--	11.5	7.7
Trial judges	36.4	27.3	18.2	3.6	9.1	5.5

78. Question 20: When two or more persons are brought to trial for a substantive felony, what percent of the time are they also brought to trial on a conspiracy charge?

	0-10 percent	11-25 percent	26-50 percent	51-75 percent	76-90 percent	91-100 percent
Federal prosecutors	33.3	33.3	16.7	10.0	3.3	3.3
State prosecutors	93.4	2.4	2.1	--	0.9	1.2
Federal defense attorneys	8.8	8.8	11.8	17.6	26.5	26.5
State defense attorneys	71.1	11.5	8.3	3.7	4.6	0.9

79. In the Providence, Rhode Island, Public Defender's Office, 6 of the 360 pending cases involved conspiracy counts. Letter from Peter DiBiase, Assistant Public Defender, Providence, Rhode Island, to author (Apr. 20, 1976) (copy on file at the *Georgetown Law Journal*). The Legal Aid Society of Nassau County, New York, handles approximately 1000 felony cases per year and less than 10 involve conspiracy counts. Letter from James J. McDonough, Attorney in

advantages unique to the federal system are immediately discernible, there are two reasons why conspiracy is charged so often in the federal system and so rarely in the state systems. The first relates to the type of offense typically charged in state jurisdictions—local, violent crime.<sup>80</sup> Moreover, if conspiratorial combinations are involved, they are less complex and less sophisticated than the cases generally handled at the federal level.<sup>81</sup> Illegal businesses such as narcotics smuggling, extortion, and transportation of illegal aliens often involve elaborate transportation networks that are interstate in nature, thus requiring federal action even when there is concurrent jurisdiction.<sup>82</sup>

The nature of the crimes committed is a major reason for federal prosecutors to charge conspiracy more often than state prosecutors, but it cannot be the only reason. Many federal crimes do involve planning and sophisticated coordination of large numbers of persons, but conspiracy is often used in federal districts in connection with narcotics offenses of every size—offenses that in the states as well as the federal districts involve planning and distribution.

The second reason that seems to explain the difference in the use of the charge has to do with the makeup of the prosecuting offices and their backup staffs. The district attorneys' offices probably handle more cases than United States attorneys' offices,<sup>83</sup> and their investigative staffs are state or local police forces concerned more

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Charge of the Legal Aid Society of Nassau County, New York, to author (Apr. 8, 1976) (copy on file at the *Georgetown Law Journal*).

Of course, state prosecutors can utilize the conspiracy doctrine without formally charging conspiracy. In the federal system and in most states, the evidentiary advantages as well as the complicity rules apply if a conspiracy is proved, whether charged or not. V. BALL, R. BARNHART, K. BROUN, G. DIX, E. GELLHORN, R. MEISENHOLDER, E. ROBERTS, & J. STRONG, *MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* §267, at 646 (2d ed. E. Cleary 1972). Nonetheless, state counsel made it clear that conspiracy was not being utilized in this manner to any great extent.

80. Interview with Lowell Jensen, District Attorney for Alameda County (Oakland), Cal. (late 1975) (few pure conspiracy charges).

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

82. See O'Dougherty, *supra* note 3, at 263 (federal conspiracy charges more common because federal crimes not customarily "of the 'lone wolf' variety").

83. It is difficult to prove this observation statistically. Some state districts make distinctions in determining case loads between appeals, habeas corpus matters, misdemeanors, felonies, and so on. Trying to match these figures against the federal reporting system proved to be quite an arduous task. The statistics published by federal and local prosecutors' offices with roughly the same number of attorneys do indicate that each local attorney handles more cases than his federal counterpart. Compare 1975 Annual Report to the Mayor of San Francisco (John Jay Ferdon, District Attorney) (59 attorneys handled 1525 informations involving 1829 defendants and 73 indictments involving 101 defendants) with Report of Activities, United States Attorney, Southern District of New York, June 1973 — October 1975 (between 60 and 68 attorneys filed 1233 cases in fiscal 1975). Moreover, every attorney with whom I spoke felt that state prosecutors did handle more criminal cases per attorney.

with preventing crimes than with the investigation of complicated criminal schemes. It is this latter function that federal agencies—for example, the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Bureau of Alcohol, Tobacco & Firearms—perform so well.<sup>84</sup> Both prosecutors and defense counsel stressed repeatedly the limited manpower and investigative assistance of the state offices.<sup>85</sup> Despite these limitations, the interviews indicate that state prosecutors are likely to begin charging conspiracy more often, particularly with narcotics and white-collar offenses. The reason given is that as crime becomes more sophisticated, state prosecutors are discussing and carefully studying the favorable conspiracy rules of evidence and complicity and are perceiving conspiracy as an effective approach to serious criminal activities such as narcotics, robbery, and consumer fraud and other white-collar crimes.<sup>86</sup> Perhaps at that future time we will begin to hear more from state defense counsel on the subject of criminal conspiracy.

### THE AGREEMENT

An understanding of the theoretical and practical purposes for the crime of conspiracy is necessary for a close examination of the various formulations of what constitutes a conspiracy and the practical result of accepting a particular definition. The most interesting facets of conspiracy doctrine are the requirements of a punishable agreement and the prohibited objects of that agreement.

The crime of conspiracy is the illegitimate agreement, and the agreement is the crime. The agreement is the most important aspect of the conspiracy doctrine because it is the basis for early liability and for charging both the inchoate crime and the substantive offense.<sup>87</sup> Moreover, it, by itself, satisfies the traditional *actus reus* requirement.<sup>88</sup> The agreement, however, need not be a formal transaction involving meetings and communications.<sup>89</sup> The prosecution need only

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84. Interview with Robert Brosio, Chief Assistant United States Attorney, Los Angeles, Cal. (Dec. 16, 1975).

85. Interview with George Cotsirilos, defense attorney, Chicago, Ill. (Nov. 7, 1975) ("State court prosecutors don't have . . . the resources to go after the non-street crime situation.").

86. Interview with Robert Brosio, Chief Assistant United States Attorney, Los Angeles, Cal. (Dec. 16, 1975) (state officials often defer to federal investigative resources in sophisticated cases, but are becoming more conscious of the conspiracy charge).

87. See notes 45-46 *supra* and accompanying text.

88. See Orchard, *Agreement in Criminal Conspiracy*, 1974 CRIM. L. REV. 297, 298-99.

89. *Castro v. Superior Court*, 9 Cal. App. 3d 675, 686, 88 Cal. Rptr. 500, 508 (1970) (assent inferred from nature of act, relationship and interest of conspirators; "not necessary to show that the parties met and actually agreed"); *People v. Lauria*, 251 Cal. App. 2d 471, 475, 59 Cal. Rptr. 628, 630 (1967) ("tacit, mutual understanding" sufficient).

show concert of action with all the parties working together for the accomplishment of a common purpose.<sup>90</sup> It is sufficient that the defendant was a party to an agreement to commit an unlawful act<sup>91</sup> at the time the conspiracy is alleged to have been in existence, that he understood—and committed himself to—at least the basics of the agreement.<sup>92</sup>

Courts consistently have held that juries may infer from the evidence that an unlawful agreement existed despite the absence of direct evidence of agreement.<sup>93</sup> The classic illustration of this is *Direct Sales Co. v. United States*.<sup>94</sup> The defendant company, a wholesaler of narcotics, provided inordinately large amounts of morphine sulfate to a physician practicing in a rural community.<sup>95</sup> The defendant argued that it had not entered into an agreement with the doctor to sell the drugs illegally and had not intended that the doctor sell the goods illegally. The Supreme Court affirmed the conviction because the company must have known that the doctor was distributing the drugs illegally.<sup>96</sup> This knowledge, coupled with the unusual mass marketing practiced by the defendant, was sufficient to sustain the existence of an agreement in the form of a "tacit understanding."<sup>97</sup> The agreement is the crucial fact, "[n]ot the form or manner in which the understanding is made."<sup>98</sup>

90. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Camacho*, 528 F.2d 464, 469 (9th Cir.), *cert. denied*, 425 U.S. 995 (1976).

91. An unlawful act is required in most, but not all, cases. *See* text accompanying notes 144-49 *infra*.

92. *See* Marcus, *supra* note 16, at 628-29.

93. Note, *The United States Courts of Appeals: 1974-1975 Term Criminal Law and Procedure*, 64 GEO. L.J. 165, 399-400 & nn.1415-18 (1975); *see, e.g.*, *United States v. Borelli*, 336 F.2d 376, 384 (2d Cir.) (although agreement can be proved by inference, kind of agreement must be established), *cert. denied*, 379 U.S. 960 (1964); *Gerson v. United States*, 25 F.2d 49, 56 (8th Cir. 1928) (proof of formal agreement unnecessary; natural inferences may show agreed concert of action); *United States v. Palladino*, 203 F. Supp. 35, 37 (D. Mass. 1962) (Wyzanski, J.) (jury instruction: "sufficient if their agreement is shown by conduct, by a wink or a nod, by a silent understanding to share a purpose to violate the law"); *People v. Hardeman*, 244 Cal. App. 2d 1, 41, 53 Cal. Rptr. 168, 193 (1966) (conspiracy generally proved by indirect evidence, inferences from circumstances), *cert. denied*, 387 U.S. 912 (1967). *See also* Card, *The Working Paper on Inchoate Offenses: Reform of the Law of Conspiracy*, 1973 CRIM. L. REV. 674, 675 (same rule in United Kingdom). This rule comports with the general rules of proof in criminal cases. *See* *Holland v. United States*, 348 U.S. 121, 140 (1940) (circumstantial evidence intrinsically same as testimonial evidence).

94. 319 U.S. 703 (1943).

95. *Id.* at 704-05.

96. *Id.*

97. *Id.* at 714.

98. *Id.*; *accord*, *United States v. Falcone*, 311 U.S. 205, 210 (1940); *see* *United States v. Downen*, 496 F.2d 314, 319 (10th Cir. 1974) (knowledge or acquiescence in object of conspiracy without agreement to cooperate does not make out conspiracy); *United States v. Bekowies*, 432 F.2d 8, 15 (9th Cir. 1970) (no conspiracy without agreement); *Dennis v. United States*, 302 F.2d 5, 8 (10th Cir. 1962) (unlawful agreement gist of conspiracy).

*Direct Sales* holds that a jury may infer an agreement without any direct evidence, but—and this point is crucial—neither mere similarity of action nor aiding and abetting is the same as an agreement.<sup>99</sup> They may be criminal activities, but they are not conspiratorial agreements because two or more persons have not agreed to commit a crime. The danger that the ultimate crime will occur is not increased to the same extent as in a true conspiracy.

#### PROOF OF THE AGREEMENT

Despite *Direct Sales*, defense lawyers are concerned that courts do not enforce the agreement requirement and too often permit juries to infer an agreement from too little evidence.<sup>100</sup> The quality and quantity of circumstantial evidence that has sustained some conspiracy convictions is frightening. Moreover, the quantum of proof required is particularly crucial in the conspiracy area; the “conspiracy doctrine comes closest to making a state of mind the occasion for preventive action against those who threaten society but who have come nowhere near carrying out the threat.”<sup>101</sup> Thus, courts should require substantial evidence of some sort of agreement: an agreement understood by the defendant, to which the defendant was a party, and to which he meant to be a party.

That defendants can and do get convicted of conspiracy with little apparent proof of an actual agreement is shown by *United States v. Miller*.<sup>102</sup> The defendants agreed to steal a Chevrolet and to travel across state lines with it, a violation of the Dyer Act.<sup>103</sup> They did so, but were spotted by police in the second state. When the police began to close in on them, they escaped by stealing an officer's police car, but the car ended up in a ditch. The owners of a Ford, seeing the stuck vehicle, pulled over to help. One of the defendants pointed two guns at the Ford owners and took their car. All the defendants drove off in the Ford and eventually left it in yet another state. The Government charged the defendants with a number of offenses including separate conspiracies to steal the Chevrolet and to steal the Ford and

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99. See *Louie v. United States*, 218 F.36, 40 (9th Cir. 1914) (acquittal of conspiracy charge not bar to aiding and abetting charge).

100. For example, George Cotsirilos of Chicago contended that “[t]he agreement is so easy to prove. In a recent case the agreement just was never shown. There was weak circumstantial evidence. It certainly was not beyond a reasonable doubt; still there were convictions.” Interview with George Cotsirilos, defense attorney, Chicago, Ill. (Nov. 7, 1975).

101. Goldstein, *supra* note 3, at 406.

102. 508 F.2d 444 (7th Cir. 1974).

103. See 18 U.S.C. §§ 2312-2313 (1970).

violations of the Dyer Act for both the Chevrolet and the Ford. On appeal, the defendants contended that the evidence insufficiently demonstrated that they had conspired to steal the Ford. The United States Court of Appeals for the Seventh Circuit rejected that argument and found that "the jury could have inferred the existence of an agreement to steal the [Ford] from the circumstances surrounding its acquisition and disposal by [the defendants]." <sup>104</sup>

*Miller* illustrates the evidentiary situation of which defense counsel complain so vociferously. No doubt the defendant who pulled the guns on the Ford owners stole their car and planned to do so. Perhaps the other defendants were guilty of aiding and abetting the driver by going along with him and by trying to wipe the car clean when they abandoned it, but there was no proof that they actually agreed to take possession of the Ford and to transport it across state lines. The mere fact that some of the defendants could have been guilty of violating the Dyer Act, on an aiding and abetting theory, does not necessarily mean that they had agreed to violate it.

Cases like *Miller* do seem to confirm the worst fears of defense counsel. Juries can convict, and the convictions can be affirmed, on evidence showing only a common course of conduct, or aiding and abetting, even though no real evidence, direct or circumstantial, proves an agreement.

Nonetheless, other cases require substantial evidence of a genuine agreement. The most significant such case is the opinion of the United States Court of Appeals for the Second Circuit in *United States v. Bufalino*, <sup>105</sup> which arose out of the famous Apalachin meeting of suspected gangland figures. Police officers stopped fifty-eight persons for questioning as they left the home of a suspected underworld figure, Joseph Barbara. <sup>106</sup> In response to questions concerning their reasons for visiting Barbara, who lived in rural New York State, the fifty eight gave a most interesting variety of answers. Some said that their great personal friendships with Barbara brought them to Apalachin; others said that Barbara was ill and that they were calling on him to help him through the illness; and still others talked about visiting for business reasons. <sup>107</sup> They gave similar answers to questions put to them before a grand jury. Twenty of them were convicted of conspiring to obstruct justice and to commit perjury before the grand jury. <sup>108</sup> The Government contended that when the

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104. 508 F.2d at 448.

105. 285 F.2d 408 (2d Cir. 1960).

106. *Id.* at 413.

107. *Id.* at 414.

108. *Id.* at 410.

defendants learned of the presence of the police officers outside Barbara's home, they must have agreed to give false answers to explain the reason for the gathering.<sup>109</sup>

The Second Circuit carefully weighed the Government's position, but reversed the convictions. Judge Lumbard found that the fact that some of the defendants obviously lied did not mean that they had agreed to lie. Moreover, their presence in Barbara's house when they learned of the officers did not show that they had agreed to lie. The court noted that it was equally plausible that each defendant decided for himself that it would be better not to discuss all that he knew.<sup>110</sup> Although the reasoning in *Bufalino* would not necessarily apply in a situation in which planning arguably is an inherent part of the actions ultimately taken, the discussion is a thoughtful affirmation of the concept that agreement is at the heart of the conspiracy doctrine.

Cases such as *Bufalino* lead many to conclude that normally the prosecution adequately establishes the agreement in conspiracy cases. The results from the empirical research are conflicting, but do lend support to the defense position.

*Question 21: How does the conviction rate for conspiracy charges compare to the conviction rate for completed offenses?*

	Much greater	Somewhat greater	Same	Somewhat Less	Much less	Uncer- tain
Prosecutors	1.3	4.4	41.1	12.7	12.7	27.8
Defense attorneys	21.3	16.9	12.2	12.6	15.0	22.0
Appellate judges	4.5	22.7	50.0	11.4	4.5	6.8
Trial judges	3.1	16.9	61.5	6.2	4.6	7.7
Law professors	2.0	17.6	25.5	23.5	11.8	19.6
Average for all respondents	8.6	11.9	32.3	12.7	12.2	22.2

The general responses to this question can be explained by the reluctance of many prosecutors to charge conspiracy unless they need it. The interviews offered prosecutors the hypothetical situation of two bank robbers caught in the act of robbing a bank and then asked: "Would you as a prosecutor also charge conspiracy to rob the bank if the only evidence was the defendants' presence at the bank?"

109. *Id.* at 415.

110. *Id.*

Presence in the bank probably indicated that the defendants must have agreed previously; nevertheless, few prosecutors expressed any interest in a conspiracy charge.

In view of the prosecution's advantages in conspiracy trials, it is difficult to understand the responses to the bank robbery hypothetical and Question 7.<sup>111</sup> In contrast to these general responses, almost 75% of the federal defense lawyers—who handle considerably more conspiracy cases than their state counterparts—believe that the conspiracy conviction rate is at least somewhat higher.<sup>112</sup> Moreover, a question was designed specifically to test the perceptions of the respondents on the need to prove an agreement:

*Question 22: A sells 20 cases of bootleg whiskey to B. B sells them to C who subsequently sells them bottle by bottle. A and C are not acquainted. Will the conviction of A for conspiring with C be affirmed on appeal?*

	Yes	No	Need more facts
Prosecutors	16.8	59.0	24.1
Defense attorneys	28.5	48.4	23.2
Appellate judges	11.6	44.2	44.2
Trial judges	33.9	30.6	35.5
Law professors	18.0	23.0	59.0
Average for all respondents	22.0	49.1	28.9

Although the hypothetical indicated neither that A imagined the whiskey would be sold by anyone other than B, nor that A's interest was anything other than selling the whiskey to B, one-third of the trial judges were willing to convict or uphold a jury verdict convicting, even

111. See note 53 *supra*.

112. The breakdown between state and federal defense attorneys follows:

	Much greater	Some-what greater	Same	Some-what less	Much less	Un-certain
Federal defense attorneys	41.2	32.4	17.6	5.9	--	2.9
State defense attorneys	17.1	13.7	11.8	14.2	18.0	25.1

though there was no proof of any agreement or understanding between A and C.<sup>113</sup>

It appears from these responses that the concerns of the defense lawyers are justified in many cases. One commentator has even suggested that conspiracy may be more accurately defined as "adherence to a joint criminal venture" because the existence of an agreement often cannot be proved directly and must be inferred from concerted action.<sup>114</sup> The distinction in theory is a subtle one, looking to the nature of the act—adherence—rather than to the nature of the intended understanding—agreement. The distinction, however, may be devastating in practice. An individual might aid in the performance of the object of a conspiracy, a jailbreak for example, and could be charged with such aid; but, if he did not know about the planning of the jailbreak and merely took advantage of an opportunity to escape, he is not a conspirator.<sup>115</sup>

To punish such a person for conspiracy is to turn the theory of conspiracy on its head, because such punishment would be for the criminal act that is the object of the combination, not for the agreement that leads to the criminal objective. Moreover, neither of the purposes for conspiracy law supports such an application. Nevertheless, a disturbing number of respondents believed that the late joiner can be indicted for conspiracy and for the substantive

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113. The 28.9% of respondents who correctly perceived that additional facts were needed most often focused on the degree of knowledge of the parties. For example, if A knew that B continuously engaged in selling the whiskey to others, A might be part of the larger conspiracy due to his knowledge and implied intent to have that larger conspiracy prosper and continue.

114. Johnson, *supra* note 3, at 1142 n.17; see *People v. Bailey*, 60 Ill. 2d 37, 47-48, 322 N.E.2d 804, 810 (1975) (Ryan, J., dissenting) (need only show conspirators pursued course toward accomplishing objective); *People v. Fedele*, 366 Ill. 618, 622, 10 N.E.2d 346, 348 (1937) (same).

115. A case similar to this recently came out of the District of Columbia Circuit. In *United States v. Bridgeman*, some of the inmates prosecuted for conspiracy in connection with an attempted prison break contended that they were not involved in the planning of the escape, but had participated in the actual escape attempt only when they became aware of the possibilities created by the tumult. 523 F.2d 1099, 1111 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 961 (1976). The appeals court stated that a defendant could be convicted of conspiracy if he "knew of the conspiracy, associated himself with it and knowingly contributed his efforts during its life to further its design." *Id.* at 1108. The evidence in *Bridgeman* might justify a factual finding of an agreement under the current law of conspiracy, but the point is that neither the group danger nor the inchoate offense rationales support the conspiracy charge against the defendant who did not join in the escape until it had started. Many other charges were available—rioting, assault, attempted escape, and aiding and abetting such offenses. The conduct of the defendant "who perceived that an escape would be attempted and who decided to leave his cell and act in furtherance of that objective," *id.* at 1111, amounts to little more than aiding and abetting, and the Supreme Court has recently reiterated that the crime of conspiracy is not to be confused with the crime of aiding and abetting. See *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975).

offense in a case in which that offense had already been completed when he joined the conspiracy.<sup>116</sup>

*Question 23: A and B agree to defraud an insurance firm and, in furtherance of the plan, kidnap someone. After the kidnapping C joins in on the scheme to defraud. In addition to conspiracy to defraud, C should be indicted for:*

	Conspiracy to kidnap	Kidnapping	Neither
Prosecutors	8.8	26.8	64.4
Defense attorneys	9.1	18.6	72.3
Appellate judges	17.5	2.5	80.0
Trial judges	24.6	12.3	63.2
Law professors	6.8	8.5	84.7
Average for all respondents	10.5	20.0	69.5

This misconception should not be surprising in view of the larger distortion of the conspiracy rationale that is becoming the law, the unilateral approach to conspiracy.

#### THE UNILATERAL APPROACH

Under the so-called rule of consistency, courts refuse to convict one defendant of conspiracy if all other alleged coconspirators have been acquitted.<sup>117</sup> There are exceptions to this rule: the release of the other conspirator must be by a judgment on the merits in the same

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<sup>116</sup>. A late joiner does not become liable for earlier substantive offenses. *United States v. Knippenberg*, 502 F.2d 1056, 1059-60 (7th Cir. 1974); see *Levine v. United States*, 383 U.S. 265, 266 (1966) (per curiam) (concession by Solicitor General that defendant not liable for substantive offense committed by other conspirators before defendant joined scheme).

<sup>117</sup>. *United States v. Fleming*, 504 F.2d 1045, 1055 (7th Cir. 1974) (acquittal of all but one alleged conspirator operates as acquittal of remaining defendant); *United States v. Musgrave*, 483 F.2d 327, 333 (5th Cir.) (conviction of one defendant of conspiracy when others acquitted not acceptable), cert. denied, 414 U.S. 1023 (1973); *United States v. Shuford*, 454 F.2d 772, 779-80 (4th Cir. 1971) (conviction of one conspirator impermissible when only coconspirator acquitted); *Lubin v. United States*, 313 F.2d 419, 423 (9th Cir. 1963) (same); see *Rogers v. United States*, 340 U.S. 367, 375 (1951) (dictum) (at least two persons needed for conspiracy, but identity of one may be unknown).

prosecution;<sup>118</sup> generally a nolle prosequi is insufficient.<sup>119</sup> Moreover, the rule does not apply if the prosecution shows that other conspirators were involved, even though the indictment did not name these conspirators,<sup>120</sup> or even though it named them but did not formally charge them.<sup>121</sup> The consistency rule makes sense, as do its limitations, because conspiracy requires an agreement between two or more persons; if only one person is found to have actually agreed, there is no agreement and no conspiracy.<sup>122</sup>

The consistency rule has not gone unchallenged. The Model Penal Code and the proposed revised federal criminal code reject it and look entirely to the culpability and state of mind of the accused, embracing the so-called unilateral approach toward conspiracy. Thus, the acquittal of all other alleged conspirators would not necessarily undercut a finding of guilt as to one conspirator.<sup>123</sup>

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118. *People v. Holzer*, 25 Cal. App. 3d 456, 460, 102 Cal. Rptr. 11, 13 (1972) (jury trying X alone may find that X and Y were coconspirators, and subsequent acquittal of Y for conspiring with X does not affect validity of first jury's conviction).

119. See, e.g., *United States v. Fox*, 130 F.2d 56, 58 (3d Cir.) (nolle prosequi of two named conspirators no bar to conviction of third), *cert. denied*, 317 U.S. 666 (1942); *Regle v. State*, 9 Md. App. 346, 353, 264 A.2d 119, 123 (Ct. Spec. App. 1970) (better view is nolle prosequi does not compel acquittal of remaining conspirator); *State v. Goldman*, 95 N.J. Super. 50, 53, 229 A.2d 818, 819 (App. Div. 1967) (per curiam) (nolle prosequi of one conspirator no bar to conviction of other); *State v. Verdugo*, 79 N.M. 765, 766, 449 P.2d 781, 782 (1969) (same); *Cline v. State*, 204 Tenn. 251, 259, 319 S.W.2d 227, 231 (1958) (nolle prosequi of one conspirator and not guilty verdict of other no bar to conviction of third). *Contra*, *Berness v. State*, 40 Ala. App. 198, 201, 133 So. 2d 178, 180 (Ct. App. 1958) (majority rule that nolle prosequi a bar to prosecuting remaining conspirator).

120. *United States v. Pena*, 527 F.2d 1356, 1365 (5th Cir.) (conviction reversed where evidence of conspiracy with unknown conspirators insufficient), *cert. denied*, 96 S. Ct. 3168 (1976); *Cross v. United States*, 392 F.2d 360, 362 (8th Cir. 1968) (indictment naming unknown conspirators may stand if evidence to support charge); *People v. James*, 189 Cal. App. 2d 14, 15, 10 Cal. Rptr. 809, 810 (1961) (indictment may name one conspirator, refer to others unknown).

121. The practice of naming but not indicting alleged coconspirators will be less common after *United States v. Briggs*, at least in the Fifth Circuit. See 514 F.2d 794 (5th Cir. 1975). The court found that the practice denied the alleged coconspirators their due process rights because they would not have an opportunity to establish their innocence at trial. *Id.* at 806, 808. See also *United States v. Peraino*, No. Cr-75-91 (W.D. Tenn. Mar. 22, 1976) (order expunging named, unindicted alleged coconspirator).

122. See *United States v. Chase*, 372 F.2d 453, 459 (4th Cir.) (conspiracy ends when two of three conspirators arrested absent evidence of other unknown conspirators), *cert. denied*, 387 U.S. 907 (1967); *State v. Horton*, 275 N.C. 651, 657, 170 S.E.2d 466, 470 (1969) (no conspiracy where one of two alleged conspirators feigns acquiescence in scheme), *cert. denied*, 398 U.S. 959 (1970); cf. *Sears v. United States*, 343 F.2d 139, 141-42 (5th Cir. 1965) (informant may serve as connecting link between conspirators unknown to one another); *King v. State*, 104 So. 2d 730, 738 (Fla. 1958) (per curiam) (no conspiracy between two persons and undercover agent where agent to perform essential act of offense); *United States v. Wray*, 8 F.2d 429, 430 (N.D. Ga. 1925) (conspiracy possible between defendant and undercover agent).

123. See MODEL PENAL CODE §5.04(1) (Proposed Official Draft, 1962); Criminal Justice Reform Act of 1975, S. 1., 94th Cong., 1st Sess. §1002(d) (1975) (eliminating defense that coconspirators acquitted, not prosecuted, incompetent, or immune).

*State v. St. Christopher*<sup>124</sup> demonstrates the problem the drafters of the codes addressed in adopting the unilateral approach. The defendant told his cousin that he wanted help in murdering the defendant's mother. The cousin feigned agreement and told the police of the plan. Just prior to the planned murder, the police, with the cousin's cooperation, stepped in and arrested the defendant. The defendant was convicted of conspiracy to commit first-degree murder and of attempted first-degree murder.<sup>125</sup> The Minnesota Supreme Court affirmed the conspiracy conviction, stating that the new Minnesota conspiracy statute,<sup>126</sup> unlike the old one, used a unilateral approach that permitted a conspiracy conviction even without a true agreement.<sup>127</sup> The new statute had adopted the Model Penal Code's unilateral approach, "Whoever conspires with another."<sup>128</sup> The court held as it did because St. Christopher had conspired with his cousin, even though the cousin had not conspired with him.<sup>129</sup> The court pointed out that the true agreement requirement was a strict doctrinal approach conceiving of conspiracy as an actual meeting of the minds,<sup>130</sup> and concluded that requiring a meeting of the minds was wrong because conspiracy is an inchoate offense, and "the act of conspiring by a defendant . . . is the decisive element of criminality."<sup>131</sup>

The unilateral approach makes sense at first blush.<sup>132</sup> The unsuccessful conspirator did try to conspire—his state of mind was

124. 232 N.W.2d 798 (Minn. 1975).

125. *Id.* at 799-800.

126. MINN. STAT. § 609.175(2) (Supp. 1976).

127. 232 N.W.2d at 803.

128. *Id.* Compare MODEL PENAL CODE § 5.03(1) (Proposed Official Draft, 1962) with MINN. STAT. § 609.175(2) (Supp. 1976). See also ILL. ANN. STAT. ch. 38, § 8-2 (Smith-Hurd Supp. 1976); TEX. PENAL CODE ANN. tit. 4, § 15.02 (Vernon 1974); Criminal Justice Reform Act of 1975, S. 1, 94th Cong., 1st Sess. § 1002(d) (1975).

129. See 232 N.W.2d at 803.

130. *Id.* at 801.

131. *Id.* at 802; see *id.* at 803; MODEL PENAL CODE § 5.03(1), Comment (Tent. Draft No. 10, 1960). The Comment states:

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.

132. I am grateful for the assistance of my colleagues Peter Hay and William Hawkland in analyzing the unilateral approach.

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.<sup>133</sup> Group activities, it is said, are more likely to lead to serious antisocial acts than are the acts of one person.<sup>134</sup> What rationale, then, is present for punishing St. Christopher as a conspirator although he did not enter into a true agreement? None. St. Christopher may have been guilty of a number of crimes, but conspiracy was not one of them.<sup>135</sup> Two persons did not combine forces to commit a crime. Certainly St. Christopher had a guilty state of mind, but nowhere else in the criminal law can one be guilty of a crime solely based upon a state of mind.<sup>136</sup> 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.”<sup>137</sup>

As a practical matter, most attorneys thought that the unilateral approach would not have a significant impact on conspiracy prosecutions. The one area in which it might have had an important impact, purchase and sale of narcotics, usually involves more than one true conspirator and the informant or undercover agent; many persons often form the ring. Nevertheless, defense lawyers and appellate judges, in particular, thought that the unilateral approach would have some impact on conspiracy prosecutions.

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133. See notes 31-34 *supra* and accompanying text.

134. See *id.*

135. The Minnesota court ultimately reversed the conviction for attempted murder, finding that the statute did not permit conviction for both attempt and conspiracy. 232 N.W.2d at 804. Nonetheless, there appeared to be sufficient evidence to support an attempt conviction because the defendant took a substantial step toward the completion of the crime.

136. See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 73-79 (1968) (with possible exceptions of civil commitment and crimes of status, no culpability without conduct).

137. *Morrison v. California*, 291 U.S. 82, 92 (1934) (citations omitted).

*Question 24: If A could be convicted of conspiracy for agreeing with B, an undercover police officer, to commit a crime, how would the number of conspiracies charged in your district change?*<sup>138</sup>

	Substantial increase	Some increase	No change	Some decrease	Substantial decrease
Prosecutors	18.5	33.5	45.0	1.6	1.3
Defense attorneys	47.6	28.4	22.0	1.6	0.4
Appellate judges	37.5	32.5	27.5	2.5	—
Trial judges	27.9	44.3	26.2	1.6	—
Law professors	24.5	49.1	22.6	3.8	—
Average for all respondents	31.0	33.8	32.8	1.5	1.0

A number of defense attorneys spoke out strongly against the unilateral approach. One remarked:

The unilateral approach could become another abuse. It is obviously designed not as sound doctrine to punish joint crime. It is like the king's spies waiting for someone to say something and then arresting him: you are punishing someone for thinking of talking, not for being engaged in dangerous joint criminal activity, because it really is not an agreement.<sup>139</sup>

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138. This was one case in which federal and state practitioners gave very similar responses:

	Substantial Increase	Some increase	No change	Some decrease	Substantial decrease
Federal prosecutors	18.5	44.4	37.0	--	--
State prosecutors	18.6	32.6	45.6	1.8	1.4
Federal defense attorneys	39.4	39.4	18.2	--	3.0
State defense attorneys	49.0	26.4	22.6	1.9	--

139. Interview with Robert Kasanof, former teacher of criminal law and head of a legal aid office, in New York City (Jan. 19, 1976).

Protestations about the strict doctrinal approach leave unexplained how the group danger rationale can be distorted to punish someone who does not pose the sort of increased danger that should give rise to a conspiracy conviction.<sup>140</sup> No one—not the American Law Institute,<sup>141</sup> the Brown Commission,<sup>142</sup> the Minnesota Supreme Court, or any of the legislatures that have adopted the unilateral approach—has answered this. An evil state of mind and the limited act of asking someone to agree to commit a crime ought not to result in criminal responsibility under a conspiracy statute.<sup>143</sup>

#### THE OBJECT OF THE AGREEMENT

Conspiracy prosecutions usually involve only agreements to commit relatively serious crimes. Indeed, virtually every attorney with whom I spoke was careful to talk about conspiracy in the context of a very few object crimes, often a drug, fraud, or weapons offense.<sup>144</sup> This is

140. What danger there is in the inchoate unilateral crime can be handled by laws other than conspiracy. Interview with Elliott Golden, Kings County (Brooklyn) District Attorney's Office (Jan. 20, 1976) (so-called unilateral agreement is covered by crimes like solicitation and attempt).

141. The Model Penal Code's rationale for the unilateral approach should be compared with the Code's apparent position that a person aiding a conspiracy cannot be prosecuted for conspiracy unless he agrees to aid the conspiracy, although he can be prosecuted as an accomplice. Compare MODEL PENAL CODE § 5.03(1)(b) (Proposed Official Draft, 1962) (person guilty of conspiracy if he agrees to aid other in planning of crime) with *id.* § 2.06(3)(a)(ii) (person is accomplice if he aids or agrees or attempts to aid another in an offense) and *id.* § 5.01(3) (person who engages in conduct designed to aid another to commit crime is guilty of attempt to commit the crime). One wonders whether the Code requires a true consensus in the aiding and abetting situations when it ignores the absence of such consensus in the situation where a person in essence is conspiring with himself.

142. See NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT, reprinted in *Hearings Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 224-26 (1971) (no discussion of usage of unilateral conspiracy language in defining conspiracy).

143. One approach would have convicted St. Christopher of attempting to conspire to commit murder. *Developments in the Law-Criminal Conspiracy*, *supra* note 3, at 926 n.35. The Minnesota court rejected that suggestion because "it would result in disparate sentences for defendants whose conduct was the same, the length of sentence turning on a fortuity." 232 N.W.2d at 803 n.7 (the fortuity being whether the person approached was feigning agreement or was serious). A more fundamental objection, however, is that this approach results in a person being convicted of attempting to commit an inchoate offense. Such conduct is remarkably distant from the ultimate act that society fears. In the absence of the supposed danger from the conspiratorial combination of more than one person, as in the unilateral agreement situation, the defendant ought to be charged with attempt to commit the substantive offense or ought not be charged at all.

144. A number of states have limited felony conspiracy to a few object crimes or to only those object crimes that are themselves felonies. *E.g.*, MD. ANN. CODE art. 27, § 38 (Michie 1976 Repl. Vol.) (punishment for conspiracy may not exceed maximum for object offense); MO. ANN. STAT. § 556.120 (Vernon Supp. 1977) (conspiracy a felony only if object crime is murder, rape, arson, or robbery).

not always the case, however, and some statutes permit conspiracy prosecutions although no crime was planned.<sup>145</sup> In *Kentucky v. Donoghue*<sup>146</sup> the defendant was convicted of conspiracy to engage in the business of lending money and charging usurious interest rates,<sup>147</sup> although no Kentucky statute made it a crime for an individual to charge usurious interest rates.<sup>148</sup> A Kentucky statute did make it a crime to conspire to commit an act injurious to the public health or morals, and the Kentucky Court of Appeals focused on the object of the agreement: "If ever there was a violation of public policy as reflected by the statutes and public conscience, or a combination opposed to the common weal, it is that sort of illegitimate business."<sup>149</sup>

What is the rationale for holding that something can be legal if done by one person yet illegal if planned by more than one? Such a result has no support at all in the theoretical purposes for conspiracy. If the object act is not unlawful, intercepting individuals before they commit the object act has no justification. If the object act is not unlawful, the added danger that a group is more likely to carry it out is similarly irrelevant. Either the act is unlawful or it is not. If the act itself is legal, conviction for planning to commit the act is an absurd result.<sup>150</sup>

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145. ALA. CODE tit. 14 §103 (1958) (conspiracy defined, *inter alia*, as two or more persons conspiring to commit any act injurious to public health, morals, trade or commerce); CAL. PENAL CODE §182 (West 1969) (same); IDAHO CODE §18-1701 (1949) (same); MISS. CODE ANN. §97-1-1 (1972) (same); NEV. REV. STAT. §199.480 (1957) (same); OKLA. STAT. ANN. tit. 21, §421 (West Supp. 1976) (same); TENN. CODE ANN. §39-1101 (1955) (same). *Contra*, Florida Criminal Code, 1974 Fla. Laws, ch. 383, §66 (repealing conspiracy to injure public health); ME. REV. STAT. tit. 17-A, §151(1) (Supp. 1976) (object of conspiracy must in fact constitute a crime or crimes); MONT. REV. CODES ANN. §94-4-102 (1973) (repealing noncriminal object conspiracy laws).

146. 250 Ky. 343, 63 S.W.2d 3 (1933).

147. *Id.* at 344, 63 S.W.2d at 3.

148. *Id.* at 354, 63 S.W.2d at 7. The majority did not address the apparent *ex post facto* nature of such a conviction pointed out by the dissent. *See id.* at 358, 63 S.W.2d at 9 (Clay, J., with Dietzman, J., dissenting).

149. *Id.* at 355, 63 S.W.2d at 8.

150. *See* MODEL PENAL CODE §5.03, Comment (Tent. Draft No. 10, 1960) (rejecting criminalization of conspiracy to do acts legally done individually); Sayre, *supra* note 3, at 427. Sayre states that:

Perhaps enough has been said to make it evident that it is high time to abandon the prevalent and often repeated idea that mere combination in itself can add criminality or illegality to acts otherwise free from them. Such a doctrine grew out of an historical mistake, and has no real basis in our law. It is logically unsound and indefensible. Moreover, it is dangerous. It tends to rob the law of predictability and to make justice depend too often upon the chance prejudices and convictions of individual judges.

*Id.*

There are two constitutional difficulties with criminalizing an agreement to commit a lawful act injurious to the public health or morals. The first is that it appears to be an *ex post facto* law.<sup>151</sup> As the dissenters in *Donoghue* pointed out, it was not illegal to be a loan shark in Kentucky, and the revelation that to agree to charge usurious interest rates was against public health and morality came only at the defendant's trial.<sup>152</sup>

The second and perhaps more fundamental difficulty is the vagueness of such a statute.<sup>153</sup> In *Musser v. Utah*<sup>154</sup> the defendant was convicted of conspiracy "to commit acts injurious to public morals . . . , acts which amount briefly to conspiring to counsel, advise, and practice polygamous or plural marriage . . . ." <sup>155</sup> Justice Jackson, speaking for the Supreme Court, noted that "this is no narrowly drawn statute."<sup>156</sup> Indeed, he questioned whether the statute "cover[s] so much that it effectively covers nothing."<sup>157</sup> Although the Court looked favorably on Musser's due process argument, it refused to strike down the statute. Instead, it remanded the case, saying that the statute "does not stand by itself as the law of Utah but is part of the whole body of common and statute law of that State and is to be judged in that context."<sup>158</sup> On remand, the Utah Supreme Court saw its job as deciding whether it could "place a construction on these words which limits their meaning beyond their general meaning."<sup>159</sup> The court considered the legislative history of the statute and the surrounding historical circumstances and concluded that the legislature meant what it said when it wrote the statute. The law was struck down as being "void for vagueness and uncertainty."<sup>160</sup>

Although some courts, following *Musser*, have struck down such statutes,<sup>161</sup> many states continue to include acts against public health or morals in the definition of conspiracy.<sup>162</sup> Perhaps the infrequency of

151. See U.S. CONST. art. I, §9, cl. 3.

152. 250 Ky. at 358, 63 S.W.2d at 9 (Clay, J., with Dietzman, J., dissenting).

153. See *Jordan v. DeGeorge*, 341 U.S. 223, 231-32 (1951) (measured by common understanding, statute must provide sufficiently definite warning of proscribed conduct). See generally Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

154. 333 U.S. 95 (1948).

155. *Id.* at 96.

156. *Id.* at 97.

157. *Id.*

158. *Id.*

159. *State v. Musser*, 118 Utah 537, 539, 223 P.2d 193, 194 (1950).

160. *Id.*

161. *E.g.*, *State v. Bowling*, 5 Ariz. App. 436, 440, 427 P.2d 928, 932 (1967) (invalidating as void for vagueness statute criminalizing conspiracy to commit any act injurious to public morals).

162. See note 145 *supra*.

prosecution explains the continued existence of such laws. Most prosecutors with limited resources concentrate their efforts on conspiracies to commit serious crimes. Notwithstanding this attitude, statutes such as these ought to be repealed, if for no other reason than their potential for abuse and their denigrating effect on the criminal justice system.

#### ABANDONMENT AND WITHDRAWAL FROM THE AGREEMENT

Unless the conspirator signals his departure from the endeavor prior to a true agreement or an overt act, he will be liable for the conspiracy until it ends.<sup>163</sup> Once the conspiracy has formed, he may withdraw from it, but he will be subject to a conspiracy charge and responsible for any acts in furtherance of the conspiracy committed prior to his withdrawal.<sup>164</sup>

To accomplish effective withdrawal from the conspiracy, the defendant must take some "affirmative act bringing home the fact of his withdrawal to his confederates."<sup>165</sup> As stated by the Supreme Court, he must do "some act to disavow or defeat the purpose [of the conspiracy]."<sup>166</sup> Thus, the act must be accomplished prior to the end of the conspiracy and must be timed so that the other conspirators could follow the disavowing defendant's lead and withdraw from the conspiracy. Cases involving true withdrawals from a conspiracy are rare; most cases involve situations in which the defendant tries to recant after the fact. In those cases, the courts always disallow the defense.

#### CONCLUSIONS

"We don't need it; it creates unfair advantages for the prosecution." "The conspiracy charge is essential if we are to combat serious organized crime." These comments are typical of the remarks I heard over a two-year period from defense counsel and prosecutors across the country. Who is right? Is the concept of a punishable criminal agreement unfair except in the narrowest of situations? Is it actually needed to deal with organized criminal activities? The questions are simple; the answers are not. For every generalization about the crime

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163. Note, *supra* note 93, at 401.

164. *Id.* Once the defendant has withdrawn, he can limit the subsequent acts and declarations of coconspirators that otherwise could be used against him. *Loser v. Superior Court*, 78 Cal. App. 2d 30, 32, 177 P.2d 320, 321 (1947).

165. *Hyde v. United States*, 225 U.S. 347, 369 (1912).

166. *Id.*

of conspiracy, there are other—seemingly contradictory—beliefs. Conspiracy is often an effective tool for dealing with some serious group criminal behavior.<sup>167</sup> On the other hand, group behavior is not always more dangerous than individual behavior.

The interviews with, and questionnaire responses from, the many attorneys and judges I contacted articulate the theoretical purposes for the crime of conspiracy and also give an insight into the manner in which those purposes are reflected in practice.<sup>168</sup> It is difficult to say that we should entirely eliminate the crime of conspiracy, but the conspiracy doctrine can subject defendants to unfair practices. What is needed is the formulation of standards defining the kind of serious group criminal behavior that should be the subject of conspiracy prosecutions.

Stating such standards with precision is difficult. They should not be codified, and should focus on prosecutorial discretion. The most important thing to keep in mind in establishing the standards is that Professor Johnson was probably correct that the conspiracy charge is unnecessary in many if not most prosecutions.<sup>169</sup> In the inchoate situation, the crime of attempt does or could handle most uncompleted offenses. In addition, the guidelines could sharply curtail conspiracy charges and convictions without any significant loss to the prosecution of serious crimes.<sup>170</sup> In most cases in which conspiracy is charged, other offenses are or could be charged, thus eliminating the need for the surplus conspiracy allegation. Consecutive sentencing is rare and elimination of the conspiracy charge would not necessarily eliminate such procedural practices as venue rules, the complicity doctrine, and joinder.

Curbing the number of conspiracies charged would alleviate some of the problems so vociferously discussed by defense lawyers: convictions due to hearsay statements, limited proof of true agreements, and large and complex joint trials. Such a policy would not eliminate conspiracy in the situations in which it is both proper and necessary, such as the true inchoate offense in which no attempt has been made, or the substantive crime situation in which a large scale criminal endeavor can only be shown and proved by reference to

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167. *Contra* Johnson, *supra* note 3, at 1188.

168. I am deeply indebted to the many lawyers and judges who took the time to speak or correspond with me and to answer the questionnaire. Only a few are named in the article, but without the help of all of them the article would have been impossible.

169. Johnson, *supra* note 3, at 1139.

170. Some states already provide that a defendant cannot be convicted of both conspiracy and of the substantive offense. *See* note 51 *supra*.

the concept of a criminal conspiracy. These situations, however, are relatively few. Until the charge is curbed, the conspiracy doctrine will remain the source of considerable confusion and, more troublingly, the source of at least occasional injustice.

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## APPENDIX A

1. How long have you practiced criminal law? What is the nature of your practice, or the practice in the office where you work?
2. How often is conspiracy charged, either by itself or in connection with another offense?
3. What is the major advantage of utilizing conspiracy when there is a substantive offense which can be charged?
4. What is the advantage of conspiracy generally?
5. Does conspiracy, more than other offenses, either inchoate or substantive, raise serious problems for defendants?
6. What is the rationale for having a crime in which the agreement forms the basis of the sanction?
7. Have you noticed any substantial changes in conspiracy doctrine or in the manner in which conspiracy prosecutions are pursued since you began practice?
8. What would be the impact of requiring direct evidence for proof of the agreement; what would be the impact of requiring, for proof of an overt act, an act which is a substantial step toward the completion of the crime?
9. What would be the impact of eliminating the hearsay exception?
10. Does the so-called Wharton's Rule arise very much in practice?
11. What sorts of First Amendment issues are raised in connection with conspiracy cases which are not raised in other cases?
12. How substantial a problem is the First Amendment issue in connection with conspiracy cases?
13. What would be the impact of prohibiting the use, in cases in which First Amendment issues are raised, of circumstantial evidence as per the *Castro* case?
14. Is the conviction rate any different for conspiracy than it is for other offenses?
15. What is the largest case you have personal knowledge of? Largest, that is, defined to mean the greatest number of defendants at trial.
16. Do large trials create unusual problems for the prosecution or for the defense; what are the rules with regard to severance? Should these rules be changed?
17. Does the complicity rule in *Pinkerton* make sense? How often is this rule applied in practice?
18. Do the particular conspiracy rules as to venue create serious questions for either the prosecution or for the defense?
19. What sorts of limitations, if any, would you propose in connection with prosecutions for criminal conspiracy?
20. As a practical matter how often is a defendant given consecutive sentences when he is convicted of conspiracy and of committing the substantive offense which is the object of that conspiracy?
21. Do you foresee any changes in either the theory of criminal conspiracy or the manner in which the crime is prosecuted?

## APPENDIX B

1. In what area of criminal law are you most involved?
2. Where does most of your case load come from? Metropolitan area of more than 500,000 persons. Metropolitan area of 100,000 to 500,000 persons. Metropolitan area of less than 100,000 persons. Primarily rural area.
3. How long have you been involved in some phase of criminal law? Less than 5 years. 5-10 years. More than 10 years.
4. Are the *majority* of your cases tried in federal or state court?
5. When two or more persons are brought to trial for a substantive felony, what percent of the time are they *also* brought to trial on a conspiracy charge?
- 6a. Are you or have you ever been a prosecutor?
  - b. What motivated you to bring a conspiracy charge where the object offense had been completed or attempted? (*Circle all that apply*) Evidentiary advantages. Venue considerations. Possibilities of greater sentence for defendant. Advantages in connection with plea bargaining. Other (*Specify*).
7. What percentage of conspiracy charges is for conspiracy only and not in conjunction with a substantive or completed offense?
8. In what percentage of cases where conspiracy alone was charged had the object crime been completed or attempted?
9. How does the conviction rate for conspiracy charges compare to the conviction rate for completed offenses? Is the conviction rate for conspiracy charges . . . much greater; somewhat greater; about the same; somewhat less; much less; uncertain.
10. How does the conviction rate for a conspiracy charge change when charged and tried along with a substantive count? Is it . . . much greater than when conspiracy is charged alone; somewhat greater than when conspiracy charged alone; about the same as when conspiracy charged alone; somewhat less than when conspiracy charged alone; much less than when conspiracy charged alone; uncertain.
11. How does the conviction rate for a substantive count change when charged and tried along with a conspiracy count? Is it . . . much greater than when substantive count charged alone; somewhat greater than when substantive count charged alone; about the same as when substantive count charged alone; somewhat less than when substantive count charged alone; much less than when substantive count charged alone; uncertain.
12. What percentage of felonies charged in your district is for the crime of conspiracy?
13. Is a conviction for conspiracy in your jurisdiction . . . a felony; a misdemeanor; can be either a felony or a misdemeanor.
14. Is the penalty for a conspiracy conviction . . . a fixed term equal to the term of the object offense; a fixed term which is a percentage of the term for the object offense; a fixed term determined independent of the object offense.
15. What do you feel is the greatest advantage(s) for the prosecution in conspiracy trials involving more than one defendant? (*Circle all that apply*.) Admissibility of hearsay evidence. Admissibility of one conspirator's acts "in furtherance of the conspiracy" against all other conspirators. The reaction of the jury or judge to the alleged danger of group activity. The confusion in the minds of the jury when there are many conspirators charged – thus causing them to convict all charged. Rules with regard to venue. Other (*Specify*).
16. When a defendant is convicted on both the conspiracy charge and the substantive charge, what percent of the time is consecutive sentencing employed?
17. In what percent of cases does the jury convict *some but not all* of the alleged conspirators?
18. Do you agree or disagree with this statement: As the *number* of defendants in a joint conspiracy trial *increases*, there is a *greater chance* that *all* of the defendants will be convicted.
19. With which one of the following statements are you *most* in agreement? (*Circle one*) There is a greater danger in conspiracy because of the encouragement and aid that conspirators

- give each other. There is less danger in conspiracy because of the possibilities of infiltration by undercover officers and disagreement among conspirators. Neither of the above, depends on the fact situation.
20. What would be the effect of requiring direct evidence of the conspiratorial agreement? Significant reduction in convictions. Small reduction in convictions. No effect on conviction rate.
  21. What would be the effect of requiring, for purposes of the overt act, a "substantial step" toward commission of the crime? Significant reduction in convictions. Small reduction in convictions. No effect on conviction rate.
  22. 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? Significant reduction in convictions. Small reduction in convictions. No effect on conviction rates.
  23. What is the largest conspiracy trial, insofar as number of defendants in a joint trial, that you have handled or know of from personal knowledge?
  24. Have the *majority* of joint conspiracy trials that you are aware of had . . . less than 5 defendants; between 5 and 10 defendants; more than 10 defendants.
  25. What would be the impact, in a multidistrict conspiracy, of allowing prosecution only in the district where the agreement was made as opposed to allowing prosecution where any overt act occurred? Would this . . . severely limit prosecution; hamper prosecution to some extent; have almost no effect on the prosecution.
  26. How often does the ability of prosecution to establish venue in places other than where the agreement was formed actually disadvantage defendants? Often. Sometimes. Seldom. Never.
  27. What would be the impact of doing away with conspiracy and utilizing attempt crimes in its place? Great reduction of convictions. Some reduction of convictions. Little or no effect. Some increase in convictions. Great increase in convictions.
  28. If "A" could be convicted of conspiracy for agreeing with "B," an undercover police officer, to commit a crime, how would the number of conspiracies charged in your district change? Would the number . . . substantially increase; somewhat increase; not change; somewhat decrease; substantially decrease.
  29. "A" and "B" agree to defraud an insurance firm and, in furtherance of the plan, kidnap someone. After the kidnapping "C" joins in on the scheme to defraud. In addition to conspiracy to defraud, "C" should be indicted for . . . conspiracy to kidnap; the completed offense of kidnapping; neither of the above.
  30. "A" sells 20 cases of bootleg whiskey to "B". "B" sells them to "C" who subsequently sells them bottle by bottle. "A" and "C" are not acquainted. Will the conviction of "A" for conspiring with "C" be affirmed on appeal?
  31. In what percent of conspiracy cases are there co-conspirators indicted together who are not personally acquainted?