

Justice Begins Before Trial: How to Nudge Inaccurate Pretrial Rulings Using Behavioral Law and Economic Theory and Uniform Commercial Laws

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JUSTICE BEGINS BEFORE TRIAL: HOW TO NUDGE
INACCURATE PRETRIAL RULINGS USING BEHAVIORAL
LAW AND ECONOMIC THEORY AND UNIFORM
COMMERCIAL LAWS

MICHAEL GENTITHES*

ABSTRACT

Injustice in criminal cases often takes root before trial begins. Overworked criminal judges must resolve difficult pretrial evidentiary issues that determine the charges the State will take to trial and the range of sentences the defendant will face. Wrong decisions on these issues often lead to wrongful convictions. As behavioral law and economic theory suggests, judges who are cognitively busy and receive little feedback on these topics from appellate courts rely upon intuition, rather than deliberative reasoning, to resolve these questions. This leads to inconsistent rulings, which prosecutors exploit to expand the scope of evidentiary exceptions that almost always disfavor defendants. Such intuitive, inconsistent decision-making thereby undermines criminal justice before trial even starts.

In this Article, I argue that criminal judges can rely on an alternative model to decide an especially vexing pretrial evidentiary issue—the admissibility of a co-conspirator’s hearsay statement at the defendant’s trial. Judges can look to principles in uniform commercial laws to resolve this issue in a more deliberative fashion. Uniform commercial laws predictably, accurately, and simply allocate individual liability for the actions of opaque, profit-driven commercial organizations. Those laws can likewise allocate individual liability among members of analogous conspiratorial organizations.

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Because those laws are also reducible to decision trees and checklists that encourage deliberative reasoning while still generating relatively fast decisions, judges can rely upon them to produce fair results without bringing their dockets to a standstill.

I provide several examples of situations in which illicit organizations are sufficiently analogous to commercial organizations for judges to apply uniform commercial laws when resolving co-conspirator hearsay issues. When judges do so, they will check the growth of anti-defendant evidentiary exceptions. Critically, they will also increase the likelihood of just outcomes in criminal cases once the trial begins.

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INTRODUCTION

Andy, Brian, and Devin, longtime cops in the outwardly sleepy town of Anytown, decided to spice things up on routine drug busts. They started small, taking home a dime-bag of marijuana here, selling a few seized pills of ecstasy there. But things changed when a raid led them to arrest Isaac, Devin's old high school football teammate and a major player in Anytown's nascent drug scene. Devin convinced Isaac that he would cut his old friend a break if Isaac would do him just one favor: act as a fence and resell seized drugs for the fledgling criminal enterprise.

Isaac began funneling a growing pipeline of drugs into the black market. Profits grew as Isaac brought heaps of recycled contraband onto Anytown's streets. But trouble loomed. Isaac was picked up on another case that could put him away for years, this time while driving in a nearby county with an unlicensed gun. Unless, the friendly arresting officer suggested, Isaac had information on Anytown's burgeoning drug trade.

Isaac quickly flipped against the corrupt officers and began wearing a wire to their meetings. The case against Andy and Brian solidified; on the wire, they boasted about their drug heists and the prices they hoped Isaac could fetch on resale. But for some reason, Devin stopped attending the meetings. He even texted Isaac to say they might not see each other for a while. When Isaac asked the others about Devin, they insisted he was just overloaded with "official duties" from their pig-headed Chief.

On the next delivery to Isaac, an ambitious prosecutor decided to spring the trap against the crooked cops. The prosecutor caught Andy and Brian red-handed with seized drugs that never made it to the evidence locker. The two quickly accepted plea deals, but they refused to implicate Devin. In fact, both said Devin was too undisciplined to be invited into their scheme, claiming they only told Isaac that his good friend Devin was involved to gain Isaac's trust.

The prosecutor, determined not to let Devin walk, sought to admit Andy's and Brian's recorded conversations against Devin. She argued that the three cops were longtime co-conspirators, and the recorded conversations were made "during the course of" and "in

furtherance of” that conspiracy. They were thus admissible against Devin under the co-conspirator exception to the hearsay rule.¹

This problem illustrates a quagmire criminal judges often face: When are an alleged co-conspirator’s statements admissible at a defendant’s trial? If the co-conspirator refuses to testify, then his conversations with others are hearsay—unless, under Federal Rule of Evidence (FRE) 801(d)(2)(E) and its state analogues, those conversations were made “during and in furtherance of th[at] conspiracy.”² That vague language is difficult to apply in muddled fact patterns, such as cases in which statements were made after the defendant was expressly disavowed from the conspiracy.³

Co-conspirator hearsay issues are one type of many vexing pretrial evidentiary decisions that have dramatic effects on the outcome of a criminal case.⁴ Those rulings often dictate which charges the State will pursue. In the vast majority of cases, those rulings establish a baseline for plea bargains that resolve the litigation.⁵ For those cases that go to a jury, pretrial evidentiary rulings control the narrative jurors will construct from the evidence, determining the course of litigation and the range of counts upon which the jury will deliberate.⁶

1. FED. R. EVID. 801(d)(2)(E).

2. *Id.* The FRE’s categorical approach to hearsay aims to promote efficient analysis. *See, e.g.,* Liesa L. Richter, *Posnerian Hearsay: Slaying the Discretion Dragon*, 67 FLA. L. REV. 1861, 1882-83, 1893-94 (2015). However, the co-conspirator exception is one area where it falls considerably short.

3. In Part IV, I discuss additional co-conspirator hearsay problems that often arise, using variations upon the facts in the Introduction to illustrate them.

4. *See, e.g.,* Kara MacKillop & Neil Vidmar, *Decision-Making in the Dark: How Pre-Trial Errors Change the Narrative in Criminal Jury Trials*, 90 CHI.-KENT L. REV. 957, 958 (2015) (“[E]stablished evidentiary doctrines are sometimes compelling incorrect verdicts by presenting the juries with incomplete and inaccurate evidence while expecting them to develop complete and accurate narratives.”).

5. *See* Rodney J. Uphoff, *On Misjudging and Its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 NEV. L.J. 521, 538-39 (2007). *See generally* U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 24 (2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf> [<https://perma.cc/QW6K-K8QH>] [hereinafter FELONY DEFENDANTS]. According to the Bureau of Justice Statistics, in the seventy-five largest counties in the U.S. during the year 2006, “[a]bout two-thirds of felony defendants were eventually convicted and more than 95% of these convictions occurred through a guilty plea.” *Criminal Cases*, U.S. DEP’T JUSTICE, BUREAU JUSTISE STATISTICS, <https://www.bjs.gov/index.cfm?ty=tp&tid=23> [<https://perma.cc/A7WR-AUNG>].

6. MacKillop & Vidmar, *supra* note 4, at 962-63 (citing NAT’L REGISTRY OF

Behavioral law and economic theory accurately predict that such pretrial evidentiary rulings are a cognitive minefield where intuitive “System 1” thinking predominates over deliberative “System 2” reasoning.⁷ Criminal judges have punishingly crowded dockets that overburden their cognitive capacities.⁸ They also receive precious little guidance on these discretionary issues from higher courts.⁹ Yet

EXONERATIONS, A PROJECT OF THE UNIV. OF MICH. LAW SCHOOL, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=Contributing_x0020_Factors_x0020&FilterValue1=False%20or%20Misleading%20Forensic%20Evidence [<https://perma.cc/EEJ3-PPSG>] (noting the frequency with which erroneous pretrial evidentiary rulings can lead to convictions of defendants who are later proven innocent in post-conviction proceedings).

Admissibility issues are generally dealt with prior to trial, with motions presented and judicial decisions rendered outside of the jury’s presence. Of course, the results of these motions, right or wrong, will alter the narrative developed by a jury, whatever the righteous or devious intentions of counsel and the judge. Furthermore, because these issues are typically addressed and dismissed on direct appeal (... typically under the harmless error doctrine), they are not available as strong arguments in innocence petitions unless the cumulative effect of these errors can show a due process violation.

Id. at 974.

7. I discuss these terms in more detail below in Part II.B. *See also* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20-21 (2011).

Some environments are inherently better for experts to develop accurate guiding intuitions than other environments.

If the environment is sufficiently regular and if the judge has had a chance to learn its regularities, the associative machinery will recognize situations and generate quick and accurate predictions and decisions. You can trust someone’s intuitions if these conditions are met....

....

[But i]n a less regular, or low-validity, environment, the heuristics of judgment are invoked. [Intuition] is often able to produce quick answers to difficult questions by substitution, creating coherence where there is none.

Id. at 243; *see also* Robin M. Hogarth et al., *The Two Settings of Kind and Wicked Learning Environments*, 24 CURRENT DIRECTIONS PSYCHOL. SCI. 379, 379-82 (2015).

8. In just the month of May 2009, “[a]bout 56,000 felony cases were filed in the 75 largest counties” in America. FELONY DEFENDANTS, *supra* note 5, at 2.

9. *See* MacKillop & Vidmar, *supra* note 4, at 969 (“[T]he appeals courts have historically rubber-stamped the decisions of trial courts in these areas ... utilizing the harmless error doctrine.”); Uphoff, *supra* note 5, at 539 (“[A]ppellate courts rarely overturn convictions based on erroneous evidentiary rulings.” (citing Margaret A. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error?*, 25 LOY. L.A. L. REV. 893, 894-96 (1992))); *see also* Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 32 (2007).

For example, the United States Supreme Court has avoided directly addressing the admissibility of co-conspirator hearsay statements. *See* *Bourjaily v. United States*, 483 U.S. 171, 176 n.1 (1987) (“[The Court] do[es] not express an opinion on the proper order of proof

they must somehow quickly and accurately resolve questions like the co-conspirator hearsay problem above to avoid interminable delays in the cases they handle.

Busy criminal judges faced with these difficult pretrial evidentiary issues tend to rely on intuitive judgments, rather than on deliberative reasoning, to reach rapid rulings.¹⁰ Judgments based upon intuitive heuristics are subject to a plethora of cognitive biases that undermine their reliability.¹¹ For instance, a judge might rely too much on hindsight to conclude erroneously that the harm a conspiracy would work upon victims was inevitable.¹² Therefore, the judge finds that a defendant's participation in that conspiracy's early activities renders him liable for everything that co-conspira-

that trial courts should follow in concluding that the preponderance standard has been satisfied in an ongoing trial."). Furthermore, appellate courts are commonly unwilling to reverse on these difficult evidentiary issues, relying instead on the "harmless error" doctrine to uphold the lower court's decision when the defendant was convicted. *See MacKillop & Vidmar, supra* note 4, at 969, 974, 979.

The lack of such guidance leads judges to over-rely on intuitive reactions at the expense of more deliberate thinking about the issue. *See KAHNEMAN, supra* note 7, at 241 ("Whether professionals have a chance to develop intuitive expertise depends essentially on the quality and speed of feedback, as well as on sufficient opportunity to practice."); *see also* Guthrie et al., *supra*, at 35.

10. Guthrie et al., *supra* note 9, at 35 ("Judges facing cognitive overload due to heavy dockets or other on-the-job constraints are more likely to make intuitive rather than deliberative decisions because the former are speedier and easier. Furthermore, being cognitively 'busy' induces judges to rely on intuitive judgment." (footnotes omitted)).

11. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 780 (2001) ("Psychologists have learned that human beings rely on mental shortcuts, which psychologists often refer to as 'heuristics,' to make complex decisions. Reliance on these heuristics facilitates good judgment most of the time, but it can also produce systematic errors in judgment." (footnotes omitted)). Judges are subject to the same flawed thinking. *Id.* at 784 ("[U]nder certain circumstances judges rely on heuristics that can lead to systematically erroneous judgments."); *see also* Guthrie et al., *supra* note 9, at 13-29. For that reason, Guthrie and his co-authors suggest that "deliberative decision making is more likely than intuitive decision making to lead to just outcomes." Guthrie et al., *supra* note 9, at 6. The need to avoid intuitive judging is especially acute on discretionary issues where trial judges typically receive little feedback or guidance from higher courts. *Id.* at 33 ("[J]udges should use deliberation as a verification mechanism especially in those cases where intuition is apt to be unreliable either because feedback is absent or because judges face cues likely to induce misleading reliance on heuristics.").

12. This kind of reasoning, known as "hindsight bias," is based on the mistaken intuition that the actual outcome of events was predictable or even inevitable *ex ante*. Guthrie et al., *supra* note 9, at 24.

tors later did or said, irrespective of his withdrawal or excommunication.¹³

Overreliance on intuition generates inconsistencies in judges' decisions on issues like the co-conspirator hearsay exception.¹⁴ Enterprising prosecutors have capitalized on those inconsistencies to expand the scope of such evidentiary exceptions.¹⁵ Thus, although

13. *See id.* at 25-26.

14. As I discuss in more detail in below, examples of inconsistent application of the co-conspirator exception to hearsay abound in court rulings. *See infra* Part II.C. For instance, courts have often conflicted when determining the admissibility of statements made after a conspiracy has achieved its primary objective, but while the co-conspirators remain intent upon concealing the conspiracy's existence. *Compare* *United States v. Honken*, 378 F. Supp. 2d 928, 959-60 (N.D. Iowa 2004) (holding statements made to induce another to falsely confess to the murder of several witnesses to her conspiracy with the defendant were inadmissible), *and* *United States v. Gonzalez*, 610 F. Supp. 568, 573 (D.P.R. 1985) (“[O]nce the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment.”), *with* *United States v. Trent*, 306 F. App'x 482, 484-86 (11th Cir. 2009) (*per curiam*) (affirming the admission of co-defendant's statement regarding the filing of false tax returns and submission of false statements in 2006 to conceal a conspiracy to defraud a local housing authority years earlier in 2003), *and* *United States v. White*, 766 F. Supp. 873, 888 (E.D. Wash. 1991) (holding the conspiracy to illegally dispose of hazardous waste “would necessarily entail a conspiracy to ensure that the true nature of the acts would not be uncovered,” so statements made in the effort to conceal those acts were admissible as made in furtherance of the conspiracy).

Another area of discord concerns statements made before the defendant actually entered the conspiracy. *Compare* *United States v. Carter*, 966 F. Supp. 336, 346-47 (E.D. Pa. 1997) (holding statements co-conspirator made to undercover agent about potential conspiracy to launder money using the defendant's business, before the defendant agreed to join, were admissible at defendant's trial), *and* *United States v. Brown*, 755 F. Supp. 942, 946 (D. Colo. 1991) (holding that because overarching conspiracy had multiple criminal objects which required some participants to leave and join it during its lifetime, statements co-conspirators made before the defendant joined were admissible at his trial), *with* *United States v. Hill*, 279 F. App'x 90, 95 (2d Cir. 2008) (excluding evidence that months before the defendant participated in a conspiracy to rob the victim, his co-defendants participated in a similar robbery), *and* *United States v. Davis*, 67 F. App'x 771, 775-76 (4th Cir. 2003) (*per curiam*) (holding statements made by a co-defendant in a drug conspiracy were inadmissible at trial where those statements were made years before the charged conspiracy).

15. As an example, a 2010 study of the use of the co-conspirator hearsay exception in just eight of the federal circuits since the exception was adopted in 1975 found some 2500 cases where prosecutors relied upon the exception. Ben Trachtenberg, *Coconspirators, “Coventurers,” and the Exception Swallowing the Hearsay Rule*, 61 HASTINGS L.J. 581, 623 (2010). Some federal prosecutors have begun to argue “a revised definition of the Exception itself, arguing that the ‘conspiracy’ joined by the defendant and declarant need not ‘have as its object an unlawful purpose.’” *Id.* at 612. Such expansions of the co-conspirator exception to hearsay typically disfavor defendants. *See id.* at 626-27.

intuitive evidentiary rulings expedite criminal dockets and preserve judges' analytical capacities, they carry unacceptable costs for criminal justice.

I offer an alternative decision-making path for criminal judges that will restore much-needed consistency to their pretrial rulings, at least in the area of co-conspirator hearsay. By turning to principles contained in uniform commercial laws, criminal judges can fashion normatively sound decision-making models to resolve co-conspirator hearsay questions without bringing the machinery of the criminal justice system to a stand still.¹⁶ Multi-factor scripts and checklists can disrupt judges' unexamined reliance upon intuition and encourage deliberative thinking on especially difficult questions.¹⁷ They can guide judges to ask the right questions about a case, leaving room for individual judgment once their deliberative faculties are triggered.¹⁸ By relying on the multi-factored, rule-based thinking required to analyze problems under uniform commercial laws, judges can reduce their dependence on intuitive heuristics with questionable normative bases,¹⁹ yet still find consistent answers relatively quickly.²⁰ In turn, judges can check the growth of

16. See *infra* Part III.

17. See Guthrie et al., *supra* note 9, at 40 (“Scripts and checklists can free judges from reliance on their memories and encourage them to proceed methodically, thereby ensuring that they touch all of the deliberative bases. A judge who must review a script or checklist at each step in the decision-making process is less likely to rely on intuition when doing so is inadvisable.”); see also KAHNEMAN, *supra* note 7, at 65 (“Cognitive strain, whatever its source, mobilizes System 2, which is more likely to reject the intuitive answer suggested by System 1.”).

18. Such checklists can “provide reminders of only the most critical and important steps,” allowing even “experts,” like judges, to “remember how to manage a complex process”—applying the co-conspirator exception to the hearsay rule. ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* 120 (2010).

19. See Guthrie et al., *supra* note 9, at 41 (“Multifactor tests can help ensure that judges consider all relevant factors and can remind them of their responsibility to base decisions on more than mere intuition. Similar reminder systems have reduced medical diagnostic error. Thus, a system that forces judges to weigh each of the factors expressly also might help reduce judges’ reliance on intuition.” (footnotes omitted)); see also Paul R. Dexter et al., *A Computerized Reminder System to Increase the Use of Preventive Care for Hospitalized Patients*, 345 *NEW ENG. J. MED.* 965, 965 (2001). “The legal system might also adopt procedural, evidentiary, and even substantive rules to minimize the deleterious effects of cognitive illusions on judicial decision making. By adopting such rules, the system can avoid placing judges in a position in which cognitive illusions are likely to lead them astray.” Guthrie et al., *supra* note 11, at 828.

20. As an example of the utility of checklists in another professional discipline, in a study

evidentiary exceptions that largely favor prosecutors and preserve the judges' intellectual capital for the ultimate issues of guilt or innocence in the case.²¹

Uniform commercial laws are ripe for application to co-conspirator hearsay questions. Conspiratorial agreements are surprisingly similar to existing commercial arrangements subject to those uniform laws.²² The authors of those laws sought to enhance the predictability of arms-length economic transactions in part by ensuring that the proper parties within an amorphous, opaque, profit-driven commercial organization are liable for that organization's actions.²³ Similarly, judges can apply uniform commercial law in the criminal context to ensure that the proper party in an amorphous, opaque, profit-driven conspiracy is criminally liable for the illicit activities the conspiracy undertakes.²⁴ Furthermore, judges can apply those laws through decision trees and checklists that reduce reliance upon intuition in favor of more accurate, deliberative thinking.²⁵ Because conspiratorial arrangements may reflect new ideas in the organizational structure of a profit-motivated organization, the application

requiring eight hospitals around the world to utilize a carefully designed surgical safety checklist, "the rate of major complications for surgical patients in all eight hospitals fell by 36 percent after introduction of the checklist. Deaths fell 47 percent." GAWANDE, *supra* note 18, at 154.

21. Though a ruling on the co-conspirator exception may be outcome determinative for one or more of the State's charges, numerous others often remain standing. At trial on those remaining counts, the trier of fact—often the court itself if the defendant elects a bench trial—must determine whether the State has proven the defendant's guilt beyond a reasonable doubt. Efficient evidentiary rulings allow the court to allocate intellectual capital to the guilt-innocence phase of trial, rather than consuming it in pretrial evidentiary matters. This argument also favors the FRE's categorical hearsay approach. *See, e.g., Richter, supra* note 2, at 1893-94.

22. *See infra* Part III.B.

23. *See, e.g., REVISED UNIF. P'SHIP ACT* § 301(1) (UNIF. LAW COMM'N 1997) (allocating partnership liability where a partner's transaction exceeds his actual authority); *id.* §§ 702, 704, 801 (allocating partnership liability following the dissociation of a partner); U.C.C. § 4-205 (AM. LAW INST. 2017) (introducing warranty provisions to allocated liabilities in the event of forged indorsements on an instrument); *id.* § 3-405 (allocating losses from fraudulent indorsements made by an employee between the drawer employer, the drawee bank, and the depository bank); *see also infra* Part III.A.

24. *See infra* Part III.B.

25. *See Guthrie et al., supra* note 9, at 40. As I discuss in more detail below, commercial subjects are often amenable to checklists from which answers can be quickly derived. *See infra* Part III.

of uniform bodies of commercial law to those conspiratorial arrangements can also aid the development of commercial legal theory.²⁶

When conspiratorial arrangements are sufficiently analogous to commercial arrangements, criminal judges should apply those uniform commercial laws to resolve co-conspirator hearsay issues.²⁷ As an example, both the Revised Uniform Partnership Act (RUPA) and the Uniform Commercial Code (UCC) provide ready answers to the hypothetical scenario outlined at the beginning of this Introduction. As detailed further below,²⁸ RUPA section 703's rule on the liability of a dissociated partner and UCC section 3-403's treatment of the effect of an unauthorized signature each counsel against admitting Andy's and Brian's statements in Devin's trial.²⁹

I begin the Article with a discussion of the history and mechanics of the co-conspirator exception to the hearsay rule.³⁰ Next, I discuss how judges typically rely on intuitive judgments rather than on deliberative reasoning to resolve questions under that rule, a dangerous precedent under the theories promulgated by the behavioral law and economics movement.³¹ I then argue that uniform commercial law concepts can provide a needed decision-making model for overworked criminal judges facing co-conspirator hearsay questions while preserving neutrality in pretrial evidentiary rulings.³² Next, I provide specific examples where the application of uniform commercial law principles can readily resolve what would otherwise be vexing applications of the co-conspirator exception to the hearsay

26. Doing so will help preserve the Dworkinian integrity of both commercial and criminal jurisprudence. *See* RONALD DWORKIN, *LAW'S EMPIRE* 89-90 (1986); *see also* Michael Gentithes, *Precedent, Humility, and Justice*, 18 *TEX. WESLEYAN L. REV.* 835, 848-49 (2012) (discussing Dworkin's theory of integrity). This reflective process will allow commercial law to develop the flexibility needed to address an economy of rapidly shifting organizations and intricately balanced supply lines. *See infra* Part III.B.

27. *See infra* Part III.B. Criminal courts that borrow from uniform commercial laws will also be treating arrangements for the sale and distribution of commercial and illicit goods identically, a requirement of formal justice. For a fuller discussion of theories of formal justice, *see* Gentithes, *supra* note 26, at 845-47.

28. *See infra* Part IV.

29. *See* REVISED UNIF. P'SHIP ACT § 703 (UNIF. LAW COMM'N 1997); U.C.C. § 3-403 (AM. LAW INST. 2017).

30. *See infra* Part I.

31. *See infra* Part II.

32. *See infra* Part III.

rule.³³ Lastly, I consider some limitations and likely objections to my position before concluding.³⁴

I. THE HISTORY AND MECHANICS OF THE CO-CONSPIRATOR EXCEPTION

Recorded statements such as those of crooked cops Andy and Brian fit the traditional definition of hearsay; they are out-of-court statements the prosecution uses to prove the facts asserted in them about the crimes charged.³⁵ Such statements are generally excluded as unreliable evidence of the truth of the matters they assert.³⁶ But an evidentiary tradition offers the government a reprieve.³⁷ Under FRE 801(d)(2)(E) and its state analogues, a co-conspirator's statement made during and in furtherance of the conspiracy is not hearsay.³⁸ This workaround to the hearsay rule has its roots in common law and was generally approved by the United States Supreme Court as early as 1827.³⁹

Many justifications for the exception have emerged over time.⁴⁰ One is that co-conspirators, like partners or agents, are legally

33. See *infra* Part IV.

34. See *infra* Part V.

35. For a broad review of the history of the hearsay rule in general, see Trachtenberg, *supra* note 15, at 587-95.

36. See FED. R. EVID. 801, 802.

37. FED. R. EVID. 802.

38. FED. R. EVID. 801(d)(2)(E).

39. See *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 469-70 (1827). For a more detailed discussion of the *Gooding* case, see Michael L. Seigel & Daniel Weisman, *The Admissibility of Co-Conspirator Statements in a Post-Crawford World*, 34 FLA. ST. U. L. REV. 877, 883-84 (2007).

40. Professor Trachtenberg provides a helpful summary of some of these justifications:

The leading arguments put forth to support the Exception are (1) an analogy to agency law and the principal-agent exception to the Rule, wherein each conspirator is said to adopt his confederates as his agents; (2) the proposition that statements within the Exception are not hearsay at all because they constitute verbal acts; (3) the argument that, like other categories of hearsay for which exceptions exist, coconspirator statements are generally reliable and so ought not be barred by the Rule; and (4) the practical position that absent the Exception, necessary prosecutions of many crimes—ranging from treason to drug distribution—would be impossible, or at least severely impeded.

Trachtenberg, *supra* note 15, at 627 (citing David S. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1384 (1972)).

responsible for the acts of all other parties to their agreed-upon enterprise, including the statements of those other parties.⁴¹ As Learned Hand observed, “[w]hen men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made ‘a partnership in crime.’ What one does pursuant to their common purpose, all do, and, as declarations may be such acts, [those declarations] are competent against all.”⁴² A defendant who makes an illicit agreement with a co-conspirator binds himself, by the very nature of that agreement, to any statements the co-conspirator makes.⁴³ The co-conspirator speaks with the same voice as the defendant, and thus the co-conspirator’s statements are admissible at trial as if they were the defendant’s own.⁴⁴

Another justification for the exception is the position that co-conspirator statements are often not hearsay at all. Instead, co-conspirator statements are acts with legal repercussions.⁴⁵ They can establish the elements of a crime, be it conspiracy or another underlying offense.⁴⁶ “More than a mere statement to [the defendant], the law deems the words of [a co-conspirator] a criminal act, and it is the *act* that the prosecutor means to show the jury.”⁴⁷

Two additional justifications for the rule have emerged over time. First, some argue that co-conspirator statements are inherently reliable.⁴⁸ The reliability allegedly arises from the unlikelihood that a co-conspirator would falsely accuse himself of participating in a criminal enterprise.⁴⁹ Second, others claim that co-conspirator

41. See KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE § 259 (7th ed. 2014).

42. *Van Riper v. United States*, 13 F.2d 961, 967 (2d Cir. 1926).

43. This justification initially supported the exception in early America. See Trachtenberg, *supra* note 15, at 599-600 (quoting 2 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 402 (Phila., P.H. Nicklin & T. Johnson 3d American ed. 1830); 1 S. MARCH PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 199-200 (N.Y., Banks, Gould & Co. 3d ed. 1849)).

44. The drafters of the FRE expressed skepticism about this theory of conspiracy, noting in the Advisory Committee Notes that “the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established.” FED. R. EVID. 801(d)(2)(E) advisory committee’s note.

45. See Trachtenberg, *supra* note 15, at 598.

46. See *id.*

47. *Id.*

48. See *id.* at 631-34.

49. See *id.* at 631. But often these statements prove inherently unreliable, especially in describing the aims or membership of the conspiracy. See *id.* at 632 (quoting Joseph H. Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators’ Exception to the Hearsay*

statements are a necessity in many criminal prosecutions.⁵⁰ The necessity argument posits that many crimes committed by clandestine organizations could not be prosecuted at all if such statements were inadmissible.⁵¹

To qualify a co-conspirator's statement as nonhearsay under the exception, the prosecution must meet a few seemingly simple requirements. It must first provide prima facie evidence of the existence of that conspiracy.⁵² Though it may rely on the statements themselves, they "do[] not by [themselves] establish ... the existence of the conspiracy or [the declarant's] participation in it."⁵³

Once the government makes that prima facie showing, the co-conspirator's statement is admissible if it was made "during and in furtherance of the conspiracy."⁵⁴ Although those requirements seem straightforward, they are difficult to apply in complex factual scenarios. Co-conspirators often will not reduce agreements to writing, forcing courts to parse the language the co-conspirators use to determine if a statement was made "during and in furtherance of" that conspiracy.⁵⁵ As I discuss in more detail below, criminal judges' approaches to the ambiguous statements typical in multiple-defendant prosecutions have varied widely, making this area of law unpredictable.⁵⁶

II. INTUITION AND PRETRIAL EVIDENTIARY RULINGS

In this Part, I argue that overworked criminal judges too often rely on intuitive cognitive processes, rather than on their deliberative faculties, to resolve pretrial evidentiary issues such as the

Rule, 52 MICH. L. REV. 1159, 1165 (1954).

50. *See id.* at 633-34.

51. *See id.* However, this does not explain why co-conspirator statements ought to be considered reliable in favor of a prosecution.

52. *See* Norman M. Garland & Donald E. Snow, *The Co-Conspirators Exception to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements*, 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 1, 8 (1972).

53. FED. R. EVID. 801(d)(2). Though outside the scope of this Article, a significant body of research addresses what constitutes a sufficient prima facie showing to trigger the co-conspirator exception. *See, e.g.*, Garland & Snow, *supra* note 52.

54. FED. R. EVID. 801(d)(2)(E).

55. *See id.*

56. *See infra* Part II.C.

co-conspirator exception to the hearsay rule. By doing so, judges generate inconsistent rulings that expand evidentiary rules, usually to defendants' disadvantage.⁵⁷ Such inconsistent rulings undermine justice in criminal courtrooms throughout the country.

A. Criminal Judges' Heavy Dockets

Criminal judges are incredibly overworked. State court processing statistics gathered by the Department of Justice's Bureau of Justice Statistics demonstrate an alarming upward trend in criminal court workloads.⁵⁸ For example, in Cook County, Illinois,⁵⁹ which encompasses Chicago and is home to the second largest unified court system in America,⁶⁰ "31,106 felony cases were filed ... [i]n 2009 ... which equates to about 598 felony cases filed per week."⁶¹ That workload is divided among approximately 400 circuit court judges,⁶² with fewer than 50 judges assigned full time to adjudicating the most serious criminal offenses.⁶³ Cook County is not alone in the pace or volume of criminal cases it assigns to overcrowded dockets.⁶⁴ In May 2009, "[a]bout 56,000 felony cases were filed in the 75 largest counties" in America.⁶⁵ That staggering workload has a predictable effect on the efficiency with which trial courts can adjudicate criminal cases. The median time from arrest to adjudication in

57. See Richter, *supra* note 2, at 1894.

58. See *State Court Caseload Statistics*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=tp&tid=30> [<https://perma.cc/JJ59-B4QL>].

59. For the past several years, the author has served as an Assistant Appellate Defender with the Office of the State Appellate Defender in the Illinois Appellate Court First District, which encompasses Cook County.

60. Adi Leibovitch, *Punishing on a Curve*, 111 NW. U. L. REV. 1205, 1228 n.109 (2017).

61. FELONY DEFENDANTS, *supra* note 5, at 33.

62. *Organization of the Circuit Court*, CIR. CT. COOK COUNTY, <http://www.cookcountycourt.org/ABOUTTHECOURT/OrganizationoftheCircuitCourt.aspx> [<https://perma.cc/NAF5-9HWP>].

63. *Criminal Division Judges*, CIR. CT. COOK COUNTY, <http://www.cookcountycourt.org/ABOUTTHECOURT/CountyDepartment/CriminalDivision/JudgesInformation.aspx> [<https://perma.cc/N3WC-TRP4>]. These judges hear cases where the State alleges the commission of a serious criminal act, including but not limited to armed robbery, assault, burglary, criminal sexual assault, and murder. *County Department Overview*, CIR. CT. COOK COUNTY, <http://www.cookcountycourt.org/ABOUTTHECOURT/CountyDepartment.aspx> [<https://perma.cc/LCQ9-NTEY>].

64. See *State Court Caseload Statistics*, *supra* note 58.

65. FELONY DEFENDANTS, *supra* note 5, at 2.

felony cases increased 29 percent in the two decades prior to 2009, up to an average of 111 days.⁶⁶

B. Judicial Reliance on Flawed Intuition

Presented with that oppressive workload, judges must expedite their decision-making processes to make fast-paced rulings.⁶⁷ They are especially likely to turn to easily applied, intuitive heuristics to resolve pretrial evidentiary issues.⁶⁸ Evidentiary rules are saddled with innumerable exceptions, making these issues appear straightforward while in practice they are “very subjective and prone to bias influences.”⁶⁹ When asked how they resolve difficult evidentiary issues debated vigorously by opposing counsel, judges in major metropolitan areas made “frequent[] ... reference to the use of *judicial intuition*. [Judges defined this as] ... a form of learned hunch, developed through experience on the bench.”⁷⁰ Many criminal judges “show[] an unwillingness ... to wrestle with the difficult issues

66. *Id.* at 22.

67. See Guthrie et al., *supra* note 9, at 35. Predictability is a key component in the development of a coherent body of legal rules. For instance, F. A. Hayek emphasized the need to establish a sphere of predictable freedoms and constraints within which actors could organize their affairs to achieve their own aims. See, e.g., F. A. HAYEK, *THE CONSTITUTION OF LIBERTY* 142-43 (1960). For a thoughtful critique of the primacy of predictability in upholding the rule of law, see Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 9-14 (2012) (discussing the “right sort of predictability” in precedent decisions).

68. See Guthrie et al., *supra* note 9, at 35.

69. MacKillop & Vidmar, *supra* note 4, at 968 (“Evidence admissibility ... is a more complicated, nuanced area of law.”).

70. PAUL B. WICE, *CHAOS IN THE COURTHOUSE: THE INNER WORKINGS OF THE URBAN CRIMINAL COURTS* 124 (1985). Such intuitions often betray favoritism towards the prosecution. *Id.* at 20.

presented and to come to their own determination of the issues.”⁷¹ Instead, rapid-fire, intuitive rulings are the norm.⁷²

Such judicial intuition is generated by what psychology professor Daniel Kahneman and others in the behavioral law and economics movement call “System 1” mental processing.⁷³ System 1 thinking relies on spontaneous, almost automatic reactions to the facts of a case, engaging analytical pathways that are less cognitively taxing and require less than full attention.⁷⁴ Such thinking is “automatic, largely unconscious, and relatively undemanding of computational capacity,” thereby “conjoin[ing] properties of automaticity and heuristic processing.”⁷⁵

Such intuitive thinking stands in contrast to more deliberative “System 2” mental systems.⁷⁶ System 2 is more attentive and effortful, and it is “often associated with the subjective experience of agency, choice, and concentration.”⁷⁷ Such thinking will “decontextualize and depersonalize problems”; it is thus “more adept at representing in terms of rules and underlying principles.”⁷⁸ It relies on concentration to apply those learned rules to a new question.⁷⁹ These systems are often used after an initial intuitive reaction has been generated, “which may correct impulsive, inappropriate

71. Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 804 (1995). For that reason, “many judges routinely ... allow the lawyers for the state to write their orders resolving disputed factual and legal issues,” even including “long and detailed opinions, often over forty pages in length, containing extensive factual characterizations and legal analysis.” *Id.* at 793, 803. “Such ghostwritten orders are not the impartial findings of disinterested judges, but rather the briefs of advocates, containing one-sided, exaggerated ‘findings’ that prosecutors have tailored for strategic advantage on appeal and in post-conviction review.” *Id.* at 803-04.

72. See Guthrie et al., *supra* note 9, at 29.

73. See KAHNEMAN, *supra* note 7, at 20-21. For a useful, concise summary of Kahneman’s contribution to the behavioral law and economics movement specifically and legal theory in general, see generally Russell Korobkin, *Daniel Kahneman’s Influence on Legal Theory*, 44 LOY. U. CHI. L.J. 1349 (2013).

74. See Guthrie et al., *supra* note 9, at 7.

75. Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate?*, 23 BEHAV. & BRAIN SCI. 645, 658 (2000); see also KAHNEMAN, *supra* note 7, at 20-21.

76. See KAHNEMAN, *supra* note 7, at 20-21.

77. *Id.* at 21.

78. Stanovich & West, *supra* note 75, at 659.

79. Shane Frederick, *Cognitive Reflection and Decision Making*, 19 J. ECON. PERSP. 25, 26 (2005).

interpretations.”⁸⁰ Deliberative thought processes, though more taxing of one’s attention, thus increase accuracy when compared to intuitive reactions.⁸¹ Systematic, rule-based thinking tends to engage these deliberative systems and overcome intuitive ones.⁸²

Intuitive, System 1 thinking is “emotionally driven” and subject to biases based upon affect and passion.⁸³ Intuition is “the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system”⁸⁴—because overworked judges are otherwise cognitively busy, they are prone to “make selfish choices, use sexist language, and make superficial judgments.”⁸⁵ Reliance on such intuitive systems “leads to what has been termed the fundamental computational bias in human cognition—the tendency toward automatic contextualization of problems.”⁸⁶ Engagement of deliberative System 2 cognitive pathways is vital to performing effortful acts of self-control that overcome the “intuitions and impulses of System 1.”⁸⁷

Intuitive rulings on pretrial evidentiary issues, though certainly understandable,⁸⁸ are subject to a plethora of cognitive biases.⁸⁹ One stark example is hindsight bias, or the “tendency to overestimate the predictability of past events” after learning of the actual outcome.⁹⁰ In the context of the co-conspirator exception to hearsay, judges might rely too much on hindsight to conclude erroneously

80. Seymour Epstein & Rosemary Pacini, *Some Basic Issues Regarding Dual-Process Theories from the Perspective of Cognitive-Experiential Self-Theory*, in *DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY* 462, 469 (Shelly Chaiken & Yaacov Trope eds., 1999).

81. See Guthrie et al., *supra* note 9, at 7-9.

82. See *id.* at 8-9. “Multifactor tests can help ensure that judges consider all relevant factors and can remind them of their responsibility to base decisions on more than mere intuition.” *Id.* at 41; see also KAHNEMAN, *supra* note 7, at 65 (“Cognitive strain, whatever its source, mobilizes System 2, which is more likely to reject the intuitive answer suggested by System 1.”).

83. Epstein & Pacini, *supra* note 80, at 469.

84. Guthrie et al., *supra* note 9, at 31.

85. KAHNEMAN, *supra* note 7, at 41.

86. Stanovich & West, *supra* note 75, at 659 (citation omitted).

87. KAHNEMAN, *supra* note 7, at 31.

88. See Guthrie et al., *supra* note 9, at 35 (“Judges facing cognitive overload due to heavy dockets or other on-the-job constraints are more likely to make intuitive rather than deliberative decisions because the former are speedier and easier. Furthermore, being cognitively ‘busy’ induces judges to rely on intuitive judgement.”).

89. See *id.* at 19-29.

90. *Id.* at 24.

that the harm a conspiracy would work on victims was inevitable. They might then intuitively assign some blameworthiness to a defendant for that conspiracy's activities, leading them to admit into evidence everything that the defendant's co-conspirators did or said even if the defendant was later withdrawn or excommunicated.

When criminal judges make intuitive rulings on co-conspirator statements, they sacrifice accuracy and neutrality in normatively unacceptable ways.⁹¹ The hearsay rule exists to exclude inherently unreliable statements—second-hand stories by one witness about what another witness may have said—from the evidence introduced at trial.⁹² The co-conspirator exception ought to apply only in situations where a statement is clearly more reliable than ordinary hearsay because a co-conspirator meaningfully and accurately speaks for and represents a partner in crime. As the following Section explains, intuitive judicial rulings lead to inconsistent results that fail to accurately determine the reliability of co-conspirator statements and present the appropriate factual background to the judge and jury.

C. Intuition and Inconsistency on Co-Conspirator Hearsay Issues

Examples of judicial inconsistency in pretrial rulings on the co-conspirator exception are plentiful. For example, consider statements made after a conspiracy has achieved its primary objective, but while the co-conspirators remain intent on concealing the conspiracy's past existence. As a general rule, courts will not find a subsidiary conspiracy to conceal once the primary conspiracy has ended.⁹³ The Northern District of Iowa applied that reasoning in *United States v. Honken* when a co-defendant attempted to convince

91. See Guthrie et al., *supra* note 11, at 784 (“[U]nder certain circumstances judges rely on heuristics that can lead to systematically erroneous judgments.”); see also Guthrie et al., *supra* note 9, at 13-29. For that reason, Guthrie and his co-authors suggest that “deliberative decision making is more likely than intuitive decision making to lead to just outcomes.” *Id.* at 6.

92. See FED. R. EVID. 802.

93. See, e.g., *United States v. Gonzalez*, 610 F. Supp. 568, 573 (D.P.R. 1985) (“[O]nce the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment.”).

another inmate to confess falsely to the murder of several witnesses to her conspiracy with the defendant.⁹⁴ She drew maps of the location of the bodies to aid in that false confession.⁹⁵ The court reasoned that because the maps were made after the co-defendants had been arrested and were designed only to conceal the conspiracy, they were not made “in the course of” it and thus did not trigger the co-conspirator hearsay exception.⁹⁶

Other courts, however, have taken precisely the opposite position and readily implied an agreement among co-defendants to conceal a completed conspiracy, thereby rendering statements made during that concealment admissible against the defendant. For example, the Eastern District of Washington held in *United States v. White* that a conspiracy to dispose of hazardous waste illegally “would necessarily entail a conspiracy to ensure that the true nature of the acts would not be uncovered.”⁹⁷ Thus, the court admitted statements made while the co-defendants were under investigation for their activities, finding just the type of conspiracy that other courts have refused to find.⁹⁸ The Eleventh Circuit approved of a similar inference in *United States v. Trent*, in which it considered a co-defendant’s statement about the filing of false tax returns and submission of false statements in 2006 to conceal a conspiracy to defraud a local housing authority in 2003.⁹⁹ That court held the statements could be admitted even if the primary purpose of the conspiracy had long been achieved.¹⁰⁰ The court deduced that “concealment was a necessary part of the conspiracy” to execute a “continuing scheme of theft from the [housing authority] from 2001 until at least 2003,” thereby inferring an agreement to conceal the underlying criminal enterprise.¹⁰¹

94. 378 F. Supp. 2d 928, 944 (N.D. Iowa 2004).

95. *Id.* at 947.

96. *See id.* at 960. In a similar vein, the Middle District of Pennsylvania has held that a co-conspirator’s handwritten, post-arrest confession to all the activities of a conspiracy aimed to absolve the defendant entirely was written “with the intent to allocate liability *post hoc* rather than to facilitate the needs of an ongoing enterprise” and thus was inadmissible under the co-conspirator exception. *United States v. Davis*, 208 F. Supp. 3d 628, 633-34 (2016).

97. 766 F. Supp. 873, 888 (E.D. Wash. 1991).

98. *See id.*

99. 306 F. App’x 482, 484 (11th Cir. 2009).

100. *Id.* at 486.

101. *Id.*

Similar inconsistencies abound in rulings on the admissibility of statements made before the defendant actually entered a conspiracy with his co-defendants. Some appellate courts have counseled against admitting such statements. In *United States v. Davis*, the Fourth Circuit held that statements made by a co-defendant in a drug conspiracy were inadmissible at trial when those statements were made eight years before the charged conspiracy in the case and the co-defendant was imprisoned in the interim.¹⁰² Even though the statements concerned the same drug distribution activities as the charged conspiracy did, they were not made “in furtherance of” a conspiracy that they significantly predated and thus did not qualify for the co-conspirator exception.¹⁰³ In a similar decision in *United States v. Hill*, the Eastern District of New York excluded evidence that, months before the defendant participated in a conspiracy to rob the victim, his co-defendants participated in a similar robbery.¹⁰⁴

Other district courts, however, have offered more expansive interpretations of the exception that render statements made before the defendant actually entered the conspiracy admissible. The District of Colorado has held that co-conspirator statements may be admitted against a defendant who joins the conspiracy after those statements have been made.¹⁰⁵ Thus, the court held in *United States v. Brown* that because the overarching conspiracy had multiple criminal objectives that required some participants to leave and join it during its lifetime, statements that co-conspirators had made before the defendant joined were admissible at his trial.¹⁰⁶ Similarly,

102. See 67 F. App'x 771, 775-76 (4th Cir. 2003).

103. *Id.* at 776.

104. Though the district court's ruling was not published, the Second Circuit affirmed it in *United States v. Hill*, 279 F. App'x 90, 95 (2d Cir. 2008).

Though these examples suggest otherwise, appellate courts far more frequently interpret the co-conspirator exception to the hearsay rule in ways that disfavor defendants. For example, some courts have implied that a conversation discussing the rotating membership of a conspiracy might sufficiently further that enterprise so as to render the conversation admissible at trial. See, e.g., *United States v. Meeks*, 756 F.3d, 1115, 1119 (8th Cir. 2014); *United States v. Arias*, 252 F.3d 973, 977 (8th Cir. 2001). Others have ruled that a conversation about excommunicating members of the conspiracy other than the present defendant might be admissible against that defendant, even though the membership of that conspiracy has changed without any express approval from the defendant himself. See, e.g., *United States v. Maliszewski*, 161 F.3d 992, 1008-09 (6th Cir. 1998).

105. See *United States v. Brown*, 755 F. Supp. 942, 946 (D. Colo. 1991).

106. See *id.*

the Eastern District of Pennsylvania held in *United States v. Carter* that where a co-conspirator spoke to an undercover agent about a potential conspiracy to launder money using the defendant's business well before the defendant agreed to anything, the co-conspirator's statements were nonetheless admissible at his trial.¹⁰⁷ Because the defendant was later found to be a member of the conspiracy and the statements were made to further it, they were admissible against him even though he had not yet begun his involvement when they were made.¹⁰⁸

Why is such inconsistency so prevalent in rulings on the co-conspirator exception? Behavioral law and economics theory offers several plausible explanations.

First, judges are too cognitively busy to overcome intuitive processing on pretrial evidentiary rulings and engage their deliberative cognitive faculties to correct errors.¹⁰⁹ When our deliberative "System 2" faculties are "otherwise engaged, we will believe almost anything," often with little supporting evidence.¹¹⁰ When decision-makers are engaged in multiple effortful tasks at the same time, as judges are when managing punishingly crowded dockets, they tend to "go with the flow" of intuitive processing with little oversight from deliberative cognitive systems.¹¹¹

Second, judges themselves are placed in powerful positions that reinforce false confidence in their own intuitions.¹¹² Judges are made to feel powerful in the criminal courtroom, where they exercise near-dictatorial control over the other players in the criminal justice system.¹¹³ That powerful position renders judges unapologetic for, if not proud of, their reliance upon their own intuitive faculties.¹¹⁴

107. 966 F. Supp. 336, 346 (E.D. Pa. 1997).

108. *Id.*

109. See KAHNEMAN, *supra* note 7, at 41.

110. *Id.* at 81 ("System 1 is gullible and biased to believe, System 2 is in charge of doubting and unbelieving, but System 2 is sometimes busy, and often lazy. Indeed, there is evidence that people are more likely to be influenced by empty persuasive messages, such as commercials, when they are tired and depleted.")

111. See *id.* at 135.

112. See *id.*

113. For instance, judges may often assign defense attorneys to complete menial tasks if clerks are unavailable. LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 88 (1987).

114. See WICE, *supra* note 70, at 124.

They believe that their own experiences qualify them to rely upon learned hunches to make consistent, accurate rulings.¹¹⁵

Third, and contrary to judges' beliefs discussed above, the characteristics of pretrial co-conspirator hearsay questions make them especially troubling topics for experts to resolve with intuition.¹¹⁶ Intuitive judgments can reflect real expertise when there is "an environment that is sufficiently regular to be predictable" and when "the quality and speed of feedback" is high, so that experts have enough opportunity to practice.¹¹⁷ Pretrial evidentiary questions provide neither. They arise from the unpredictable richness of real life and true crime. Furthermore, because pretrial evidentiary rulings are discretionary, they are not the subject of extensive, let alone immediate, feedback from higher courts.¹¹⁸ Appellate courts are generally unwilling to overturn convictions that are based upon erroneous evidentiary rulings.¹¹⁹ "[T]he appeals courts have historically rubber-stamped the decisions of trial courts in these areas ... utilizing the harmless error doctrine."¹²⁰ Thus, higher courts have provided little guidance on the myriad complexities of the evidentiary rules that criminal courts must apply over and over again.¹²¹ The combination of factual irregularity and occasional—or entirely absent—feedback perpetuates judicial inconsistency in pretrial evidentiary rulings on the co-conspirator exception.

Judges' inconsistent application of the co-conspirator exception to the hearsay rule allows enterprising prosecutors to expand that evidentiary rule, thereby admitting more and more unreliable evidence against defendants. Prosecutors can use the device more readily as trial courts lower the requirements for evidence of the defendant's

115. *See id.* Unfortunately, "the confidence that people have in their intuition is not a reliable guide to their validity." KAHNEMAN, *supra* note 7, at 239-40.

116. *See* KAHNEMAN, *supra* note 7, at 240; *see also* Hogarth et al., *supra* note 7, at 379.

117. KAHNEMAN, *supra* note 7, at 240-41.

118. *See* MacKillop & Vidmar, *supra* note 4, at 969.

119. *See* Uphoff, *supra* note 5, at 539 (citing Berger, *supra* note 9, at 894-96); *see also* Guthrie et al., *supra* note 9, at 32.

120. MacKillop & Vidmar, *supra* note 4, at 969.

121. For instance, the United States Supreme Court has avoided directly addressing the admissibility of co-conspirator hearsay statements. *See* *Bourjaily v. United States*, 483 U.S. 171, 176 n.1 (1987) (The Court "do[es] not express an opinion on the proper order of proof that trial courts should follow in concluding that the preponderance standard has been satisfied in an ongoing trial.").

involvement in an underlying conspiracy.¹²² Some federal prosecutors have begun to argue “a revised definition of the Exception itself, arguing that the ‘conspiracy’ joined by the defendant and declarant need not ‘have as its object an unlawful purpose.’”¹²³ A 2010 study of just eight of the federal circuits found some 2500 cases where prosecutors relied upon the exception since its 1975 adoption.¹²⁴

Yet justice requires consistent, even-handed pretrial evidentiary rulings. Erroneous rulings on pretrial evidentiary issues can have dramatic trickle-down effects on the ultimate outcome of the case.¹²⁵ Those rulings often dictate which charges the State will pursue at trial and the narrative jurors will construct from the evidence, determining both the course of litigation and the range of counts upon which the jury will deliberate.¹²⁶ “[T]he results of [pretrial evidentiary] motions, right or wrong, will alter the narrative developed by a jury, whatever the righteous or devious intentions of counsel and the judge.”¹²⁷ Erroneous pretrial evidentiary rulings are frequently the culprit when a convicted defendant is later exonerated in post-

122. See Trachtenberg, *supra* note 15, at 612-13.

123. *Id.* at 612.

124. *Id.* at 623. Though it is outside the scope of this Article, over time such pretrial evidentiary rulings may begin to skew significantly against defendants. “Most judges, especially those with prosecutorial experience, presume that most defendants are, in fact, guilty.” Uphoff, *supra* note 5, at 543. Anecdotal evidence of antidefendant bias is also prevalent. Judges openly favor prosecutors in many death penalty cases, frequently at the expense of defendants’ constitutional rights. See Bright & Keenan, *supra* note 71, at 792-811. The pressures of judicial election enhance the antidefendant bias, making judges more punitive to defendants; judges often have experience in a prosecutor’s office and thus “bring a decidedly pro-prosecution attitude to the bench.” Uphoff, *supra* note 5, at 529. “The most common legal experience among ... judges, aside from the general category of working in a law firm ... was a former position with the local district attorney’s office.” WICE, *supra* note 70, at 96. For instance, in Philadelphia, 50 percent of trial court judges had prior experience as prosecutors, while 15 percent had served in the public defender’s office. *Id.* at 110. Christopher Slobogin has argued that this pro-prosecution bias is also reflected in the U.S. Supreme Court’s jurisprudence. See generally Christopher Slobogin, *Having it Both Ways: Proof that the U.S. Supreme Court Is “Unfairly” Prosecution-Oriented*, 48 FLA. L. REV. 743 (1996).

125. See, e.g., MacKillop & Vidmar, *supra* note 4, at 958 (“[E]stablished evidentiary doctrines are sometimes compelling incorrect verdicts by presenting the juries with incomplete and inaccurate evidence while expecting them to develop complete and accurate narratives.”).

126. See *id.* at 962-63 (noting the frequency with which erroneous pretrial evidentiary rulings can lead to convictions of defendants who are later proven innocent in postconviction proceedings).

127. *Id.* at 974.

conviction proceedings.¹²⁸ Error-prone, intuitive decision making should not be the norm on such important pretrial evidentiary questions. As Professor Kahneman has argued:

[J]umping to conclusions is efficient if the conclusions are likely to be correct and the costs of an occasional mistake acceptable, and if the jump saves much time and effort. Jumping to conclusions is risky when the situation is unfamiliar, the stakes are high, and there is no time to collect more information.¹²⁹

Pretrial evidentiary rulings exemplify the latter scenario and require more deliberative decision-making procedures.¹³⁰

III. THE NUDGE TOWARD DELIBERATIVE REASONING: APPLYING UNIFORM COMMERCIAL LAW CONCEPTS TO THE CO-CONSPIRATOR EXCEPTION

Although [h]umans are not irrational, they often need help to make more accurate judgments and better decisions, and in some cases policies and institutions can provide that help.¹³¹

In this Part, I argue that overworked criminal judges can apply uniform commercial laws that focus on the liabilities of members of a complex, opaque, profit-motivated organization to co-conspirator hearsay questions. Such application is possible because of the striking resemblance conspiratorial arrangements bear to existing commercial organizations, aside from their illicit aims.¹³² In addition,

128. “[E]videntiary issues at trial are a very common causal factor in wrongful convictions.” *Id.* at 980. Many cases where a convicted defendant was later exonerated “reflect questionable evidentiary rulings that clearly modified the narrative options for juries to consider.” *Id.* at 969.

129. KAHNEMAN, *supra* note 7, at 79.

130. *See id.* at 241 (“It is wrong to blame anyone for failing to forecast accurately in an unpredictable world. However, it seems fair to blame professionals for believing they can succeed in an impossible task. Claims for correct intuitions in an unpredictable situation are self-delusional at best, sometimes worse.”).

131. *Id.* at 411.

132. Applying concepts drawn from uniform commercial laws to co-conspirator exception questions will also ensure that similar organizational structures in the criminal and commercial realms are treated similarly. For an extended discussion of the necessity of treating like cases alike, which elsewhere I have labeled “formal justice,” see Gentithes, *supra* note 26, at 845-47; *see also* Theodore M. Benditt, *The Rule of Precedent*, in PRECEDENT IN LAW

uniform commercial laws are amenable to formal checklists and decision trees, which can be applied to significantly reduce error even on complex cognitive tasks.¹³³ Judges who apply such techniques will stimulate deliberative decision-making in their pretrial evidentiary rulings, which in turn will increase the accuracy of those rulings and check the growth of antidefendant rules of evidence.

A. *Uniform Commercial Laws and Predictability*

Uniform commercial laws have been developed specifically to enhance the predictability of arms-length transactions in the economic sphere. For instance, among the self-defined “underlying purposes and policies” of the UCC is its effort “to simplify, clarify, and modernize the law governing commercial transactions” and “to make uniform the law among the various jurisdictions.”¹³⁴ The RUPA similarly has uniform legal treatment of partnerships at its core. The preface to the RUPA suggests that it is “largely a series of ‘default rules’ that govern the relations among partners in situations they have not addressed in a partnership agreement,”¹³⁵ and it “reflects an attempt to craft default rules that are efficient and

89, 89 (Laurence Goldstein ed., 1987) (“[A] decision maker who has decided a kind of case in accordance with a given principle today logically commits himself to deciding a similar case tomorrow in accordance with that principle.”). Treating relevantly similar commercial and illicit arrangements in the same way is normatively sound simply because that is the fairest treatment possible. See Raleigh Hannah Levine & Russell Pannier, *Comparative and Noncomparative Justice: Some Guidelines for Constitutional Adjudication*, 14 WM. & MARY BILL RTS. J. 141, 147 (2005) (citing JOEL FEINBERG, *SOCIAL PHILOSOPHY* 100 (1973)).

133. See, e.g., GAWANDE, *supra* note 18, at 154 (citing successful error reduction after introduction of safety checklists in various hospitals, including the use of one surgical safety checklist used in eight worldwide hospitals to reduce major complications by 36 percent and deaths by 47 percent).

134. U.C.C. § 1-103 (AM. LAW INST. & UNIF. LAW COMM’N 1997); see also A. Brooke Overby, *Check Fraud in the Courts After the Revisions to U.C.C. Articles 3 and 4*, 57 ALA. L. REV. 351, 355 (2005) (Recent revisions to the U.C.C. “sought both to make uniform areas of the law that had been subject to different interpretations by ... state courts, and to update the U.C.C. to address new technology, changes in banking practices, federal preemption issues, and newer forms of payment devices which had been inadequately accommodated by the original versions of Articles 3 and 4.”). Even where it falls short of that goal, predictability is plainly at the heart of the project that the drafters of the code hoped to achieve.

135. See REVISED UNIF. P’SHIP ACT, Preface (UNIF. LAW COMM’N 1997). That “[t]he primary focus of RUPA is the small, often informal partnership” counsels in favor of applying it to necessarily informal illicit organizations. *Id.*

fair.”¹³⁶ Those default rules have been adopted by nearly all the states.¹³⁷ Criminal lawyers and judges alike have much to gain from appropriating such predictability when applying the co-conspirator exception to the hearsay rule.

Many tenets of uniform commercial laws were generated to delineate when the various members of an organization are liable to third parties for that organization’s actions. As an example, the RUPA made changes to the existing law regarding a partner’s power to act as an agent of the entity in an effort to “enhance[] the protection of persons dealing with a partnership unfamiliar to them.”¹³⁸ The RUPA thus codified the English rule that a partner has the authority to bind the partnership as a whole when he engages in “business of the kind carried on by the partnership.”¹³⁹ The RUPA also protects third parties when a partnership agrees to limit one partner’s actual authority to carry on ordinary partnership business. That partner can still bind the partnership in transactions with third parties who did not “kn[ow] or ... receive[] a notification” of the lack of authority.¹⁴⁰

Another aim of the RUPA was to correct partnership law’s prior assumption that the partnership as a whole terminates each time a partner leaves, and if the remaining members wish to perpetuate it, then they must renew all of its old contracts and receive the old partnership’s property in a legal transfer.¹⁴¹ The RUPA established

136. Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters’ Overview*, 49 BUS. LAW. 1, 2 (1993).

137. Such consistent legal rules are a primary driver of a nation’s economic success; “rule-of-law indicators are highly predictive of per capita GDP, irrespective of other factors or the overall level of economic freedom.” Edwin J. Feulner, *The Rule of Law*, in 2013 INDEX OF ECONOMIC FREEDOM 35, 35 (2013). “[The] rule of law, by empowering individuals within a stable and predictable environment, is [a] reliable factor in promoting development.” *Id.* at 36.

138. Weidner & Larson, *supra* note 136, at 31 (discussing R.U.P.A. § 301(1)).

139. REVISED UNIF. P’SHP ACT § 301(1).

140. *Id.*

141. As the reporters for the RUPA have noted, the Uniform Partnership Act (U.P.A.) assumption “suggests that the partnership business is coming to a close when all that may be coming to a close is one partner’s participation.” Weidner & Larson, *supra* note 136, at 5; see also Arnold M. Wensinger, Note, *The Revised Uniform Partnership Act Breakup Provisions: Stability or Headache?*, 50 WASH. & LEE L. REV. 905, 918 (1993) (noting that under the U.P.A., “[a]ll authority of any partner to act for the partnership and therefore to bind the other partners ceases upon dissolution of the partnership, except to the extent necessary to wind up the partnership affairs”).

that a partnership does not dissolve each time a partner leaves, but only upon certain specified events.¹⁴² Criminal defense attorneys have similarly argued that the departure of one member of a conspiracy leads *ipso facto* to its complete termination.¹⁴³ But just as the RUPA suggests that the circumstances of a partner's exit, not the mere fact of the exit itself, determines whether the partnership dissolves or carries on with new membership,¹⁴⁴ the circumstances of a co-conspirator's exit should control whether the remaining conspiracy can still create legal liability for the departed and remaining members. The exit itself is not determinative, as some courts have recognized.¹⁴⁵

The RUPA also curbs remaining partners' abilities to render a departing partner personally liable for partnership transactions. Under that regime, a departing partner is liable for partnership obligations to third parties who "reasonably believed that the dissociated partner was ... a partner" at the time of the transaction and "did not have notice of the partner's dissociation," which will be assumed ninety days after the partnership files a statement of dissociation.¹⁴⁶ Furthermore, under the RUPA, third parties who believe the dissociated partner is still a partner and extend credit on that misunderstanding can hold that dissociating partner liable.¹⁴⁷ The RUPA thus "sheds light on the continuing liability of

142. REVISED UNIF. P'SHIP ACT § 801. The RUPA established two tracks for the departure of a partner, one which leads to the winding up of the partnership as a whole and another which leads to a buyout of the departing partner while the remaining partners continue to conduct business. *See generally id.* art. 6-8; Weidner & Larson, *supra* note 136, at 6-8.

143. *See United States v. Maliszewski*, 161 F.3d 992, 1007-08 (6th Cir. 1998).

144. *See* REVISED UNIF. P'SHIP ACT § 801.

145. As discussed earlier, the Sixth Circuit has recognized this general principle in holding that a co-conspirator's statements made after the exclusion of a third member of a conspiracy may still be admissible against the defendant. *See Maliszewski*, 161 F.3d at 1008 ("[T]here is no rule that says if some members of a conspiracy talk about getting rid of another member, that conversation is not in furtherance of the first conspiracy, but is instead directed at an entirely new conspiracy."). Though the court did not directly cite the RUPA in support, its logic follows from a reading of that uniform law.

146. REVISED UNIF. P'SHIP ACT §§ 702(a), 704(c); *see also* Weidner & Larson, *supra* note 136, at 15. The RUPA's rule also works in reverse, limiting the departing partner's ability to obligate his former partners to the same class of transactions entered into with third parties who reasonably believed that the dissociated partner was then a partner and did not have notice of the partner's dissociation. REVISED UNIF. P'SHIP ACT § 702(a).

147. Wensinger, *supra* note 141, at 930 (discussing REVISED UNIF. P'SHIP ACT § 703(b)). Thus, where the third party extends credit to the partnership while relying upon the newly dissociated partner's credit history, they may hold that dissociated partner liable. *Id.*

partners after a ... dissolution or beginning of a winding up and termination.”¹⁴⁸

The UCC’s drafters were similarly focused on resolving “issues of responsibility and liability,” specifically in light of the complexity of the modern banking system and the technologies banks commonly employ.¹⁴⁹ In some instances, this focus even led to defining the proper plaintiffs and defendants in actions under the Code,¹⁵⁰ which is crucial because “[t]he allocation of losses between the ... parties is accomplished through application of a series of UCC causes of action and defenses.”¹⁵¹

148. *Id.* at 931 (discussing REVISED UNIF. P’SHIP ACT § 803). As I discuss more in Part IV below, applying the RUPA’s policy regarding postdissociation liability to conspiracies would likewise ensure that a dissociated conspirator can only create criminal liability for the remaining conspirators, and likewise can only be criminally liable for the remaining conspirators’ actions, where it is reasonable to believe that a new transaction occurred while the full conspiracy was ongoing, without direct evidence of one co-conspirator’s exit. This serves as a limitation on unfettered criminal liability and a useful heuristic for trial courts to establish when co-conspirator statements can be admitted as proof of criminal liability amidst shifts in a conspiracy’s membership.

149. Richard J. Scislowksi, Comment, *The U.C.C. Section 4-205(2) Payment/Deposit Warranty: Allow a Drawer to Hold a Depository Bank Liable For Collecting an Item With a Forged Indorsement*, 28 AKRON L. REV. 573, 574 (1995) (citing Revised Article 3, Prefatory Note, Purpose of the Drafting Effort, ¶ 2); see also James Stuart Bailey, *Allocation of Loss for Forged Checks under Articles 3 and 4 of the U.C.C. and the Proposed Revisions Thereto*, 22 PAC. L.J. 1263, 1266 (1991) (“The Uniform Commercial Code ... allocates the risk of loss for forged checks in Articles 3 and 4.”); Overby, *supra* note 134, at 352 (noting that revisions to the code “allocat[e] losses for check fraud” and “expand the number of defenses that banks potentially can raise in attempting to shift losses to another party”).

150. See Overby, *supra* note 134, at 367 (“A goal of the revisions was to streamline the litigation that inevitably follows in the wake of check fraud. Therefore, the section addressing conversion attempts to resolve a significant amount of litigation that occurred under the original U.C.C. regarding which parties are properly the defendants in a conversion action and which parties are properly the plaintiffs.”). For more on the proper plaintiffs to a conversion action under the revisions, see Wayne K. Lewis & Michael Gentithes, *Hey, But It’s My Money! Ownership and the Enforcement of Conversion Liability Under U.C.C. § 3-420*, 33 REV. BANKING & FIN. L. 191 (2013).

151. Overby, *supra* note 134, at 358.

[L]osses under the U.C.C. were and are placed, in the usual case, upon one of the banks involved in the collection process. In the case of forged drawer’s signatures, the loss is placed on the payor bank (the bank that paid the check and the bank where the drawer opened the checking account). In the case of forged indorsements and alterations, the loss is placed on the first party who dealt with the thief.

Id. (footnotes omitted); see also Nan S. Ellis & Steven B. Dow, *Banks and Their Customers Under the Revisions to Uniform Commercial Code Articles 3 and 4: Allocation of Losses Resulting from Forged Drawers’ Signatures*, 25 LOY. L.A. L. REV. 57, 58-59 (1991).

For example, warranty provisions introduced in Article 4 of the UCC seek to “place the loss on the person who could best have prevented the loss” in the event of a forged indorsement on a check.¹⁵² These provisions, in part, allocate losses between banks and their customers for checks with forged drawer signatures, as well as between banks where the payor bank recredits its customer’s account.¹⁵³ Similarly, section 3-405 of the UCC allocates losses from fraudulent indorsements made by an employee between the drawer/employer, the drawee bank, and the depository bank, generally adopting “the principle that the risk of loss for fraudulent indorsements by employees who are entrusted with responsibility with respect to checks should fall on the employer rather than the bank that takes the check or pays it.”¹⁵⁴ Because allocating such loss is critically important to the smooth functioning of our commercial banking system,¹⁵⁵ the drafters of the UCC created rules on the topic that are clear and easy to apply.¹⁵⁶

Uniform commercial laws determine the liability that members of a complex, profit-motivated organization will bear for agreements made with third parties. If there are enough objective similarities

152. Scislowski, *supra* note 149, at 606 (collecting cases); Overby, *supra* note 134, at 361 (describing how the Code generally places losses for forged drawer’s signatures initially on the payor bank and for forged indorsements or alterations on the first party to take the instrument after the theft).

153. Ellis & Dow, *supra* note 151, at 58-59. Ellis and Dow go on to argue in favor of a two-tiered liability allocation system, depending upon the amount of the check at issue. *Id.* at 75-77.

154. U.C.C. § 3-405 official cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N 2017) (“Section 3-405 is based on the belief that the employer is in a far better position to avoid the loss by care in choosing employees, in supervising them, and in adopting other measures to prevent forged indorsements on instruments payable to the employer or fraud in the issuance of instruments in the name of the employer.”).

155. See Scott D. Benner, *Commercial Law: Loss Allocation Under U.C.C. Article 4A*, 1 ANN. SURV. AM. L. 239, 239 (1990) (“In modern society, the swift and certain transfer of payments is a vital grease to the wheels of commerce.”); Overby, *supra* note 134, at 356 (“A key issue in devising a regulatory scheme for the [check payment] system is to establish a legal structure for allocating those losses.”); see also Benjamin Geva, *Forged Check Indorsement Losses Under the UCC: The Role of Policy in the Emergence of Law Merchant From Common Law*, 45 WAYNE L. REV. 1733, 1751-52 (2000) (explaining the commercial banking principles that different loss allocation systems promote and favor).

156. See, e.g., Benner, *supra* note 155, at 241 (describing how the drafters of Article 4A of the UCC responded to inadequacies in the existing law to define liabilities arising from electronic funds transfers); Overby, *supra* note 134, at 398 (“The revisions [to the UCC] do evidence an attempt to establish a comprehensive allocation scheme for check fraud losses.”).

between licit and illicit profit-motivated organizations,¹⁵⁷ then the principles of uniform commercial laws can usefully be applied to conspiracies to determine which statements by co-conspirators create binding relationships on behalf of the conspiracy and thereby create criminal liability for the defendant conspirator, which would in turn render the statements admissible at his trial.¹⁵⁸

B. Uniform Commercial Laws' Applicability to Illicit and Licit Profit-Motivated Organizations

Illicit and licit sale and distribution arrangements are similar enough to justify their similar treatment. Thieves may not be honorable, but they are rational. They have the same motivations to enter into a conspiratorial agreement that similarly rational actors in the business world have to enter into a contract. Conspirators and businessmen both seek profits for the benefit of all involved in the enterprise. The agreements may even concern identical goods that were simply acquired through different means.¹⁵⁹ A sale of goods is a sale of goods, whether it occurs in the sunshine of commerce or the shadows of conspiracy.¹⁶⁰ The law should analyze them identically as a matter of formal justice.¹⁶¹

As discussed in Part I, one of the primary justifications for the co-conspirator exception is the belief that a defendant should be held accountable for his co-conspirators' statements in the same way a principal is accountable for his agent's statements.¹⁶² That justifica-

157. In other circumstances, Christopher Peters has argued that the principle of treating like parties alike is somewhat tautological; in fact, it is equivalent to stating that "[p]eople identically entitled to the relevant treatment are entitled to be treated identically"—that is, are identically entitled to that treatment." Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2059 (1996). Though I do not subscribe to that tautology thesis, it does highlight an important problem for the "formal justice" ethos: when are "like" cases similar enough to justify "alike" treatment? "Other principles are required to determine what features of a case are the relevant ones for determining how the parties are to be treated, and thus in determining what the relevant similarities and dissimilarities are." Benditt, *supra* note 132, at 90.

158. See *infra* Part IV (discussing specific examples where commercial codes provide ready answers to co-conspirator evidentiary questions).

159. See *United States v. Falcone*, 311 U.S. 205, 206-07, 210-11 (1940).

160. See *id.*

161. See *Gentithes*, *supra* note 26, at 845-47.

162. See *supra* Part I.

tion is based on a close analogy between commercial and conspiratorial arrangements.¹⁶³ Some have argued against the exception as a whole on the grounds that a conspiracy's members "lack the power to control or authorize other members' actions."¹⁶⁴ But that objection wrongly assumes that disorganization prevails in conspiratorial arrangements.¹⁶⁵ The sophistication of those organizations should not be discounted.¹⁶⁶ Co-conspirators are capable of managing complex transactions, assigning members specific tasks, and giving some members authority to speak for the group in specific contexts.¹⁶⁷ Drug conspiracies often have roles for suppliers, distributors, retail salesmen, and other analogues to corporate actors.¹⁶⁸ The sophistication of such conspiracies counsels in favor of their similar treatment to licit business arrangements.¹⁶⁹

Illegality of the subject matter of an agreement is not a distinction that requires distinct treatment. Consider a supply chain where an early party acquired a key component of a finished good either in violation of a contractual agreement or by exceeding some government permission.¹⁷⁰ Those who later sell and distribute the finished good would still expect the UCC to apply to their transactions, even though the goods exchanged in those transactions are, in a sense, illegal.¹⁷¹ When the goods that start a conspiratorial sales arrangement are stolen or obtained without government approval, the transactions the conspiracy then undertakes can also be analyzed fruitfully under the UCC.¹⁷² Principles of uniform commercial law apply in the same manner to identical arrangements for the sale

163. See *supra* notes 40-42 and accompanying text.

164. See Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 714, 755 (1965).

165. See *id.*

166. See, e.g., *United States v. Brandon*, 17 F.3d 409, 419-21 (5th Cir. 1994) (analyzing a complex financial conspiracy).

167. See, e.g., *id.*

168. See, e.g., *United States v. Davis*, 67 F. App'x 771, 774 (4th Cir. 2003).

169. See *Gentithes*, *supra* note 26, at 848-49.

170. See, e.g., *Env'tl. Servs., Inc. v. Recycle Green Servs., Inc.*, 7 F. Supp. 3d 260, 268-69 (E.D.N.Y. 2014).

171. See U.C.C. § 2-102 (AM. LAW. INST. & UNIF. LAW COMM'N 2017) (defining the applicability of the UCC to all transactions in goods); *id.* § 2-105(1) (defining the term "goods").

172. See *id.* § 2-102.

and distribution of magnets, milk, and machinery.¹⁷³ Criminal courts can also fruitfully apply those principles to relevantly similar arrangements for the sale and distribution of methamphetamine or mescaline.¹⁷⁴

Treating identical arrangements for the sale and distribution of licit and illicit goods alike also preserves the Dworkinian “integrity” of our commercial jurisprudence, with possible gains for that field of law.¹⁷⁵ As Ronald Dworkin argued, the law at its best seeks integrity by forcing us to extend our legal rules into new areas and to use those new cases to reevaluate the propriety of those rules in their original contexts.¹⁷⁶ This is part of the common-law process through which provisional legal rules “work[themselves] pure” over time.¹⁷⁷ For Dworkin, such internal consistency amongst our norms is one of the ultimate aims of the law.¹⁷⁸

Dworkin’s views suggest that applying uniform commercial laws to conspiratorial arrangements could revitalize the original body of commercial law and simplify the decision-making process for over-worked criminal judges.¹⁷⁹ Conspirators may be more comfortable with organizational forms that include loosely aligned actors who participate in the conspiracy at different levels of involvement at different times, depending upon the needs of the overall organization. Because the conspiracy will often be in flux as members face prosecution or worse, such fluidity is a practical necessity for illicit organizations. That necessity may lead to the invention of organizational structures useful to licit enterprises.¹⁸⁰ Businesses in a global economy are increasingly characterized by dynamic, complex supply chains and therefore face similar challenges caused by the pace of

173. *Cf. id.*

174. This Article’s focus is the co-conspirator exception to the hearsay rule, not conspiracy law in general.

175. *Cf. DWORKIN, supra note 26, at 188.*

176. *See id.* at 89-90; *see also* Gentithes, *supra note 26, at 848-49* (discussing Dworkin’s theory of integrity).

177. DWORKIN, *supra note 26, at 400.*

178. *See* RONALD DWORKIN, JUSTICE IN ROBES 13 (2006); *see also* DWORKIN, *supra note 26, at 188* (“[A] political society that accepts integrity as a political virtue thereby becomes a special form of community, special in a way that promotes its moral authority to assume and deploy a monopoly of coercive force.”).

179. *See* DWORKIN, *supra note 26, at 89-90.*

180. *See* EAMONN KELLY & KELLY MARCHESE, *Supply Chains and Value Webs, in* BUSINESS ECOSYSTEMS COME OF AGE 55, 55 (2015).

change in those supply chains.¹⁸¹ Commercial jurisprudence thus stands to gain from a free exchange of ideas with conspiracy jurisprudence.

C. How Uniform Commercial Laws Engage Judges' Deliberative Faculties

Busy criminal judges face inherently difficult pretrial rulings on evidentiary issues, such as the co-conspirator exception to hearsay, and receive little guidance or feedback on these problems from higher courts.¹⁸² Those judges must find ways to engage their deliberative cognitive processes to reduce error without sacrificing speed.¹⁸³ Fortunately, uniform commercial laws offer a useful rubric by which judges can deliberatively answer co-conspirator exception issues with both accuracy and speed.

As any law student who hazards a study of commercial paper or partnership law well knows, these subjects are amenable to checklists from which correct answers can be quickly derived. Commercial outlines that graphically map the factors at play allow students to arrive at answers in these fields under the time pressure of final exams.¹⁸⁴ Students find such checklists helpful because they remind them of information they already learned and trigger deliberative, System 2 cognitive processes to resolve exam problems.¹⁸⁵ In his book on the value of checklists to reduce error in medicine, Dr. Atul Gawande extols their ability to counter the “fallibility of human memory and attention” by “remind[ing] us of the minimum necessary steps and mak[ing] them explicit.”¹⁸⁶ In complex conditions,

181. *See id.*

182. *See supra* notes 109-11, 116-18 and accompanying text.

183. *See* Guthrie et al., *supra* note 9, at 33 (“[J]udges should use deliberation as a verification mechanism especially in those cases where intuition is apt to be unreliable either because feedback is absent or because judges face cues likely to induce misleading reliance on heuristics.”); *see also* KAHNEMAN, *supra* note 7, at 417 (“The way to block errors that originate in System 1 is simple in principle: recognize the signs that you are in a cognitive minefield, slow down, and ask for reinforcement from System 2.”).

184. *See, e.g.*, RICHARD J. CONVISER, AGENCY, PARTNERSHIP, AND LIMITED LIABILITY COMPANIES 30 (7th ed. 2014); DOUGLAS J. WHALEY, COMMERCIAL PAPER & PAYMENT LAW 30 (17th ed. 2013).

185. *Cf.* GAWANDE, *supra* note 18, at 120-21.

186. *Id.* at 36.

checklists can aid judgment without eliminating it.¹⁸⁷ Checklists trigger the deliberative faculties by prompting users to conduct more complex steps, enforcing discipline upon the user but leaving room for independent thought.¹⁸⁸

If judges rely on similar checklists and decision trees to resolve co-conspirator hearsay issues, then they will engage their deliberative processes and rely less on intuition while still generating timely decisions. Deliberative decisions apply learned rules to new scenarios.¹⁸⁹ Systematic, rule-based thinking tends to engage deliberative processes, which can override faulty intuitive judgments.¹⁹⁰ For example, in one decision-making study, judges showed greater resistance to hindsight bias when given a problem that concerned probable cause under the Fourth Amendment than they did in other scenarios.¹⁹¹ The authors hypothesized that “[t]he highly intricate, rule-bound nature of Fourth Amendment jurisprudence that guides probable cause determinations might have facilitated the deliberative ... approach.”¹⁹² Because Fourth Amendment problems are typically intricate and require judges to consider a number of factors in turn before reaching a resolution, judges place less reliance upon intuition that “might be inconsistent with the governing law” when resolving such questions.¹⁹³

In important ways, uniform commercial laws are analogously intricate. The analysis of both probable cause jurisprudence and

187. *See id.* at 79 (“[U]nder conditions of complexity, not only are checklists a help, they are required for success. There must always be room for judgment, but judgment aided—and even enhanced—by procedure.”).

188. *See id.* at 120 (“Good checklists ... are precise. They are efficient, to the point, and easy to use even in the most difficult situations. They do not try to spell out everything—a checklist cannot fly a plane. Instead, they provide reminders of only the most critical and important steps—the ones that even the highly skilled professionals using them could miss.... They can help experts remember how to manage a complex process or configure a complex machine.”).

189. *See Guthrie et al., supra* note 9, at 7 (citing Frederick, *supra* note 79, at 26).

190. *See id.* at 8-9. “Multifactor tests can help ensure that judges consider all relevant factors and can remind them of their responsibility to base decisions on more than mere intuition.” *Id.* at 41.

191. *See id.* at 26-27.

192. *See id.* at 27. The results of this study contrasted with another in which judges were asked to assess the likely outcome of a case on appeal. *See id.* at 24-25. Judges who were informed in advance of how the case was actually resolved by an appellate court showed significant hindsight bias in their evaluation of the likelihood of that particular result. *See id.* at 25-26.

193. *Id.* at 27.

uniform commercial laws requires consideration of a series of factors in succession to reach the proper result.¹⁹⁴ Both are readily distilled into formal checklists to guide the user to an answer in light of the checklist factors.¹⁹⁵ Such checklists can “provide reminders of only the most critical and important steps,” allowing even “experts,” such as judges, to “remember how to manage a complex process”—such as applying the co-conspirator exception to the hearsay rule.¹⁹⁶ The checklists that a study of uniform commercial laws generates are guides for action that judges can consult as evidentiary questions arise,¹⁹⁷ much like a chef can consult a recipe.¹⁹⁸ By referring judges to relevant analogies between commercial arrangements and conspiratorial ones, these rubrics can trigger judges’ deliberative faculties, as is appropriate in an area “where intuition is apt to be unreliable either because feedback is absent or because judges face cues likely to induce misleading reliance on heuristics.”¹⁹⁹

Tests borrowed from uniform commercial laws will also allow criminal judges to increase their accuracy in rulings on the co-conspirator exception, rather than creating inconsistencies that tend to disfavor defendants.²⁰⁰ The sort of “multifactor tests” that uniform commercial laws generate “can help ensure that judges consider all relevant factors and can remind them of their responsibility to base decisions on more than mere intuition.”²⁰¹ Experiments with reminder systems designed to engage doctors’ deliberative processes before they make a diagnosis have had remarkable success, reducing unsafe diagnostic workups by more than 10 percent.²⁰² Similarly, in a study requiring eight hospitals around the world to utilize a

194. See, e.g., PAUL MARCUS & MELANIE D. WILSON, *CRIMINAL PROCEDURE* 30 (19th ed. 2016); WHALEY, *supra* note 184, at 30.

195. See, e.g., CONVISER, *supra* note 184, at 12; MARCUS & WILSON, *supra* note 194, at 42; WHALEY, *supra* note 184, at 24, 30.

196. GAWANDE, *supra* note 18, at 120.

197. See, e.g., CONVISER, *supra* note 184, at 12.

198. See GAWANDE, *supra* note 18, at 123. Gawande, borrowing his terminology from the aviation industry, refers to this as a “READ-DO checklist.” *Id.*

199. Guthrie et al., *supra* note 9, at 33.

200. See *supra* note 104 and accompanying text.

201. Guthrie et al., *supra* note 9, at 41.

202. See generally Ramnarayan et al., *Diagnostic Omission Errors in Acute Paediatric Practice: Impact of a Reminder System on Decision-Making*, 6 *BMC MED. INFORMATICS & DECISION MAKING* 37 (2006) (reporting that physician use of such a reminder system reduced unsafe diagnostic workups from 45.2 percent to 32.7 percent).

carefully designed surgical safety checklist, “the rate of major complications for surgical patients in all eight hospitals fell by 36 percent after introduction of the checklist. Deaths fell 47 percent.”²⁰³ Uniform commercial laws can similarly engage the deliberative processes of criminal judges²⁰⁴ and are thus promising candidates to reduce error on pretrial evidentiary issues prone to flawed intuitive thinking.

The substance of uniform commercial laws also makes them a promising candidate to reduce error in pretrial evidentiary rulings on the co-conspirator exception. Uniform commercial laws are designed to give consistent, rule-based answers across jurisdictions and courts.²⁰⁵ They establish a clear set of rules to determine the liability that members of a complex, opaque, profit-motivated organization will bear for agreements made with third parties.²⁰⁶ They can be applied in the criminal context to ensure that the proper parties in an amorphous, opaque, profit-driven conspiracy are criminally liable for the illicit activities the conspiracy undertakes.²⁰⁷ As I discuss in several specific examples below, uniform commercial laws can accurately determine when a defendant conspirator is liable for the statements of his co-conspirators.²⁰⁸

Applying commercial law to the co-conspirator exception to the hearsay rule also fits with the efficiency justification for the FRE’s categorical hearsay regime.²⁰⁹ That regime is premised on a general exclusion of hearsay with specific categorical exceptions.²¹⁰ Scholars and the original drafters of the FRE have long argued the merits of

203. GAWANDE, *supra* note 18, at 154 (“The results had far outstripped what we’d dared to hope for, and all were statistically highly significant. Infections fell by almost half. The number of patients having to return to the operating room after their original operations because of bleeding or other technical problems fell by one-fourth. Overall, in this group of nearly 4,000 patients, 435 would have been expected to develop serious complications based on our earlier observation data. But instead just 277 did. Using the checklist had spared more than 150 people from harm—and 27 of them from death.”).

204. *See, e.g.*, U.C.C. § 2-209 (AM. LAW INST. & UNIF. LAW COMM’N 2017) (listing the requirements for contract modification in a manner that promotes deliberative thinking).

205. *See id.* § 1-103(a).

206. *Cf. id.*

207. *See infra* Part IV (providing examples of how to apply commercial codes to conspiracy issues).

208. *See infra* Part IV (discussing specific examples where commercial codes provide ready answers to co-conspirator evidentiary questions).

209. *See* Richter, *supra* note 2, at 1867, 1882-83, 1904.

210. *See id.* at 1867, 1874.

a categorical approach over one granting judges more downstream discretion to resolve hearsay questions as they arise.²¹¹

This debate, which faded in the decades after the adoption of the FRE,²¹² is raging again today. Critics such as Richard Posner have called for the abolition of the categorical approach to hearsay, noting that the categories the FRE excepts from the general ban on hearsay are based on long-standing “folk psychology” with little scientific justification.²¹³ Better, Posner argues, to allow trial courts to make case-by-case determinations on the reliability of out-of-court statements than to rely upon idiosyncratic categories based upon unverified “judicial habit.”²¹⁴

But a powerful response, such as that proposed by Liesa L. Richter, is based upon the inefficiency of such a discretionary hearsay regime. Richter argues that “[t]he case-by-case hearsay model suggested [by Posner] undoubtedly would result in an increased expenditure of judicial and litigant resources to ascertain the admissibility of key hearsay evidence and the corresponding value of a case.”²¹⁵ Civil litigants would have difficulty evaluating the value of cases under such a regime and making efficient strategic choices, while “[o]n the criminal side, such a regime may result in fewer plea bargains with defendants and prosecutors overestimating the strength of a case.”²¹⁶ In both contexts, “trial judges likely would face increased motions in limine to gauge the admissibility of hearsay pretrial and would need to resort to time-consuming, case-specific reliability analysis to admit hearsay rather than relying upon accepted categorical hearsay exceptions.”²¹⁷ In contrast, the

211. *See, e.g., id.* at 1870-74 (detailing the debate between FRE drafters Dean John Henry Wigmore, who favored a series of highly specific categorical rules that would restrict judicial discretion, and Professor Edmund M. Morgan, who favored more generalized evidence standards the judge could employ flexibly on a case-by-case basis).

212. For more on the longstanding critiques of the FRE’s categorical approach, see *id.* at 1874-76.

213. *See United States v. Boyce*, 742 F.3d 792, 799-801 (7th Cir. 2014) (Posner, J., concurring).

214. *Id.* at 802. Specifically, Posner has proposed allowing the residual hearsay exception to swallow the categorical exemptions, allowing courts discretion to admit hearsay they find reliable and likely to enhance the correct outcome, provided the jury can understand the hearsay’s limitations. *Id.*

215. Richter, *supra* note 2, at 1882.

216. *Id.* at 1883.

217. *Id.* (citing Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 338

Federal Rules' categorical approach to hearsay makes advance judgments about admissibility easier and more predictable for litigants.²¹⁸

By applying uniform commercial law principles to the co-conspirator exception, judges can ensure an accurate allocation of criminal liability and induce deliberative, rather than intuitive, rulings, thereby addressing the concerns of critics such as Posner who accuse the categorical hearsay regime of relying upon psychological assumptions lacking scientific or analytical support.²¹⁹ At the same time, judges who apply uniform commercial law principles will use formalized decision-making techniques to ensure that answers can still be reached with enough speed to avoid halting the criminal justice system, as might occur with a purely case-by-case hearsay regime.²²⁰ The "judicial resources" expended when making pretrial evidentiary rulings will be minimized given the thoroughly developed body of uniform commercial laws.²²¹ To foster consistency and avoid bringing criminal dockets to a standstill, criminal judges should utilize commercial law principles to resolve co-conspirator hearsay questions.

(1961) (acknowledging the increased burden that a discretionary hearsay regime would place upon trial judges)).

The loss of specific hearsay exceptions would decrease the information litigants have available to value cases and predict trial outcomes. Such a decrease in *ex ante* information would require parties to expend already scarce litigation resources to ascertain the value of a particular case and the likelihood of success at trial. Likewise, trial judges would be forced to expend additional judicial resources ruling on pretrial motions seeking information about the likely admissibility of hearsay statements.

Id. at 1893-94.

218. *Id.* at 1884. Richter also highlights the likelihood that a case-by-case approach to hearsay would lead to inconsistent trial court rulings unlikely to be overturned and molded into a uniform rule of law in the appellate courts. *Id.* at 1886-91. Furthermore, "[w]ith an active scholarly community engaged in debate concerning the specific categorical hearsay exceptions, irrational foundations and inadequate requirements underlying those exceptions are certain to be identified" and can become revisions to the FRE regime. *Id.* at 1900.

219. *See United States v. Boyce*, 742 F.3d 792, 799-801 (7th Cir. 2014) (Posner, J., concurring).

220. *See Richter*, *supra* note 2, at 1882-83.

221. *See id.* at 1893-94.

IV. COMMERCIAL LAW RESOLUTIONS TO COMMON CO-CONSPIRATOR EXCEPTION PROBLEMS

The case of Andy, Brian, and Devin discussed in the Introduction illuminates the utility of uniform commercial laws for courts analyzing the co-conspirator exception to hearsay. Based on that example, I consider a variety of potential co-conspirator exception issues below. These examples show how criminal judges should approach these questions.

A. Concealing a Dissolved Conspiracy

What if the prosecution seeks to introduce statements made after a conspiracy has achieved its primary objective but while the co-conspirators remain intent on concealing the conspiracy's past existence?²²² Returning to the hypothetical discussed in the Introduction, suppose that the prosecution decides it lacks sufficient evidence to prosecute Devin in light of Andy and Brian's claims that Devin was not involved in the drug ring. However, years later Andy is recorded instructing a friend visiting him in prison to break into informant Isaac's home and destroy his ledgers, which tracked the crooked cops' activities. Andy tells his friend that the cover-up is necessary "so internal affairs can't nose around and find out that Devin was involved." Are Andy's conversations admissible if the prosecutor later brings a case against Devin?

The dissolved criminal enterprise in this scenario is akin to a partnership in dissolution. The stakeholders in that illicit organization have ceased their economic activity going forward, just as the partners of an above-board enterprise might.²²³ Thus, an examination of the legal status of transactions undertaken during the dissolution process will yield salient answers for criminal courts.

In the normal course of partnership dissolution, "a partner who has not wrongfully dissociated may participate in winding up the

222. As discussed earlier, this is a topic upon which criminal judges have often reached conflicting conclusions. *See supra* Part II.C.

223. *See* REVISED UNIF. P'SHIP ACT § 801(2)(ii) (UNIF. LAW COMM'N 1997) (noting that the express will of all the partners can trigger the winding up of its business).

partnership's business."²²⁴ However, that partner may undertake only a limited number of activities that will still bind the partnership as a whole. The act of a partner during winding up will only bind the partnership if it was "appropriate for winding up the partnership business" or if it "would have bound the partnership ... before dissolution, if the other party to the transaction did not have notice of the dissolution."²²⁵ In all other situations in which the partnership is not bound, "the faithless partner who purports to act for the partnership after dissolution may be liable individually to an innocent third party under the law of agency."²²⁶

By analogy, where a co-conspirator continues to transact business on behalf of an illicit enterprise that has already achieved its aims and subsequently dissolved, he may still be acting "in furtherance of" that conspiracy if his actions are appropriate to the winding up of the enterprise.²²⁷ That is, if Andy was simply telling a friend shortly after his arrest to sell additional inventory that all three crooked cops acquired together before dissolving their conspiracy, then his conversation would still further the conspiracy and would be admissible in a later trial against Devin. However, Andy's instructions to his friend occurred well after he and the others dissolved their drug ring. Andy furthered an effort at concealment to which the others never agreed. Andy's actions would not be appropriate to winding up that drug conspiracy, and under the RUPA would not have bound that enterprise while it was a going concern.²²⁸ Andy's actions are similar to those of a partner who continues to transact new business for a partnership well after

224. *Id.* § 803(a). The RUPA "supposedly balance[d] this loss of control by limiting liability to third parties" as described earlier under section 703(b). Wensing, *supra* note 141, at 931-32.

Similarly, in the corporate context certain parties are empowered to continue acting on the corporation's behalf as it winds up its affairs. For instance, those parties are designated in a certificate of dissolution under Delaware's General Corporation Law. DEL. CODE. ANN. tit. 8, § 275(d) (2017).

225. REVISED UNIF. P'SHIP ACT § 804.

226. *Id.* § 804 cmt.

227. *See* FED. R. EVID. 801(d)(2)(E).

228. *See* REVISED UNIF. P'SHIP ACT § 804(1).

dissolution has been triggered.²²⁹ Andy has created liabilities only for Andy personally.²³⁰

It is worth noting, however, that Devin could ratify Andy's actions and thus render Andy's later conversations admissible. As discussed in more detail in the example below, under the UCC, the parties can act to "ratify" what was originally an unauthorized signature on an instrument.²³¹ The same may be true when a partner transacts new business on behalf of a dissolving partnership and his transactions

229. See *id.* § 804 cmt.; see also, e.g., *Insulation Corp. of Am. v. Berkowitz*, 644 A.2d 128, 132-33 (N.J. Super. Ct. App. Div. 1994) (holding the signing of an insulation-installation agreement by one partner, following dissolution of real estate development partnership, was not appropriate for winding up partnership and did not bind other partners). Such actions are also similar to those of a corporate officer who continues the normal course of a corporation's business even during the postdissolution winding-up process. See, e.g., *Moore v. Occupational Safety & Health Review Comm'n*, 591 F.2d 991, 994-95 (4th Cir. 1979) (finding a majority of jurisdictions "have construed their statutes of dissolution as imposing personal responsibility on the directors for any liabilities, whether in contract or in tort, incurred in the continued operations of the dissolved corporation's business after forfeiture of its charter. This construction accords with what was the rule at common law."); *Long Oil Heat, Inc. v. Polsinelli*, 11 N.Y.S.3d 277, 278 (App. Div. 2015) ("[A] person who purports to act on behalf of a dissolved corporation is personally responsible for the obligations incurred." (citation omitted)); *Chatman v. Day*, 455 N.E.2d 672, 674 (Ohio Ct. App. 1982) ("[W]hen the articles of a corporation are canceled, whether by the Secretary of State or otherwise, the authority of the corporation to do business ceases and after such termination officers who carry on new business do so as individuals, lose the protection of the Corporation Act, and are personally responsible for such obligations as they incur.").

230. The same result would hold if there were evidence that on a certain date the co-conspirators mutually agreed to end their criminal enterprise, yet the government seeks to introduce later statements made by one of the co-conspirators. For instance, suppose that in a recorded meeting with Isaac, Andy, Brian and Devin all say this will be their last illicit transaction. They announce plans to go straight and compete for promotions in the Anytown force after their hated Chief finally resigned. Nonetheless, weeks later the government obtains conversations between Isaac and Andy, who continues to provide his own drugs for resale and asserts he is doing so on behalf of Brian and Devin. In that scenario, too, Andy's statements would not be of the sort made during the course of the conspiracy and are not part of the dissolution process. They would only render Andy himself liable, and should not be admitted at trial against the other cops.

231. According to section 3-403, "[a]n unauthorized signature may be ratified for all purposes of this Article." U.C.C. § 3-403 (AM. LAW INST. & UNIV. LAW COMM'N 2017). According to the official comments to section 3-403, "[r]atification is a retroactive adoption of the unauthorized signature by the person whose name is signed and may be found from conduct as well as from express statements. For example, it may be found from the retention of benefits received in the transaction with knowledge of the unauthorized signature." *Id.* § 3-403 official cmt. The comments also point to agency law as a source of understanding what constitutes a ratification of an unauthorized signature: "Although the forger is not an agent, ratification is governed by the rules and principles applicable to ratification of unauthorized acts of an agent." *Id.*

are later ratified by that partnership.²³² Thus, by analogy, when a defendant ratifies the unauthorized transactions of his co-conspirator, he is again a party liable for the actions of the conspiracy, and conversations in furtherance of that conspiracy are admissible against him. If Devin were later to confirm details about the ledgers with Andy's friend or otherwise aid in his efforts to destroy them, then Andy's conversations would be admissible against him at trial.

B. Transactions Unauthorized by a Former Co-conspirator

Does the exception apply to statements made by co-conspirators if there is evidence that, at some point prior to making those statements, the co-conspirators disavowed the defendant from the conspiracy? Returning again to the hypothetical, assume that Andy and Brian actually expelled Devin from their conspiracy before the government recorded any of their statements. They stopped inviting Devin to meetings about future sales, and they claimed after their arrests that Devin was never a part of any of their illicit activities. But in their conversations with Isaac the informant, Andy and Brian insisted that Devin was still part of the organization, in spite of Devin's text messages to Isaac saying he might not see him for a while. How should a court determine whether the statements Andy and Brian made to Isaac were made during the course of and in furtherance of a conspiracy that included Devin, which would render them admissible at Devin's trial?²³³ Both the UCC and the RUPA provide ready answers based on similar principles.

When a co-conspirator falsely claims that he is acting on the defendant's behalf, he is acting in the same manner as an unauthorized signer of an instrument of commercial paper. The co-conspirator is asserting that he speaks for someone who has not preapproved

232. J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, *PARTNERSHIP LAW AND PRACTICE* § 8:19, at 214 (2012) (“[W]hen a partner’s act is not within the scope of the partnership’s business and is not authorized by the partners, the transaction is still binding on the partnership if it is *ratified* by those partners who would have had the power to authorize the act.”). Similarly, where a corporate officer acts beyond his authorization to wind up a dissolving corporation, but his transactions are later ratified by that corporation, the officer is once again shielded from personal liability. *See, e.g., In re Ostrom-Martin, Inc.*, 202 B.R. 267, 274 (Bankr. C.D. Ill. 1996) (“Ratification will also be found where a corporation, with knowledge of the facts, retains the benefit of an unauthorized transaction.”).

233. *See* FED. R. EVID. 801(d)(2)(E).

his actions or granted him agency to bind him to any such agreements, just as an unauthorized signer purports to have authority for a person or entity that the signer lacks.²³⁴ Under UCC section 3-403, “an unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value.”²³⁵ Analogously, if a co-conspirator continues to claim falsely that he is acting on the defendant’s behalf while speaking to other criminal intermediaries, in fact he speaks only for himself. Any conversations that take place under that false pretense are “in furtherance of” a conspiracy that no longer includes the defendant.²³⁶ They are thus inadmissible against that defendant.²³⁷

There are exceptions to this general rule of commercial paper, however. Under the UCC, a party can ratify what was originally an unauthorized signature on an instrument.²³⁸ For purposes of Article 3, “[r]atification is a retroactive adoption of the unauthorized signature by the person whose name is signed and may be found from conduct as well as from express statements. For example, it may be found from the retention of benefits received in the transaction with knowledge of the unauthorized signature.”²³⁹ Thus, any form of ratification by the analogous criminal defendant—perhaps by accepting proceeds from transactions of the conspiracy despite allegedly being disavowed—would serve as ratification of those transactions and make him a party to those transactions such that statements made to further those transactions are admissible against him.²⁴⁰

234. *Unauthorized Signature*, BLACK’S LAW DICTIONARY (10th ed. 2014).

235. A similar situation arises where multiple signatures are required to constitute an authorized signature of an organization. In that scenario, “the signature of the organization is unauthorized if one of the required signatures is lacking.” U.C.C. § 3-403.

236. See FED. R. EVID. 801(d)(2)(E).

237. See *id.*

238. According to section 3-403, “An unauthorized signature may be ratified for all purposes of this Article.” U.C.C. § 3-403.

239. *Id.* official cmt. The comments also point to agency law as a source of understanding what constitutes a ratification of an unauthorized signature: “Although the forger is not an agent, ratification is governed by the rules and principles applicable to ratification of unauthorized acts of an agent.” *Id.*

240. The principle of ratification is not new to the law of conspiracy, where “[a] conspirator ... is deemed to have ‘ratified’ the statements made by his confederates before he joined an existing criminal scheme.” Trachtenberg, *supra* note 15, at 628.

A review of the RUPA yields similar results. Under RUPA section 703, a dissociated partner is generally not liable for obligations the partnership incurs after his dissociation.²⁴¹ There is an exception, but it applies only when the other party extends credit on the “reasonabl[e] belie[f] that the dissociated partner was then a partner” and when the other partner “did not have notice of the partner’s dissociation.”²⁴² Thus, only the unsuspecting third-party with no reasonable belief that a partner has left the organization can transact business that will still obligate the dissociating partner.

Applying these principles to the scenario outlined above, the statements would not be admissible against Devin. Andy’s and Brian’s false statements to Isaac only created personal obligations. The evidence, in both their own later statements and their actions to exclude Devin from the transactions they discuss in their recorded statements, shows that they were no longer furthering a conspiracy that included Devin. Furthermore, it was not reasonable for Isaac to believe that Devin remained a co-conspirator after he stopped attending meetings and indicated in his text message that he might not be involved in future transactions.²⁴³ Any agreements Isaac reached with Andy and Brian would be binding only against them under the RUPA and would not further a conspiracy that involved Devin.

Thus, the statements Andy and Brian made do not qualify for the co-conspirator exception to the hearsay rule.²⁴⁴ That could all

241. REVISED UNIF. P’SHP ACT § 703(a) (UNIF. LAW COMM’N 1997).

242. *Id.* §§ 703(b), 704(c); *see also* Wensinger, *supra* note 141, at 930 (discussing RUPA section 703(b)). Thus, where the third party extends credit to the partnership while relying upon the newly dissociated partner’s credit history, they may hold that dissociated partner liable. Wensinger, *supra* note 141, at 930.

243. Courts have taken a minimalist interpretation of the “notice” required to absolve a dissociated partner of future partnership obligations under RUPA section 703(b). For instance, in *In re Labrum & Doak, LLP*, the court noted that a simple publication in a local newspaper of the partner’s dissociation would suffice under section 703(b). 237 B.R. 275, 293-95 (Bankr. E.D. Pa. 1999) (collecting Pennsylvania decisions to the same effect); *see also* Wensinger, *supra* note 141, at 929-30 (noting the RUPA drafters’ intent to maintain the liberal interpretation of “notice” under the analogous section of the U.P.A.).

244. This hypothetical is adapted from the Illinois Appellate Court’s decision in *People v. Cichy*, 2016 IL App (2d) 150261. There, the court held that statements by two co-defendants excluding the defendant from future illicit transactions did not “further the goal of the charged conspiracy,” and were instead “antithetical to it.” *Id.* ¶ 25. While the broader conspiracy involving the defendant still existed at that time, those specific transactions, and statements made to further them, did not promote its aims and thus could not be admitted

change, of course, if the State can produce some evidence that Devin ratified those transactions, either through his conduct or through the acceptance of some of their proceeds.²⁴⁵

C. Collateral Agreements to a Conspiracy

How should courts evaluate statements that furthered transactions collateral to the primary dealings of the conspiracy? Assume that two of the three co-conspirators, Andy and Brian, decide to supplement the profits from reselling drugs they took from crime scenes by surreptitiously removing weapons from the evidence locker to sell on the street. They describe their agreement to do so in a recorded conversation with Isaac, whom they seek to use as a fence for the firearms before splitting the profits. Are those conversations—which do not advance the primary conspiracy between Andy, Brian and Devin—admissible at Devin’s criminal trial?

The UCC’s version of the common-law collateral agreement rule provides a ready solution.²⁴⁶ The parol evidence rule controls whether a particular term was properly added to an existing agreement amongst the parties.²⁴⁷ As a “substantive law which ... defines the limits of a contract” and “fixes the subject-matter for interpretation,”²⁴⁸ the parol evidence rule generally prohibits the introduction of proof of a term from outside the four corners of the parties’ written agreement.²⁴⁹ However, by arguing that a subsequent undertaking between the parties was a “collateral agreement,” a litigant can conveniently avoid the parol evidence rule and introduce evidence of a secondary agreement outside of what otherwise appears to be a fully integrated contract.²⁵⁰ The litigant asserts that the collateral agreement is not an addition to the original under-

against the defendant at trial. *Id.* ¶¶ 26-27.

245. *See id.* ¶ 25.

246. *See* U.C.C. § 2-202 (AM. LAW INST. & UNIF. LAW COMM’N 2017).

247. *See* Margaret N. Kniffin, *Conflating and Confusing Contract Interpretation and the Parol Evidence Rule: Is the Emperor Wearing Someone Else’s Clothes?*, 62 RUTGERS L. REV. 75, 102 (2009).

248. 2 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 631 (1st ed. 1920).

249. 11 SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 33:1 (Richard A. Lord ed., 4th ed. 2012).

250. *See* *Brennan v. Carvel Corp.*, 929 F.2d 801, 806 (1st Cir. 1991) (“[T]he parol evidence rule does not apply to a collateral agreement, i.e., a separate contract between the same parties.”).

standing of the parties, but rather a wholly separate undertaking.²⁵¹ The subsequent agreement must appear entirely separate from the original contract and thus be collateral in form.²⁵² It must also not contradict any of the express or implied provisions of the written contract.²⁵³ Lastly, it must concern matters the parties would not ordinarily be expected to embody in the original writing.²⁵⁴

The collateral agreement rule has been codified in UCC section 2-202.²⁵⁵ Under section 2-202, collateral agreements may modify an underlying contract so long as that underlying contract was not intended to be a “complete and exclusive statement of the terms of the agreement.”²⁵⁶ Courts can also look to the parties’ course of dealing and performance to interpret the underlying contract’s terms.²⁵⁷

The scenario presented above is the conspiratorial equivalent of a collateral agreement. The parties agreed to illicit resale of seized drugs. But, as is the case with almost all conspiratorial agreements, that understanding was necessarily provisional—it was an understanding with no written reduction, and it lacked the requisite completeness and exclusivity that would establish it as fully integrated and not subject to change via collateral agreement.²⁵⁸ Andy and Brian’s decision to begin selling stolen firearms would thus appear to alter that original understanding via a collateral agreement. Their decision appeared entirely separate from the original conspiratorial agreement; it did not contradict or undermine any of the provisions of the primary agreement, which was to use Isaac in a similar way to resell seized drugs for the profit of the group. It concerned matters that Andy, Brian, and Devin would not be expected to have included in their original agreement, which was formed on a lark amongst bored, small-town police officers. The course of dealing between the officers and Isaac, if it extended over a long

251. See 2 WILLISTON, *supra* note 248, § 637.

252. See *id.* § 638.

253. See *id.* § 639.

254. See *Harris v. Allstate Ins. Co.*, 300 F.3d 1183, 1194 (10th Cir. 2002) (“Under the federal common law’s version of the parol evidence rule, evidence of a collateral agreement may be admitted if (1) it does not contradict a clear and unambiguous provision of a written agreement, and (2) the parties did not intend the written agreement to be the complete and exclusive statement of their agreement.” (internal quotations omitted) (citation omitted)).

255. U.C.C. § 2-202 (AM. LAW INST. & UNIF. LAW COMM’N 2017).

256. *Id.*

257. *Id.*

258. See *id.*

period of time, could also demonstrate that such gun-running was an approved means of business for the conspiracy, even though it was not part of the original enterprise. Thus, the government could introduce conversations that furthered those gun-selling transactions against Devin himself.²⁵⁹

D. Guarantees Among Co-Conspirators

Suppose that our crooked cops were not so close at the outset of their enterprise, and instead knew each other only distantly as members of the police force. Andy was the first to try absconding with drugs from crime scenes, and it was his initiative to set up a meeting with Isaac to discuss acting as a fence. But Isaac did not know Andy—he only stayed in touch with his former high-school football teammate Devin. Isaac insisted that he would only work with Andy if Devin could also guarantee his safety and the future payments he would receive from the conspiracy. When Andy asks Devin to vouch for him, Devin does so, but he tells Andy that he also requires Brian to join their fledgling enterprise.

Andy, eager to start selling drugs, never speaks to Brian and instead lies to Isaac in a recorded conversation, telling him that he has Brian's support. He then shares the profits of subsequent drug sales with both Isaac and Devin. Are Andy's conversations with Isaac to facilitate those drug sales admissible against Devin in court?

The answer, based on the parallel situation concerning other agreements affecting an instrument under UCC section 3-117, is a perhaps surprising no.²⁶⁰ The official comment to section 3-117 discusses a situation where a lender will only make a loan to A if D

259. Under the UCC, parties can also include a no modification clause to an agreement to preclude future evidence of a collateral agreement. U.C.C. § 2-209(2). Co-conspirators may be able to present evidence that their agreement with co-defendants was unmodifiable, if there is proof that they created an analogous clause through their words or actions. That said, the U.C.C. still permits parties to create a waiver of that clause in a future agreement. *Id.* §§ 2-209(2), (4)-(5). Thus, even if the co-conspirators can support their claim that their agreement cannot be modified—an unlikely scenario in and of itself—the prosecution could respond with proof that they later explicitly waived that no-modification understanding. *See id.*

260. *See id.* § 3-117 official cmt.

cosigns the note.²⁶¹ D says he will only cosign if B does too.²⁶² D cosigns, but A never follows through and obtains B's signature.²⁶³ In that case, even though D signed the instrument, he is not obligated under it because of the other agreement he had with the lender that his co-signature was only valid if accompanied by B's cosignature.²⁶⁴

In this parallel conspiratorial situation, Devin has signed onto the conspiracy contingent on Brian also joining. Because Andy did not follow through and obtain Brian's assent, Devin's conditional signing does not obligate him to the conspiracy. Statements made to further that conspiracy by Andy thus cannot advance Devin's interests because Devin is not, in reality, a member of that conspiracy, even though some of the profits may have been distributed to him. Andy's statements made in furtherance of the conspiracy should not be admissible against Devin in court.

V. LIMITATIONS AND LIKELY OBJECTIONS

In this Part, I consider potential limitations of and objections to both (1) my claim that intuitive judicial thinking creates inconsistent evidentiary rulings and (2) my prescription to promote deliberative cognitive processes through the application of uniform commercial laws.

A. *Fear of the Mechanical Judge*

Critics of my approach will likely signal their discomfort with a model of judicial decision making that cabins judicial discretion. Given their vast experience, perhaps criminal judges should be able to rely on their instincts to resolve complex problems rather than suppressing their gut reactions in favor of a constraining, mechanical checklist.

This critique fails to appreciate the breadth of psychological research that undergirds behavioral law and economic theory. As Professor Kahneman noted, "many people are overconfident, prone to place too much faith in their intuitions" despite mounds of

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

empirical evidence that such thinking is sometimes flawed, especially in certain situations where feedback is scarce and attention is distracted.²⁶⁵ The same is equally true of judges, as others have demonstrated by performing many of the same psychological tests on them that demonstrate the same limitations as seen in the general public.²⁶⁶ People often disbelieve that they, or the average well-meaning judge, would be subject to these same cognitive limitations. But such disbelief is not a valid option in the face of decades of psychological research.²⁶⁷ Instead, we must address the cognitive limitations all of us—even judges—face in order to improve the consistency of our legal system.

Such objections are common whenever flaws in our cognitive processes are applied to a new field of expertise.²⁶⁸ For instance, when Dr. Atul Gawande first suggested the use of surgical safety checklists to reduce error caused by intuitive cognitive thinking, most of the professionals initially studied were extremely skeptical.²⁶⁹ A sizable minority—roughly 20 percent of those studied—maintained that skepticism even at the end of the study.²⁷⁰ But when asked whether they would want their own doctors to use the checklists after learning that the implementation of checklists had reduced major complications by 36 percent and deaths by 47 percent, a full 93 percent of those professionals said yes.²⁷¹

It is also noteworthy that the application of uniform commercial laws will not require judges to become machines that apply rote rules in every situation. My proposal is simply for judges to consider a few possible parallels between commercial organizations and illicit ones, and, if appropriate, apply rule-based uniform commercial laws to solve difficult problems. That exercise still requires a great deal of judicial reasoning—it is, after all, a method to engage judges' more thorough, System 2 deliberative cognitive pathways.²⁷² This

265. KAHNEMAN, *supra* note 7, at 45-46, 241.

266. See Guthrie et al., *supra* note 9, at 2-5.

267. KAHNEMAN, *supra* note 7, at 57 (“[D]isbelief is not an option. The results are not made up, nor are they statistical flukes. You have no choice but to accept that the major conclusions of these studies are true. More important, you must accept that they are true about *you*.”).

268. See *id.* at 242.

269. See GAWANDE, *supra* note 18, at 153-57.

270. See *id.* at 157.

271. *Id.* at 154, 157.

272. See KAHNEMAN, *supra* note 7, at 20-22.

proposal does not aim to turn judges into machines, but rather seeks to create more thoughtful jurists.

B. The Limited Applicability of Uniform Commercial Laws

Others may question how broadly uniform commercial laws can apply to conspiracies. Aside from a few cherry-picked examples, the parallels between licit and illicit profit-motivated organizations may be scarce, and hence the utility of applying checklist-style solutions to co-conspirator hearsay questions may be limited.

There is some resonance to this critique. Though I have presented several examples of the applicability of uniform commercial laws in this Article, the scope of their applicability is still unclear. Uniform commercial laws may well only apply to a few particular situations. But even if the crossover between uniform commercial laws and conspiratorial organizations is somewhat limited, my approach still has significant utility. Research on the use of checklists as a guide to complex cognitive tasks for professionals suggests that they are only effective when limited to a few particularly salient items.²⁷³

Furthermore, this critique does not undermine the core of my position that uniform commercial laws that allocate loss and responsibility amongst the parties to a licit for-profit organization can give guidance to criminal courts allocating responsibility among the parties to an illicit for-profit organization. The parallels between these organizations are real, and the legal approaches to them ought to be similar, even if only in a limited number of specific scenarios.²⁷⁴

C. The Complexity of Uniform Commercial Laws

Another likely objection stems from the inherent complexity of uniform commercial laws. These are intricate, likely unfamiliar rules for criminal judges working in the rapid-fire world of pretrial

273. See GAWANDE, *supra* note 18, at 120 (“Good checklists ... are precise. They are efficient, to the point, and easy to use even in the most difficult situations. They do not try to spell out everything—a checklist cannot fly a plane. Instead, they provide reminders of only the most critical and important steps—the ones that even the highly skilled professionals using them could miss. Good checklists are, above all, practical They can help experts remember how to manage a complex process or configure a complex machine.”).

274. See *supra* Parts III.B-C.

motion practice. Reliance on them simply piles an added layer of complexity atop an already complex decision-making process, the objection goes, and risks stoppering the criminal justice system.

First, this objection takes a rather dim view of the capabilities of criminal judges. Certainly they too can internalize uniform commercial laws, at least as well as law students who rely on checklists and decision trees to resolve exam questions.²⁷⁵ And those checklists themselves will be crucial to avoid unnecessary delay.²⁷⁶ The lists themselves will not be too complex, or else judges will cast them aside and refuse to implement them in their decision-making processes.²⁷⁷ As discussed above, the key to creating a useful checklist is to distill information to just a few key, salient points that the user should review—in my model, questions such as “is this alleged statement by a co-conspirator similar to a transaction unauthorized by a former partner?”²⁷⁸ Generating the lists would certainly take time, and the adoption of them might likewise be a lengthy process. But they present an opportunity, over time, to improve consistency and accuracy in pretrial evidentiary rulings.²⁷⁹

Second, the complexity of uniform commercial laws is actually a useful feature. That complexity is likely to engage criminal judges’ deliberative cognitive processes.²⁸⁰ The application of uniform commercial laws should nudge judges toward more deliberative thinking and away from intuitive rulings.²⁸¹ The cognitive strain necessary to apply uniform commercial laws will help engage those deliberative cognitive pathways.²⁸² The aim is to combine both the cognitive strain that application requires with the ready solutions available in the form of checklists and decision trees to yield more consistent, but still relatively quick, answers to pretrial evidentiary questions.

275. See, e.g., CONVISER, *supra* note 184, at 136; WHALEY, *supra* note 184, at 25.

276. See GAWANDE, *supra* note 18, at 156-57.

277. See *id.* at 120.

278. See *supra* Part III.C.

279. See *supra* Parts II.C-III.

280. See *supra* Part III.C.

281. See *supra* Part III.C.

282. KAHNEMAN, *supra* note 7, at 65 (“Cognitive strain, whatever its source, mobilizes System 2, which is more likely to reject the intuitive answer suggested by System 1.”); see also GAWANDE, *supra* note 18, at 79 (“[U]nder conditions of complexity, not only are checklists a help, they are *required* for success. There must always be room for judgment, but judgment aided—and even enhanced—by procedure.”).

CONCLUSION

Faced with crowded dockets that require myriad rulings on a daily basis, criminal judges behave just as any overwhelmed person would: they turn to intuitive cognitive processes to resolve otherwise complex evidentiary issues.²⁸³ And just as behavioral law and economic theory would predict, that perfectly natural reliance upon intuition creates inconsistency and inaccuracy in the jurisprudence on complex evidentiary rules such as the co-conspirator exception to hearsay.²⁸⁴ In turn, the scope of evidentiary exceptions that almost always disfavor defendants grows unchecked.²⁸⁵

Fortunately, we can give criminal judges a useful nudge towards deliberative cognitive processes. Law and behavioral economic theory suggests that checklist-style thinking can engage deliberative, System 2 thinking among the judiciary, reducing the prevalence of cognitive error inimical to System 1 intuitive judgments. If judges look to principles of uniform commercial laws and rely on the decision trees and checklists those disciplines provide, then they can engage their deliberative faculties while still generating decisions relatively quickly with far more consistent results. Given the close parallels between illicit and licit profit-motivated organizations, the co-conspirator exception to the hearsay rule is one area ripe for such application of uniform commercial law. By applying such laws, judges can thus reduce error on crucial evidentiary questions that are a frequent source of wrongful convictions.

283. See Guthrie et al., *supra* note 9, at 35.

284. See *supra* note 14 and accompanying text.

285. See *supra* note 15 and accompanying text.