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## Re-evaluating Large Multiple-Defendant Criminal Prosecutions

Paul Marcus

*William & Mary Law School*, pxmarc@wm.edu

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# RE-EVALUATING LARGE MULTIPLE-DEFENDANT CRIMINAL PROSECUTIONS

Paul Marcus\*

## I. INTRODUCTION

Americans have decided to get tough on crime.<sup>1</sup> This decision applies not simply to violent crime, but to white-collar crime as well. In particular, we have seen substantial prosecutorial resources directed against a wide range of criminal endeavors conducted by groups of defendants, especially in the area of white-collar prosecutions.<sup>2</sup> In support of this movement, one finds the large multiple-defendant criminal trial becoming widespread<sup>3</sup> and commonplace.<sup>4</sup> Yet, as the practice has

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\* Haynes Professor of Law, College of William and Mary. I appreciate the thoughtful and helpful comments received during presentations to law faculty workshops at Rutgers University-Newark, the University of Illinois, Valparaiso University and the College of William and Mary. The Article also greatly benefitted from discussions with Beryl Blaustone, Sandy Guerra, Ed Imwinkelried, Tony Pagone, and John Tucker. Much of the drafting of this Article took place during a research leave spent in Australia. I extend my deep appreciation to the College of William and Mary for granting the leave and to the University of Melbourne, Centre for Comparative Constitutional Law for extending warm hospitality.

<sup>1</sup> On this point, surely there can be little disagreement. For evidence of this attitude, see *infra* note 11 and text accompanying notes 11–21.

<sup>2</sup> William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1839 (1998).

<sup>3</sup> Several times in the past, I have explored questions involving multiple-defendant trials and the law of criminal conspiracy. I have twice before considered such issues from an empirical view looking to the manner in which such prosecutions are brought forward and the difficulties — real or potential — which are created. See Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925 (1977); Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back From an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1 (1992). Here, however, the focus is less on broadly identifying such difficulties and more on attempting to craft solutions to two acute problems. See discussion *infra* Part III.

<sup>4</sup> Not all agree. Note the comments of then-Assistant United States Attorney (later F.B.I. Director) Louis Freeh at the Annual Judicial Conference of the Second Judicial Circuit of the United States, *Annual Judicial Conference of the Second Judicial Circuit of the United States, Panel Presentation: The Problems in the Trial of "Monster" RICO Cases*, 125 F.R.D. 197, 234, 236–42 (1988) [hereinafter "*Monster*" RICO Cases] (remarks of Louis Freeh, Assistant United States Attorney). But see the remarks of the Honorable J. Joseph Smith forty years ago identifying the problem of "long, involved criminal trials." *Judicial Conference of the Second Judicial Circuit of the United States, The Problems of Long Criminal Trials: A Panel Discussion*, 34 F.R.D. 155, 157–58 (1963) [hereinafter *Long Criminal Trials*] (remarks of Judge J. Joseph Smith); see also Fed. Bar Council Comm. on Second Circuit Courts, *A Proposal Concerning Problems Created by Extremely Long Criminal Trials*, 128

become more entrenched at both the local and national levels, criticism of such an approach has been muted. For instance, questions about the necessity for — and wisdom of — the wide use of the conspiracy charge<sup>5</sup> have all but disappeared, replaced with a heavy reliance on the perceived dangers of group criminal activity.<sup>6</sup> Additionally, one almost never hears today the earlier cries against the RICO offense which claimed that the statute is too broad in application and too vague in definition.<sup>7</sup> RICO has become an accepted part of the law enforcement arsenal in the battle against group crime.<sup>8</sup>

In practice, these issues have become settled. Nevertheless, the conclusion of

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F.R.D. 137, 138 (1989) [hereinafter Fed. Bar Council Comm.] (writing of “the current prevalence of mega-trials”). See generally Edward J. Imwinkelried, *Prejudice to the Nth Degree: The Introduction of Uncharged Misconduct Admissible Only Against a Co-defendant at a Megatrial*, 53 OKLA. L. REV. 35 (2000) (discussing the phenomenon and complexity of large multiple-defendant joint trials).

<sup>5</sup> See Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1138-41 (1973).

<sup>6</sup> See generally *United States v. Townsend*, 924 F.2d 1385, 1394 (7th Cir. 1991) (suggesting that group action generally is more dangerous than individual activity); *United States v. Stevens*, 909 F.2d 431, 433 (11th Cir. 1990) (noting that an agreement between persons poses a higher societal threat than individual action). As stated in *Callanan v. United States*, 364 U.S. 587 (1961):

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

*Id.* at 593-94. The Supreme Court has never retreated from this position. Some trial judges even instruct on the point. See *United States v. Lopez*, 937 F.2d 716, 725 (2d Cir. 1991). However, this view of group danger has been strongly challenged. See Professor Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 414 (1959).

<sup>7</sup> See, e.g., Barry Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 169-70 (1980).

<sup>8</sup> For discussion of RICO impact, see Craig M. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 837-38, 845 (1980); Symposium, *Law and the Continuing Enterprise: Perspectives on RICO*, 65 NOTRE DAME L. REV. 873 (1990); Gerard E. Lynch, *RICO: The Crime of Being a Criminal* (pts. 1-2), 87 COLUM. L. REV. 661, 920 (1987); Symposium, *Reforming RICO: If, Why, and How?*, 43 VAND. L. REV. 621 (1990); Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291 (1983); Symposium, *20th Anniversary of the Racketeer Influenced and Corrupt Organizations Act (1970-1980)*, 64 ST. JOHN'S L. REV. 701 (1990).

that portion of the debate is hardly the end of the discussion as to issues concerning the process of multiple-defendant cases.<sup>9</sup> Increasingly, questions are being raised as to the procedures used in connection with such prosecutions. It may now be beyond dispute that we are willing to give law enforcement officials great weapons in the investigation and prosecution of group criminal behavior. It is not at all clear, however, that the manner in which we prosecute such defendants is above debate and critique.<sup>10</sup> After all, while Americans apparently have chosen to punish with severity those *convicted* of group crime, that does not mean that — consistent with constitutional mandates — those *charged* with such crimes can be processed with anything less than the full complement of procedural and constitutional guarantees.

In this Article, I will look to the way those charged with crimes involving group criminal behavior are prosecuted. Concerns will be raised in two key areas: (1) Have we extended too much power to state and federal prosecutors in determining where to bring such individuals to trial?; and (2) Should the courts scrutinize far more carefully the joining together of these defendants for trial?

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<sup>9</sup> The most remarkable aspect of the multiple-defendant process is, surely, the somewhat bizarre “slight evidence” rule. Some courts (the Eighth Circuit is the *leader*) write that “[o]nce a conspiracy has been established, only slight evidence is needed to link a defendant to the conspiracy.” *United States v. Davidson*, 195 F.3d 402, 406 (8th Cir. 1999) (quoting *United States v. Pena*, 67 F.3d 153, 155 (8th Cir. 1995)). *See generally* *United States v. Causor-Serrato*, 234 F.3d 384, 388 (8th Cir. 2000) (requiring only slight evidence to link defendant to conspiracy), *cert. denied*, 532 U.S. 1072 (2001); *United States v. Jolivet*, 224 F.3d 902, 909 (8th Cir. 2000) (holding defendant’s knowledge was enough evidence to link him to conspiracy). While such statements have a certain ring of authenticity to them, they are, alas, quite incorrect and assuredly unconstitutional. To convict an individual of conspiracy, the evidence must establish *beyond a reasonable doubt* that person’s intent to pursue crime and her knowing membership in the criminal group. Nothing less will suffice, as even the Eighth Circuit recognizes. *See United States v. Jiminez-Perez*, 238 F.3d 970, 973 (8th Cir. 2001) (holding that slight evidence must still meet reasonable doubt standard). Most courts today resist the lure of the “slight evidence” rule and have “banished” the concept. *United States v. Majors*, 196 F.3d 1206, 1211 n.8 (11th Cir. 1999). These courts have explained that “the Constitution requires *substantial* evidence to support any criminal conviction.” *United States v. Adkinson*, 158 F.3d 1147, 1152 n.10 (11th Cir. 1998). Some have redefined the rule so that a conviction is valid if evidence, beyond a reasonable doubt, shows “the connection of a defendant to a conspiracy [even if that connection is] only . . . slight.” *State v. Olea*, 678 P.2d 465, 478 (Ariz. Ct. App. 1983). For a critical view of this area, see Brent E. Newton, *The Antiquated “Slight Evidence Rule” in Federal Conspiracy Cases*, 1 J. APP. PRAC. & PROCESS 49 (1999).

<sup>10</sup> *See supra* note 9 and accompanying text.

## II. THE BASIC APPROACH

### A. *The Harshness of It*

Punishment for joint criminal activity is tough in the United States both as to responsibility for the crimes of others and as to sanction.<sup>11</sup> Whereas serious questions have been proffered in the past as to such punishment, we see little such

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<sup>11</sup> Actually, by virtually every measure and for any crime, punishment today is extremely harsh in the United States. This is true if measured against prior years or if evaluated against that which is found elsewhere in the world. On the former point, see BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES, 1995, PUB. NO. NCJ-161132, at 2 (1996) (reporting prison population as having more than doubled between 1985 and 1995), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pji95.pdf>; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE POPULATION REACHES ALMOST 3.8 MILLION, PUB. NO. NCJ-161722, at 1-2 (1996) (noting that the number of individuals in prison or on probation or parole more than tripled since 1980), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pap95.pdf>; see also Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873, 1881 n.31 (1999) ("The population of Americans incarcerated on any given day would qualify as the sixth-largest city in the country and is equal to the total combined populations of Seattle, Cleveland, and Denver.") (quoting THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 33 (Steven R. Donziger ed., 1996)). In recent years especially, the increase has been dramatic. "About 2 million Americans are in jails and prisons, and another 5 to 6 million are on probation or parole. These incarceration rates are rising much faster than the population." Michael E. Tigar, *The Vicious Prison Cycle*, NAT'L L.J., Aug. 21, 2000, at A20. As noted in Greg Krikorian, *Federal and State Prison Populations Soared Under Clinton, Report Finds*, L.A. TIMES, Feb. 19, 2001, at A3, "[d]uring [President] Clinton's tenure, the total population of federal and state prisons combined rose by 673,000 inmates."

The numbers are even more striking when placed in worldwide context. For instance, in comparison with the population of the United Kingdom, the rates in the U.S. are dramatically higher. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIME AND JUSTICE IN THE UNITED STATES AND IN ENGLAND AND WALES, 1981-96, PUB. NO. NCJ-169284, at 25 (1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cjusew96.pdf>. "Over the past twenty-five years, the United States has built the largest prison system in the world." ELLIOTT CURRIE, CRIME AND PUNISHMENT IN AMERICA 3 (1998). "Compared to other countries, [the U.S. rate of incarceration] is by far the highest rate of incarceration relative to population in the Western world." Butler, *supra* at 1881 n.31 (quoting THE REAL WAR ON CRIME, *supra* at 33) (alteration in original). "Since about 1973, the prison population has steadily soared from approximately 325,000 prisoners to nearly 2 million today — a sixfold increase, which has made the United States the world's largest per capital jailer of its population." Peter Elikann, *Do More Jails Equal Less Crime?*, NAT'L L.J., Sept. 25, 2000, at A20. "In the United States, more than 550 out of every 100,000 people are in jail. In Canada, the rate is 116 per 100,000; in France, it is 84 per 100,000." Tigar, *supra*.

The U.S. view continues as reflected in the most recent proposals from the Federal Sentencing Commission. See Carrie Johnson, *Panel Boosts Penalties for White-Collar Offenses*, WASH. POST, Jan. 9, 2003, at E1.

public debate today. Three illustrations make this point.

With an illegal scheme, the defendant may be convicted in most jurisdictions of both conspiracy and the contemplated crime. The two generally do not merge, and the act of agreement (i.e., the conspiracy) can be the basis of responsibility for the substantive crime.<sup>12</sup> Because the two offenses are seen as distinct — the agreement constituting conspiracy<sup>13</sup> and the execution of the agreed upon crime — the defendant may also receive consecutive sentences for them. While in practice<sup>14</sup> consecutive sentencing would not be the usual rule for one set of activities,<sup>15</sup> the principle is well established and followed in most places in the United States.<sup>16</sup>

The great punishment for joint criminal activities can also be seen with the wide use of criminal forfeitures in connection with such cases.<sup>17</sup> RICO allows for the forfeiture of “any proceeds which the person obtained, directly or indirectly, from racketeering activity.”<sup>18</sup> Though there may be considerable disagreement on the identification and measurement of forfeitable assets from group activities,<sup>19</sup> there can be little doubt that the loss of property often combines with the more traditional criminal penalties to punish severely those convicted of joint criminal acts.<sup>20</sup>

Perhaps the strongest evidence of the tough punishment seen for joint criminal activity can be found in the influential — and broadly copied — Federal Sentencing Guidelines. Conspiracy and RICO defendants will face harsh penalties based on the

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<sup>12</sup> *Pinkerton v. United States*, 328 U.S. 640 (1946).

<sup>13</sup> A similar notion is found with the RICO offense, which has at its core the enterprise, as opposed to any predicate acts committed. Racketeer Influenced and Corrupt Organizations Act, Pub. L. 91-452, § 904(a), 84 Stat. 947 (1978) (codified at 18 U.S.C. §§ 1961–1968 (2000)).

<sup>14</sup> See *supra* note 3.

<sup>15</sup> The conspiracy and the contemplated crime, the RICO enterprise and the predicate offense.

<sup>16</sup> Indeed, the Supreme Court has written that, in addition to consecutive sentences, the defendant can — strangely enough — receive *greater* punishment for the inchoate offense of conspiracy than for the completed offense, the object of that conspiracy. *Iannelli v. United States*, 420 U.S. 770, 778 (1975).

<sup>17</sup> JIMMY GURULE & SANDRA GUERRA, *THE LAW OF ASSET FORFEITURE* (1998) is an excellent book which thoroughly analyzes this area.

<sup>18</sup> 18 U.S.C. § 1963(a)(3) (2000).

<sup>19</sup> Identifying such property is a difficult task, for judges must trace revenue, profits, and costs in deciding which property should be given up to the government. See *United States v. \$10,700.00 in U.S. Currency*, 258 F.3d 215 (3d Cir. 2001); *United States v. Martinez*, 228 F.3d 587, 590 (5th Cir. 2000); *United States v. Simmons*, 154 F.3d 765, 770–71 (8th Cir. 1998); *United States v. Najjar*, 57 F. Supp. 2d 205, 207 (D. Md. 1999).

<sup>20</sup> To be sure, the practice is spreading well beyond our national borders. Federal prosecutors strongly advance the argument that the government ought to “press in bilateral and multilateral forums for international commitments to institute asset forfeiture regimes to undercut the profit motive in international crime.” THE WHITE HOUSE, *INTERNATIONAL CRIME CONTROL STRATEGY* 11 (1998).

transactions of others within the scope of the plan or enterprise.<sup>21</sup>

### *B. The Trial and Appeal Process*

Some of the more troubling problems encountered by criminal defendants in this area are those that have been resolved and relate to the substance of the offenses and the appropriate defenses. As to the *process* of adjudication, there can be little doubt: defendants in multi-party criminal actions have little room for mistake. With no automatic right of severance,<sup>22</sup> those defendants linked to a criminal scheme usually are tried together.<sup>23</sup> Securing a severance will be difficult. This is true in most cases, even with the extreme situation in which defendants offer defenses which apparently are contradictory.<sup>24</sup> Whether for conspiracy or for RICO, each defendant may be joined with others even without an extensive knowledge of the broad endeavor, so long as the basic plan is known to all.<sup>25</sup> Jurisdictional restrictions may not even protect such a defendant, since such joinder can take place in a city far from the particular defendant.<sup>26</sup>

The standard of review in multi-defendant prosecutions is not high. The evidence does not have to exclude every reasonable theory or hypothesis of innocence.<sup>27</sup> All factual questions in the record will be construed to support the government's case.<sup>28</sup> The evidence is to be considered "in the light most favorable to the guilty verdict."<sup>29</sup> The burden for the defense is formidable. As the Supreme

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<sup>21</sup> See, e.g., *United States v. Downing*, 297 F.3d 52, 60 (2d Cir. 2002); *United States v. Vaziri*, 164 F.3d 556, 568 (10th Cir. 1999); *United States v. Roach*, 164 F.3d 403, 413 (8th Cir. 1998).

<sup>22</sup> As in FED. R. CRIM. P. 14. The standard in the states, too, normally is tied to an exercise of discretion by the trial judge. See *infra* notes 113–15 and accompanying text.

<sup>23</sup> See *supra* note 3.

<sup>24</sup> "[I]t will be the rare case, if ever, where a district court should sever the trial of alleged coconspirators." *United States v. Frazier*, 280 F.3d 835, 844 (8th Cir. 2002); see *United States v. Davis*, 154 F.3d 772, 781 (8th Cir. 1998); see also *infra* text accompanying notes 105–07.

<sup>25</sup> The government need only prove "knowledge of the essential elements" of the plan. *United States v. Hickman*, 151 F.3d 446, 454 (5th Cir. 1998). "[A] defendant may be found guilty . . . without knowing the full extent of the enterprise or the identities of all the coconspirators." *United States v. Ortiz de Jesus*, 230 F.3d 1, 5 (1st Cir. 2000). And, of course, the elements of the offenses can be shown by circumstantial evidence. *United States v. Gore*, 154 F.3d 34, 40 (2d Cir. 1998). As for the key element of agreement, the government need only show, by circumstantial evidence, "a tacit understanding." See *United States v. Samaria*, 239 F.3d 228, 234 (2d Cir. 2001) (quoting *Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999); *United States v. Peterson*, 223 F.3d 756, 760 (8th Cir. 2000).

<sup>26</sup> See *infra* text accompanying notes 54–64.

<sup>27</sup> *Hickman*, 151 F.3d at 454.

<sup>28</sup> *United States v. Nichols*, 151 F.3d 850, 851 (8th Cir. 1998).

<sup>29</sup> *Id.* The court on appeal is "highly deferential" to the verdict. *United States v. Green*,

Court has written repeatedly, the guilty verdict must stand if “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”<sup>30</sup> Or, as stated by many courts, a defendant who challenges the sufficiency of evidence bears “a nearly insurmountable burden.”<sup>31</sup>

### III. CHANGES TO BE MADE

Much has been settled regarding the prosecution of cases with multiple defendants. As indicated above, several important aspects of the substantive law for conspiracy and RICO are now clear. In regard to punishment, the People seemingly have spoken: frequent — and longer — imprisonment is better.

These decisions all reflect a notion that defendants, if proven guilty, deserve to be treated toughly. The decisions do not, however, suppose that the *process* by which we determine responsibility has somehow been altered. Fairness in the investigatory, pre-trial, and trial stages must be maintained. The burden remains on the government to prove each element of every offense beyond a reasonable doubt.<sup>32</sup> Moreover, criminality must be decided on an individual basis, even as to multiple defendants.<sup>33</sup>

As one considers multi-defendant prosecutions, deep concerns surface as to whether fairness and due process are being maintained, particularly in two significant areas. Defense counsel have raised many serious problems in connection

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258 F.3d 683, 695 (7th Cir. 2001).

<sup>30</sup> Jackson v. Virginia, 443 U.S. 307, 319 (1979).

<sup>31</sup> United States v. Viezca, 265 F.3d 593, 597 (7th Cir. 2001) (quoting *United States v. Phillips*, 239 F.3d 829, 842 (7th Cir. 2001)); see *United States v. Marji*, 158 F.3d 60, 63 (2d Cir. 1998).

<sup>32</sup> The Supreme Court’s most famous statement here is in *In re Winship*, 397 U.S. 358 (1970):

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence — that bedrock “axiomatic and elementary” principle whose “enforcement lies at the foundation of the administration of our criminal law.” . . . “[A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.”

*Id.* at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895); *W. v. Family Court*, 247 N.E.2d 253, 259 (N.Y. 1969) (Fuld, C.J., dissenting)) (second omission in original). See generally *United States v. Jimenez-Perez*, 238 F.3d 970, 973 (8th Cir. 2001) (holding that evidence must be sufficient to meet the reasonable doubt standard).

<sup>33</sup> See *United States v. Gaudin*, 515 U.S. 506, 522–23 (1995) (“The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged.”).



with trial and pre-trial procedures in multi-defendant criminal cases.<sup>34</sup> They speak of the adequacy of the charging papers,<sup>35</sup> complain of insufficient notice as to charges,<sup>36</sup> and question the discovery rules.<sup>37</sup> Some of the sharpest critiques center on venue in multi-defendant prosecutions and on joinder and severance issues. The location of the proceedings and the number of defendants prosecuted together have a tremendous impact on the trial. If significant improvement is to be achieved in balancing the competing interests of multiple defendants in criminal prosecutions, it will need to be made in these two important areas.

### A. Venue

Deciding where a person will face trial is one of the most important

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<sup>34</sup> The concerns have been raised for decades, nowhere more cogently than in Justice Jackson's concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (noting that large conspiracy trials create "an especially difficult situation for the defendant"). See generally *supra* note 3.

<sup>35</sup> Normally, an indictment is deemed sufficient if it simply demonstrates the elements of the statutory offense. *Hamling v. United States*, 418 U.S. 87, 117 (1974). Some courts, however, have written that with conspiracy not as much detail or specificity is required as with the underlying offense. *United States v. Daily*, 921 F.2d 994, 999 (10th Cir. 1990); *United States v. Tavelman*, 650 F.2d 1133, 1137 (9th Cir. 1981). But see *United States v. Hajecate*, 683 F.2d 894, 897 (5th Cir. 1982).

<sup>36</sup> The pause here relates to the reluctance of courts to grant defense motions for bills of particulars, even in complicated multi-party prosecutions. See generally *United States v. Barnes*, 158 F.3d 662, 665-66 (2d Cir. 1998); *United States v. Feola*, 651 F. Supp. 1068, 1132 (S.D.N.Y. 1987), *aff'd*, 875 F.2d 857 (2d Cir. 1989).

<sup>37</sup> Specific, but fairly narrow, rights of discovery are granted in a host of settings. See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963) (providing the constitutional basis for the "Brady Rule"); *United States v. Martinez*, 151 F.3d 384, 390 (5th Cir. 1998) (discussing, in part, the Jencks Act, 18 U.S.C. § 3500). Nevertheless, the limited scope of discovery can be difficult especially in multi-party cases. For instance, statements of co-conspirators generally are not discoverable. *United States v. Cauty*, 971 F. Supp. 687, 691 (N.D.N.Y. 1997). Moreover, the protection offered in a large prosecution, even under *Brady*, may be more apparent than real. That is, a defense challenge — resulting in dismissal — will prevail only if the government did not disclose evidence which was both exculpatory and material. *Parkus v. Bowersox*, 157 F.3d 1136, 1140-41 (8th Cir. 1998); *United States v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998). As stated in John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437 (2001):

In the context of a trial, *Brady* is not a rule requiring disclosure of all — or even most — information helpful to a defendant. *Brady* requires disclosure only of information that is both "favorable" to the defense and "material" to guilt or punishment. For advocates of broad discovery in criminal cases, the Court's narrow view of "materiality" under *Brady* has been one of the largest disappointments of the last quarter century.

*Id.* at 442 (citations omitted).

determinations to be made in the entire criminal justice process. The requirement of proper venue is found in the Sixth Amendment to the United States Constitution<sup>38</sup> and has been praised repeatedly by American judges as “a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place.”<sup>39</sup> Justice Frankfurter wrote that “[q]uestions of venue in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy.”<sup>40</sup>

In multi-defendant prosecutions, the venue question is vitally important. By definition, the charges involve more than one individual, people who themselves may reside throughout this large country.<sup>41</sup> The somewhat cavalier attitude which has developed on the venue question over the past century in U.S. courts is both surprising and disappointing. The rule for venue in multi-defendant cases — at

<sup>38</sup> Although the Sixth Amendment refers to jury selection, it has been applied to have the “impact of a venue provision.” Norman Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 UCLA L. REV. 751, 751 n.1 (1962). U.S. CONST. art. III, § 2, cl. 3, also deals with the matter by noting that criminal trials “shall be held in the State where the said crimes shall have been committed.” See generally *United States v. Saavedra*, 223 F.3d 85, 88 (2d Cir. 2000), *cert. denied sub nom. Rodriguez v. United States*, 532 U.S. 976 (2001).

<sup>39</sup> *United States v. Cores*, 356 U.S. 405, 407 (1958). Early concerns about venue were expressed in the Declaration of Independence. In issuing a string of complaints against King George III, the drafters wrote, “For transporting us beyond Seas to be tried for pretended offences.” THE DECLARATION OF INDEPENDENCE para. 21 (U.S. 1776).

<sup>40</sup> *United States v. Johnson*, 323 U.S. 273, 276 (1944). The lower courts, too, have been somewhat extravagant in praising the venue provision as a bulwark for justice. See, e.g., *United States v. Angotti*, 105 F.3d 539, 541 (9th Cir. 1997) (affirming the “important concerns that a criminal jury trial be held near the place where the crime was committed and where prosecution can conveniently proceed.”). The most recent statements on venue from the Supreme Court — consistent with its earlier views — are found in *United States v. Rodriguez-Moreno*, 526 U.S. 275, 281–82 (1999), and *United States v. Cabrales*, 524 U.S. 1 (1998). See generally *United States v. Perez*, 280 F.3d 318, 327–28 (3d Cir.), *cert. denied*, 123 S. Ct. 231 (2002); *United States v. Scott*, 270 F.3d 30, 33 (1st Cir. 2001), *cert. denied*, 535 U.S. 1007 (2002); *United States v. Ochoa*, 229 F.3d 631, 636–37 (7th Cir. 2000); *United States v. Bowens*, 224 F.3d 302, 308 (4th Cir. 2000), *cert. denied*, 532 U.S. 944 (2001); *United States v. Romero*, 150 F.3d 821, 826–27 (8th Cir. 1998).

<sup>41</sup> See Abrams, *supra* note 38, at 752 (footnotes omitted) (discussing this problem forty years ago!):

Because of a variety of factors — including improvements in long-distance communication and transportation facilities, the commercial and industrial development of the nation, the growth of criminal groups organized nationwide and the nature of crimes now covered by federal criminal laws — the incidence of federal prosecutions involving crimes with some type of multi-district contacts is today very large. Accordingly, the problem of determining proper venue in such cases is today a recurring one.

Without question, as we shall see, the problem is far more acute today.

least when conspiracy is alleged<sup>42</sup> — can be stated easily: The prosecution may pursue a conviction in any district<sup>43</sup> in which an act by any conspirator was committed in furtherance of the criminal endeavor.<sup>44</sup> Had this act requirement been construed narrowly, little problem would exist today.<sup>45</sup> Early in the last century, however, the Supreme Court allowed for a broad reading of the venue principle.

In *Hyde v. United States*,<sup>46</sup> Justice Holmes challenged the majority to apply the venue rules strongly in favor of the criminal conspiracy defendant.<sup>47</sup> He contended that the core of the crime of conspiracy was the agreement, so the proper site for prosecution was the place where the agreement had been reached,<sup>48</sup> not simply any city where some act had been taken in furtherance of the agreement. He offered deep concerns as to a contrary doctrine.

[T]he trial of crimes shall be held in the State and district where the crimes shall have been committed. With the country extending from ocean to ocean this requirement is even more important now than it was

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<sup>42</sup> The case almost always entails charges involving more than one defendant. *See supra* note 3.

<sup>43</sup> Under the federal rules. *See United States v. Stewart*, 256 F.3d 231, 241 n.3 (4th Cir.), *cert. denied sub nom. Simms v. United States*, 534 U.S. 1049 (2001), *cert. denied sub nom. Livingston v. United States*, 535 U.S. 977 (2002); *Saavedra*, 223 F.3d at 94; *United States v. Tingle*, 183 F.3d 719, 726 (7th Cir. 1999); *United States v. Bin Laden*, 91 F. Supp. 2d 600, 612 (S.D.N.Y. 2000). The state requirements are essentially the same. *See, e.g., State v. Johnson*, No. Crim. A. IN-00060900, 2000 WL 33113954, at \*2 (Del. Super. Ct. Dec. 14, 2000); *Hill v. State*, 797 So. 2d 914, 916 (Miss. 2001); *People v. Kassebaum*, 744 N.E.2d 694 (N.Y. 2001); *State v. Logue*, No. W1999-01795-CCA-R3-CD, 2000 WL 1843248 (Tenn. Crim. App. Dec. 15, 2000).

<sup>44</sup> *Perez*, 280 F.3d at 329; *United States v. Crozier*, 259 F.3d 503, 519 (6th Cir. 2001), *cert. denied*, 534 U.S. 1149, *cert. denied sub nom. Burton v. United States*, 534 U.S. 1171 (2002); *United States v. Cordova*, 157 F.3d 587, 597 (8th Cir. 1998). In most jurisdictions, the government is obliged to prove proper venue by a preponderance of the evidence. *Scott*, 270 F.3d at 34; *United States v. Carreon-Palacio*, 267 F.3d 381, 391 (5th Cir. 2001); *United States v. Villarini*, 238 F.3d 530, 534 (4th Cir. 2001); *United States v. Bala*, 236 F.3d 87, 95 (2d Cir. 2000); *United States v. Cryar*, 232 F.3d 1318, 1323 (10th Cir. 2000), *cert. denied*, 532 U.S. 951 (2001); *United States v. Jones*, 231 F.3d 508, 516 (9th Cir. 2000); *State v. Logue*, No. W1999-01795-CCA-R3-CD, 2000 WL 1843248 (Tenn. Crim. App. Dec. 15, 2000). *But see Jones v. State*, 537 S.E.2d 80, 82 (Ga. 2000); *State v. Cavallari*, 571 N.W.2d 176, 181 (Wis. App. 1997) (holding that the State must prove venue beyond a reasonable doubt).

<sup>45</sup> As with a limitation, for instance, that venue would be proper only in places where the defendant resided or where a crime had been committed. *See infra* text accompanying notes 84–94.

<sup>46</sup> 225 U.S. 347 (1912).

<sup>47</sup> *Id.* at 384–91 (Holmes, J., dissenting). Justices Lurton, Hughes, and Lamar joined Justice Holmes in that dissent.

<sup>48</sup> Or alternatively, where later planning meetings had been held. *Hyde*, 225 U.S. at 385.

a hundred years ago, and must be enforced in letter and spirit if we are to make impossible hardships amounting to grievous wrongs. In the case of conspiracy the danger is conspicuously brought out. Every overt act done in aid of it of course is attributed to the conspirators, and if that means that the conspiracy is present as such wherever any overt act is done, it might be at the choice of the Government to prosecute in any one of twenty States in none of which the conspirators had been. And as wherever two or more have united for the commission of a crime there is a conspiracy, the opening to oppression thus made is very wide indeed.<sup>49</sup>

*Hyde* clearly illustrated just such a problem. The defendants in *Hyde* were compelled to travel across the country and appear in Washington because their attorney had entered a lawful appearance earlier before a federal agency there.

The majority was not persuaded by Holmes's concerns. These Justices saw the overt act requirement in the federal conspiracy statute as an essential element of the crime.<sup>50</sup> Thus, wherever such an act occurred, a part of the crime was committed, and it was then a proper place for prosecution of the alleged conspirators. In response to the argument that such a reading of the statute could create serious and unfair situations for criminal defendants, the Court responded forcefully:

We realize the strength of the apprehension that to extend the jurisdiction of conspiracy by overt acts may give to the Government a power which may be abused, and we do not wish to put out of view such possibility. But there are counter considerations. It is not an oppression in the law to accept the place where an unlawful purpose is attempted to be executed as the place of its punishment, and rather conspirators be taken from their homes than the victims and witnesses of the conspiracy be taken from theirs. We must not, in too great a solicitude for the criminal, give him a kind of immunity from punishment because of the difficulty in convicting him — indeed, of even detecting him. And this may result, if the rule contended for be adopted. Let him meet with his fellows in secret and he will try to do so; let the place be concealed, as it can be, and he and they may execute their crime in every State in the Union and defeat punishment in all.<sup>51</sup>

While the potential for serious mischief was present in *Hyde*, it certainly was not inevitable that the holding would lead to the difficult situation we see today.

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<sup>49</sup> *Id.* at 386–87 (citation omitted).

<sup>50</sup> *Id.* at 359.

<sup>51</sup> *Id.* at 363.

After all, in *Hyde* much of the evidence regarding the crime was in Washington, the attorney's act was not minor, all the defendants were well aware of the accused's actions, and the overt act was a necessary element of the offense. Therefore, if *Hyde* had been limited to its facts, the problems found in today's world never would have appeared. Alas, *Hyde* has not been limited. Consider as a working illustration a composite case drawn from a few actual prosecutions. Let us suppose an alleged wide ranging conspiracy to import and distribute drugs nationally and also re-distribute the drugs internationally.<sup>52</sup> The "heads" of the scheme are in Atlanta, Boston, Chicago, Seattle, and Washington. Each of these individuals, in turn, has associates in several cities: Baltimore, Houston, Indianapolis, Kansas City, Las Vegas, Miami, Milwaukee, New York, Newark, Philadelphia, Phoenix, Portland, Richmond, San Francisco, and Shreveport. Each person takes some action related to the broad operation<sup>53</sup> in his/her home district: twenty defendants, twenty cities, twenty states. In chart form the prosecution looks like this:



With that illustration in mind, one must note that the reading given to the *Hyde* venue holding has been generous to a fault.<sup>54</sup> Though the burden is on the

<sup>52</sup> The drugs are being brought in from Asia and South America, sold throughout the United States, and also shipped to Canada and Europe.

<sup>53</sup> Ranging from innocuous travel arrangements to serious crimes such as assault and extortion.

<sup>54</sup> This, of course, is true in the federal system. In *Rodriguez-Moreno*, 526 U.S. 275 (1999), the Supreme Court wrote: "[V]enue [is] proper against [the] defendant in [any] district where [a] co-conspirator carried out overt acts even though there was no evidence that the defendant had ever entered that district or that the conspiracy was formed there." *Id.* at 281-82; see also *Prosper v. United States*, 218 F.3d 883, 884 (8th Cir. 2000); *United States v. Joselyn*, 99 F.3d 1182, 1191 (1st Cir. 1996); *Badalamenti v. United States*, No. 95

government to establish proper venue, that burden usually is satisfied — as noted earlier — by a preponderance of the evidence.<sup>55</sup> Moreover, any act, however “small”<sup>56</sup> or “trivial,”<sup>57</sup> will demonstrate venue. As one commentator noted, “[n]o significant limitations are imposed on the nature and type of acts which suffice to . . . provide a basis for the laying of venue.”<sup>58</sup> Moreover, all defendants charged with being part of the plan will be held responsible for such acts,<sup>59</sup> even if they were not aware of the acts,<sup>60</sup> or joined the group after the acts were completed.<sup>61</sup> In addition, the venue principle will apply to statutes that do not themselves require proof of an overt act.<sup>62</sup> With the above illustration, then, it is reasonably certain that the twenty defendants could be joined together for trial<sup>63</sup> in any of the twenty cities; moreover, the minor Phoenix, Arizona participant could be forced to travel for a lengthy trial to Portland, Maine, the domicile of another minor participant. One can conclude quite fairly that the venue result here is a sort of strict liability, or at most adherence to a negligence standard. Defendants may be tried in any far-flung district in which any act was committed at any time by any charged defendant so long as it was done for the purpose of furthering the overall plan.<sup>64</sup>

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Civ. 10128, 1997 U.S. Dist. LEXIS 2601 (S.D.N.Y. 1997). That also is true in most states. *See, e.g.,* *People v. Bobo*, 897 P.2d 909, 913 (Colo. Ct. App. 1995); *People v. Brown*, 438 N.E.2d 250, 252 (Ill. App. Ct. 1982); *see also* CAL. PENAL CODE § 781 (1985).

<sup>55</sup> *See supra* note 44.

<sup>56</sup> *United States v. Tingle*, 183 F.3d 719, 728 (7th Cir. 1999).

<sup>57</sup> As stated by Justice Jackson in *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

<sup>58</sup> *Abrams*, *supra* note 38, at 768. “[P]hone calls from one district to another by themselves can establish venue in either district as long as the calls further the conspiracy.” *United States v. Smith*, 198 F.3d 377, 382 (2d Cir. 1999). One court has actually written that flying over a landing site in a district could establish venue there. *United States v. Fanello*, 662 F.2d 505, 509 n.8 (8th Cir. 1981).

<sup>59</sup> *United States v. Antonakeas*, 255 F.3d 714, 723 (9th Cir. 2001); *United States v. Kim*, 246 F.3d 186 (2d Cir. 2001). And, of course, direct proof of venue is not required, circumstantial trial evidence will be sufficient. *United States v. Jones*, 231 F.3d 508, 516 (9th Cir. 2000).

<sup>60</sup> *United States v. Savage*, 891 F.2d 145, 149 (7th Cir. 1989).

<sup>61</sup> *United States v. Davis*, 666 F.2d 195, 200 (5th Cir. 1982). For most matters, including venue, late-joining conspirators are held responsible for acts that their co-defendants committed before their late entry. As stated in *United States v. Goldberg*, 105 F.3d 770 (1st Cir. 1997): “[A] late-joining conspirator takes the conspiracy as he finds it: ‘a conspiracy is like a train,’ and ‘when a party steps aboard, he is part of the crew, and assumes conspirator’s responsibility for the existing freight.’” *Id.* at 775. *See generally* *United States v. Wagner*, 996 F.2d 906, 914 (7th Cir. 1993); *United States v. Edwards*, 945 F.2d 1387, 1403 (7th Cir. 1991).

<sup>62</sup> Such as RICO and Title 21 drug offenses in the federal courts. *United States v. Rodriguez*, 67 F.3d 1312, 1317–18 (7th Cir. 1995).

<sup>63</sup> *See infra* Part III.B.

<sup>64</sup> *See generally* *United States v. Bala*, 236 F.3d 87 (2d Cir. 2000).

We have moved far with the venue rules. One must hasten to add, though, that the federal system and most states employ checks to limit an unfair venue result which might otherwise occur. First and foremost, there is the commonsense realization that prosecutors are not likely to bring an action in a district distant from a majority of the evidence, thousands of miles from the witnesses and investigators. An unchallengeable statement, but hardly dispositive. In a case such as the one posited earlier,<sup>65</sup> the witnesses, investigators, and evidence may be scattered all over the country. It simply is not self-evident which city would be most convenient for the government under the circumstances. Moreover, with the great discretion given to prosecutors as to where, how, and whom to charge,<sup>66</sup> good reasons may exist for the government seeking to go to a somewhat distant locale. In particular, to put the matter bluntly, prosecutors may expect the imposition of more severe punishment for convicted defendants in some places than in other places. Indeed, even in the federal system where sentencing guidelines exist, there is little doubt that serious sentencing disparities between federal districts are seen rather routinely.<sup>67</sup>

The major check on burdensome venue decisions rests not with prosecutors but with trial judges who are given wide powers to alleviate such problems. Federal Rule of Criminal Procedure 21(b) allows the trial judge to transfer the proceedings, at the defendant's request, "in the interest of justice."<sup>68</sup> However, the hope of deference to negatively-impacted defendants never has been realized. These provisions, in both federal and state prosecutions, often are not applied in favor of criminal defendants.<sup>69</sup> To the contrary, they usually are construed quite narrowly in response to removal motions based on venue hardships.<sup>70</sup>

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<sup>65</sup> See *supra* text accompanying notes 52–53.

<sup>66</sup> See generally Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 *FORDHAM L. REV.* 1511 (2000).

<sup>67</sup> A study by the Transactional Records Access Clearinghouse of Syracuse University, using Departments of Justice statistics, demonstrated that the goal of uniformity in the Federal Guidelines has hardly been fully accomplished, with serious variances found even among adjacent districts. The information is reported in Michael Higgins, *Sizing Up Sentences*, A.B.A.J., Nov. 1999, at 42.

<sup>68</sup> FED. R. CRIM. P. 21(b). The state rules are similar. See, for example, Section 1033(a) of the California Penal Code, which allows for transfer if "there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." CAL. PENAL CODE § 1033(a) (1985).

<sup>69</sup> In California, for instance, according to one report, "[i]t is extremely rare for a change of venue to be granted." Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 *S. CAL. L. REV.* 1533, 1539 n.27 (1993).

<sup>70</sup> Professor Wright commented: "In no case has a final judgment been reversed on this ground." 2 CHARLES ALAN WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 347, at 425-26 (3d ed. 2000). I too have found no case — not one — in which the defense transfer request was denied at the trial level and then reversed on appeal because the requested location would be more fair to the defense. Only two came close to such a result. One is *Matter of Phillip R. Balsimo*, 68 F.3d 185 (7th Cir. 1995), wherein mandamus was issued to require

The case that established the manner in which transfer rules function demonstrates several key points. First, the Supreme Court's opinion in *Platt v. Minnesota Mining and Manufacturing Co.*<sup>71</sup> was rendered in an antitrust matter, not a major, more typical, criminal prosecution. Second, the entire opinion is less than a dozen paragraphs long, with a minimal treatment of the transfer request question.<sup>72</sup> It is so minimal, in fact, that it essentially only restates the dissenting circuit judge's view of the numerous considerations present with such a request. Third, and perhaps most to the point, it is the only "extended" treatment by the Court of this matter in a non-publicity case.<sup>73</sup>

A few important principles emerge from *Platt*. The heavily cited notion is that the transfer issue generally raises numerous factors for consideration by the trial judge.<sup>74</sup> The location of the defendant is only one of these, not necessarily the most important. To be sure, the Court in *Platt* rejected the defendant's request for transfer in forceful fashion:

The fact that Minnesota is the main office or "home" of the respondent has no independent significance in determining whether transfer to that

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the district court to reconsider denial of the motion for change of venue; the district court had placed upon the defendant the burden of establishing "truly compelling circumstances," for this change, but the correct standard was whether, "all relevant things considered, the case would be better off transferred to another district." *Id.* at 187. The other is *United States v. Williams*, 274 F.3d 1079 (6th Cir. 2001). There the appeals judges did indeed reverse the lower court and order that the matter be transferred to another district. *Id.* at 1085. In that case, however, the defendant did not argue that his alleged behavior was more properly seen as having occurred in Texas rather than Michigan. *Id.* at 1083. Instead, he argued — and the appeals court agreed — that venue was never proper at all in Michigan. *Id.* at 1084–85. To be sure, "Michigan was chosen as a venue *solely* for the convenience of the government[;] none of the overt acts . . . occurred in Michigan and the conspiracy had no effect in Michigan. Moreover, it was never intended to have any effect there." *Id.* at 1085.

<sup>71</sup> 376 U.S. 240 (1964).

<sup>72</sup> *Id.* at 241.

<sup>73</sup> There are numerous cases in which courts consider problems concerning venue and pretrial publicity. The courts' views as to transfer here are considerably more defense-oriented. For instance, see the discussion in *United States v. Blom*, 242 F.3d 799 (8th Cir.), cert. denied, 534 U.S. 880 (2001), and *United States v. Volpe*, 42 F. Supp. 2d 204 (E.D.N.Y. 1999).

<sup>74</sup> Some examples of those factors include:

(1) location of corporate defendant; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket condition of each district or division involved; and (10) any other special elements which might affect the transfer.

*Platt*, 376 U.S. at 243–44.



district would be "in the interest of justice," although it may be considered with reference to such factors as the convenience of records, officers, personnel and counsel.<sup>75</sup>

The lower courts certainly have not extended *Platt* in favor of criminal defendants raising venue concerns. Judges do not transfer mainly to accommodate defendants;<sup>76</sup> the convenience of witnesses and the government is weighed heavily.<sup>77</sup> In addition, the trial judge's rejection of the transfer requests will only be overturned on a showing of an abuse of discretion.<sup>78</sup> Whatever relief might have been present for the venue-burdened criminal defendant is not to be found in the laws of transfer or change of venue.<sup>79</sup> The transfer decision is rarely made in favor of the defense.<sup>80</sup>

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<sup>75</sup> *Id.* at 245-46. As stated in *United States v. Maldonado-Rivera*, 922 F.2d 934 (2d Cir. 1990): "No one of these considerations is dispositive, and '[i]t remains for the court to try to strike a balance and determine which factors are of greatest importance.'" *Id.* at 966 (quoting *United States v. Stephenson*, 895 F.2d 867, 895 (2d Cir. 1990)).

<sup>76</sup> *United States v. Scholl*, 166 F.3d 964, 970 (9th Cir. 1999); *United States v. Bittner*, 728 F.2d 1038, 1041 (8th Cir. 1984).

<sup>77</sup> *United States v. Kopituk*, 690 F.2d 1289, 1322 (11th Cir. 1982) (discussing the convenience of joining twelve defendants as well as the government's interest in promoting "judicial economy").

<sup>78</sup> *United States v. Fagan*, 821 F.2d 1002, 1008 (5th Cir. 1987). As stated in *United States v. Hunter*, 672 F.2d 815 (10th Cir. 1982): "The facts must compel and not merely support venue transfer before an abuse of discretion will be found by an appellate court." *Id.* at 816; see also *supra* note 70.

<sup>79</sup> A review of the cases makes clear that the courts have been decidedly unsympathetic to defense claims as to the need for the granting of a transfer motion. Good illustrations of this point can be seen in *United States v. Jordan*, 223 F.3d 676, 684-86 (7th Cir. 2000) (involving a resident of Puerto Rico being tried in Chicago); *United States v. Heaps*, 39 F.3d 479, 482-83 (4th Cir. 1994) (involving a New York defendant being tried in Virginia, though co-defendants not joined with him and he personally took no actions in Virginia); and *United States v. Morrison*, 946 F.2d 484, 489-90 (7th Cir. 1991) (proper to have a resident of Puerto Rico being tried in Milwaukee, even though a majority of the criminal actions took place in Puerto Rico). See generally *United States v. Hunter*, 672 F.2d 815 (10th Cir. 1982).

<sup>80</sup> It is particularly striking how different the analysis is here compared with the quite broad reading of defense transfer motions found in civil actions under FED. R. CIV. P. 21, which provides for transfer of venue "in the interest of justice." That language is identical to the language in FED. R. CRIM. P. 21. Trial judges appear far more inclined to order a transfer for the convenience of the parties in actions under the civil rules.

In order to transfer a civil action, a court must examine factors set out in the statute as well as other factors that involve public or private interests. The statutory factors are: (1) the convenience of the parties; (2) the convenience of the witnesses; (3) the interest of justice; and (4) whether the case could have been brought in the proposed transferee forum. The court must also balance some of the public and private interests at stake in the litigation in addition to

This discussion is not offered to suggest that venue problems arise in all or most multiple-defendant prosecutions without any possible viable remedy present. Still, such problems do surface regularly, and when they do, they can be most serious. *Hyde* itself is a good illustration, as the defendants there were required to appear three thousand miles from their residences, based on a lawful and relatively minor action by their agent.<sup>81</sup> In today's world with prosecutions of more than one or even two dozen defendants scattered throughout the country, the current broad and liberal venue rule can truly be devastating to the defendants in a number of ways. It can create tremendous costs to be borne by the parties, affect the ability to present documentary evidence and numerous witnesses, and limit the opportunity to prepare adequately for the trial. It will not do for the courts to respond, as in *Hyde* and *Platt*, by relying on an outdated and conclusory argument that a conspiracy is committed in any district in which any minor overt act took place and that undue burdens can be eliminated through the transfer power.<sup>82</sup>

With the movement toward bigger trials nationwide, there can be little doubt that Justice Holmes was on the right track in his *Hyde* dissent, though perhaps his opinion was too restrictive.<sup>83</sup> With Holmes's concerns in the forefront, surely there is a middle ground between the two positions in *Hyde*.

I propose just such a middle ground. Allow the prosecution great flexibility in establishing venue, but not complete freedom to proceed in *any* district in which *some* act occurred. Venue ought not to be proper if the parties flew over a city, placed a call into it, or merely sent a representative to it for some minor chore. Rather, the law should give the government several, finite options. Prosecute, as Justice Holmes wrote, where the agreement was born.<sup>84</sup> Or, charge a particular

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examining the elements set out in the statute, such as: (1) the plaintiff's choice of forum; (2) the relative ease of access to sources of proof; (3) the availability of compulsory process for attendance of unwilling witnesses; (4) the possibility of viewing premises, if applicable; (5) the cost of obtaining attendance of willing witnesses; (6) all other practical problems that make trial of a case easy, expeditious, and inexpensive; and (7) "public interest" factors, including the relative congestion of court dockets, choice of law considerations, and the relationship of the community in which the courts and jurors are required to serve to the occurrences that give rise to the litigation. The burden of establishing the need for transfer rests with the moving party. The court also has broad discretion to determine "whether convenience and fairness considerations weigh in favor of transfer."

*Am. Littoral Soc'y v. EPA*, 943 F. Supp. 548, 549–50 (E.D. Pa. 1996) (citations omitted). While the language in the two provisions is the same, this sort of broad discussion — while common in civil actions — is rare in reported criminal cases.

<sup>81</sup> *Hyde v. United States*, 225 U.S. 347, 359–60 (1912).

<sup>82</sup> See, e.g., *id.*; *Platt v. Minn. Mining & Mfg. Co.*, 376 U.S. 240, 243–44 (1964).

<sup>83</sup> See *Hyde*, 225 U.S. at 386–87 (Holmes, J., dissenting).

<sup>84</sup> See *id.* at 389–90.

defendant in any district in which she *personally* took any act — however minor — in furtherance of the scheme.<sup>85</sup> Or, all defendants could be tried in a district in which something other than a minor act took place, perhaps a “substantial step” toward the ultimate goal.<sup>86</sup> Finally, the proposal would allow the government to establish venue in a district in which even a minor act occurred, so long as the parties had earlier agreed specifically that such a place would be involved in the endeavor.

While such a “middle ground” approach might give Justice Holmes some hesitation,<sup>87</sup> it is a great improvement over the “strict liability” attitude<sup>88</sup> currently in place. To ensure careful compliance with these requirements, the law should mandate both explicit findings on the trial court record<sup>89</sup> and the option for an interlocutory appeal by either party. This approach has been used effectively elsewhere in criminal justice process conspiracy cases<sup>90</sup> and would impose little added burden when compared to the tremendous impact of the venue determination.<sup>91</sup> If we are serious that venue raises “deep issues of public policy,”<sup>92</sup>

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<sup>85</sup> Of course, the price to be paid here would be a more expanded view of severance, as discussed *infra* Part III.B.

<sup>86</sup> Borrowing from the law of attempt. The courts have generously construed the “substantial step” requirement, but have drawn the line in connection with genuinely minor acts. *See, e.g.,* United States v. McDowell, 250 F.3d 1354 (11th Cir. 2001); United States v. Duran, 96 F.3d 1495 (D.C. Cir. 1996); Walters v. Maass, 45 F.3d 1355 (9th Cir. 1995).

<sup>87</sup> After all, for him, venue was proper *only* in the district in which the agreement was formed.

<sup>88</sup> Under strict liability, unlike responsibility for the crime itself, the defendants are charged with co-defendant’s actions — however insubstantial — if unintended and even if completely unforeseen and unforeseeable. *See generally* United States v. Matthews, 168 F.3d 1234, 1246 (11th Cir. 1999).

<sup>89</sup> Such findings should include why transfer would not be in the interest of justice — in response to the defense request — and why it is most fair to have the trial conducted in the particular city requested by the prosecution.

<sup>90</sup> Both are routinely imposed with the use of co-conspirator declarations. *See, e.g.,* United States v. Rodriguez, 975 F.2d 404, 408 (7th Cir. 1992); United States v. Layton, 720 F.2d 548 (9th Cir. 1983); United States v. Bolla, 685 F.2d 929, 933 (5th Cir. 1982); United States v. Fitts, 635 F.2d 664, 666 (8th Cir. 1980) (ordering that findings that the statement was made by a conspirator during and in furtherance of the scheme); United States v. Perry, 624 F.2d 29, 30 (5th Cir. 1980). The explicit finding requirement is seen often in connection with determinations by the trial court that probative value of evidence outweighs its prejudicial impact. *See, e.g.,* United States v. Ward, 190 F.3d 483, 494 (6th Cir. 1999); White v. United States, 148 F.3d 787, 792 (7th Cir. 1998).

<sup>91</sup> In the federal courts, an accommodation would have to be made, for the statutes that allow government appeals on an interlocutory basis apply to certain “final decisions,” as noted in *In re Sealed Case*, 893 F.2d 363, 366 (D.C. Cir. 1990), and would not appear to cover venue determinations (or joinder and severance decisions, as proposed *infra*). 18 U.S.C. § 3731 allows for government interlocutory appeals with dismissals of indictments, suppression, or exclusion of evidence, the status determination and transfer order of

any added minimal burden should be readily accepted.<sup>93</sup>

This venue proposal strikes a reasonable balance. On the one hand, it allows the prosecution to choose from an array of venue locations, necessary in today's world of national and international conspiracies. On the other hand, it avoids most of the problems anticipated by Justice Holmes in *Hyde*. Under this proposed system, defendants could not be prosecuted in districts in which they had, realistically, no serious contact and from which they could not transfer prior to trial.<sup>94</sup>

### *B. Joinder of Defendants for Trial*

#### 1. In Support

It is not at all unusual today, in both the state and federal criminal justice systems, to see unwieldy, complicated, and complex jury proceedings involving large numbers of criminal defendants being tried together. This is not to suggest that the problem here is a new one — that would hardly be the case. Justice Jackson more than half a century ago railed against “Government institute[d] mass trials.”<sup>95</sup> Almost a quarter century ago, one prominent commentator carried the argument further by recommending major changes to avoid these sorts of challenging trials.<sup>96</sup> Still, the problem is worse today, as we are seeing greater numbers of large, complicated, joint-defendant trials than ever before.<sup>97</sup> It is not

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juveniles, and the directed release of defendants. *See United States v. M.C.E.*, 232 F.3d 1252 (9th Cir. 2000); *United States v. Holt*, 229 F.3d 931 (10th Cir. 2000); *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000); *United States v. Delatorre*, 157 F.3d 1205 (10th Cir. 1998).

<sup>92</sup> *See supra* text accompanying note 40.

<sup>93</sup> Certainly there would be added burdens, and legitimate concerns have been expressed as to such burdens, particularly with interlocutory appeals. “[T]he delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law.” *DiBella v. United States*, 369 U.S. 121, 126 (1962). Truly, no one would wish to create further delays and disruptions in the criminal justice process. Still, the issues here are of great import; moreover, the interlocutory appeals process with evidentiary rulings appears to run elsewhere without major difficulty. If there is a price to be paid for this process, that price would appear to be reasonable.

<sup>94</sup> *See generally Long Criminal Trials*, *supra* note 4, at 183 (remarks of Judge J. Joseph Smith) (discussing the problems of people “tried in places remote from their homes”).

<sup>95</sup> *Krulewicz v. United States*, 336 U.S. 440 (1949) (Jackson, J., concurring).

<sup>96</sup> Robert O. Dawson, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 MICH. L. REV. 1379 (1979) (asserting that criminal responsibility is individual and suggesting that courts relax the requirement that defendants must show compelling reasons for severance).

<sup>97</sup> *See supra* note 3; *see also infra* text accompanying notes 101–104. *See generally Richardson v. Marsh*, 481 U.S. 200, 209 (1987) (“Joint trials play a vital role in the criminal

that the law has changed. For many years in both state and federal courts, prosecutors have been given considerable discretion in charging single, huge conspiracies.<sup>98</sup> The standing rule for these cases has been that parties charged together as co-conspirators generally can be tried together.<sup>99</sup> True enough. But the manner in which this rule is applied has changed. The experience in the United States Court of Appeals for the Fifth Circuit Appeals over the past several years is instructive, if hardly unique.<sup>100</sup>

In *United States v. Posada-Rios*,<sup>101</sup> thirty-five defendants were charged with various drug offenses in a 134-page indictment, ten defendants were convicted after

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justice systems.”).

<sup>98</sup> It is hornbook law that the criminal law allows the government to prosecute for one conspiracy many individuals who do not know each other, who are living in varied parts of the country, and who are engaged in different criminal activities. The rationale — often played out with metaphors of chains and links, or wheels, spokes, and hubs — is that each individual is part of the larger operation, each acting to further the broad interests of that operation. It is this principle which allows the twenty defendants in the earlier illustration to be charged together, though the actions of most of them would appear to be not wholly related to the actions of the others. Moreover, if the proof at trial demonstrates distinct smaller conspiracies, rather than a single overarching scheme, the defendants will not necessarily benefit; the trial judge generally determines the propriety of joinder on the basis of the indictment alone. *United States v. Dominguez*, 226 F.3d 1235, 1240 (11th Cir. 2000) (holding that joinder of drug charges and mortgage fraud charges was proper). Under the doctrine of retroactive misjoinder, if the evidence at trial shows that joinder was not proper, the question then is whether bringing the defendants together at trial necessarily resulted in substantial prejudice to the defense. *See Schaffer v. United States*, 362 U.S. 511 (1960).

<sup>99</sup> *See generally Zafiro v. United States*, 506 U.S. 534, 537 (1993).

<sup>100</sup> See, for instance, these recent cases from other circuits: *United States v. Albers*, 226 F.3d 989 (9th Cir. 2000) (prosecution of twelve defendants for BASE (Buildings, Antennas, Spans, and Earth) jumping from peaks in national parks), *cert. denied*, 531 U.S. 1114 (2001); *United States v. Saavedra*, 223 F.3d 85 (2d Cir. 2000) (prosecution of twelve members of a violent gang), *cert. denied sub nom. Rodriguez v. United States*, 532 U.S. 976 (2001); *United States v. Patterson*, 215 F.3d 776 (7th Cir.) (trial of fifteen defendants on drug charges), *vacated in part on other grounds*, 531 U.S. 1033 (2000); *United States v. Jackson*, 207 F.3d 910 (7th Cir.) (twelve defendants in a three-month trial), *vacated on other grounds*, 531 U.S. 953 (2000), *reinstated*, 236 F.3d 886 (7th Cir. 2001); *United States v. Diaz*, 176 F.3d 52 (2d Cir. 1999) (trial of ten defendants involved in a racketeering enterprise); *United States v. Magana*, 118 F.3d 1173 (7th Cir. 1997) (sixty-six-count indictment, five-week trial of eight defendants, and over four hundred taped conversations in English, Spanish, or Assyrian being received in evidence); *United States v. Baker*, 10 F.3d 1374 (9th Cir. 1993) (fifteen defendants in a sixteen-month trial in which there were nearly two hundred limiting instructions given to the jury); *United States v. Accetturo*, 842 F.2d 1408 (3d Cir. 1988) (twenty-six defendants in a fifteen-month trial); *United States v. Parks*, No. 95-CR-510, 1998 U.S. Dist. LEXIS 9967 (N.D. Ill. June 17, 1998) (twelve defendants in a sixteen-week trial); *United States v. Balogun*, 971 F. Supp. 1215 (N.D. Ill. 1997) (twenty-four defendants).

<sup>101</sup> 158 F.3d 832 (5th Cir. 1998).

eighty-four days of trial. The resulting appellate opinion took more than fifty pages to dispose of the many contentions involving the length of the trial and the "tense atmosphere created by the high security required."<sup>102</sup> Ten defendants were tried together in *United States v. Morrow*,<sup>103</sup> in spite of the fact that numerous items of evidence were admitted as to some charges, but not all, and were admitted against some of the defendants, but not all. The jury returned convictions against the nine defendants in *United States v. Brown*,<sup>104</sup> another drug case; the criminal acts there were shown to have been committed over a seven year period.

Certainly it is true that many of the appeals judges considering the experience in the Fifth Circuit, and elsewhere, express concerns and doubts as to the fairness of such a complex and lengthy process.<sup>105</sup> The fact remains, though, that in most, if not all, reported decisions and in each of these cited cases,<sup>106</sup> the courts rejected the defense arguments as to the prejudicial impact of the joinder of large numbers of defendants. It will take a very powerful argument to persuade a trial judge as to the merits of a severance motion. As noted recently in the Fifth Circuit, it is not enough for the defense to offer "[m]ere generalized criticism of megatrials," the defendants must demonstrate substantial prejudice resulting from specific isolated events at trial.<sup>107</sup>

The problems here are not isolated; throughout the nation there are quite a number of these large, joint trials today.<sup>108</sup> Several reasons can be suggested for this phenomenon. Prosecutors assert forcefully that such trials are necessary to save judicial resources and to ensure that jurors have a full picture of the entire criminal

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<sup>102</sup> *Id.* at 863.

<sup>103</sup> 177 F.3d 272 (5th Cir. 1999).

<sup>104</sup> 217 F.3d 247 (5th Cir. 2000).

<sup>105</sup> See, e.g., *United States v. Ellender*, 947 F.2d 748, 751 (5th Cir. 1991); see also *infra* note 125–26 and accompanying text.

<sup>106</sup> See *supra* note 100.

<sup>107</sup> *Posada-Rios*, 158 F.3d at 863.

<sup>108</sup> The number of multiple-defendant trials, though large and seemingly growing, is considerably less than one would imagine, given the enormous number of multiple-defendant indictments brought. After pre-trial skirmishes (with motions concerning venue, severance, and evidence), many defendants plead guilty. See, e.g., *United States v. Colon*, No. 97-CR-659, 1999 U.S. Dist. LEXIS 21681 (N.D. Ill. Jan. 8, 1999); *United States v. O'Neill*, 27 F. Supp. 2d 1121 (E.D. Wis. 1998); *United States v. Chavez*, No. 97-CR-197-D, 1998 U.S. Dist. LEXIS 22646 (D. Colo. May 12, 1998); *United States v. Guzman*, 11 F. Supp. 2d 292 (S.D.N.Y.), *aff'd*, 152 F.3d 921 (2d Cir. 1998). Illustrative is *United States v. Kipp*, 990 F. Supp. 102 (N.D.N.Y. 1998) in which more than seventy defendants were indicted; after severance motions were denied, most of the defendants pleaded guilty. That case is noteworthy, because the defendant Kipp was named in only one count of the charging document.

endeavor.<sup>109</sup> Though many have strongly challenged this view,<sup>110</sup> it is one that continues to be made and that does have some validity to it. After all, if, in the previous example of the joint prosecution,<sup>111</sup> the government had to conduct twenty separate proceedings against the twenty defendants, chaos might reign. As stated by the Supreme Court:

Joint trials play a vital role in the criminal justice system, accounting for almost one-third of federal criminal trials in the past five years. Many joint trials — for example, those involving large conspiracies to import and distribute illegal drugs — involve a dozen or more codefendants. Confessions by one or more of the defendants are commonplace . . . . It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability — advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.<sup>112</sup>

The prevailing position in both federal and state courts is that “there is a clear preference that defendants who are indicted together be tried jointly,”<sup>113</sup> and the rules are to be “construed liberally” in favor of joinder.<sup>114</sup> To be sure, the argument

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<sup>109</sup> See, e.g., Kevin P. Hein, *Joinder and Severance*, 30 AM. CRIM. L. REV. 1139, 1158–59 (1993).

<sup>110</sup> See Dawson, *supra* note 96.

<sup>111</sup> See *infra* notes 53–54 and accompanying text.

<sup>112</sup> *Richardson v. Marsh*, 481 U.S. 200, 209–10 (1987). See generally *United States v. Gibbs*, 182 F.3d 408, 434 (6th Cir. 1999) (“Courts typically favor the joinder of defendants . . . because it is more efficient than conducting separate trials.”).

<sup>113</sup> *United States v. Jackson*, 180 F.3d 55, 75 (2d Cir. 1999); see also *United States v. Frazier*, 280 F.3d 835, 844 (8th Cir.) (stating that it is rare for a court to “sever the trial of alleged coconspirators”), *cert. denied sub nom.* *Robinson v. United States*, 122 S. Ct. 2317, *cert. denied sub nom.* *Thomas v. United States*, 122 S. Ct. 2606, *cert. denied*, 123 S. Ct. 255 (2002); *Phillips v. Commonwealth*, 17 S.W.3d 870, 877 (Ky. 2000); *State v. Turner*, 956 P.2d 215, 217 (Or. App. 1998) (“Jointly charged defendants shall be tried jointly unless the court concludes before trial that it is clearly inappropriate to do so . . .”).

<sup>114</sup> *United States v. Sarkisian*, 197 F.3d 966, 975 (9th Cir. 1999). See generally *United States v. Novaton*, 271 F.3d 968, 988–89 (11th Cir. 2001) (“Nevertheless, because of the

is reinforced by counting the number of states that reject the federal view and establish a presumption against joinder. How many such states are there? None, not even one.<sup>115</sup> This inquiry wields a rather strong indication that judges and legislators overwhelmingly, almost without dissent,<sup>116</sup> recognize the need for, and importance of, joinder of defendants for trial.<sup>117</sup>

It also should be emphasized that the broad rules concerning venue support the decisions of prosecutors to join large numbers of defendants for trial. As discussed previously, co-conspirators normally can be tried in any district or city in which any defendant took any act, however minor, in furtherance of the plan.<sup>118</sup> Thus, the defendant may not be heard to complain that, as a result of joinder, she will have to cross the country to defend herself in a place where she has never been and where only a trivial action was taken by someone she had never even met. Of course, if the earlier suggestions of this Article were to be adopted — requiring the trial in places only where major actions were taken or where the defendant herself had been — the impact on the ability to join together large numbers of defendants would be substantial.<sup>119</sup> Without some sort of change, it is clear that the liberal rules of venue encourage the liberal application of the joinder rules, just as those same wide rules for joinder encourage the wide use of the venue rules.

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well-settled principle that it is preferred that persons who are charged together should also be tried together . . . the denial of a motion for severance will be reversed only for an abuse of discretion.”), *cert. denied* 122 S. Ct. 2345 (2002).

<sup>115</sup> One of the last “hold out” states was Minnesota, which previously had a statute that “strongly favor[ed] separate trials. . . .” *State v. Duncan*, 250 N.W.2d 189, 198 (Minn. 1977). The statute provided that jointly charged defendants “shall be tried separately,” though giving the trial court the power to order a joint trial “in the interest of justice and not related to economy or economy.” The law was changed, and the new statute eliminates the preference for separate trials. It provides:

When two or more defendants are jointly charged with a felony, they may be tried separately or jointly in the discretion of the court. In making its determination on whether to order joinder or separate trials, the court shall consider the nature of the offense charged, the impact on the victim, the potential prejudice to the defendant, and the interest of justice.

MINN. R. CRIM. P. 17.03.

<sup>116</sup> The view is not entirely unanimous. *See infra* text accompanying notes 128–29.

<sup>117</sup> As seen by this practice: Even in the situations where joinder was improperly used, or severance wrongly refused, the court will still seek to determine if the error affected substantial rights. *See Sarkisian*, 197 F.3d at 976. That determination is not often made.

<sup>118</sup> *See supra* Part III.A.

<sup>119</sup> After all, with our identified group of twenty defendants, no more than five or six would likely have ever personally been to a particular city; moreover, only a few of the cities would be identified as a place where a substantial step had been taken in furtherance of the overall conspiracy.



## 2. In Response

These rules as to joinder — coupled with the venue principles — do not make sense in today's world. Before turning to specific problems created by such joinder, it is important to note that the supposed benefits offered by large trials are often illusive. A key benefit, we are told, is that the joint trial eliminates the need for ordinary citizens to testify repeatedly.<sup>120</sup> One prominent commentator evaluated this argument many years ago and concluded that the fear of citizen witnesses being forced to testify several times in multiple jurisdictions if joinder were not available simply is not the reality. In large conspiracy cases, the essential witnesses often are not truly disinterested parties. Instead, they are government officers, undercover agents, and formerly charged defendants.<sup>121</sup> It also is often asserted that the joint trial is economical; it saves money.<sup>122</sup> It is highly doubtful that most large trials will necessarily result in many tangible benefits, economic or otherwise. Consider, for example, another case cited above: *United States v. Baker*.<sup>123</sup> There, the court conceded that "joint trials 'conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial.'"<sup>124</sup> In a prosecution, however, in which the government conducted "one of the lengthiest and costliest trials in this nation's history"<sup>125</sup> the judges concluded, with a fair measure of exasperation, that "the claim that joint trials save

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<sup>120</sup> See *supra* text accompanying note 112.

<sup>121</sup> Dawson, *supra* note 96, at 1384–85.

A second presumed efficiency of joint trials is that they are more convenient for witnesses. In fact, however, the effect of joint trials on witnesses varies greatly from case to case and depends in part on whether the witness is a civilian or a professional. To involve lay witnesses in the prosecution of a case certainly forces real burdens upon them. They must leave work or home to testify, and an important witness may be required to remain at the courthouse throughout the trial. If the witness is a child or the victim of an alleged sex offense, we do not want him to repeat the trauma of testifying without excellent reasons. Most witnesses in criminal trials, however, are not civilians but professionals. The burden of presenting witnesses lies upon the government, whose witnesses are usually police officers, laboratory employees, prosecution investigators, and others whose jobs include testifying in court. While time away from the patrol beat or the laboratory is time away from important work, professional witnesses suffer little personal inconvenience or expense by testifying more than once. Thus, when assessing the inconvenience that separate trials impose on witnesses, we should ask whether testifying is part of their jobs.

<sup>122</sup> See Fed. Bar Council Comm., *supra* note 4, at 138.

<sup>123</sup> 10 F.3d 1374 (9th Cir. 1993).

<sup>124</sup> *Id.* at 1387 (citing *United States v. Lane*, 474 U.S. 438, 449 (1986)).

<sup>125</sup> The case at issue consisted of a sixteen-month trial with thirty thousand pages of transcripts and involving two thousand narcotics transactions over an eleven-year period. *Id.*

time and serve judicial economy is ludicrous under the present facts."<sup>126</sup>

Support for the large joint trial also comes from those who assert that such a proceeding avoids inconsistencies and does not unduly affect the accused individual's ability to defend.<sup>127</sup> The problem, however, is that in many cases in which multiple defendants are tried together, serious questions are raised as to whether defendants truly receive individualized attention from jurors. The primary question is whether each person will be convicted as a result of overwhelming evidence against him, or, as Justice Jackson lamented decades ago, will jurors conclude that if a few defendants are notoriously bad people, the defendants must all be guilty because "birds of a feather are flocked together."<sup>128</sup> In *Baker*, the Ninth Circuit echoed this concern:

Most importantly, the human limitations of the jury system and the consequent risk of spillover prejudice cannot be ignored. This risk is particularly acute for comparatively peripheral defendants . . . whose separate trial could have been concluded in a matter of days or weeks, but who was required to sit in the courtroom during months of proof involving entirely unrelated conspiracies and substantive offenses. . . . When a seasoned prosecutor is unable to keep track of nearly 200 limiting instructions given over the course of a 16-month trial, our faith in a lay jury's ability to do so is stretched to the limit. Our presumption that a jury is able to follow the trial court's instructions is "rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." . . . The

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<sup>126</sup> *Id.* at 1389. Note these observations of a group of experienced trial lawyers:

Although most commentators have focused upon the prejudice the very long criminal trial may cause to defendants and the court itself, the Committee is mindful of the detrimental impact such trials can have upon the prosecution. While defense lawyers point to the dangers of a verdict of "guilt by association" or "conviction by confusion," the problem of "acquittal by comparison" cannot be ignored. One of the longest racketeering prosecutions in recent history — *United States v. Accetturo* — concluded this year in Newark federal court after 15 months of trial with a verdict acquitting each of the approximately two dozen defendants. Observers of the trial have speculated that the jury's verdict may represent either an angry attack on the prosecution for the length of the trial or an abdication of the jurors' responsibilities occasioned by their inability or refusal to deliberate over the enormous volume of evidence introduced at the trial. Of course, whether the very long trial results in prejudice to the defendant, prosecution, jurors of the court itself is beside the point. Any such prejudice tarnishes the criminal justice system and is unacceptable.

Fed. Bar Council Comm., *supra* note 4, at 138.

<sup>127</sup> See *supra* text accompanying note 112.

<sup>128</sup> See *Krulewitch v. United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring).

presumption is not irrebuttable.<sup>129</sup>

The proposition here can be broadened to encompass harm to the government as well. Many cases exist in which large numbers of defendants are brought together and in which the prosecution has not benefitted from the joint proceedings. Consider, for instance, the case of *United States v. Ellender*.<sup>130</sup> In that case, the government went forward with an enormously complicated case which created rather incredible practical problems.<sup>131</sup> Judge Jones on appeal was not kind in her appraisal of the situation:

These appeals are the remnants of an ambitious drug prosecution involving a cast of 187 defendants, scores of witnesses, numerous sailing vessels, many thousands of pounds of marijuana, and hundreds of kilograms of cocaine. Courtroom spectators heard accounts of great intrigue spanning several years and involving colorful characters, including a certain deposed Central American dictator. Twenty-three defendants, less than a sixth of the named defendants, were eventually tried. As the dust settled in the specially-modified courtroom, only a handful of defendants stood convicted. The low ratio of convictions to the number of defendants tried, plus the very small sentences against those convicted, best demonstrate the flaw in the government's apparent assumption that "bigger is better" in this type of proceeding.<sup>132</sup>

With these examples as the principal justifications for allowing joinder of many defendants for the "mega-trials," one ought to be skeptical. Moreover, we would do well to pause and reconsider the sage words of Judge Lehman, written years ago.

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<sup>129</sup> *Baker*, 10 F.3d 1374 at 1391 (citations omitted).

<sup>130</sup> 947 F.2d 748 (5th Cir. 1991).

<sup>131</sup> As noted by the Fifth Circuit:

The government's aspirations of conducting a megatrial were limited only by the physical bounds of courtroom walls. Each defendant and attorney was limited to a small writing space crowded into a block-seating arrangement. Bleachers were installed. Seating charts were issued to jurors and trial participants to facilitate identification. A special intercom system of dubious efficacy was installed for "bench conferences." When an attorney wished to address the court and fellow counsel privately, the jurors were treated to background music. However, this intended distraction proved futile, and counsel turned to the time-honored method of hushed voices and bowed heads. In sum, the courtroom assumed the appearance of an overcrowded classroom.

*Id.* at 754.

<sup>132</sup> *Id.* at 752. Justice Jackson, in his *Krulewitch* opinion decades earlier, echoed this view when he observed that the evidence "will hardly convince one that a trial of this kind is the highest exemplification of the working of the judicial process." *Krulewitch*, 336 U.S. at 454 n.21 (Jackson, J., concurring).

In response to the argument that such trials “conserve state funds, diminish inconvenience . . . and avoid delays,”<sup>133</sup> he wrote: “We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high.”<sup>134</sup>

### 3. Particular Difficulties

#### *i. Confessions*

Wholly apart from the sorts of broad issues joinder raises, there are many specific difficulties which arise, some of which are not easily remedied. The most well known is the so-called *Bruton* dilemma. More than thirty years ago, in *Bruton v. United States*,<sup>135</sup> the Court recognized the traditional principle that the Confrontation Clause of the Sixth Amendment does not allow a jury, in determining the guilt or innocence of defendants, to use the incriminating confession of a non-testifying<sup>136</sup> co-defendant against the other defendants. It was an out-of-court statement of potentially great significance that identified the other defendants, and the co-defendant could not be confronted and cross-examined.<sup>137</sup> In *Bruton*, however, the Court took the additional and extraordinary step of concluding that a jury instruction advising the jurors to use the statement only against the confessing defendant would be insufficient to eliminate the potential Sixth Amendment harm as to other defendants.<sup>138</sup> Limiting instructions in this context, therefore, are held to be constitutionally inadequate.<sup>139</sup> These confessions can be quite probative, providing names, dates, and places. How, then, is a prosecutor to deal with a trial of many defendants, only some of whom confessed and were willing to take the witness stand to be cross-examined by counsel for co-defendants? The obvious answer, of course, is to sever on this basis. After all, if the parties are tried separately, the *Bruton* problem instantly disappears, as only the defendant's own statement will be heard by her jury. Granting severance, though, eliminates the whole point of joinder: bringing the parties together for one trial.

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<sup>133</sup> *Bruton v. United States*, 391 U.S. 123, 134 (1968).

<sup>134</sup> *People v. Fisher*, 164 N.E. 336, 341 (N.Y. 1928) (Lehman, J., dissenting).

<sup>135</sup> 391 U.S. 123 (1968).

<sup>136</sup> If the person who gave the confession is willing to testify, even if she denies making the statement, the Confrontation Clause challenge is usually — though not always — vanquished. See *United States v. Sauza-Martinez*, 217 F.3d 754, 759 (9th Cir. 2000) (stating that the jury must still get appropriate *Bruton* limiting charge).

<sup>137</sup> *Bruton*, 391 U.S. at 126.

<sup>138</sup> *Id.* at 123.

<sup>139</sup> Prior to *Bruton*, courts consistently relied upon the limiting instruction in rejecting Sixth Amendment attacks. See *Delli Paoli v. United States*, 352 U.S. 232 (1957), *overruled in part* by *Bruton v. United States*, 391 U.S. 123 (1968).

The agreed-upon solution, used throughout the country, has been to join the parties, allow the confession to be admitted, give a limiting jury instruction, but also redact references in the confession to the non-testifying defendants. A simple and neat solution, one would think. Not exactly. Soon after *Bruton*, it became apparent that references in the confession might nevertheless identify individual defendants even though their names were not actually used. A major line of cases has developed to determine which sorts of redactions are permissible and which are not.<sup>140</sup> The problem has become quite complicated and continues to vex the courts;<sup>141</sup> it is not so easily solved with the broad notion of redaction.<sup>142</sup>

## ii. Evidence of Other Crimes

State and federal rules of evidence take the consistent position that evidence of earlier crimes generally is not admissible for the purpose of proving it more likely that the defendant committed a similar crime as charged.<sup>143</sup> The rules, however, just as consistently allow such earlier acts to be offered to the jury if they would prove

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<sup>140</sup> The Supreme Court has found no necessary constitutional violation with the elimination of references to one defendant, even though the confession may be incriminating as to that individual. If “neutral” references in the confession are understood by jurors, no error will be found so long as the understanding results from a link to other proper evidence presented at trial. *Richardson v. Marsh*, 481 U.S. 200 (1987). In *Gray v. Maryland*, 523 U.S. 185 (1998), however, the Court found a Sixth Amendment violation with the redaction of a defendant’s name with the word “deleted” or a blank space. The differences between the two opinions are not self-evident. As a consequence, the problem clearly has not been solved. The amount of litigation and seemingly inconsistent judicial decisions is substantial. Contrast, for instance, the decision in *United States v. Edwards*, 159 F.3d 1117 (8th Cir. 1998), with that in *People v. Archer*, 99 Cal. Rptr. 2d 230 (Cal. App. 2000).

<sup>141</sup> See generally the discussions in *Ex parte Sneed*, 783 So. 2d 863 (Ala. 2000) (determining that the edited statement became incomplete and inconsistent), and *United States v. Edwards*, 159 F.3d 1117 (8th Cir. 1998).

<sup>142</sup> Indeed, there have been cases — amazingly enough — where “witnesses forg[e]t the[] *Bruton* instructions and blurt[] out a codefendant’s name instead of replacing it with a neutral pronoun.” *Edwards*, 159 F.3d at 1127. One court found no error, as the trial judge “immediately instructed the jury to disregard the blurred testimony, and it twice ordered the testimony stricken from the record.” *Id.*

<sup>143</sup> This is “out of ‘fear that the jury will use [such] evidence’ . . . to convict him of the charged offense.” *United States v. Baptiste*, 264 F.3d 578, 590 (5th Cir. 2001). See generally *United States v. Lemay*, 260 F.3d 1018, 1024–26 (9th Cir. 2001) (quoting FED. R. EVID. 404(b), which disallows evidence of prior crimes that are used to prove “the character of a person in order to show action in conformity therewith”), *cert. denied*, 534 U.S. 1166 (2002). A few exceptions can be found in both the state and federal systems. CAL. EVID. CODE § 1109 allows, in a prosecution for a charge involving domestic violence, evidence of the defendant’s commission of other acts of domestic violence to show propensity. Rule 414 of the Federal Rules of Evidence permits a defendant’s prior child molestation offenses to be offered “on any matter to which it is relevant.” FED. R. EVID. 414.

something other than the defendant's propensity to commit this sort of crime.<sup>144</sup> This principle is used often. With such evidence — especially with joint-defendant trials — serious difficulties can be created for the court and the trial lawyers.<sup>145</sup> These include identifying the relevance of the prior acts,<sup>146</sup> determining the probative value of them,<sup>147</sup> giving notice to the defense,<sup>148</sup> the making of specific findings,<sup>149</sup> and the evaluation of the impact of errors in the area.<sup>150</sup>

One issue is especially noteworthy with prior acts, for it relates quite directly to multiple-defendant trials. Jurors must be instructed, if prior acts are admitted, that such acts may only be considered for particular purposes other than propensity; such purposes include motive, lack of mistake, and common scheme.<sup>151</sup> These limiting instructions are seen as extremely important and are normally viewed as "curative" of any complaints about the introduction of such damaging earlier acts.<sup>152</sup> Many have openly questioned the ability of jurors to receive such evidence and to consider it only for the relatively limited purposes directed.<sup>153</sup> Jurors are asked to

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<sup>144</sup> *United States v. Grizzo*, 277 F.3d 339, 353 (3d Cir. 2002); *United States v. Claxton*, 276 F.3d 420 (8th Cir. 2002). The earlier crime must be both similar enough and close enough in time to the charged crime so as to be relevant. In addition, the value of the earlier acts must not be outweighed by the danger of unfair prejudice. *United States v. Asher*, 178 F.3d 486, 492 (7th Cir. 1999).

<sup>145</sup> *United States v. Rosenwasser*, 550 F.2d 806, 814 (2d Cir. 1977) (Gurfein, J., dissenting) ("There are few areas in which it is as important for this court to keep a watchful eye as on the admissibility of similar offenses in a case involving more than a single defendant."). See generally *United States v. Green*, 258 F.3d 683, 693–94 (7th Cir. 2001).

<sup>146</sup> See, e.g., *United States v. Grimes*, 244 F.3d 375 (5th Cir. 2001); *United States v. Schumacher*, 238 F.3d 978 (8th Cir. 2001); *United States v. Varoudakis*, 233 F.3d 113 (1st Cir. 2000); *United States v. Eggleston*, 165 F.3d 624, 626 (8th Cir. 1999).

<sup>147</sup> *United States v. Williams*, 238 F.3d 871, 875 (7th Cir.), cert. denied, 532 U.S. 1073 (2001); *United States v. Heath*, 188 F.3d 916, 921 (7th Cir. 1999).

<sup>148</sup> See *United States v. Vega*, 188 F.3d 1150 (9th Cir. 1999).

<sup>149</sup> See *United States v. Mastrangelo*, 172 F.3d 288, 295 (3d Cir. 1999).

<sup>150</sup> See *United States v. Layne*, 192 F.3d 556, 573 (6th Cir. 1999); *Heath*, 188 F.3d at 921–22; *State v. Bell*, 781 So. 2d 846 (La. 2001).

<sup>151</sup> See FED. R. EVID. 404(b).

<sup>152</sup> See, e.g., *United States v. Griffin*, 194 F.3d 808, 821 (7th Cir. 1999). But see *United States v. Varoudakis*, 233 F.3d 113 (1st Cir. 2000).

<sup>153</sup> See generally Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589, 600 (1997). The Arizona Supreme Court now requires that clear and convincing evidence be shown before prior crimes may be admitted. "Such evidence is quite capable of having an impact beyond its relevance to the crime charged and may influence the jury's decision on issues other than those on which it was received, despite cautionary instructions from the judge." *People v. Terrazas*, 944 P.2d 1194, 1198 (Ariz. 1997). In Wyoming the trial record must identify, with specificity: the purpose for the admitted evidence, the relevance of that evidence, and the manner in which the trial judge determined that the probative value of the evidence outweighed its prejudicial impact. See *Gleason v. State*, 57 P.3d 332 (Wyo. 2002). One

review highly persuasive evidence as to intentionally-committed earlier crimes, yet to look at the evidence only for a very narrow and specific reason. Indeed, as one court recently remarked, such evidence "asks jurors to engage in mental gymnastics that may well be beyond their ability or even their willingness."<sup>154</sup> That task may be difficult generally; it may well become monumental when jurors are told, in a large defendant trial, not only to consider the evidence for a limited purpose, but to apply the evidence against only one of the many defendants seated before them.<sup>155</sup>

If the judge decides to permit the prosecutor to introduce evidence of a co-defendant's uncharged misconduct at a joint trial, the defense faces a virtual nightmare. At the defendant's trial, the jury may learn of a co-defendant's uncharged crimes solely because the defendant is standing trial with the co-defendant. At a paradigmatic trial, a single defendant may need to be prepared to meet only testimony about the charged crime. In contrast, when the trial judge allows the prosecution to introduce evidence of a co-defendant's uncharged misconduct at a joint trial, the trial becomes several steps removed from the paradigm.<sup>156</sup>

### *iii. Dealing with Other Defendants and Their Lawyers*

In some situations individuals may wish affirmatively to be tried together with others. There could well be perceived advantages as to cost, development of investigative resources, and the ability to present a "united front" defense.<sup>157</sup> Of course, such advantages may quickly disappear when differences develop among the individuals up to and including the parties presenting antagonistic defenses.<sup>158</sup>

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thoughtful commentator wrote: "Notwithstanding the judge's limiting instruction on the proper use of uncharged misconduct evidence, the typical lay juror's common sense may prompt the juror to fall back on simplistic reasoning that if the defendant did it once, he probably did it again." Imwinkelried, *supra* note 4, at 39.

<sup>154</sup> United States v. Ward, 190 F.3d 483, 489-90 (6th Cir. 1999).

<sup>155</sup> The problem is a common one, as evidence of prior acts is often seen in multiple-defendant trials. See United States v. Morrow, 177 F.3d 272, 290 (5th Cir. 1999). One state judge recently expressed concern:

[There is the] risk of guilt by association with a codefendant who has a criminal record, substantial injustice may also result by a jury's confusion of the evidence. As the record becomes more complex, it becomes more difficult for the jury to keep the testimony separate as to each codefendant.

State v. Booth, 737 A.2d 404, 439 (Conn. 1999) (Berdon, J., dissenting).

<sup>156</sup> Imwinkelried, *supra* note 4, at 39-40.

<sup>157</sup> See Holloway v. Arkansas, 435 U.S. 475 (1978).

<sup>158</sup> In *Holloway*, the trial judge rather casually remarked: "That's all right; let them testify. There is no conflict of interest. Every time I try more than one person in this court each one blames it on the other one." *Id.* at 479. In *Krulewitch*, Justice Jackson was somewhat more

In such situations, the attorneys face a dilemma regarding questions of professional responsibility.<sup>159</sup> Remedies utilized include severance, mistrial orders, and appointment of separate counsel.<sup>160</sup>

Numerous practical problems in the conduct of the trial can also be seen as to which defendant's attorney may examine particular witnesses, or even the seating arrangements for the attorneys and their clients.<sup>161</sup> Worse still is the problem of what the attorney and the client are to do when a lengthy, complex trial has almost nothing to do with that client.<sup>162</sup>

The ultimate nightmare for the defense attorney is the disruptive co-defendant. Will the non-disruptive defendant look "better" in comparison? Will he look worse for he, after all, knew the disruptive defendant and undoubtedly had dealings — even if arguably lawful — with that person?<sup>163</sup> In *United States v. Lara*,<sup>164</sup> the attorney for Lara tried, to no avail, to have his client unlinked from the co-defendant Perry, "A/K/A 'King Animal.'"<sup>165</sup> Lara's attorney moved for severance,<sup>166</sup> mistrial,<sup>167</sup> and a verdict of acquittal.<sup>168</sup> With the appeals court emphasizing the jurors' ability to follow the instruction that they should not make an adverse

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sympathetic to the defense claim: "[I]f, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other." *Krulewitch v. United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring); see also *infra* note 285 and accompanying text.

<sup>159</sup> As in *Glasser v. United States*, 315 U.S. 60 (1942), where the defense counsel was required to represent two codefendants whose interests were in conflict. The lawyer's inability to advocate vigorously for both was "indicative of [his] struggle to serve two masters." *Id.* at 75.

<sup>160</sup> In *Holloway*, the Supreme Court held that error here would be seen as necessarily prejudicial. The Court's later rulings as to severance and mistrial orders are something less stirring.

<sup>161</sup> Not at all a frivolous matter, as in *United States v. Ellender*, 947 F.2d 748 (5th Cir. 1991), the case in which "[t]he government's aspirations of conducting a megatrial were limited only by the physical bounds of courtroom walls." *Id.* at 754.

<sup>162</sup> See "*Monster*" *RICO Cases*, *supra* note 4, at 246 (1988) (remarks of Ivan Fisher, Esq.) ("[T]here is this case [in which] two defendants were there for ten months before their names were ever mentioned, ten months, day in, day out.")

<sup>163</sup> As stated in the dissenting opinion in *State v. Booth*, 737 A.2d 404 (Conn. 1999): "It is a recognized fact that juries may refuse to believe one defendant is innocent because of his association with a codefendant who has a substantial criminal record." *Id.* at 438 (Berdon, J., dissenting).

<sup>164</sup> 181 F.3d 183 (1st Cir. 1999).

<sup>165</sup> *Id.* at 190.

<sup>166</sup> *Id.* at 202 n.7.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 200.



inference from "Perry's gaffe,"<sup>169</sup> Lara's conviction was affirmed. Was Perry's behavior, his "gaffe," disruptive? One would think that it could well have interfered with the court proceedings when the defendant Perry "stood up, turned his back to the jury, unzipped his pants, and urinated on the carpet."<sup>170</sup>

While egregious, *Lara* is hardly the only example of disruptive behavior by co-defendants seriously impacting on the ability of an individual to receive a fair trial.<sup>171</sup> Numerous cases demonstrate that it can be a risky business indeed to be joined with co-defendants who may have quite different views of how the trial should go forward. A co-defendant may scream at the trial judge,<sup>172</sup> throw things at others in the court room,<sup>173</sup> threaten a witness,<sup>174</sup> try to communicate with the jury,<sup>175</sup> attempt to escape,<sup>176</sup> or do injury to himself.<sup>177</sup> Each of these cases was serious, each involved motions to sever, and in each the motions were denied. Typically the courts dispute the defense claim of prejudice with the view that "a cautionary instruction advising the jury not to allow a disruptive co-defendant's behavior to impact the decision regarding other defendants affords sufficient protection against undue prejudice."<sup>178</sup> Otherwise, one court wrote, "it might never

<sup>169</sup> "[T]he almost invariable assumption of the law that jurors follow their instructions." *Id.* at 202 (quoting *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)).

<sup>170</sup> *Id.* at 202 n.6.

<sup>171</sup> This list, of course, excludes disruptions caused by counsel for the co-defendant. *See United States v. Garrett*, 961 F.2d 743, 747 n.5 (8th Cir. 1992) (determining that, while lawyer's actions were extreme and distracting, the court on appeal suggested that such behavior might have been helpful to the complaining defendant as "it is possible that [the co-defendant's lawyer's] actions caused the jury to sympathize with Garrett"); *see also United States v. Lumumba*, 794 F.2d 806 (2d Cir. 1986) (describing an instance in which a lawyer's actions were so problematic that he was held in criminal contempt twice).

<sup>172</sup> *United States v. Smith*, 578 F.2d 1227, 1231 (8th Cir. 1978). The defendant yelled in the court room, calling the proceeding a "kangaroo court." *Id.* The Eighth Circuit held, on appeal, that it was sufficient for the trial judge to advise the jury that the "outbursts had nothing to do with the other defendants and should not be considered in rendering the verdict." *Id.*

<sup>173</sup> *United States v. Koskela*, 86 F.3d 122, 125 (8th Cir. 1996) (throwing a water pitcher); *United States v. Marshall*, 458 F.2d 446 (2d Cir. 1972) (throwing a chair).

<sup>174</sup> *United States v. Rocha*, 916 F.2d 219, 239 (5th Cir. 1990) (defendant mouthed the words "you are dead" to a witness); *United States v. Mazza*, 792 F.2d 1210 (1st Cir. 1986) (defendant yelled at informant: "He is lying. I got shot for you, you mother piece of shit. This is my pay back."); *United States v. Tashjian*, 660 F.2d 829, 837-38 (1st Cir. 1981) (defendant told witness that he would soon receive five bullets in his head).

<sup>175</sup> *United States v. Koskela*, 86 F.3d 122 (8th Cir. 1996).

<sup>176</sup> *United States v. Chaussee*, 536 F.2d 637 (7th Cir. 1976) (attempting to escape in front of the jury).

<sup>177</sup> *United States v. Bamberger*, 456 F.2d 1119 (3d Cir. 1972) (swallowing of one of the government's exhibits by defendant); *United States v. Marshall*, 458 F.2d 446 (2d Cir. 1972) (cutting of defendant's own wrist with a razor blade).

<sup>178</sup> *Koskela*, 86 F.3d at 125.

be possible to conclude a trial involving more than one defendant; it would provide an easy device for defendants to provoke mistrials whenever they might choose to do so."<sup>179</sup>

One troubling problem is worth special note here — the coming apart of an earlier joint defense agreement. This sort of arrangement involves cooperative efforts — often informal — to uncover and share information prior to trial; it creates a privilege which is an extension of the attorney-client privilege. The efforts by counsel pursuant to this plan may include review of documents and grand jury information. It is problematic typically when one of the defendants, a party to such an arrangement, reaches a plea bargain, and pursuant to that understanding he agrees to testify for the government. That is exactly what happened in one recent case.<sup>180</sup> There, counsel for the remaining defendants strenuously argued that earlier discussions with all of the then-defendants leading to the joint defense pact were protected by the attorneys' duty of confidentiality, for the earlier agreement "establishes an implied attorney-client relationship with the co-defendant."<sup>181</sup> As a consequence, they asserted, the prosecution could not cross-examine the witness/former co-defendant based on information given during the earlier privileged meetings and conversations.<sup>182</sup> Ultimately, counsel moved for a mistrial and an order permitting withdrawal as counsel.<sup>183</sup>

On appeal of the denial of the motions, the court recognized that joint defense arrangements, hardly a rare occurrence, can "create a disqualifying conflict where information gained in confidence by an attorney becomes an issue."<sup>184</sup> The problems with such agreements are well known.<sup>185</sup> The difficulty in this case was especially troubling, for the witness's testimony now was in conflict with statements he had made during those earlier, confidential joint defense meetings.<sup>186</sup>

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<sup>179</sup> *Rocha*, 916 F.2d at 230 (quoting *Bamberger*, 456 F.2d at 1128).

<sup>180</sup> *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000).

<sup>181</sup> *Id.* at 637.

<sup>182</sup> *Id.* at 637–38.

<sup>183</sup> *Id.* at 637.

<sup>184</sup> *Id.*

<sup>185</sup> See, e.g., *Walter P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977):

[A]n attorney should . . . not be allowed to proceed against a co-defendant of a former client wherein the subject matter of the present controversy is substantially related to the matters in which the attorney was previously involved, and wherein confidential exchanges of information took place between the various co-defendants in preparation of a joint defense.

See also *Henke*, 222 F.3d at 637 (discussing the reasoning in *Abraham*). See generally *United States v. Hsia*, 81 F. Supp. 2d 7 (D.D.C. 2000); *United States v. Weissman*, 195 F.3d 96 (2d Cir. 1999); *United States v. Edwards*, 39 F. Supp. 2d 716 (M.D. La. 1999), *aff'd*, 303 F.3d 606 (5th Cir. 2002); *United States v. Sawyer*, 878 F. Supp. 295 (D. Mass. 1995).

<sup>186</sup> *Henke*, 222 F.3d at 637.

Thus, to represent their clients effectively, the attorneys should have vigorously cross-examined the witness, hopefully resulting in the jury hearing of such discrepancies. To do so, however, would have required divulging confidences against their earlier "client."<sup>187</sup> Reversing the convictions, the court stressed the grave questions which can arise from joint defense agreements which fly in the face of the right to be defended by counsel, a "[vital] aspect[] of our criminal justice system."<sup>188</sup>

#### 4. But the Joinder System Works, Doesn't It?

Problems exist with large multiple-defendant prosecutions; few would deny that. Still, the response of many judges and lawyers is that the overall process works well, in a reasonably efficient and fair fashion. In a few important areas, such a belief seems highly doubtful.

##### *i. Curative Jury Instructions*

If problems do arise, jury instructions are seen as curative of just about anything and everything in joint trials. Ills ranging from evidence to be used against only one of several defendants,<sup>189</sup> to the extreme case in which the disruptive defendant's actions are not to be taken against co-defendants, are thought to be curable through jury instructions.<sup>190</sup> The Supreme Court often has remarked of "the almost invariable assumption of the law that jurors follow their instructions."<sup>191</sup> To be sure, it would be "too cynical" to think that a jury would intentionally disobey a clear instruction on the law by the judge.<sup>192</sup> This view certainly prevails in some

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 638. For a thoughtful analysis of the area, see, Craig Lerner, *Conspirators' Privilege and Innocents' Refuge: A New Approach to Joint Defense Agreements*, 77 NOTRE DAME L. REV. 1449 (2002).

<sup>189</sup> See, e.g., *United States v. Peterson*, 244 F.3d 385, 394 (5th Cir.) (limiting instruction on bad acts of one defendant not admissible against other defendants), *cert. denied sub nom. O'Keefe v. United States*, 534 U.S. 857, *cert. denied sub nom. Clark v. United States*, 534 U.S. 861 (2001). In *United States v. Collazo-Ponte*, 216 F.3d 163 (1st Cir. 2000), the court emphasized the presence of the limiting instruction while writing that "[w]e are well aware of the potential for prejudice in a complicated conspiracy trial involving several defendants." *Id.* at 180-81.

<sup>190</sup> As in the *Lara* case discussed above. *United States v. Lara*, 181 F.3d 183, 202 (1st Cir. 1999); see *supra* text accompanying notes 164-70.

<sup>191</sup> *Richardson v. Marsh*, 481 U.S. 200, 206 (1987).

<sup>192</sup> Dawson, *supra* note 96, at 1405-06. The presumption that jurors follow the instruction is "rooted less in the absolute certitude that [it] is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." *Richardson*, 481 U.S. at 211.

important cases. The use of *Miranda* violation confessions for impeachment purposes comes to mind.<sup>193</sup> While jurors are told not to consider the confession as proof of guilt, they are instructed that the confession may be used to impeach or discredit the defendant who testifies in a manner inconsistent with that confession.<sup>194</sup>

Still, while the law generally follows this “almost invariable assumption” of such compliance,<sup>195</sup> it is by no means accepted in all situations, especially in large joint trials.<sup>196</sup> The perfect example, of course, is the co-conspirator confession case, *Bruton*, discussed above.<sup>197</sup> In that case, the Supreme Court had a serious question as to whether, with such a confession, jurors could follow the specific instruction to use the statement only against the confessing party.<sup>198</sup> Moreover, the question of the jurors’ ability to adhere to a limiting instruction is far more troubling in the lengthy and large multiple-defendant prosecutions where such instructions must be given on numerous occasions, calling the jury’s attention to particular items of evidence to be applied to only one of the many defendants.<sup>199</sup> In one case, the

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<sup>193</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1968).

<sup>194</sup> *Harris v. New York*, 401 U.S. 222 (1971).

<sup>195</sup> See, e.g., *Richardson*, 481 U.S. at 200.

<sup>196</sup> For a thorough discussion of the concerns regarding the ability of jurors to follow instructions and sort evidence in “massive joint trials,” see *Long Criminal Trials*, *supra* note 4, at 159 (remarks of Judge J. Joseph Smith); Imwinkelried, *supra* note 4.

<sup>197</sup> See *supra* Part III.3.i.

<sup>198</sup> The Court’s conclusion, quoting an earlier opinion, is noteworthy:

Unless we proceed on the basis that the jury will follow the court’s instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. We agree that there are many circumstances in which this reliance is justified. Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. A defendant is entitled to a fair trial but not a perfect one. It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge’s instructions to disregard such information. Nevertheless, . . . there are some contexts in which the risk that the jury will not, or cannot follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.

*Bruton v. United States*, 391 U.S. 123, 135–36 (1968).

<sup>199</sup> Though even in smaller cases it can be a problem, as in *United States v. Edwards*, 159 F.3d 1117 (8th Cir. 1998), where — in a *Bruton* situation — witnesses forgot the instructions and “blurted out a codefendant’s name instead of replacing it with a neutral pronoun.” *Id.* at 1127. The court ruled that there was no prejudice, and the jury was instructed to disregard the blurted out testimony. *Id.*; see also *supra* note 142 and accompanying text.

defendants complained because the judge gave nearly two hundred limiting instructions, many of which were repeated several times.<sup>200</sup> It is difficult indeed not to share Justice Jackson's view that in large joint-defendant cases, not just *Bruton* situations, the notion that such limiting instructions will necessarily eliminate prejudice is an "unmitigated fiction."<sup>201</sup>

## ii. *Differentiated Verdicts*

The lore — and the law — regarding the ability of juries to differentiate items of evidence and to distinguish among defendants, even in large joint trials, is well known and settled. The routine goes something like this:

- (1) Jurors can carefully sort evidence — some admissible, some not — among various defendants in the mega-trials.
- (2) Jurors do just such sorting and distinguishing among defendants.
- (3) These distinctions are validly based in the evidence.
- (4) Verdicts that state guilt for some defendants, but not for others, and on some counts, but not on others, demonstrate the validity of points (1), (2), and (3).

One must concede much of the essence contained in points (1) and (2). Jurors often can understand the evidentiary differences set forth in a trial, even with joint defendants; in their judgments, the jurors often draw proper distinctions. Whether one can argue that this *always* occurs, however, is highly doubtful. We are trained to believe that jurors will attempt diligently to follow instructions and make these important distinctions. How do we know, however, that they get the decisions right? That these distinctions, as set forth in point (3), really are validly based in the evidence? Of course, we do not know and we cannot know. Moreover, point (4) hardly proves anything at all. And, the judicial statements indicating verdict differentiation as settling the argument most assuredly do not settle the argument.

Judges certainly seem convinced of the power of this verdict differentiation; they repeatedly refer to it. Some examples of this tendency include:

- (1) "When a defendant presses a plausible claim of spillover effect, differentiated verdicts often constitute tangible evidence of the jury's enduring ability to distinguish between the culpability of codefendants."<sup>202</sup>
- (2) "We have held that in a multi-defendant case, a mix of guilty and not guilty

<sup>200</sup> *United States v. Baker*, 10 F.3d 1374, 1388 (9th Cir. 1993); *see also* *United States v. Casamento*, 887 F.2d 1141 (2d Cir. 1989). In *Casamento*, the jury was instructed on numerous occasions as to evidence admissible against some, but not all, of the defendants. The trial, with twenty-one defendants, lasted more than seventeen months and involved the introduction of thousands of exhibits and the testimony of more than 275 witnesses. *Id.* at 1149. *See generally* Imwinkelried, *supra* note 4, at 49–50.

<sup>201</sup> *Krulewicz v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

<sup>202</sup> *United States v. Lara*, 181 F.3d 183, 202 (1st Cir. 1999).

verdicts is some indication that the jury was able to sift through voluminous evidence and differentiate among various defendants.”<sup>203</sup>

(3) “[Partial acquittal of a defendant in multi-defendant trial] is a strong indication — that there was no prejudicial ‘spillover’ of evidence.”<sup>204</sup>

(4) “The best evidence of the jury’s ability to compartmentalize the evidence is its failure to convict all defendants on all counts.”<sup>205</sup>

Differentiating verdicts do not *necessarily* prove that jurors understood the evidence fully and made measured judgments as to guilt. Such verdicts merely demonstrate that the jury did not simply issue one blanket determination on every defendant and on every charge. But, does that mean that this determination was the correct one as to every person and every charge? Is it not just as plausible, for instance, that with the joinder of defendants and charges, a minor figure might well have been convicted of something, perhaps in the form of compromise? Had she been tried separately, perhaps she would have been wholly acquitted.<sup>206</sup> Moreover, looking for relief on appeal will not be satisfying. The consideration of such a question by appellate judges is given light treatment if there is evidence in the record which would support the jury’s decision.<sup>207</sup>

To be sure, if one has doubt as to the validity of the argument in connection with multi-defendant trials generally, that doubt must be heightened tremendously with large trials. Multi-defendant criminal cases, as seen previously, can involve enormous numbers of defendants, continue for several months, and at times require the jury to consider literally thousands of documents and the testimony of hundreds of witnesses.<sup>208</sup> These concerns are even more acute in the sort of prosecution in which one defendant is — from the outset — viewed as a minor figure with only slight connection to the major conspirators.<sup>209</sup> While she may have minimal involvement, she can be joined with the others for trial in a distant location and the burden on her to defend will be tremendous.<sup>210</sup> When the evidence is overwhelming against “the group,” she has a very difficult position to occupy. Will the jury lump

<sup>203</sup> Casamento, 887 F.2d at 1150.

<sup>204</sup> United States v. Garcia, 848 F.2d 1324, 1334 (2d Cir. 1988); *see also* United States v. Solis, 299 F.3d 420, 441 (5th Cir. 2002).

<sup>205</sup> United States v. Unruh, 855 F.2d 1363, 1374 (9th Cir. 1987); *see also* United States v. Gravatt, 280 F.3d 1189, 1191 (8th Cir. 2002).

<sup>206</sup> Dawson, *supra* note 96, at 1405.

<sup>207</sup> *See* United States v. Koskela, 86 F.3d 1122 (8th Cir. 1996); United States v. Tashjian, 660 F.2d 829 (1st Cir. 1981).

<sup>208</sup> *See, e.g.,* cases cited *supra* note 100.

<sup>209</sup> *See supra* note 9.

<sup>210</sup> The point was recognized by the Supreme Court in *Zafiro v. United States*, 506 U.S. 534 (1993). While the Court in *Zafiro* was not at all generous as to the granting of severance, it did express some concern for this type of defendant. “When many defendants are tried together in a complex case and they have markedly different degrees of culpability, [the] risk of prejudice is heightened.” *Id.* at 539.

her together with the others — the “birds of a feather” conclusion?<sup>211</sup> Or, will the jury decide that she stands alone (though she sits together with the others) and is not a part of the scheming conspirators?<sup>212</sup> An experienced person in this field will be hard pressed to state that the differentiating verdict necessarily means that the jury “got it right” on all counts as to that minor figure and as to all of the other defendants as well.<sup>213</sup>

*iii. Let's Not Forget the Savings*

If one could conclude that the difficulties presented by big joint-defendant trials were balanced by important countervailing considerations, then such trials could perhaps be viewed as justified.<sup>214</sup> Courts repeatedly discuss the benefits of joint-defendant trials.

- (1) Legislators in allowing for joinder have “recognized the utility of multi-defendant trials to effectuate the prompt efficient disposition of criminal justice.”<sup>215</sup>
- (2) “The obvious advantage of a joint criminal trial of several defendants under a single conspiracy allegation is the avoidance of separate trials inuring to the benefit of the overall administration of justice.”<sup>216</sup>
- (3) Multi-defendant trials promote efficiency and minimize the chance of inconsistent verdicts.<sup>217</sup>
- (4) These trials allow witnesses to avoid the burden of successive trials.<sup>218</sup>

While these purported advantages in a routine case may be more illusory than actual,<sup>219</sup> even if one were to accept them as necessarily correct, they still do not demonstrate the importance of having huge multiple-defendant trials. That is, few would argue for a rule of absolute severance requiring, for example, three trials for three separate defendants when there is little serious risk of great prejudice in the routine case.<sup>220</sup> With the advent of the mega-trial, and the trial of a dozen or more defendants, however, the calculation is quite different.

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<sup>211</sup> As suggested by Justice Jackson. *See supra* text accompanying note 201.

<sup>212</sup> *See United States v. Ginton*, 154 F.3d 1245, 1250 (11th Cir. 1998).

<sup>213</sup> *See generally* “Monster” *RICO* Cases, *supra* note 4, at 243–47 (remarks of Ivan Fisher).

<sup>214</sup> Though the admonition of Judge Lehman still rings in the ears. *See supra* text accompanying note 134.

<sup>215</sup> *United States v. Davenport*, 935 F.2d 1223, 1236 (11th Cir. 1991).

<sup>216</sup> *Ginton*, 154 F.3d at 1250.

<sup>217</sup> *Richardson v. Marsh*, 481 U.S. 200, 209–10 (1987).

<sup>218</sup> *United States v. Cohen*, 145 F.2d 82, 91 (2d Cir. 1944).

<sup>219</sup> *See supra* Part III.2.

<sup>220</sup> And, I am not such a person. *See infra* text accompanying notes 333–37.

To prove the point, consider again *United States v. Baker*.<sup>221</sup> The prosecution there was remarkable in its scope, alas it is hardly unique.<sup>222</sup> The fifteen defendants went to trial (three reached plea agreements during the trial) for a variety of drug offenses.<sup>223</sup> The trial, according to the Ninth Circuit, raised questions as to the “practical and human limitations of our jury system itself,”<sup>224</sup> “challeng[ing] the most fundamental goals of our federal criminal justice system: ‘simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.’”<sup>225</sup> The trial took more than sixteen months, produced over thirty thousand pages of transcripts, involved 250 witnesses and thousands of exhibits.<sup>226</sup> The evidence indicated over two thousand narcotics transactions in an eleven-year period.<sup>227</sup> The government argued strenuously that such a mega-trial was appropriate.<sup>228</sup> The court was not persuaded and set out in some detail its response to the particular assertions raised by the United States:

(1) *Joint trials save time and serve judicial economy.*

“Ludicrous,” the court found separate trials would have been far more economical. With the experience of shorter trials in the same basic subject area, the trial judge can move more rapidly, and the prosecutors’ presentations are “sharper and more streamlined . . . so that ‘[e]ach successive trial moves at a quicker and smoother pace than the last.’”<sup>229</sup>

(2) *Problems in prosecuting later tried defendants.*

With separate trials, the government’s case will be weakened because later-tried defendants will be aware of more of the government’s strategy and evidence. Not so, wrote the court: “Disclosure of the government’s method and quality of proof may even benefit the prosecution by inducing additional guilty pleas from severed defendants.”<sup>230</sup> And, if the difficulty is so great, why has the problem not been seen where the government must retry a case reversed on appeal, “a situation in which the government has proved fully capable of securing convictions?”<sup>231</sup>

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<sup>221</sup> 10 F.3d 1374 (9th Cir. 1993).

<sup>222</sup> See *supra* text accompanying note 108.

<sup>223</sup> *Baker*, 10 F.3d at 1386.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 1392 (quoting FED. R. CRIM. P. 2).

<sup>226</sup> *Id.* at 1386.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 1390.

<sup>229</sup> *Baker*, 10 F.3d at 1389. In addition, “[w]ith fewer defendants and defense counsel involved, there is less need for the sidebars and continuances that contribute to the length of a joint trial.” *Id.*

<sup>230</sup> *Id.* at 1390. This point was made forcefully in *United States v. Gallo*, 668 F. Supp. 736, 757 (E.D.N.Y. 1987).

<sup>231</sup> *Baker*, 10 F.3d at 1390.



(3) *The need to avoid inconsistent verdicts.*

Not a significant concern, wrote the judges. While the court conceded that inconsistent verdicts “may appear unfair and undermine public confidence in the judicial system,”<sup>232</sup> the appeals judges were not at all sure why the difficulty is greater with severed trials than it would be in one trial where some defendants are convicted of some counts while others are not. Moreover, inconsistent verdicts are no more likely in separate trials than in a joint trial.<sup>233</sup>

(4) *Witnesses will be intimidated or become reluctant to testify again.*

This was the government’s strongest argument, though here too the court was not moved, for the judges could not understand why the problem would be greater in separate trials than in a joint trial, “where, as here, the defendants know the identity of most of the government’s witnesses far in advance.”<sup>234</sup> In any case, if the issue should arise, the “possible loss of testimony and, more importantly, risk to the lives of witnesses must be factored into the equation on a case-by-case basis.”<sup>235</sup>

Government concerns about severed trials, and the “questionable benefits” of the joint trial did not persuade the *Baker* court.<sup>236</sup> Recognition of the “indisputable staggering hardships” of this mammoth trial did.<sup>237</sup>

The first hardship recognized by the court was the risk of real harm to the defendants, which “increases sharply with the number of defendants and the length of the trial.”<sup>238</sup> Defendants must be present in court at all times, enduring “months or even years of incarceration while they are presumed, and may in fact turn out to be, innocent.”<sup>239</sup> Defendants may not be able to secure the lawyer of choice due to

<sup>232</sup> *Id.*

<sup>233</sup> For example, of the seven defendants charged in the marijuana conspiracy in this case, four were convicted, one was acquitted, and the district court declared a mistrial as to the remaining two. We cannot see how the same result occurring after separate trials would result in any greater “scandal and inequity.”

*Id.* (quoting *Richardson v. Marsh*, 481 U.S. 200, 210 (1987)).

<sup>234</sup> *Baker*, 10 F.3d at 1390.

<sup>235</sup> *Id.* The court also mentioned the probability of preserving testimony of witnesses for use at subsequent trials under Fed. R. Evid. 804(b)(1). *Baker*, 10 F.3d at 1390. It is hard to understand the court’s reasoning here, for the rule is limited in criminal cases — unlike in civil actions — to situations in which the defendant was involved directly in the earlier proceeding.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* “The Sixth Amendment speedy trial guarantee is rendered toothless when a verdict is not returned until years after an indictment.” *Id.* The court focused attention on one defendant.

Most importantly, the human limitations of the jury system and the consequent risk of spillover prejudice cannot be ignored. This risk is particularly acute for comparatively peripheral defendants such as Robert Cole, who was charged only in the methamphetamine conspiracy count and whose separate trial could have

the "staggering attorney fees . . . or because attorneys are unwilling to suspend the balance of their practice for such a protracted period."<sup>240</sup>

Second, the very negative impact on the lawyers involved presents an added hardship. Counsel may not be able to make an orderly presentation, as they are often in the awkward situation of calling later witnesses to impeach the credibility of prosecution witnesses who testified many months earlier. Lawyers for the defendants can disagree sharply as to trial tactics and strategies. Moreover, the "tremendous burdens" on both defense and government lawyers cannot be understated. Another potential hardship deals directly with appointed counsel. "Appointed defense counsel may sacrifice their time and other practice to earn less than half of what they normally charge, and the government must commit experienced prosecutors to a single trial indefinitely."<sup>241</sup>

A third hardship recognized by the *Baker* court is the poor treatment of jurors. Ordinary citizens are not well served in the large joint trial. The court stated the matter forcefully: "Jurors have their employment and home life disrupted, often at great financial, physical, and personal expense. They are required to 'sit stoically and silently for hours every day, day after day,' and are prohibited from engaging in many ordinary pursuits of their daily lives, such as reading the newspaper."<sup>242</sup>

Finally, such cases may have an adverse impact on both levels of the judiciary. The trial judge's commitment to one case means that "the administration of justice in *all* of the court's cases is unconscionably delayed."<sup>243</sup> At the trial, if a mistake by the court is made on a ruling, the judge will be most reluctant to declare a mistrial.<sup>244</sup> On appeal the impact is just as bad. In *Baker* transcripts were not filed until almost one-and-a-half years after trial, and oral argument was not heard until

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been concluded in a matter of days or weeks, but who was required to sit in the courtroom during months of proof involving entirely unrelated conspiracies and substantive offenses.

*Id.* at 1391.

<sup>240</sup> *Id.* at 1390. See generally *Long Criminal Trials*, *supra* note 4, at 157 (remarks of Judge J. Joseph Smith).

<sup>241</sup> *Baker*, 10 F.3d at 1391. Noted trial lawyer Edward Bennett Williams remarked, forty years ago, that "[t]he economic facts of life are such that skilled, competent, able trial lawyers are shunning these cases, the mass conspiracy multiple defendant, multiple count case." *Long Criminal Trials*, *supra* note 4, at 182–83 (remarks of Edward Bennett Williams, Esq.).

<sup>242</sup> *Baker*, 10 F.3d at 1391 (quoting *United States v. Gallo*, 668 F. Supp. 736, 754 (E.D.N.Y. 1987)). See generally *Long Criminal Trials*, *supra* note 4, at 157–58 (remarks of Judge J. Joseph Smith).

<sup>243</sup> *Baker*, 10 F.3d at 1391 (quoting *Gallo*, 668 F. Supp. at 755).

<sup>244</sup> "The pressure to avoid a mistrial or reversal may also affect evidentiary rulings. 'The option of a mistrial and a restarting of the case is almost closed when such a large expenditure of time and effort would be wasted.'" *Id.* at 1391 (quoting *Gallo*, 668 F. Supp. at 755).

almost four years after the conclusion of the trial.<sup>245</sup>

From the court's analysis in *Baker*, one should be reluctant indeed to trumpet the values of the large joint trial while discounting the negative impact of it in so many areas. Large joint trials are expensive, difficult, and not necessarily beneficial to any one party.<sup>246</sup> The financial investment in such a case is staggering.<sup>247</sup> The time commitments are onerous.<sup>248</sup> The ability of the jurors to follow the flow of the case is greatly compromised.<sup>249</sup> And, surely to the chagrin of champions of the

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<sup>245</sup> The court was clearly upset with the burden placed upon it:

The difficulties in coordinating briefing schedules and oral argument, the practical impossibility of a thorough review of the record, and the strain on judges and court clerks from reading the "briefs" (over 1200 pages in this appeal) make it more difficult fully to consider the issues raised and significantly burden our already congested calendar.

*Baker*, 10 F.3d at 1391.

<sup>246</sup> For an excellent discussion, see *Long Criminal Trials*, *supra* note 4, at 161-62 (remarks of Judge Edward Weinfeld).

<sup>247</sup> The Ninth Circuit described the financial investment as follows:

Finally, we are abundantly aware that it is the taxpayers who frequently foot the bill for an extended criminal trial. The legal fees of defense attorneys appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (1988), exceeded \$2 million. Counsel for Robert Cole, whose separate trial we believe could have been concluded in a couple of weeks, filed over \$250,000 in CJA vouchers during the joint trial. An additional \$550,000 in appointed defense counsel fees have been paid on this appeal to the date of oral argument. When these millions of dollars in defense costs are combined with the millions in prosecution and court costs (including extensive reconstruction of the courtroom to accommodate the large number of defendants), the price tag of these 12 convictions is virtually indefensible.

*Baker*, 10 F.3d at 1392.

<sup>248</sup> "We do not believe that this case would have required 16 months in the courtroom had the defendants been tried in manageable groups of three or four." *Id.* at 1390.

<sup>249</sup> At oral argument in this case, the Assistant United States Attorney averred that his multiple violations of the district court's limiting instructions during closing argument were the inadvertent result of confusion. When a seasoned prosecutor is unable to keep track of nearly 200 limiting instructions given over the course of a 16-month trial, our faith in a lay jury's ability to do so is stretched to the limit. Our presumption that a jury is able to follow the trial court's instructions is "rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." The presumption is not irrebuttable.

*Id.* at 1391 (quoting *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)). As stated by trial lawyer Williams:

The great problem confronting the district judge is one of trial management. The jury must constantly be made aware of the fact that there are separate individuals on trial and that each must be judged solely on the evidence properly admissible

large joint-defendant trial, appeals courts now more frequently question the claims that no prejudicial is being present in such a colossal undertaking.<sup>250</sup>

*iv. Current Remedies*

In considering the remedies available for problems in connection with large joint trials, let us return to the illustration presented earlier — the wide-ranging conspiracy involving the importation, distribution, and exportation of illegal narcotics.<sup>251</sup> Twenty defendants, in twenty cities, have been charged as participants in this scheme. Venue, as noted previously, likely would be proper in any one of the twenty cities in which the twenty actors are domiciled.<sup>252</sup> The mere fact that some of the twenty individuals were not major players, or were not fully aware of the broad nature of the plan, would not defeat the government's venue assertion.<sup>253</sup> Recall, that in discussing the problems with venue, we saw that a remedy was in fact present which could lessen greatly the problems created by liberal venue rules.<sup>254</sup> A trial judge has the power to order a transfer of a case to another, more convenient place, even though venue had been properly set in her district or city.<sup>255</sup>

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against him." How can you cope with this problem? This is a problem that plagues defense counsel in the trial of a multi-defendant, multi-offense case, because at the end of the case, when a great morass of evidence has been dumped before the jury and hundreds of exhibits have gone before them, there is a tendency for the jury to look at the defendants as all tarred with the same brush and not to eliminate and distinguish between them.

*Long Criminal Trials*, *supra* note 4, at 186 (remarks of Edward Bennett Williams).

<sup>250</sup> The government also takes on a significant risk of reversal on appeal, not only as a result of the prejudice of such an epic trial, but because of any number of evidentiary or instructional errors that occur in the most basic proceedings. Even the most fair and attentive trial judge will err during the course of a 16-month trial, and some of those errors may require reversal.

*Baker*, 10 F.3d at 1391.

<sup>251</sup> See *supra* text accompanying notes 53–54.

<sup>252</sup> See *supra* Part III.A.

<sup>253</sup> This holds true as well for convictions as co-conspirators. As discussed in *United States v. Pedrick*, 181 F.3d 1264 (11th Cir. 1999):

[A] conspirator is not required to participate in all aspects of a conspiracy and may be convicted as a co-conspirator or even an aider and abettor if she participates in some affirmative conduct designed to aid the success of the venture with knowledge that her actions would further the venture. Indeed, the evidence need not show that each defendant knew of each phase of the conspiracy, all of its details, all of the conspirators, or the participants in each event.

*Id.* at 1272 (citations omitted).

<sup>254</sup> See *supra* notes 65–67 and accompanying text.

<sup>255</sup> Under the usual transfer rules, as in FED. R. CRIM. P. 21(b).

Alas, this possible remedy is far from reality. Few judges order such transfers, even in cases which seem to cry out for movement of the large multiple-defendant criminal trial.<sup>256</sup>

The situation is strikingly similar with joinder of parties. Individuals may be joined together if it is alleged<sup>257</sup> that they participated in a large operation, even at a fairly minor level. Serious problems associated with that charging process have been identified. Once more, a clear remedy appears to be available to trial judges, and yet again, judges rarely employ it.

Let us assume the joinder of our twenty defendants for purposes of the trial. If the joinder creates problems, the trial judge in either a state or federal jurisdiction may order the severance of some of those defendants into smaller, more manageable groupings for the purpose of later proceedings. As one former prosecuting attorney once said, "[the system] give[s] the judges all of the capability in the world to limit these trials and to prepare for them and to conduct them in a fair and efficient way."<sup>258</sup> That is correct. Under the Federal Rules of Criminal Procedure, a judge may sever a trial "[i]f it appears that a defendant . . . is prejudiced by a joinder of offenses or of defendants."<sup>259</sup> With a strong preference for joint trials and a clear presumption against severance,<sup>260</sup> however, trial judges do not often utilize this remedy.

Following the direction of the United States Supreme Court, one sees state supreme courts,<sup>261</sup> federal<sup>262</sup> and state<sup>263</sup> courts of appeal, and trial judges<sup>264</sup> routinely reject motions for severance. They understand that "[t]here is a preference . . . for joint trials of defendants who are indicted together,"<sup>265</sup> a "preference . . . particularly strong where . . . the defendants are alleged to have

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<sup>256</sup> See *supra* text accompanying notes 78–90.

<sup>257</sup> The facts supporting the joinder need not be shown at trial, only charged in the indictment. See *Schaffer v. United States*, 362 U.S. 511 (1960).

<sup>258</sup> "Monster" *RICO* Cases, *supra* note 4, at 236 (remarks of Louis Freeh).

<sup>259</sup> FED. R. CRIM. P. 14. The state rules are similar. See, e.g., D.C. CODE ANN. § 23-313 (2000); LA. CODE CRIM. PROC. art. 495.1 (West 2000); NEV. REV. STAT. ANN. 174.165 (Michie 2001), S.D. CODIFIED LAWS § 23A-11-2 (Michie 2001).

<sup>260</sup> The point is emphasized repeatedly in Fed. Bar Council Comm., *supra* note 4.

<sup>261</sup> See, e.g., *State v. Booth*, 737 A.2d 404 (Conn. 1999).

<sup>262</sup> See, e.g., *United States v. Carbajal*, 290 F.3d 277, 289 n.20 (5th Cir. 2002); *United States v. Hart*, 273 F.3d 363, 370 (3d Cir. 2001); *United States v. Novaton*, 271 F.3d 968, 989 (11th Cir. 2001); *United States v. Pierro*, 32 F.3d 611 (1st Cir. 1994).

<sup>263</sup> See, e.g., *State v. Brooks*, 758 So. 2d 814, 821 (La. App. 1999) ("Whether to grant or deny a severance is within the sound discretion of the trial court, and the court's decision will not be disturbed absent clear abuse of that discretion.").

<sup>264</sup> See, e.g., *United States v. Aiken*, 76 F. Supp. 2d 1346 (S.D. Fla. 1999); *United States v. Volpe*, 42 F. Supp. 2d 204 (E.D.N.Y. 1999); *United States v. Bodie*, 990 F Supp. 1419 (S.D. Fla. 1997).

<sup>265</sup> *Zafiro v. United States*, 506 U.S. 534, 537 (1993).

participated in a common plan or scheme.”<sup>266</sup> The general rule is that persons indicted together should be tried together, “particularly in conspiracy cases.”<sup>267</sup> “Rarely, if ever, will it be improper for co-conspirators to be tried together.”<sup>268</sup> To have a severance motion granted, a defendant must demonstrate “that a miscarriage of justice looms,”<sup>269</sup> that “he could not have a fair trial without severance.”<sup>270</sup> It is not enough to show that the evidence against co-defendants is far more powerful than against the defendant in question,<sup>271</sup> or that a large and lengthy trial will spend little time on the evidence against him.<sup>272</sup> To the contrary, in virtually all jurisdictions, trial judges appear to believe that one of two conditions must be present before they will be willing to act. In the words of the United States Supreme Court, “[a trial judge] should grant a severance . . . only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.”<sup>273</sup>

On the latter point, we have already seen a deep reluctance to conclude that joinder will affect a reliable judgment, even in cases involving enormous amounts of evidence, large numbers of defendants, and extremely lengthy proceedings.<sup>274</sup> On the former point, it is hard to imagine what such a specific trial right could be. Unless something foolish is seen — such as an undue restriction on the ability of a defense attorney to examine a particular witness, or improper limitations on the time for argument — specific trial rights are not the issue regarding severance in these trials.

The real problem here is not the specific trial rights. Instead, it is an atmosphere of confusion, generated by a production-line type of proceeding which can lead to dissension, conflict, confusion, and serious questions of fairness. Indeed, the one claim of a specific trial right in this area, which has been vigorously asserted, has failed miserably before most courts. The reference here is to the jury hearing evidence and arguments of one defendant which directly conflict with the evidence and arguments of another — the antagonistic defenses.

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<sup>266</sup> *United States v. Salameh*, 152 F.3d 88, 115 (2d Cir. 1998).

<sup>267</sup> *United States v. Pedrick*, 181 F.3d 1264, 1272 (11th Cir. 1999).

<sup>268</sup> *United States v. Frazier*, 274 F.3d 1185, 1194 (8th Cir. 2001); *United States v. Davis*, 154 F.3d 772, 781 (8th Cir. 1998).

<sup>269</sup> *United States v. LiCausi*, 167 F.3d 36, 49 (1st Cir. 1999).

<sup>270</sup> *United States v. Robbins*, 197 F.3d 829, 841 (7th Cir. 1999).

<sup>271</sup> This is so even if co-defendants are indicted on many more counts than the defendant at issue. *See United States v. Mathison*, 157 F.3d 541, 546 (8th Cir. 1998).

<sup>272</sup> *See United States v. Eads*, 191 F.3d 1206, 1209 (10th Cir. 1999) (noting that the evidence dealing with the defendant’s participation in the conspiracy ended by the second day of twelve-day trial).

<sup>273</sup> *Zafiro v. United States*, 506 U.S. 534, 539 (1993).

<sup>274</sup> *See supra* text accompanying notes 215–18.

Showing that antagonistic defenses might cause sufficient harm is painfully difficult. Having a court accept the notion that the differing defenses are even antagonistic is quite a chore itself. Conflicting arguments by counsel<sup>275</sup> and mere inconsistencies in evidence and testimony are insufficient.<sup>276</sup> So too is "fingerpointing."<sup>277</sup> The defense attorney must show that the defendants are on an evidentiary "collision course."<sup>278</sup> Few cases are reported in which antagonistic defenses have persuaded judges at trial<sup>279</sup> or on appeal<sup>280</sup> that

<sup>275</sup> *United States v. Davis*, 170 F.3d 617, 621 (6th Cir. 1999).

<sup>276</sup> *United States v. Volpe*, 42 F. Supp. 2d 204, 210–11 (E.D.N.Y. 1999).

<sup>277</sup> *United States v. Voigt*, 89 F.3d 1050, 1095 (3d Cir. 1996); *United States v. Arruda*, 715 F.2d 671, 679 (1st Cir. 1983).

<sup>278</sup> As most notably stated in one of the Watergate appeals, *United States v. Haldeman*, 559 F.2d 31, 71 (D.C. Cir. 1976). See generally *United States v. Angwin*, 263 F.3d 979, 987–88 (9th Cir.), *amended*, 271 F.3d 786 (9th Cir. 2001), *cert. denied*, 535 U.S. 966 (2002).

<sup>279</sup> One important exception is the Oklahoma City bombing prosecution. *United States v. McVeigh*, 169 F.R.D. 362 (D. Colo. 1996). The thoughtful comments of a concerned trial judge regarding this matter are worth pondering:

Both defendants seek severance on the ground that their defenses are so antagonistic as to prevent a fair joint trial. The Supreme Court limited the use of antagonistic defenses as a basis for severance, holding that there is no per se rule of severance. More than mere "finger pointing" is required. . . . While the defenses of these two men may not fully meet the mutually exclusive standard, there will be substantial and significant differences in the tactical approaches taken by their respective counsel. At times they will have different positions on evidentiary objections, and different approaches to the cross-examination of the government's witnesses and in the presentation of defense witnesses. . . . Preference for a joint trial of persons charged with conspiracy and with aiding and abetting crimes assume efficiencies resulting in conservation of resources, reduction in inconveniences to witnesses and public authorities, avoidance of delays and mitigation of adverse effects on witnesses and victims. Such assumptions must be analyzed for their validity in any particular case and their value may be outweighed by the compelling interest in the fairness and finality of the verdict. . . . There are efficiencies and advantages in single focused trials. The time needed for jury selection is significantly reduced: the number of defense peremptory challenges is halved and only one defense counsel conducts voir dire questioning. It is easier to apply the rules of evidence when there is a trial of one defendant, particularly with regard to the admissibility of statements offered under Rule 801(d)(2); character evidence under Rule 404(a)(1) and proof of motive, opportunity, intent, preparation, plan, knowledge and identity under Rule 404(b). Given these considerations, it is far from certain that the time required for two separate trials would, in total, be substantially greater than the time required for a joint trial. . . .

*Id.* at 370; see also *United States v. Williams*, 181 F. Supp. 2d 267, 301 (S.D.N.Y. 2001).

<sup>280</sup> It will take the extreme situation where, in effect, a defense lawyer becomes "a second prosecutor [who i]n order to zealously represent his client [does] everything possible to

substantive rights would be violated with the presence of antagonistic defenses.

This result should hardly be surprising considering the astonishingly narrow view taken by the United States Supreme Court. In *Zafiro v. United States*,<sup>281</sup> the Court emphasized the “preference in the federal system for joint trials of defendants who are indicted together.”<sup>282</sup> With that proposition in mind, its view of antagonistic defenses becomes predictable: “Mutually antagonistic defenses are not prejudicial *per se*.”<sup>283</sup> While the Court conceded that prejudice could possibly be shown in cases in which so many defendants are being tried that the complexity of the prosecution and the presence of antagonistic defenses would lead to juror confusion,<sup>284</sup> it is rare indeed for a trial judge to find such a situation.<sup>285</sup> As one court stated, severance is required only if “the jury will infer that both defendants are guilty solely because of the conflict.”<sup>286</sup>

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convict the other defendant.” *United States v. Tootick*, 952 F.2d 1078, 1082 (9th Cir. 1991). *But see United States v. Romanello*, 726 F.2d 173, 174 (5th Cir. 1984). *See generally United States v. Evans*, 272 F.3d 1069, 1084 (8th Cir. 2001).

The joint trial of conspiracy defendants was originally deemed useful to prove that the parties planned their crimes together. However, it has become a powerful tool for the government to prove substantive crimes and to cast guilt upon a host of co-defendants. In this case, we are concerned with the specific prejudice that results when defendants become weapons against each other, clawing into each other with antagonistic defenses. Like the wretches in Dante’s hell, they may become entangled and ultimately fuse together in the eyes of the jury, so that neither defense is believed and all defendants are convicted. Under such circumstances, the trial judge abuses its discretion in failing to sever the trials of the co-defendants.

*Romanello*, 726 F.2d at 174.

<sup>281</sup> 506 U.S. 534 (1993).

<sup>282</sup> *Id.* at 537.

<sup>283</sup> *Id.* at 538.

<sup>284</sup> Even so, severance would not necessarily be the remedy, according to the Court, for the Rule “leaves the tailoring of the relief to be granted, if any, to the district court’s sound discretion.” *Id.* at 539.

<sup>285</sup> *See Imwinkelried, supra* note 4, at 36 (“As a practical matter, *Zafiro* has made it exceedingly difficult for a defendant to persuade a trial judge to grant a severance motion, especially in conspiracy prosecutions.”) For an incisive discussion of the problem, see *United States v. Mayfield*, 189 F.3d 895 (9th Cir. 1999), in which the court wrote that *Zafiro* “rejects a *per se* rule [and finds] severance may be required because the inconsistent defenses suggest a heightened risk of prejudice.” *Id.* at 904.

<sup>286</sup> *United States v. Caporale*, 806 F.2d 1487, 1510 (11th Cir. 1986). The process for evaluation was laid out in *Williams v. Singletary*, 114 F.3d 177 (11th Cir. 1997). Four questions must be answered:

- (1) Do the alleged conflicts with co-defendants’ defenses go to the essence of the appellant’s defense?
- (2) Could the jury reasonably construct a sequence of events that accommodates the essence of both defendants’ defenses?



A showing, then, of antagonistic defenses is not likely to persuade a trial judge that severance should be granted to avoid "compromis[ing] a specific trial right."<sup>287</sup>

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(3) Did the conflict subject the appellant to compelling prejudice?

(4) Could the trial judge ameliorate the prejudice?

*Id.* at 179. Justice Steven's concurring opinion in *Zafiro* — harkening back to the words of Justice Jackson in *Krulewitch* — is a far more careful balancing of the concerns that the majority of the Court should have considered regarding antagonistic defenses:

I would save for another day evaluation of the prejudice that may arise when the evidence or testimony offered by one defendant is truly irreconcilable with the innocence of a codefendant. Because the facts here do not present the issue squarely, I hesitate in this case to develop a rule that would govern the very different situation faced in cases . . . in which mutually exclusive defenses transform a trial into "more of a contest between the defendants than between the people and the defendants." Under such circumstances, joinder may well be highly prejudicial, particularly when the prosecutor's own case in chief is marginal and the decisive evidence of guilt is left to be provided by a codefendant. The burden of overcoming any individual defendant's presumption of innocence, by proving guilt beyond a reasonable doubt, rests solely on the shoulders of the prosecutor. Joinder is problematic in cases involving mutually antagonistic defenses because it may operate to reduce the burden on the prosecutor, in two general ways. First, joinder may introduce what is in effect a second prosecutor into a case, by turning each codefendant into the other's most forceful adversary. Second, joinder may invite a jury confronted with two defendants, at least one of which is almost certainly guilty, to convict the defendant who appears the more guilty of the two regardless of whether the prosecutor has proven guilt beyond a reasonable doubt as to that particular defendant. Though the Court is surely correct that this second risk may be minimized by careful instructions insisting on separate consideration of the evidence as to each codefendant, the danger will remain relevant to the prejudice inquiry in some cases. Given these concerns, I cannot share the Court's enthusiastic and unqualified "preference" for the joint trial of defendants indicted together. . . . There will, however, almost certainly be multidefendant cases in which a series of separate trials would be not only more reliable, but also more efficient and manageable than some of the mammoth conspiracy cases which the Government often elects to prosecute. And in all cases, the Court should be mindful of the serious risks of prejudice and overreaching that are characteristic of joint trials, particularly when a conspiracy count is included in the indictment. . . . I agree with the Court that a "bright-line rule, mandating severance whenever codefendants have conflicting defenses" is unwarranted. For the reasons discussed above, however, I think district courts must retain their traditional discretion to consider severance whenever mutually antagonistic defenses are presented. Accordingly, I would refrain from announcing a preference for joint trials, or any general rule that might be construed as a limit on that discretion.

*Zafiro v. United States*, 506 U.S. 534, 543–45 (1993) (Stevens, J. concurring) (citations omitted).

<sup>287</sup> *Id.* at 539.

On appeal, too, those defendants relying on severance arguments — even with antagonistic defenses present — generally fare poorly. The severance question is placed in the discretion of the trial judge,<sup>288</sup> and the exercise of that discretion is virtually unreviewable.<sup>289</sup> Even if an abuse of discretion — or in the words of some courts, a *clear* abuse<sup>290</sup> — occurs, the defendant on appeal will prevail only if she can show that the denial of the motion to sever resulted in “manifest prejudice.”<sup>291</sup> While the hurdle may not be entirely unsurmountable,<sup>292</sup> it is extremely difficult for the defense.

With few possible remedies available in the area of these large joint-defendant trials, we find ourselves in a curious situation. Judges regularly and somewhat routinely decry the problems with such trials. It is not at all unusual to find this sort of statement: “A long and complex trial like this one taxes the patience and vigor of the judge, jury, and counsel.”<sup>293</sup> At the same time, the very judges who pronounce such concerns regularly and routinely either deny motions for severance or uphold such rulings on appeal.<sup>294</sup>

Three principal reasons explain this seeming anomaly. First, as discussed above, there is the widespread notion — stated most forcefully by the United States Supreme Court — that as a general matter these large trials really do work; they are economically sound with little risk of harm to defendants.<sup>295</sup> This statement in *Richardson v. Marsh* has been relied upon in many cases:

It would impair both the efficiency and the fairness of the criminal justice system to require . . . that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution’s case beforehand.<sup>296</sup>

Apart from the fact that the statement here was utterly gratuitous,<sup>297</sup> no one has ever

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<sup>288</sup> See *United States v. Gbemisola*, 225 F.3d 753, 760–61 (D.C. Cir. 2000).

<sup>289</sup> *United States v. Salameh*, 152 F.3d 88, 115 (2d Cir. 1998) (quoting *United States v. Lasanto*, 978 F.2d 1300, 1306 (2d Cir. 1992)).

<sup>290</sup> See *United States v. Pedrick*, 181 F.3d 1264, 1272 (11th Cir. 1999).

<sup>291</sup> *State v. Booth*, 737 A.2d 404, 415 (Conn. 1999). See also *Salameh*, 152 F.3d at 115, wherein the court — relying on well established precedent — wrote that the defense will succeed on appeal only if the prejudice shown is “so severe that his conviction constituted a miscarriage of justice . . . prejudice so great as to deny him a fair trial. . . .” *Id.* See generally *United States v. Phillips*, 239 F.3d 829 (7th Cir.), *cert. denied*, 534 U.S. 884, *cert. denied sub nom.* *Stork v. United States*, 534 U.S. 967 (2001).

<sup>292</sup> See *supra* notes 279–80 and accompanying text.

<sup>293</sup> *United States v. Posada-Rios*, 158 F.3d 832, 865 (5th Cir. 1998).

<sup>294</sup> See *id.*

<sup>295</sup> See *Richardson v. Marsh*, 481 U.S. 200, 210 (1987).

<sup>296</sup> *Id.*

<sup>297</sup> In *Richardson*, the Court was dealing with a two-person prosecution, not a twenty-two-

offered empirical support for this cost-saving rationale. Indeed, in spite of the conclusion that these large trials "by and large . . . promote [] judicial efficiency,"<sup>298</sup> as indicated earlier, in many cases the evidence seems quite to the contrary.<sup>299</sup>

Second, there is the somewhat surprising rationale that, in many cases, if it is not a "clean sweep" of guilty verdicts for all defendants on all charges that must mean jurors were able to act in a fair and consistent fashion. This point is made often.<sup>300</sup> Once again, the support for such a conclusion is wanting, and indeed none is ever seriously offered. And, as noted earlier,<sup>301</sup> one could argue forcefully that such split verdicts prove nothing — not juror understanding, not juror confusion. They are what they are, verdicts in cases in which neither the government nor the defense was entirely successful.

Third, judges truly do seem to believe that even if problems exist in these trials, particularly with evidentiary matters, instructions to the jury will cure them.<sup>302</sup> How does one take this argument seriously? No doubt in small, short trials, jurors may be able to follow the directions from the trial court.<sup>303</sup> But in a case involving more than a dozen defendants? In a trial taking a year? In a prosecution with hundreds or even thousands of items of evidence? It is hard to understand such dogged adherence to this rationale. Consider a recent Connecticut case mentioned above, *State v. Booth*.<sup>304</sup> The state supreme court majority was entirely dismissive of the defense argument as to severance, with the judges firmly writing that "'the jury [is] presumed to follow the court's directions in the absence of a clear indication to the contrary.'" <sup>305</sup> Following the nationally accepted practice, that group of judges could not find such "a clear indication to the contrary" despite the contention that the instructions were exceedingly complex and confusing.<sup>306</sup> This trial was troubling,

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person prosecution. As Justice Stevens argued in dissent, the savings present in such a joint case were not readily apparent. *Id.* at 218.

<sup>298</sup> *United States v. Salameh*, 152 F.3d 88, 115 (2d Cir. 1998).

<sup>299</sup> See *supra* text accompanying notes 228–35.

<sup>300</sup> *United States v. Marks*, 209 F.3d 577, 585–85 (6th Cir. 2000); *United States v. Jackson*, 180 F.3d 55, 75 (2d Cir. 1999); *United States v. Mann*, 161 F.3d 840, 862 (5th Cir. 1998); *United States v. Casamento*, 887 F.2d 1141, 1153 (2d Cir. 1989).

<sup>301</sup> See *supra* text accompanying notes 202–07.

<sup>302</sup> See, e.g., *United States v. Hardin*, 209 F.3d 652, 664 (7th Cir. 2000), *vacated on other grounds sub nom. Sallis v. United States*, 531 U.S. 1135 (2001); *United States v. Eads*, 191 F.3d 1206, 1209 (10th Cir. 1999); *United States v. Mathison*, 157 F.3d 541, 546 (8th Cir. 1998).

<sup>303</sup> But see *Moore v. Morton*, 255 F.3d 95, 113 (3d Cir. 2001) (holding that a curative instruction not sufficient in response to arguments of the prosecutor which were "irrelevant, illogical and offensive").

<sup>304</sup> 737 A.2d 404 (Conn. 1999).

<sup>305</sup> *Id.* at 418 (quoting *State v. Griffin*, 397 A.2d 89, 92 (Conn. 1978)) (alteration in original).

<sup>306</sup> *Booth*, 737 A.2d at 418; cf. *id.* at 440–41 (Berdon, J., dissenting).

with evidence offered against a co-defendant for impeachment purposes only; on at least one occasion the limiting instruction for that testimony was not given at the time the evidence was offered, but rather after counsel for the co-defendants had made their closing arguments.<sup>307</sup> In addition, the trial court revised the instructions regarding certain testimony one week after the original limiting instruction had been given.<sup>308</sup> Moreover, the instructions as given were hardly a model of clarity, leading the dissenting judge to conclude that “these corrective instructions would bewilder the mind of any juror, let alone a juror who has just sat through a long, complicated trial that entailed continual limiting instructions.”<sup>309</sup> Still, in affirming the denial of a severance request, the majority expressed confidence in the ability of the jurors to follow such instructions.<sup>310</sup>

For a more realistic view of the limiting instruction, one should prefer to look to Learned Hand and Jerome Frank. The former called the limiting instruction a “recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody[] else[’s].”<sup>311</sup> The latter asserted that the instruction “is a kind of ‘judicial lie’: It undermines a moral relationship between the courts, the jurors, and the public; like any other judicial deception, it damages the decent judicial administration of justice.”<sup>312</sup>

Where, then, does this discussion lead regarding remedies available for problems created by the joinder of large numbers of defendants? Remedies do unquestionably exist. The trial judge has the power to sever unwieldy proceedings.<sup>313</sup> With no showing that many trial judges actually are willing to utilize that power, however, the remedy becomes meaningless in most such cases. The option of the limiting instruction is even less appealing. While used in many

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<sup>307</sup> See *id.* at 440 (Berdon, J., dissenting); see also Imwinkelried, *supra* note 4, at 46 (discussing the timing for such instructions).

<sup>308</sup> *Booth*, 737 A.2d at 440 (Berdon, J., dissenting).

<sup>309</sup> *Id.* at 441 (Berdon, J., dissenting). Justice Berdon continued: “The confusion that these instructions caused jurors who sat on the panel becomes readily apparent, when merely reading the trial transcript of these corrective instructions boggles the mind of the reader.” *Id.*

<sup>310</sup> See *id.* at 418.

<sup>311</sup> *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932).

<sup>312</sup> *United States v. Grunewald*, 233 F.2d 556, 574 (2d Cir. 1956) (Frank, J., dissenting), *rev’d on other grounds*, 353 U.S. 391 (1957). In EDMUND M. MORGAN, *SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION* (1956) — quoted favorably in *Bruton v. United States*, 391 U.S. 123, 132 n.8 (1968) — the author wrote that the use of limiting instructions shows an inconsistent attitude toward juries, by “treating them at times as a group of low-grade morons and at other times as men endowed with a superhuman ability to control their emotions and intellects.” MORGAN, *supra* at 105; see also *supra* note 139 and accompanying text.

<sup>313</sup> See, e.g., *United States v. Price*, 13 F.3d 711, 717 (1994).

cases, it is, to quote Judge Hand again, "a placebo . . . a medicinal lie."<sup>314</sup>

*v. Time to Correct the Problem*

In reviewing multiple-defendant prosecutions and judicial decisions on joinder and severance, one ought to have little doubt that serious issues exist within the system. These issues will remain so long as the Supreme Court of the United States writes of a marked preference for joint trials,<sup>315</sup> and appeals courts view the review of severance decisions as "extremely narrow,"<sup>316</sup> concluding that severance rulings "will rarely be disturbed on review."<sup>317</sup> To get a sense of the problem, one need only look at several appellate opinions which expressly question the wisdom of these large joint-defendant trials.

A good starting point is *United States v. Casamento*, the widely publicized "Pizza Connection Case."<sup>318</sup> In that case, the jury returned guilty verdicts against eighteen of twenty-one defendants after a trial of more than seventeen months.<sup>319</sup> On appeal, the court discussed the serious disadvantages which can occur in "mega-trials"<sup>320</sup> and offered some solutions to the problems in such cases.<sup>321</sup> There is also *United States v. Ellender*,<sup>322</sup> in which twenty-three defendants went to trial, and the court noted that the result "demonstrate[d] the flaw in the government's apparent assumption that 'bigger is better' in this type of proceeding."<sup>323</sup> And, of course, one should not ignore the appeal in *United States v. Baker*,<sup>324</sup> resulting from "one of the lengthiest and costliest trials in this nation's history," a sixteen-month proceeding with thirty thousand pages of transcripts involving twelve defendants.<sup>325</sup> The court deliberated whether the prosecution unduly tested "the practical and human limitations of our jury system itself."<sup>326</sup>

<sup>314</sup> *Bruton*, 391 U.S. at 132 n.8.

<sup>315</sup> See also Justice White's strong language in *Cruz v. New York*, 481 U.S. 186 (1987), discussing "the effect of severance on already overburdened state and federal court systems." *Id.* at 198 (White, J., dissenting).

<sup>316</sup> *United States v. Mariscal*, 939 F.2d 884, 886 (9th Cir. 1991).

<sup>317</sup> *United States v. Campanile*, 518 F.2d 352, 359 (9th Cir. 1975).

<sup>318</sup> 887 F.2d 1141, 1147 (2d Cir. 1989). The origins (from an investigation in Sicily) of this remarkable case are discussed in ALEXANDER STILES, *EXCELLENT CADAVERS: THE MAFIA AND THE DEATH OF THE FIRST ITALIAN REPUBLIC* 124-29, 132-33, 211, 249 (1995).

<sup>319</sup> *Casamento*, 887 F.2d at 1148.

<sup>320</sup> *Id.* at 1151.

<sup>321</sup> See *infra* text accompanying notes 332-37.

<sup>322</sup> 947 F.2d 748 (5th Cir. 1991).

<sup>323</sup> *Id.* at 751. Twenty-three defendants — less than one-sixth of whom were named — were tried in this case, and at the end, "only a handful of defendants stood convicted." *Id.*

<sup>324</sup> 10 F.3d 1374 (9th Cir. 1993).

<sup>325</sup> *Id.* at 1386.

<sup>326</sup> *Id.*

All three of these cases involved incredibly large, complicated joint-defendant trials.<sup>327</sup> Each considered an appeal from a denial of a severance motion.<sup>328</sup> In each, the court of appeals strongly chastised the government for the mess created by such a prosecution,<sup>329</sup> but ultimately upheld the severance denials by the trial judge.<sup>330</sup> Is any further evidence needed as to the lack of a true remedy for inappropriate — though technically correct — joinder? In short, if defendants cannot win on the severance issues at trial or on appeal in spectacularly large and fitfully difficult cases such as *Baker*, *Ellender*, and *Casamento*, it is fair to conclude that severance is not going to be a terribly viable option in most joinder situations, even those in “mega-trials.”

It is not enough, then, to offer the uncritical view that judges retain sufficient power to deal with these problems. Though the power may be present, the ability and willingness to exercise that power in effective fashion can only be seen as greatly constrained throughout the country at both the trial and appellate levels. Strong remedies could be developed which would significantly improve the defense situation with joint trials while not unduly burdening the government. It should be emphasized at the outset, however, what is not being suggested. Let us return to the earlier illustration involving the twenty defendants spread throughout the country who could be joined together in a single trial in any one of twenty locations.<sup>331</sup> Surely severance should be a realistic option here. Unfortunately, in all probability, it is not. The Supreme Court in dismissive fashion misreads the arguments of its critics when it writes that the choice on severance is either to retain our current system, or to

impair both the efficiency and the fairness of the criminal justice system [with] prosecutors [having to] bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand.<sup>332</sup>

No one on the national scene is asserting a right to severance that would mandate twenty trials of these twenty defendants requiring at least some witnesses to testify twenty times. No criminal justice system in the United States has such a process,

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<sup>327</sup> *Id.* at 1386; *United States v. Ellender*, 947 F.2d 748, 751 (5th Cir. 1991); *United States v. Casamento*, 887 F.2d 1141, 1148 (2d Cir. 1989).

<sup>328</sup> *Baker*, 10 F.3d at 1386; *Ellender*, 947 F.2d at 753; *Casamento*, 887 F.2d at 1149.

<sup>329</sup> *Baker*, 10 F.3d at 1390–91; *Ellender*, 947 F.2d at 754–55; *Casamento*, 887 F.2d at 1150–51.

<sup>330</sup> *Baker*, 10 F.3d at 1393; *Ellender*, 947 F.2d at 752; *Casamento*, 887 F.2d at 1151.

<sup>331</sup> See *supra* text accompanying notes 53–54.

<sup>332</sup> *Richardson v. Marsh*, 481 U.S. 200, 210 (1987).

and for good reason, as it would be unduly restrictive for the prosecution in serious cases involving far-flung criminal endeavors.

A middle ground can be found between our current system (virtually no severance) and the Court's imagined horrible system (severance for all defendants in almost all joint trials). Trial judges should be charged to weigh sensitively the potential difficulties with large joint-defendant trials and to evaluate carefully the need for — and impact of — severance.<sup>333</sup> It certainly has been done effectively on occasion in the past and should be pursued far more vigorously in the future.<sup>334</sup> To achieve this end, the law ought to reverse wholly the current presumption in favor of joint trials for defendants who have been indicted together. In cases involving many defendants, judges must be directed to question seriously the wisdom of the six- to twelve-month trial involving a dozen or more individuals. If the government can make a showing of great need coupled with little likely harm, perhaps its joinder position will prevail. The trial judge should, however, presume that in a major multiple-defendant prosecution, such need is not great and such harm will occur; the burden would then be placed squarely on the prosecution to demonstrate the contrary. While not the only key reform which could be pursued in large cases,<sup>335</sup> “[placing] the burden of justifying a joint trial upon the party wishing it”<sup>336</sup>

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<sup>333</sup> In the Second Circuit, where ten defendants are joined together, the courts have been told to determine the issue of potential prejudice with particular care. *See United States v. Casamento*, 887 F.2d 1141, 1152 (2d Cir. 1989).

<sup>334</sup> *See, e.g., United States v. Diaz*, 176 F.3d 52, 75 (2d Cir. 1999) (severing and dividing defendants into groups based upon breadth of charges); *United States v. Thomas*, 114 F.3d 228, 235 (D.C. Cir. 1997) (dividing twenty-four defendants into four groups for separate trials); *United States v. Andrews*, 754 F. Supp. 1161, 1170 (N.D. Ill. 1990) (ordering severance when the trial judge “weigh[ed] the public interest in a joint trial of the twenty-two to twenty-nine defendants against the possibility of undue prejudice or confusion arising from such a trial”). At the appellate level, *see United States v. Pedrick*, 181 F.3d 1264, 1273 (11th Cir. 1999).

<sup>335</sup> One proposal is to have judges simply be more realistic in evaluating the risks involved with a high profile matter, such as with the Oklahoma City bombing case, *see supra* note 279 and accompanying text, or with a case containing mutually exclusive defenses, as in *United States v. Mayfield*, 189 F.3d 895 (9th Cir. 1999). This is the position of the ABA Criminal Justice section, discussed in Imwinkelried, *supra* note 4, at 54. Other proposals abound. First, judges could conduct a more careful scrutiny of joinder on the basis of the length of the trial, rather than the number of defendants. *Casamento*, 887 F.2d at 1152 (requiring prosecutors to reasonably justify joinder in cases where “the prosecution’s case will exceed four months”); Fed. Bar Council Comm., *supra* note 4, at 140–41. Second, a limit could be imposed on the permissible number of charges. *Casamento*, 887 F.2d at 1152. Third, judges could consider severance mid-trial, after the situation becomes more clear. *Pedrick*, 181 F.3d at 1274. *But see Dawson*, *supra* note 96, at 1411. Finally, the parties could conduct one trial but use multiple juries for jointly tried defendants. *Lambright v. Stewart*, 191 F.3d 1181 (9th Cir. 1999).

<sup>336</sup> *Dawson*, *supra* note 96, at 1453.

would go far to insure due process of jointly charged defendants.

To promote and enforce this new presumption, once again, the law ought to require a change in the procedure offered. If the judge in a multiple-defendant case rules on a severance motion, that judge should have to make these explicit findings:

- (1) why joinder is or is not appropriate;
- (2) why such a joint trial is or is not necessary; and
- (3) whether steps apart from severance could be taken to insure that prejudice to the defendants will not result.

And, to reinforce the validity of appellate review, changes again would be needed so as to make such findings the basis for an interlocutory appeal by either party.<sup>337</sup> To do any less will not appreciably change our current, and rather dire, situation.

#### IV. CONCLUSION

Over the past fifty years the substantive law regarding joint criminal activities has changed dramatically, with a decided shift in favor of the government. In both legislatures and courts, old debates have been settled conclusively against defendants. Nary a word is uttered today about the basis for the conclusion that joint criminal danger is particularly great, that liability of one person for the crimes of others should be very broad, or that RICO is an equitable criminal law principle. The public, too, seemingly has spoken when it comes to the prosecution of joint criminal ventures. Whether as to the penalties meted out or the resources utilized to prosecute, few today challenge the direction in which our nation has moved.

It is important, though, to identify two quite distinct guiding principles. The first is that, with a just system of criminal procedure in this area, we will prosecute vigorously and impose wide liability and stiff penalties. The second, of equal importance, is that we will not limit the *process* by which those suspected of joint criminal actions are tried. The former is certainly well-established throughout the country. Yet, in moving to the almost limitless rules currently governing venue and joinder, we have virtually ignored the latter. Return, for a final time, to the illustration utilized throughout this Article: the twenty defendants from twenty cities accused of engaging in a nationwide conspiracy.<sup>338</sup> Under our current venue rules it is fairly certain that the prosecution could take place in any city — literally *any* city — in which any act — truly *any* act — in furtherance of the plan, was taken by *any* of the charged defendants. It is just as certain that the prosecution could — in all but the most unusual of cases — insist that the twenty defendants be joined together for a single trial.

Such a result should be unacceptable. It is unfair for the defendants, it is burdensome for the courts, and it may well be counterproductive for the

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<sup>337</sup> As with venue decisions. See discussion *supra* Part III.A.

<sup>338</sup> See *supra* text accompanying notes 53–54.



government. It is beyond the time to say that reforms must be taken in such cases to insure an equitable fact finding process.<sup>339</sup> Procedures must be put in place which will reasonably accommodate both the government's interest in vigorously prosecuting and the right of the defendant to contest massive trials held thousands of miles from her home or from any activities she took part in, or even knew about. Large joint proceedings with virtually unlimited prosecutorial power as to location create tremendous difficulties for all concerned. It is essential that steps be taken now to ensure due process of law even for those accused of participating in wide ranging conspiracies. This thought of the Ninth Circuit's — in the appeal from an astonishingly long, complex and difficult multiple-defendant trial — was written now almost a decade ago: "[W]e hope that trials such as this remain exotic blooms among legal flora and not rampant weeds threatening to strangle our most basic ideals of a fair and efficient justice system."<sup>340</sup>

One can only hope.

<sup>339</sup> Sixty years have passed since Circuit Judge Jerome Frank wrote of "[t]he need for safeguarding defendants from misunderstanding by the jury[, which] is peculiarly acute in conspiracy trials." *United States v. Liss*, 137 F.2d 995, 1003 (2d Cir. 1943) (Frank, J., dissenting). Justice Jackson's famous opinion in *Krulewitch* condemning such trials — cited several times in this Article — was written more than fifty years ago. *Krulewitch v. United States*, 336 U.S. 440, 445–58 (1949) (Jackson, J., concurring).

<sup>340</sup> *United States v. Baker*, 10 F.3d 1374, 1393 (9th Cir. 1993). And the thought certainly continues, as stated in *United States v. Gibbs*, 182 F.3d 408 (6th Cir. 1999):

[E]vidence that the defendants knew each other, grew up together, sold crack in the same area, or on occasion sold crack together fails to prove membership in the conspiracy. Any other conclusion would permit the jury to infer membership in the conspiracy by association of the defendants with one another. We must be careful, especially in multi-defendant drug conspiracy trials, to guard against such findings of guilt by association.

*Id.* at 423.