Conspiracy, Really?

Andrew Ingram[*]

ABSTRACT: A heap of criminals is not a conspiracy any more than a pile of bricks is a house, yet every day in court, prosecutors elevate the stakes in prosecutions and plea bargaining by charging defendants who commit crimes in groups with conspiracy. The crime may be as disorganized as the impulsive decision to rob a convenience store, but if the prosecutor can show that more than one person participated in the crime, she can add a conspiracy charge. The premise of the Article is that this is wrong and that conspiracy charges should be reserved for cases where there is an agreement to commit a crime followed by substantial planning and plotting to carry out the crime. Only in these cases do the defendants' actions pose a special danger and deserve to be called a conspiracy.

My solution is to add a substantial planning and organization requirement to the definition of conspiracy. The Article shows various factors that can be used to instruct juries on whether the requirement has been met. Courts can ask whether the alleged conspiracy featured a pattern of criminal activity, a division of labor, hierarchy, and institutionalization; they can probe whether there was overt planning (a meeting or Slack channel), a lapse in time between the alleged agreement and the execution of the crime, and whether the target of the conspiracy was a sufficiently complicated crime to require planning and organization to execute it.

In the course of the Article, I argue that doctrinal scholarship has an important role to play in the effort for criminal justice reform because it can appeal to those in power who do not support criminal justice reform for humanitarian or egalitarian reasons.

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I. BACKGROUND 1209

[*] Associate, Yetter Coleman LLP. Visiting Assistant Professor, Chicago-Kent College of Law, 2019–2021. Ph.D. (Philosophy), The University of Texas at Austin; J.D., *with highest honors*, The University of Texas School of Law; A.B., Brown University. Law Clerk to the Honorable Gregg Costa, U.S. Court of Appeals for the Fifth Circuit, 2016–2017; Law Clerk to the Honorable Michael Massengale, Texas Court of Appeals for the First District, 2013–2014. The Author's prior articles on the criminal law and moral theory are forthcoming or have appeared in the *George Mason Law Review*, *Houston Law Review*, *University of Richmond Law Review*, *Ohio State Journal of Criminal Law*, *Philosophy*, and *Ratio*.

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INTRODUCTION

What does a criminal conspiracy look like? When we think about conspiracy, we imagine a major, exceptional crime. We bemoan the conspiracies to terrorize freedmen perpetuated by the Ku Klux Klan during Reconstruction; we picture scenes from *The Godfather* films of mobsters plotting murders and drug shipments. As this Article shows, however, the undue breadth of current conspiracy law means that prosecutors apply it regularly to simple crime with none of the arachnid plotting and organized criminal networks of the paradigmatic conspiracies just mentioned.

Consider the heart-wrenching facts of *State v. Bridges.*[1] *Bridges* was a murder and conspiracy case,[2] but Bridges—a Black man who was sentenced to life imprisonment—never fired a shot nor planned for his companions to do

1. *See generally* State v. Bridges, 628 A.2d 270 (N.J. 1993).
2. *Id.* at 271.

so.[3] In fact, far from being marked by preparation and foresight, the killing in *Bridges* is a sadly simple, mundane story of hotheaded teenagers and the shortsighted, impetuous decisions they make when they get in fights. As you read the facts that follow, ask yourself whether someone other than an Anglo-American lawyer would describe the crime as a "conspiracy."

One fall night in New Jersey, Bridges was at a sixteenth birthday party for a girl named Cheryl Smith.[4] After a heated argument with another partygoer named Strickland, Bridges angrily stormed out of the party, declaring that he would return with "his 'boys.'"[5] Driving back to Trenton, he met two acquaintances, Bing and Rolle, whom he successfully recruited to return with him to the birthday party.[6] On the return drive, they stopped at Bing's house, where Rolle and Bing armed themselves with guns that they showed to Bridges in the car.[7] Bridges later testified that he thought Bing and Rolle brought guns to intimidate the large number of other men at the party and thus make room for his intended unarmed scuffle.[8]

In the small hours of the morning, the three men returned to the birthday party looking for combat.[9] Bridges sought out Strickland and renewed his feud with him: "Defendant said he would not leave the house until he 'fuck(ed) somebody up.'"[10] Raspberry, a friend of Strickland, stepped forward to oblige Bridges's desire for a fight.[11] Raspberry and Bridges then went outside for what they expected to be a fistfight:

> A crowd then gathered to watch Bridges and Raspberry begin their fight in the street in front of Smith's house. Bing shouted to the crowd, "Nobody jump in," and Rolle warned, "Nobody here is Superman." A witness testified that the statement by Rolle was meant to imply that nobody in the crowd was bullet-proof.
>
> During the fight Bridges was able to get on top of Raspberry, at which point either Strickland or another member of the crowd pulled defendant off and struck him in the head. At the same time, a member of the crowd struck Bing in the face. Bing immediately drew a .22 caliber revolver, and Rolle pulled out a .32 caliber revolver. Rolle pointed the gun at the crowd and then fired it into the air. Numerous shots were then fired into the crowd as the onlookers tried to flee.

3. *See id.* (identifying Bridges's friends Rolle and Bing as gunmen, not Bridges).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*

> Shawn Lockley was shot in the chest and died at the scene; Paul Suszynski was injured by a bullet in the shoulder.[12]

The authorities later arrested Bridges and charged him with aggravated assault, several firearms crimes, and conspiracy to commit aggravated assault and gun crimes.[13] They also charged him with the murder of Lockley by utilizing the *Pinkerton* rule of vicarious liability for the foreseeable crimes of coconspirators.[14] A jury convicted Bridges on all counts, with the exception of one of the gun crimes.[15] The trial court sentenced him to life imprisonment with no possibility of parole for thirty years.[16]

Reversing the murder conviction, the intermediate court of appeals could not stomach assigning responsibility for Lockley's death to Bridges, who wielded only his fists during the fracas.[17] It held "that a conspirator is vicariously liable for the substantive crimes committed by coconspirators only when the conspirator had the same intent and purpose as the coconspirator who committed the crimes."[18] The New Jersey Supreme Court, however, rejected this deviation from the usual logic of *Pinkerton* and reversed.[19]

A just system of criminal law could assign some measure of responsibility for Lockley's death to Bridges. By committing other crimes and instigating violence, he played a role in causing the homicide. The ready availability of a conspiracy charge for his conduct, however, enabled the prosecution to advance directly to the murder charge without the jury reckoning with the fact that there was no evidence Bridges shot someone or directed anyone to shoot someone. As we will see, vicarious liability is only one of several advantages a conspiracy charge gifts to the prosecution.

A young man looking for a fistfight in the middle of the night, after storming away from a teenager's house party, exhibits neither the orderly discipline nor fiendish prudence of an archetypal conspirator. According to the trial record, the only plan Bridges had was to get even by beating up the other young man he was feuding with at the party he had departed in anger. And yet, given the lamentable state of conspiracy doctrine, the fact that he brought two other men with him back to the house made it a simple matter for prosecutors to invoke conspiracy and gain access to myriad strategic advantages in their pursuit of a maximalist sentence. The accumulation of such maximalist sentences is a known driver of the high rates of incarceration

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12. *Id.*

13. *Id.* at 272.

14. *See id.* at 272, 274 (explaining the heritage of the New Jersey vicarious liability rule at issue).

15. *Id.* at 272.

16. *Id.*

17. *Id.*

18. *Id.*; *cf.* Andrew Ingram, Pinkerton *Short-Circuits the Model Penal Code*, 64 VILL. L. REV. 71, 92 (2019) (proposing a statute that would require a mens rea match before vicarious liability could be imposed under the *Pinkerton* rule).

19. *Bridges*, 628 A.2d at 281.

in the United States, particularly the high rates of imprisonment of people of color like Bridges.[20]

* * *

In this Article, I propose a reform to the law of criminal conspiracy: The crime should require substantial planning and organization on the part of some or all of the conspirators. The purpose of this reform is to limit conspiracy prosecutions to those cases in which conspiracy is a wrong distinct from the object offense.

Practically speaking, cleaning up the slack doctrine in this area will help restore the balance between prosecutors and defense counsel in plea negotiations and trials. As prior scholarship makes evident, prosecutors' outsized plea-bargaining leverage is a key driver of the mass incarceration of Black and brown people in the United States.[21]

The conspiracy prosecutions that would become impossible with my reforms are petty conspiracies. They are petty not necessarily because the results of the crime are insignificant (they may include "conspiracies" to commit armed robbery or murder) but because the element contributed by the conspiracy—the criminal agreement—is vanishingly small. Not all crime in the plural should be indictable as conspiracy: This Article aims to prove that proposition and make the case for a reform that will bring the law into conformity with it.

Justice Jackson's concurrence in *Krulewitch v. United States* illustrates the petty joint activity that ought not be denominated a "conspiracy."[22] In that case, the government indicted a man and woman for violating the Mann Act by traveling together from New York City to Florida in the capacities of pimp and prostitute and for conspiracy to violate the Mann Act based on the same facts.[23] Jackson commented, "[Conspiracy] also may be trivialized, as here, where the conspiracy consists of the concert of a loathsome panderer and a prostitute to go from New York to Florida to ply their trade . . . and it would appear that a simple Mann Act prosecution would vindicate the majesty of federal law."[24]

Jackson was not the first judge or scholar to look wryly on the overuse of conspiracy charges by federal prosecutors. The crime that Learned Hand famously called the "darling of the modern prosecutor's nursery"[25] has been

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20. *See, e.g.*, Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL'Y 503, 514 (2014) (citing life without parole laws as a driver of mass incarceration); Robin Walker Sterling, *"Children Are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 LOY. L.A. L. REV. 1019, 1063 (2013) ("[T]he available data reveal that African Americans make up [sixty] percent of all youths serving life without parole sentences.").

21. *See infra* notes 239–41 and accompanying text.

22. Krulewitch v. United States, 336 U.S. 440, 445–58 (1949) (Jackson, J., concurring).

23. *Id.* at 441 (majority opinion).

24. *Id.* at 449 (Jackson, J., concurring).

25. Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).

assailed by scholars regularly for decades.[26] Various reforms, up to and including abolition, have been proposed, but with one notable exception, these calls for reform have been nothing but voices crying from the ivory tower.

Although no prior proposals target the problem that I raise here, some of them sweep up petty conspiracy in a broader cleanup; others would make a marginal contribution to alleviating the mislabeling of trivially concerted action as "conspiracy." I will review several of these remodeling plans here and do not disagree with any of them. My ambition is not to see my own amended doctrine anointed as the heir apparent but rather to place another option on the table for those judges and legislators who are in positions to adjust the current doctrine.

Eliminating the ability of prosecutors to label petty conspiracies as such would do more than save the law from fatuous hyperbole. Morally, restricting conspiracy will help the law respect retributivist principles and avoid punishing defendants more than they deserve to be punished. To wit, when petty conspiracies are no longer indictable as such, the defendants can have their culpability assessed individually, without the vicarious liability rules that adhere to conspiracy.

Practically, it would shorten the buffet of charges from which contemporary prosecutors can select when writing indictments. As other scholars have shown,[27] prosecutors' leeway in selecting crimes from an overlapping roster of offenses increases their leverage in plea bargaining and sometimes makes their charging decisions more consequential for the ultimate punishment received for criminal conduct than the decisions of the court. Tighter doctrine thus combats bureaucratic mass incarceration by restoring power to neutral decision-makers (judges and juries) and strategic leverage to defense counsel.

As I have indicated, my critique will employ both moral arguments (retributivism) and doctrinal ones. In the course of establishing the problem, I will make a reasoned plea for the continued relevance of doctrinal analysis in the criminal law. Despite the dominance of statutory law and the meddling hands of tough-on-crime legislators, technocratic scholarship on the criminal law has a role to play in the assessment and response to mass incarceration. Because they rely on no values other than the coherence and good order of the law itself, doctrinal proposals for tidying slatternly law can draw support from lawyers and legislators across the spectrum of moral and political opinion.

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26. *See, e.g.*, Steven R. Morrison, *The System of Modern Criminal Conspiracy*, 63 CATH. U. L. REV. 371, 372–74 (2014); Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 44–45 (1992); Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 448–61 (1959).

27. *See, e.g.*, Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 703–04 (2014).

I. BACKGROUND

A. CURRENT DOCTRINE

Conspiracy is a distinct crime at both the state and federal levels. While local variations exist, the three elements of conspiracy are (1) agreement to commit a criminal offense; (2) the intent to agree and the intent to bring about the target offense; and (3) an overt act in support of the conspiracy.[28]

Not all jurisdictions require an overt act,[29] but the modern trend is to insist the prosecution demonstrate one.[30] The reason to require an overt act is to demonstrate that the conspiracy is not merely idle talk and to afford conspirators an opportunity to rethink their participation and back away from the conspiracy without incurring liability.[31] That said, the overt act requirement is rarely an obstacle to a successful conspiracy prosecution.[32] It is satisfied by any act beyond mere agreement that helps the conspiracy, even if it is not otherwise criminal (buying supplies from a hardware store, for example).[33] Moreover, each participant charged with conspiracy need not commit an overt act herself—one person's actions can furnish the overt act to convict every conspirator charged.[34] Finally, most conspiracies are not detected, and their participants are not apprehended until some criminal acts have been committed.[35] Absent the use of an informer or electronic surveillance, law enforcement does not usually identify and arrest conspirators until they have gone well beyond the agreement and the initial nondescript acts in furtherance of their criminal purpose.[36]

There are two, subtly different versions of the element of agreement: the unilateral approach and the bilateral approach.[37] Under the unilateral approach deployed in the Model Penal Code, the prosecution need not prove an agreement—only that the defendant agreed to commit a crime.[38] Thus, if one of two conspirators was an insincere undercover detective and no meeting of the minds occurred, the defendant could still be guilty of "agreeing" to commit an offense.[39] On the bilateral approach, conspiracy requires the

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28. Morrison, *supra* note 26, at 403.

29. Laurent Sacharoff, *Conspiracy as Contract*, 50 U.C. DAVIS L. REV. 405, 457 (2016).

30. *Id.*

31. Morrison, *supra* note 26, at 407.

32. *Id.* at 408.

33. *Id.*

34. Benjamin E. Rosenberg, *Several Problems in Criminal Conspiracy Laws and Some Proposals for Reform*, 43 CRIM. L. BULL. 427, 434 (2007) (citing Braverman v. United States, 317 U.S. 49, 56 (1942)).

35. Marcus, *supra* note 26, at 3.

36. *See* Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925, 930 (1977).

37. Peter Buscemi, Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1136 (1975).

38. *Id.* at 1135–36.

39. *See id.* at 1137.

existence of an actual agreement between more than one alleged conspirator.[40] It follows that acquittal of every other alleged conspirator mandates acquittal of the remaining defendant—the so-called "Rule of Consistency."[41] By contrast, on the unilateral approach, the prosecution can go forward against the remaining defendant for having "agreed" to commit a crime.[42]

Conspiracy is often classed with attempt and solicitation as a species of inchoate crime.[43] Like other inchoate crimes, conspiracy is a metacrime that references another crime in its definition. As an inchoate crime, conspiracy is complete and can be prosecuted even if the object offense never occurs and no one is ever harmed. Once there has been an agreement and an overt act, all conspirators are guilty, regardless of how far away they are from achieving their objective. This sets conspiracy apart from attempt, but not solicitation,[44] because attempt demands a "substantial step" that places the defendant or defendants closer to executing their purpose and causing harm.[45] "[A]s Justice Holmes has pointed out, the mere agreement to murder a man fifty miles away could not possibly constitute an attempt, but might easily be indictable as a conspiracy."[46]

That said, the same conduct can often be charged as an attempt, a conspiracy, or a solicitation. Consider Snidely, who asks two of his friends if they want to rob a bank. The friends agree, and the trio spends a couple of days staking out the premises, making notes of the flow of customers and presence of security guards. On the day of the planned robbery, the three are driving to the bank with sacks containing ski masks, gloves, and pistols. Due to a broken taillight, they are stopped and discovered by the police. Snidely can be charged with soliciting robbery, with conspiracy to commit robbery, and with attempt.

Conspiracy also often covers the same facts as a charge of aiding and abetting. Had the bank-robbing trio managed to get to the bank and start robbing, each would be liable for aiding and abetting the criminal actions of the others.[47] Supposing Snidely remains in the car and does not participate in holding the tellers at gunpoint or taking the cash, he could still be charged with solicitation, conspiracy, and aiding and abetting. Note here that conspiracy does not merge into the completed offense but can still be charged after the

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40. *Id.* at 1136.

41. Marcus, *supra* note 26, at 23.

42. Buscemi, *supra* note 37, at 1137.

43. *E.g.*, MODEL PENAL CODE §§ 5.01–.03 (AM. L. INST. 1985).

44. *See id.* § 5.02(1) (defining solicitation).

45. *Id.* § 5.01(1)(c).

46. Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 400 (1922) (citing Hyde v. United States, 225 U.S. 347, 388 (1912)).

47. *See, e.g.*, MODEL PENAL CODE § 2.06(3) ("A person is an accomplice of another person in the commission of an offense if . . . [the person] aids or agrees or attempts to aid such other person in planning or committing it.").

object offense comes off successfully.[48] And indeed, separate sentences can usually be imposed for both the conspiracy and the completed crime.[49]

As a metacrime, conspiracy is adaptable to a wide variety of criminal fact patterns. Moreover, wherever it can be invoked, it carries multiple procedural advantages for prosecutors. Indeed, conspiracy stands out as a criminal offense that comes equipped with a slate of special procedural rules applicable only when prosecutors charge it.

When prosecuting an alleged conspirator, venue is proper in any place where an overt act of the conspiracy occurred, even an overt act performed by another member.[50] This enables the prosecution to circumvent typical procedural rules that keep prosecutions located where the defendant committed her crimes and where she likely resides.[51] Apart from the convenience to the defendant of being tried where she lives, defendants may reasonably count on hometown juries, judges, and prosecutors to be more sympathetic or respectful towards them. The Constitution's Vicinage Clause[52] shows solicitude for those accused of a federal crime, that they be able to "hometown" their accusers in the central government.[53] Put bluntly, as a matter of raw power, the Vicinage Clause lets a defendant force prosecutors to try to obtain convictions from juries more in sympathy with the defendant than the national government or the laws sought to be enforced.[54] When prosecutors can charge conspiracy, however, they can circumvent the Vicinage Clause and other normal rules to lay venue wherever any one conspirator committed any one act in furtherance of the conspiracy.

Cases against several coconspirators are easily joined for trial.[55] In the federal system, joinder is presumptively appropriate for coconspirators.[56] There is no limit but a trial judge's patience and fortitude on how many members of a conspiracy can be charged together, and the past decades have witnessed

48. Iannelli v. United States, 420 U.S. 770, 777 (1975) ("Unlike some crimes that arise in a single transaction, the conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act." (citations omitted)).

49. *Id.* at 777–78.

50. *See, e.g.*, United States v. Gonzalez, 683 F.3d 1221, 1224 (9th Cir. 2012) ("It is by now well settled that venue on a conspiracy charge is proper where the conspiracy was formed or where any overt act committed in furtherance of the conspiracy occurred.").

51. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 13.18 (West 2023) ("If venue is not specifically stated, the proper county for the prosecution of offenses is that in which the offense was committed.").

52. U.S. CONST. amend. VI.

53. *See* Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 MD. L. REV. 107, 139 (1994) ("These clauses originally protected defendants not against specific biases from sources such as pretrial publicity, but rather against being tried by a community having a different social character or historical perspective from the community in which the crime occurred.").

54. *See id.*

55. *See* Paul Marcus, *Re-Evaluating Large Multiple-Defendant Criminal Prosecutions*, 11 WM. & MARY BILL RTS. J. 67, 86 (2002) ("The standing rule for these cases has been that parties charged together as co-conspirators generally can be tried together.").

56. *Id.* at 88.

"mega-trials" involving dozens of defendants at a time.[57] Lawyers debate the strategic import of these great consolidations: Some say that big trials risk confusing jurors, who may let everyone go if the prosecutor cannot help them hold on to the thread of the plot; others insist that the same jurors will indiscriminately sweep all the accused to prison as they hear days and days of testimony about the infamous deeds of this and that unsavory character.

Regardless, it is undeniable that prosecutors find something to like about the joinder rules as they keep pursuing the large trials.[58] Conversely, it is easy to see that defense counsel for one of the many men crowded into the dock will have trouble enforcing the rules of evidence and insisting on other procedural niceties applicable to her client alone.[59] After all, her client may only play a minor role in the drama, but the prosecutor needs to present every chapter and every character of that drama to the spectators in the jury box before the joint trial is over. Justice Jackson described defense counsel's troubles in a large conspiracy trial well:

> A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, codefendants can be prodded into accusing or contradicting each other, they convict each other. There are many practical difficulties in defending against a charge of conspiracy which I will not enumerate.[60]

Easy joinder synergizes with another procedural advantage for prosecutors of conspiracy charges: a fat hearsay exception.[61] Coconspirators are treated as agents of a party, and as such, their statements can be used as substantive evidence in the prosecution of each conspirator.[62] When multiple accused conspirators are charged together, the ability to disregard the hearsay rule for anything any one of them has said connected to the alleged conspiracy increases the risk that an innocent defendant will be caught in a crossfire of recriminations as hearsay statements by codefendants who cannot be cross-

57. *See, e.g.*, United States v. Ellender, 947 F.2d 748, 752 (5th Cir. 1991) (recounting a mega-trial with 187 named defendants of whom twenty-three were ultimately tried).

58. Marcus, *supra* note 26, at 2 (describing the increasing number of mega-trials initiated by prosecutors).

59. *See* Edward J. Imwinkelried, *Prejudice to the* N*th Degree: The Introduction of Uncharged Misconduct Admissible Only Against a Co-Defendant at a Megatrial*, 53 OKLA. L. REV. 35, 37–38 (2000).

60. Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Jackson, J., concurring).

61. *E.g.*, FED. R. EVID. 801(d)(2)(e) (excluding statements by a party's coconspirator from the definition of hearsay by classing them as statements made by an opposing party).

62. *See* David S. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1384 (1972) ("[T]he major development of the exception has been the result of a seemingly random appeal to various of the following rationales: (1) a characterization of conspiracy as a relationship of mutual agency, with the admissions of one conspirator thereby being treated as vicarious admissions by the others . . . .").

examined, if they hold to their right not to take the stand, are admitted into evidence through the testimony of declarants.[63]

B. Historical Development

The metacrime of general applicability we know as conspiracy is unknown in civil law countries.[64] It originates in medieval attempts to deter and punish those who schemed to bring false accusations against their enemies before the English courts.[65] One trick to avoid responsibility for false accusations was to use children—who were immune from the harms the law generally pinned to those who brought baseless accusations—to level charges and stir up litigation.[66] It was only in the Renaissance that English judges extended the crime of conspiracy to the plots of other malefactors.[67]

By the seventeen- and eighteen-hundreds, conspiracy had reached its high-water mark. From a crime that had originated to block abuses of legal procedure, conspiracy had come to apply to "all confederacies whatsoever, wrongfully to prejudice a third person."[68] As Francis Sayre explained, this broad definition of conspiracy (authored by esteemed commentator William Hawkins) was frequently quoted by courts who used it to uphold conspiracy prosecutions for agreements to commit, not just crimes, but torts and mere immorality.[69] Writing in 1922, Sayre saw Hawkins's influential maxim as highly pernicious:

> The truth of the matter is that judges found the Hawkins conception of criminal conspiracy entirely too convenient an instrument for enforcing their own individual notions of justice to be lightly discarded. It enabled judges to punish by criminal process such concerted conduct as seemed to them socially oppressive or undesirable, even though the actual deeds committed constituted of themselves no crime, either by statute or by common law. And in cases where the actual deeds were of doubtful criminality, it saved the judges from the often embarrassing necessity of having to spell out the crime.[70]

63. *See* United States v. Tootick, 952 F.2d 1078, 1082 (9th Cir. 1991) ("The joinder of defendants advocating mutually exclusive defenses can have a prejudicial effect upon the jury, and hence the defendants, in a number of ways. Defendants who accuse each other bring the effect of a second prosecutor into the case with respect to their codefendant.").

64. Sayre, *supra* note 46, at 427.

65. *Id.* at 394–96.

66. *Id.* at 394.

67. *Id.* at 400–01.

68. *Id.* at 402 (quoting 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 348 (London, Thomas Leach, 6th ed. 1787)).

69. *Id.* at 406.

70. *Id.*

To read the articles and notes written on conspiracy in the law reviews for the first half of the twentieth century is to imbibe the spirit of Sayre's criticism.[71] As the quoted passage indicates, these scholars had no patience for a doctrine that would turn torts or perfectly legal actions into crimes once more than one person agreed to carry out the action together.[72] They were especially indignant about the way that judges had used conspiracy law to attack labor organizing, labeling peaceful boycotts and strikes as criminal conspiracies to accomplish tortious ends like restraining trade or the merely immoral goal of "oppressing" factory owners.[73]

Whatever other problems they had with the crime of conspiracy, this generation of critics definitely wanted it limited to agreements to commit *crimes*, not any illegal, tortious, or immoral action.[74] By the sixties and seventies, their wave of scholarship had engulfed conspiracy law and scoured it of the influence of Hawkins's dictum that any "wrongful" conduct agreed upon to prejudice a third person was a crime.[75] Largely a creature of the common law in earlier years,[76] the broad reading of conspiracy that reached beyond agreements to commit crimes disappeared from the states as they adopted new criminal codes that required a crime be the object of the conspirators' agreement.[77] The Model Penal Code, for example, only recognizes "conspiracy . . . to commit a crime" as an offense.[78] These first-wave reformers achieved their mission; as we will see, the present wave of conspiracy reformers are still struggling to gain the cooperation of legislators and judges.

C. *Ongoing Critiques and Reform Proposals*

Conspiracy remains an unpopular crime in the academy. I will not here review all of the proposals for reform that populate the literature, but I will describe those that would help remedy the problem of petty conspiracies. My purpose is not to argue that adding a substantial planning and organization

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71. *See, e.g.*, Note, *The Objects of Criminal Conspiracy—The Inadequacy of State Law*, 68 HARV. L. REV. 1056, 1067–69 (1955) [hereinafter *The Objects of Criminal Conspiracy*]; Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276, 284–85 (1948) [hereinafter *The Conspiracy Dilemma*].

72. *See, e.g.*, *The Objects of Criminal Conspiracy*, *supra* note 71, at 1057 ("[T]he objects of conspiracy—those acts which, when planned by two or more persons, will render them susceptible to conviction—are defined so vaguely and broadly in the majority of states that both predictability of what will constitute an offense and objectivity by the courts in applying the law have been greatly undermined.").

73. *E.g.*, Sayre, *supra* note 46, at 406–09.

74. *See, e.g.*, *The Conspiracy Dilemma*, *supra* note 71, at 285 ("Particularly in punishing conspiracies to commit acts which themselves are not criminal, the outlines of the present law seem unduly broad." (footnote omitted)).

75. Buscemi, *supra* note 37, at 1129–30.

76. *See, e.g.*, Goldstein, *supra* note 26, at 461 ("The breadth of the concept of common-law conspiracy has conditioned the judiciary to tolerate a looseness of interpretation which essentially allows the fact situation to shape the crime.").

77. Buscemi, *supra* note 37, at 1129–30.

78. MODEL PENAL CODE § 5.03(1) (AM. L. INST. 1985).

requirement is the best possible reform. Rather, I intend my proposal to be another option available to judges or legislators. If my plan has a marked advantage over others, it is that it is more conciliatory. Not without reason, I hope that my reform proposal will be more appetizing to the friends of conspiracy law and will retain as much of what they like about the crime as possible while eliminating the petty conspiracies of which Justice Jackson complained.

1. The Definition of Agreement

A law student who takes contracts before criminal law could be forgiven for thinking that conspiracy is the home of contract law within the penal code. Reading that a conspiracy requires an agreement, a sharp law student will naturally reach for the definitions and rules of thumb for finding an agreement in contract law: a meeting of the minds,[79] an objective manifestation of assent,[80] or an exchange of promises.[81] Within contract law, these rules serve an important purpose of distinguishing idle talk, negotiations, and brainstorming from actual agreements that can be contracts.[82]

Conspiracy law has not availed itself of these tools, so the law student who assumes that an agreement needs the indicia of an agreement in contract law will write the wrong answer on the exam. The agreement element in conspiracy is understood loosely and often taken for granted wherever concerted activity is presented. The chief critic of this sloppiness is Laurent Sacharoff at Arkansas Law. He writes:

> As an initial matter, the vast majority of courts simply leave the term "agreement" undefined and certainly do not include terms such as promises, commitment, or obligation—in striking contrast to how courts define contracts. The Supreme Court regularly elaborates on how the agreement is the "essence" of a conspiracy, saying the agreement is the act, or is a distinct evil, or shows the serious intent of the parties, or shows that the crime is more likely to occur—all without ever defining "agreement" or saying it involves mutual promises.
>
> Lower appellate courts, in assessing whether particular evidence meets the agreement requirement, likewise do not apply a test that involves defining agreement or using promises. In fact, a review of

79. *E.g.*, David J. Sacks, P.C. v. Haden, 266 S.W.3d 447, 450 (Tex. 2008) (per curiam) ("A meeting of the minds is necessary to form a valid contract." (quoting Hathaway v. General Mills, Inc., 711 S.W.2d 227, 228 (Tex. 1986))).

80. Indus. Am., Inc. v. Fulton Indus., Inc., 285 A.2d 412, 415 (Del. 1971) ("It is basic that overt manifestation of assent—not subjective intent—controls the formation of a contract . . . .").

81. Bilbao v. Goodwin, 217 A.3d 977, 988 (Conn. 2019) (holding that an "exchange of promises" provides sufficient consideration to support a contract).

82. *See, e.g.*, DeVries v. Evening J. Ass'n, 87 A.2d 317, 318 (N.J. 1952) ("It is fundamental that the essential element to the valid consummation of a contract is a meeting of the minds of the contracting parties and that until there is such a meeting of the minds either party may withdraw and end all negotiations.").

> thousands of conspiracy cases shows that courts almost never use terms such as promise, commitment, obligation, or the like.[83]

In the absence of well-defined doctrine, courts end up instructing juries in vague terms that a "mutual understanding" or a "slight connection" is enough to show that a defendant formed or joined a conspiracy.[84] As Sacharoff explains, judges often start off by telling jurors that they can "infer . . . an . . . agreement from circumstantial evidence"—an unobjectionable proposition that treats agreement the same as any other element of a crime.[85] But this innocuous platitude is the termite eating away at the agreement element—and the crime of conspiracy has precious few load-bearing elements!

Starting by offering a sip of circumstantial evidence, the judges slide into telling the jury that an implicit agreement is as good as an explicit one for making a conspiracy.[86] And from there, you only need a thesaurus to get to "common understanding" or "mutual understanding" as the jury's ticket to finding a conspiracy.[87] The final plunge takes the judge to speak of a conspiracy as a "working relationship" or a "partnership in crime."[88] The element of agreement has been transmuted into the element of partnership without any regard for the difference the law otherwise insists on between a contract and a partnership.[89] In civil law, "every partnership is a contract, but not every contract is a partnership."[90]

When a defendant is accused of joining an existing conspiracy rather than founding one, judges will use a "slight connection" or "slight evidence" rule to instruct the jury how to decide if the prosecution proved an agreement.[91] The agreement requirement suggests that to join an extant conspiracy, a defendant must agree with one of the existing conspirators to further one of the criminal goals of that conspiracy.[92] However, beginning once more from a relatively harmless proposition, judges tell juries that a defendant must have "knowingly participated in the conspiracy."[93] From there, judges instruct juries that a slight role or connection is enough (in for a dime, in for a dollar).[94] In this manner, the agreement requirement is stretched to the point that occasional

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83. Sacharoff, *supra* note 29, at 417–18 (footnotes omitted).

84. *Id.* at 438–42.

85. *Id.* at 438.

86. *Id.*

87. *Id.*

88. *Id.*

89. *See, e.g.*, Richard A. Booth, *Partnership Law and the Single Entity Defense*, 18 STAN. J.L. BUS. & FIN. 1, 39 (2012) ("Partnership is a contract that defines the rights of the partners against each other. But a mere contract does not entail fiduciary duties. In short, every partnership is a contract, but not every contract is a partnership.").

90. *Id.*

91. Sacharoff, *supra* note 29, at 440.

92. *Id.* at 441.

93. *Id.* at 440.

94. *Id.* at 440–42.

aid to a group of criminals is enough to satisfy it, without regard for the difference between casual support and agreement to forward the criminal objectives of the conspiracy.

Consider Sara, whose boyfriend, Britain, traffics in cocaine with a group of other men. One day, Britain comes to Sara's house and asks to leave a bag of cocaine in her air conditioning vents. Sara reluctantly acquiesces. When the traffickers are exposed, Sara's house is raided, and the bag of cocaine is recovered by the police. Sara knew that Britain was in a group that bought and sold cocaine, and she knowingly let him keep some of it at her house. But, rather than simply charge Sara with possession of cocaine or aiding and abetting possession or distribution of cocaine by Britain, the prosecution can charge her as a conspirator in the conspiracy to distribute much larger quantities of cocaine. And this is the case despite the fact that Sara never agreed—never promised or committed herself, in any sense that would pass muster in contract law—to forward the objectives of the conspiracy between Britain and his friends.

Both of these common glosses on the agreement requirement obviate the need to specify when the agreement was reached. Instead of referring to a noun, an event in time, the agreement becomes adjectival. To invert the famous words of Henry Maine, conspiracy goes from contract to status.[95] As we will see below, criminal status—membership in a criminal organization—is the proper target of RICO, not conspiracy.

Professor Sacharoff aims to brace up the agreement element by installing doctrinally robust contract principles.[96] Sacharoff "propose[s] we expressly define the 'agreement' at the heart of a conspiracy as an exchange of promises to commit a crime or further its ends."[97] These promises, of course, could be exchanged implicitly, but "mere acquiescence" in the criminal actions of another—as Sara acquiesced to Britain storing cocaine in her home—is not promising.[98] As Sacharoff rightly claims, his reinforced agreement element offers "a concrete test" for measuring the prosecution's circumstantial evidence of agreement and a focal point for juries who are surely familiar with the quotidian practices of promising and trading promises.[99]

A proposal by Benjamin Rosenberg in the *Criminal Law Bulletin* makes a fine compliment to Sacharoff's idea.[100] He recommends that juries be made to agree upon the object of the alleged conspiracy:

> The vagueness in the workings of conspiracy law arises from the imprecision at its core. The law provides that a conspiracy may have many objectives, and the conspirators need not agree to all of

95. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 174 (John Murray 1920) (1861) ("[T]he movement of the progressive societies has hitherto been a movement *from Status to Contract.*").

96. Sacharoff, *supra* note 29, at 424–33.

97. *Id.* at 424.

98. *Id.* at 416 n.58, 425 (quoting Ocasio v. United States, 578 U.S. 282, 297–98 (2016)).

99. *Id.* at 434–35.

100. Rosenberg, *supra* note 34, at 457.

> them—but how can people be said to have agreed to anything if their objectives are not shared? To ameliorate the vagueness, before it begins deliberating every jury should be given a simply [sic] jury interrogatory form requiring it to make the following findings as to each conspirator: (1) what the conspirator agreed to, and (2) with whom did the conspirator agree. This exercise would focus the jury on each defendant's acts of agreement, and would thus avoid the tendency to lump people together indiscriminately.[101]

Rosenberg's proposal serves the same purpose sought by Sacharoff: cutting through centuries of cruft to get back to the core of conspiracy—the agreement. If agreement is the crux of the crime,[102] then the jury ought to be asked as plainly as possible to decide who promised whom to commit which crime.

Putting a backbone in the agreement element would prevent the misapplication of the conspiracy concept to much petty joint criminal activity. Three men who witness their friend in a fight with students from a rival college and rush into the fray have not exchanged promises to commit a crime, but where the agreement element has been allowed to grow slack and shapeless, one could show that they had a "mutual understanding" to commit assault together on the other collegians.[103] Of course, some petty conspiracies—an unfortunate agreement to rob the next convenience store along the highway, for example—are still exchanges of promises to commit definite crimes. Nonetheless, while requiring such would not remove all petty conspiracies from the ambit of the crime, it would take away many of them. This result, along with the need to ground an otherwise generic, abstract crime on the fact of an agreement, is ample reason to adopt Rosenberg's and Sacharoff's proposals.

2. Limiting Conspiracy to Specific Criminal Objectives

Another possible reform to conspiracy law that would eliminate the problem of petty conspiracies is to limit conspiracy to a certain narrow number of criminal acts. Only agreements to accomplish certain criminal objects would be chargeable as conspiracies. The list of criminal objectives would be a limited one, confined to only those crimes where group action poses a distinct, severe danger. These could include conspiracy to violate another person's civil rights, conspiracy to overthrow the government of the United States or a state, conspiracy to distribute controlled substances, or any other particular offense

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101. *Id.* (footnote omitted).

102. *E.g.*, Iannelli v. United States, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act.").

103. And it does matter whether the prosecution has access to conspiracy in such scenarios. Suppose that in the heat of the brawl, one of the three men gets carried away and picks up a rock to smash his enemy. Tragically, this man causes the death of that enemy. If the prosecution can use conspiracy, then they can use the *Pinkerton* doctrine to charge his coconspirators with the killing. *See generally* Pinkerton v. United States, 328 U.S. 640 (1946) (making conspirators vicariously liable for the reasonably foreseeable crimes of their coconspirators committed in furtherance of the conspiracy). The charge need not even be likely to succeed to serve as potent leverage in plea negotiations.

where group activity or organized crime has proven to be a discrete, pressing menace.

This reform of conspiracy law could be accomplished in two ways legislatively. The first is to reject the generic crime of conspiracy and replace it with specific conspiracy offenses (e.g., conspiracy to violate civil rights, conspiracy to distribute controlled substances). These specific conspiracy crimes could be defined with greater specificity than the three elements of generic conspiracy currently offer. For instance, conspiracy to distribute controlled substances could be written with tailored elements. Legislators could specify a certain large quantity of drugs that would trigger liability for the offense. Alternatively, they might require proof of a specific set of overt acts. For instance, the overt acts specified would be ownership of controlled substances, transporting controlled substances, and selling controlled substances. An attempt to carry out one of these overt acts could also stand in its place. As matters stand, the federal criminal law already includes multiple conspiracy offenses—like conspiracy to distribute controlled substances—in addition to the generic conspiracy offense.[104] Of course, the current offense of conspiracy to distribute controlled substances does not exhibit the tailoring it could show that would define the crime with more precision.[105]

The second way to accomplish this reform is to retain the generic offense of conspiracy but add a wide disclaimer announcing that conspiracy is only good for charging agreements to commit particular crimes. As was true before, there are pieces of this approach in extant law: For example, some states do not allow a misdemeanor to be the object crime of a conspiracy—the goal must be a felony.[106] This current approach could be extended to only allow conspiracy to be the charge where the object of the agreement either is a felony of the highest degree or sits on a list of specified crimes like violation of civil rights or treason.

"The concept of conspiracy, punishable even where no crime has been committed, in its broad application as historically developed in common law countries, is not known in . . . civil law system[s]."[107] In continental Europe, the closest offenses to conspiracy target threats to the security of the state or the welfare of the community as a whole.[108] Writing in the *Journal of Criminal Law, Criminology, and Police Science*, Wienczyslaw Wagner explained to his American audience that France, Germany, Italy, and Poland had no generic

104. *E.g.*, 15 U.S.C. § 1 (2018) (making it a felony to conspire to restrain trade or commerce among the several states); 21 U.S.C. § 846 (criminalizing conspiracy to commit controlled substances offenses).

105. *See* 21 U.S.C. § 846 (using the generic term "conspiracy" without further elaboration).

106. *E.g.*, TEX. PENAL CODE ANN. § 15.02(a) (West 2019) (requiring intent that a felony be committed for conspiracy).

107. Wienczyslaw J. Wagner, *Conspiracy in Civil Law Countries*, 42 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 171, 171 (1951).

108. *See id.* ("Historically, the term 'conspiracy' was associated, in continental Europe, with some political purposes.").

crime comparable to American conspiracy but instead had specific crimes focused on threats to the integrity of the state and community.[109]

Looking at the *Code Pénal* in France today, this sort of offense remains the closest analogue to common law conspiracy. For instance, the French code says, "*[l]e fait de participer à un groupe de combat est puni de trois ans d'emprisonnement et de 45 000 euros d'amende.*"[110] A *groupe de combat* is defined thusly: "*en dehors des cas prévus par la loi, tout groupement de personnes détenant ou ayant accès à des armes, doté d'une organisation hiérarchisée et susceptible de troubler l'ordre public.*"[111] Notice that only armed groups, apt to disturb public order, are targeted by this provision.[112] Thus, the focus is on groups of a paramilitary nature whose high level of organization, as manifested by their hierarchy, makes them a special danger, not just to particular individuals, but to the public weal in totem. In like manner, the French word for conspiracy, *complot*, appears in the title of only one section of the penal code, which makes it a crime to conspire to commit acts of violence that endanger the institutions of the French Republic.[113]

On the individual rights side, French law also makes it a crime to impede, in *concert with others* and with the aid of threats, another's freedom of expression or other enumerated civil liberties.[114] That these violations should be treated as equally grave as conspiracies directed at overthrowing the state is only natural in a liberal state that exists to protect the human rights of its citizens.[115] We in common law countries thus have the option to follow the French pattern and reduce conspiracy to a handful of particular offenses that threaten people in their civil rights, endanger public order, or imperil the continuation of the state itself. Our own history in the Reconstruction Era gives us the precedent of the Force Act,[116] which aimed at suppressing the armed groups that were menacing the rights of freed slaves and their allies in the former Confederate states.[117]

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109. *See id.*

110. Code pénal [C. pén] [Penal Code] art. 431-14 (Fr.). "The act of participating in a *groupe de combat* is punishable by three years imprisonment and a fine of 45,000 Euros." *Id.* (translating "*[l]e fait de participer à un groupe de combat est puni de trois ans d'emprisonnement et de 45 000 euros d'amende*").

111. *Id.* art. 431-13. "Outside of cases allowed by the law, every grouping of people holding or having access to arms, endowed with a hierarchical organization and likely to disturb public order." *Id.* (translating "*en dehors des cas prévus par la loi, tout groupement de personnes détenant ou ayant accès à des armes, doté d'une organisation hiérarchisée et susceptible de troubler l'ordre public*").

112. It also has the virtue of targeting only *hierarchical* groups—a worthwhile way of only targeting groups exhibiting the planning and organization worth making their grouping criminal.

113. Code pénal [C. pén] [Penal Code] art. 412 (Fr.).

114. *Id.* art. 431-1 (translating "*d'une manière concertée et à l'aide de menaces*").

115. *See generally* DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN DE 1789 (Fr. 1789), https://www.conseil-constitutionnel.fr/node/3850/pdf [https://perma.cc/LNJ5-J4N8] (declaring that the rights of man are the goal of any political institution).

116. Enforcement Act of 1870, ch. 114, 16 Stat. 140, *amended by* Act of Feb. 28, 1871, ch. 99, 16 Stat. 433.

117. Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2137 (1993).

Limiting conspiracy to plots against civil rights, the state, and public order would bring it in line with the ominous public image of the crime that Jackson described in *Krulewitch.* He wrote, "'Privy conspiracy' ranks with sedition and rebellion in the Litany's prayer for deliverance."[118] He reported, "The crime comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state itself."[119] The French code shows that conspiracy can be drastically remodeled along the lines suggested by the Justice's description.

With the Nuremberg trials on his mind,[120] Jackson reminds us that "[c]onspiratorial movements do indeed lie back of the political assassination, the coup d'etat, the *putsch*, the revolution, and seizures of power in modern times, as they have in all history."[121] It stands to reason that combined criminal action poses a special threat when it becomes powerful enough to menace the state or constitutional order itself rather than simply the lives, health, and property of private citizens. The civil law countries have gotten along fine without generic conspiracy, but they have felt the need for a special offense aimed at armed bands and other group criminality on a political scale. Jackson noticed this in *Krulewitch*: "The doctrine does not commend itself to jurists of civil-law countries, despite universal recognition that an organized society must have legal weapons for combatting organized criminality. Most other countries have devised what they consider more discriminating principles upon which to prosecute criminal gangs, secret associations and subversive syndicates."[122] Moreover, our own history combatting conspiracies against civil rights with the Force Acts confirms the need for offenses of this type.[123] At bottom, there is a special need here that a crime of criminal agreement can address without encompassing agreements to commit any crime in the code book.

Although I believe adopting the French model would make a fine reform, it asks prosecutors to accept visitation rights just one weekend a month with the "darling of their nursery." Conspiracy as we know it would no longer exist if we took this path. For reasons I explore in the next Section, I do not believe any significant crime would become unpunishable under such a legal regime (remember that civil law countries get along fine without generic conspiracy). At the same time, the substantial planning and organization requirement that I introduce in this Article is more conciliatory to those who believe conspiracy is an important prosecutor's tool because it retains the possibility of using

118. Krulewitch v. United States, 336 U.S. 440, 448 (1949) (Jackson, J., concurring).

119. *Id.*

120. Jackson referenced what he heard at Nuremberg about conspiracy from foreign lawyers in his concurrence. *Id.* at 450–51 n.15.

121. *Id.* at 448.

122. *Id.* at 450 (footnote omitted).

123. *See* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 121 (2019) (describing the use of the Acts to "crush" the Ku Klux Klan).

conspiracy for street crime and organized crime that does not threaten the constitutional order.

3. Abolition

If legislators abolished conspiracy, they would eliminate the problem of petty conspiracies. Although likely politically infeasible in most jurisdictions, such a move would not be as drastic as it seems. Other inchoate crimes—solicitation, attempt, and aiding and abetting—could take up the slack. After these doctrines were exhausted, to the extent that organized crime remained inadequately sanctioned, RICO and its state counterparts could be brought to bear in the fight against criminal syndicates.

Solicitation is an apt crime to charge when a criminal plot involves leaders and followers. The heads who are organizing and directing what under current law is chargeable as a conspiracy can just as easily be charged with soliciting the object crimes of the conspiracy.[124]

Under modern codes, attempt is easier to use than ever, and much inchoate criminal activity that could be charged as conspiracy is susceptible to the attempt label.[125] All that is needed is a substantial step towards committing the crime—proximity is no longer the hinge of the charge.[126] By charging attempt, prosecutors can convict even those who are not leading or directing the conspiracy, thus overcoming the limits of a solicitation charge. As former Attorney General of the United States Ramsey Clark told researcher Paul Marcus, "We don't need conspiracy. It's not effective against organized crime, and we could handle the [inchoate] offense through the use of attempt."[127]

Aiding and abetting (accomplice) liability will work when the crime or crimes have been committed. The Model Penal Code states, "A person is an accomplice of another person in the commission of an offense if . . . [the person] aids or agrees or attempts to aid such other person in planning or committing it."[128] In a putative conspiracy, each member has acted with the intent to bring about the criminal deeds of the other that were the target of

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124. *See* MODEL PENAL CODE § 5.02(1) (AM. L. INST. 1985) ("A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.").

125. *See id.* § 5.01(1) ("A person is guilty of an attempt to commit a crime if . . . [the person] purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.").

126. *Compare id.* § 5.01(1)(c) (finding an attempt wherever the accused has taken a substantial step towards an intended crime), *with* State v. Boutin, 346 A.2d 531, 532 (Vt. 1975) (embodying the older common law that a defendant must come very close to be guilty of attempt, i.e., "far enough towards the accomplishment of the desired result to amount to the commencement of the consummation").

127. Marcus, *supra* note 36, at 930–31 (alteration in original).

128. MODEL PENAL CODE § 2.06(3) (AM. L. INST. 1985).

the conspiracy.[129] Given that conspiracies are rarely detected at the moment of agreement but are primarily charged after the criminal designs have been executed,[130] accomplice liability would frequently be enough to capture all parties to a criminal agreement. In those states that retain the natural and probable consequences approach to accomplice liability,[131] it is even easier to nick putative conspirators for aiding and abetting.

While it is hard to imagine a putative conspiracy that both (1) goes beyond the mere fact of agreement and (2) would not be captured under one or more of these traditional theories, it remains the case that none of these are directed at group criminal activity as a special menace. Yet, in today's law, there is another statute that targets group criminal activity—RICO.[132] RICO and the "Baby RICOs" in the states[133] target criminal organizations, not just agreements, and would still be available to use against criminal syndicates were conspiracy to be abolished.

Whereas weakening the agreement element in conspiracy has tended to transform conspiracy into a status crime, RICO has always been "the crime of being a criminal."[134] RICO makes it an offense to participate in the affairs of an enterprise through a pattern of racketeering activity.[135] A pattern of racketeering activity requires the commission of at least two crimes drawn from a list of crimes defined as racketeering activity.[136] Obliquely phrased and worded as it is, the gist of RICO is that it is a crime to participate in the affairs of a legitimate organization (like a labor union) or an illegitimate organization

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129. Morrison, *supra* note 26, at 403.

130. Paul Marcus found as much in his survey of judges, prosecutors, defense attorneys, and professors: "[S]urvey results support the widely held view that the crime rarely is treated as an inchoate offense. That is, most charged conspiracies involve situations in which an attempted or completed 'substantive offense' (the object of the agreement) has taken place." Marcus, *supra* note 26, at 3. Marcus comments, "To be sure, in most of these cases the government only finds out about the underlying conspiracy because that object crime has been completed or at least attempted." *Id.* (emphasis omitted).

131. *See, e.g.*, State v. Howard, 30 S.W.3d 271, 276 (Tenn. 2000) (explaining how the rule "extends the scope of criminal liability to the target crime intended by a defendant as well as to other crimes committed by a confederate that were the natural and probable consequences of the commission of the original crime").

132. Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968).

133. Jason D. Reichelt, Note, *Stalking the Enterprise Criminal: State RICO and the Liberal Interpretation of the Enterprise Element*, 81 CORNELL L. REV. 224, 225 (1995) (explaining how a majority of the states in the union have passed their own versions of RICO).

134. *See* Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 663 (1987) (identifying how prosecutors use RICO "to prosecute members of criminal enterprises for an assortment of criminal offenses").

135. 18 U.S.C. § 1962(c).

136. *Id.* § 1961(1).

(like the mafia) through the criminal activities typical of criminal syndicates like "murder, kidnapping, gambling, arson, robbery, bribery, [and] extortion."[137]

As commentators have noted, a reason for the erosion of the agreement element in the classic conspiracy offense has been the tendency to think of a conspiracy as a going concern, a partnership in crime.[138] Thus, rather than agree to commit certain criminal acts, conspirators become members of a conspiracy in the same way that partners come into a legitimate mercantile business. Where conspiracy is used as a tool against organized crime, it is natural, though doctrinally sloppy, to think of conspiracies as partnerships rather than mere agreements. Since it is really the criminal business/enterprise/partnership that the conspiracy charge aims to punish and disrupt, RICO could fill the gap left by conspiracy in fighting organized crime should legislators choose to abolish conspiracy.

The power of RICO to reach criminal organizations without embracing petty conspiracies gives it a resemblance to the offenses in civil law countries targeting hierarchical criminal groups and armed bands. Laying aside misgivings about crimes of status, the need for a crime against "the mob" is satisfied by RICO. Crime with a paramilitary character that menaces the state or the citizens' liberties has a size and scope that warrants a special crime; the same is true of archetypal "mobs" like the mafia, Yakuza, or Colombian cartels that operate like businesses, subvert the polity through corruption, and sometimes rival the state in their power and influence. The threat posed by these criminal groupings to the community is different from the acute danger to individual citizens posed by impulsive criminals acting jointly. Conspiracy doctrine makes no distinction between three men agreeing to rob a convenience store and Al Qaeda or the Cali Cartel. RICO rightly captures the latter and neglects the former.

D. Katyal's Conspiracy Theory

Conspiracy may be the prosecutor's darling, but it would be an utterly forsaken orphan at the law schools were it not for Neal Katyal, who penned an encomium to the child for the *Yale Law Journal* back in 2003.[139] Katyal uses his article not only to defend conspiracy but to criticize the retributive and philosophical tenor of criminal law scholarship.[140] He plumps instead for a

137. *Id.*; *see also* Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 945 (1987) ("To be found guilty, it is not enough that the defendant has committed specific criminal acts; those acts must be part of an ongoing commitment to the values of a criminal organization.").

138. *E.g.*, Sacharoff, *supra* note 29, at 438 (describing how courts slide from speaking of conspiracy as an agreement to talking of it as a "partnership in crime").

139. *See generally* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307 (2003) (arguing for an understanding of conspiracy modeled on group behavior).

140. *See id.* at 1310–11 ("[T]he dominant motif in criminal law scholarship has veered too far toward retributivist analysis.").

criminal law molded by microeconomics and psychology.[141] Conspiracy seems a good crime to have, says Katyal, when one recognizes that it tends to deprive criminals of many of the benefits that can be achieved by linking together and organizing their depredations at a large scale.[142]

Katyal identifies two special problems of group criminality: (1) the formation of a group identity that bucks up and inspires criminals[143] and (2) economies of scale and efficiencies from division of labor that all organizations reap as they grow.[144] He supports both points with empirical research from psychology,[145] business school scholarship,[146] and economics.[147]

When someone joins a criminal group, Katyal plausibly asserts that he will come to define himself in part by his membership in that group.[148] Once he identifies as a criminal or a member of a particular syndicate, it will become easier for him to imagine further crimes and summon the spirit needed to execute those he or the group have already targeted.[149] Groups of humans embolden and pressure each other into conformity, making it harder for individuals to stand up for their own interests or change their minds.[150]

Katyal stresses that we should analyze criminal organizations with the same theories with which economists describe legitimate businesses.[151] By getting bigger, criminal groups can benefit from the same division of labor and the economies of scale that have made behemoth companies—from U.S. Steel to Microsoft—feared and immensely lucrative marketplace juggernauts.[152] And just like big corporations, big criminal organizations increase their profits

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141. *See id.* at 1397–98 ("Twentieth-century criminal law began with great interdisciplinary promise in incorporating advances in psychiatry, and concluded with the hope of integrating microeconomics into its picture. By viewing conspiracy through this refurbished interdisciplinary lens, law can move further in its quest to understand and respond to dangerous forms of human behavior.").

142. *See id.* at 1397.

143. *See id.* at 1316.

144. *See id.* at 1325.

145. *See id.* at 1316–18.

146. *See id.* at 1350 n.164 (quoting Roderick M. Kramer, *Trust and Distrust in Organizations: Emerging Perspectives, Enduring Questions*, 50 ANN. REV. PSYCH. 569, 577 (1999)).

147. *See id.* at 1351 n.170 (citing Edward L. Glaeser, David I. Laibson, José A. Scheinkman & Christine L. Soutter, *Measuring Trust*, 115 Q.J. ECON. 811, 840 (2000)).

148. *Id.* at 1316 ("Much of the most influential research focuses on how group membership changes an individual's personal identity to produce a new social identity." (emphasis omitted)).

149. *See id.* at 1316–17.

150. *Id.* at 1317–18.

151. *See id.* at 1325 (relating work by economists explaining the advantage of bigness for large firms to criminal conspiracies).

152. *See id.* ("A conspiracy, too, can exploit these benefits—the criminal firm creates a framework of trust to reduce the transaction costs involved in forming new contracts with each other. A criminal enterprise can hire specialists and use its size to obtain benefits that uncoordinated individuals cannot." (footnote omitted)).

by cutting down on competition among their members, specializing members' labor, and promoting trust among members.[153]

Just as social scientific research can be used to better understand conspiracies, it can be used to subvert them as well. Much business school scholarship aims at making legitimate businesses more successful by identifying common causes of inefficiency and failure for legitimate enterprises. Katyal's reasoned hope is that this work can be inverted to undermine their dark, criminal counterparts.[154]

Business school texts teach that, to better prosper, legitimate businesses should foster trust and delegate more; additionally, they should resist compartmentalization and share information broadly within the firm.[155] Such vices eat away at the body of honest businesses, making them less efficient and less profitable, and such virtues are the solid pillars of market success.[156] Katyal thinks that conspiracy law should be shaped to inculcate these same frailties in criminal organizations and deny them those same strengths. He writes:

> In particular, conspiracy law should encourage the use of excessive monitoring, chill discussion within the firm, lead it to compartmentalize information, strive to create team-production problems, impose vicarious liability to make illegal firms more inefficient, make it difficult for the parties to use default rules and off-the-rack principles to reduce transaction costs, refuse to extend legal enforcement to intra-firm disputes, and water down their intellectual property.[157]

Katyal believes that extant conspiracy law is already pulling on the load-bearing elements, blocking mafiosi and their ilk from conforming to the *6 Habits of Highly Successful Managers*.[158] As such, he defends features of conspiracy law that other scholars have denounced as unprincipled shortcuts in the law.[159] However, the fact that conspiracy law already contains many features that subvert successful group organizing is a happy accident.[160] As such, Katyal argues new law enforcement policies could be engineered specifically to subvert the integrity of criminal syndicates.[161] Nonetheless, Katyal's proposed innovations

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153. *Id.*

154. *Id.* at 1397 ("Criminal law can profitably borrow from insights generated by corporate law scholars and organizational theorists. This body of work is generally concerned with making legitimate enterprises operate in a more efficient manner. By reverse engineering these concepts, law can stymie criminal conspiracies.").

155. *Id.*

156. *Id.*

157. *Id.*

158. *See id.* ("Federal law attempts to do some of this, although its choices are often unconscious and consistently undertheorized.").

159. *E.g.*, *id.* at 1372 (defending conspiracy law's *Pinkerton* doctrine against the scholarly "conventional wisdom that *Pinkerton* liability is some sort of criminal monster").

160. *Id.* at 1369 ("Federal conspiracy law evolved, somewhat unconsciously, to take advantage of many of the pressure points generated by the theory of group behavior outlined in Part II.").

161. *Id.* at 1390–97.

concern sentencing guidelines and other matters collateral to the definition of conspiracy itself.[162] In the end, when it comes to substantive doctrine, he is an outlier defender of the status quo.[163]

II. THE PROBLEM

The target of this Article is the ill of petty conspiracies. These conspiracies are not petty in the sense that the crimes they are aimed at are not serious. On the contrary, a petty conspiracy can involve murder, armed robbery, or any other serious felony. What is petty in these conspiracies is the conspiracy itself, not the crimes at which it allegedly aims. In petty conspiracies, there is little or no organization or planning. Under current law, conspiracy can be charged whenever there is an agreement to commit a crime and an overt act.[164] The agreement need not be explicit.[165] As such, a conspiracy can consist of nothing more than a group of people acting together to commit a crime spontaneously and with only the slightest measure of lead time, verbal discussion, or conscious joint resolution manifested before the crime is committed.[166] A ready example of a "conspiracy" carried out with a minimum of lead time or discussion is the everyday error of two benighted men deciding to drive five blocks away to rob their local convenience store or the case of three drug addicts desperately deciding one night to sneak into the home of a rich acquaintance to pilfer power tools to sell at a pawnshop. A spontaneous conspiracy, where the agreement is only implied, could be charged where five collegians rush across a field to join a fight in progress between their fraternity brothers and their rivals.

As the foregoing examples show, petty conspiracies are also not petty due to the small number of participants. Even larger groups of people committing crime together may still constitute only a "petty conspiracy," as I am using that phrase. Consider the case of the brawling collegians. There could be ever so many fraternity brothers fighting it out on the quad, but the conspiracy is a petty one if there was no planning, no organization, but only nods and shouted exhortations to attack the boys with the other Greek letters. The human consequences of these crimes can be very serious, but the conspiracy component in them is petty and undeserving of the name. A heap of criminals should not count as a conspiracy any more than a pile of bricks should count as a house.

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162. *See id.* (promoting, inter alia, increased monetary rewards and a public (dis)information campaign to make people believe that government informants are infiltrating criminal groups everywhere).

163. *See id.* at 1369.

164. *See supra* notes 28, 37–42 and accompanying text.

165. *See* text accompanying note 86; *see also* Sacharoff, *supra* note 29, at 438 ("[Juries] may infer an implicit agreement from circumstantial evidence.").

166. *See supra* notes 92–94 and accompanying text.

This is a doctrinal problem and a moral problem.[167] Doctrinally, it is silly to call three foolish, impulsive men robbing a package store at gunpoint a "conspiracy." As Justice Jackson said in *Krulewitch*, "The crime . . . . sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state itself."[168] As terrible as the consequences of such a conspiracy can be for the store clerk, innocent bystanders, and the men themselves, this is a long way from the Gunpowder Plot.[169] The connotations of the word "conspiracy" are at odds with the breadth of the current crime and its application to petty conspiracies.

One doctrinal fault, then, is that the law is making an ass of itself by calling a cherry a cantaloupe and insisting that unorganized, unplanned group criminality can be charged as conspiracy. A second defect is that the possibility of charging petty conspiracies shows that the crime is not tailored to a distinct evil. The elements of conspiracy have produced a metacrime of such general applicability that it can be used in almost every case in which two or more are gathered together with criminal intentions. As previously discussed, the weakening of the agreement element means that express words or a definite exchange of promises, even a silent one, need not be shown to establish a conspiracy. Wherever one woman carries marijuana to her friend's door and the other woman agrees to drive and keep a lookout for the police, wherever three men spot a fourth on the street and attack him with their fists because they think he has been sleeping with their friend's wife, current doctrine lets the prosecutor point to the concerted activity—mere united crime without premeditation, forethought, or planning—and call it a conspiracy.

Morally, it is dangerous to increase the charges, and thus the criminal punishment, when the number of wrongs remains constant. Mere concerted criminal activity lacks the element of preparation and organization that makes conspiracy a separate menace from both the object crime itself and other offenses like aiding and abetting, attempt, or solicitation. As a distinct offense,

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167. A doctrinal problem is one that can be appreciated from within the standpoint of the law alone, without adopting any opinion on questions of morality. A doctrinal problem can consist of internal inconsistencies in the law, a poorly drafted statute, redundancies in the law, or any other feature that makes the law unwieldy, incoherent, asymmetrical, or illogical. These arguments should appeal to any lawyer who values the law for its own sake.

A moral problem exists when the law demands or allows immoral outcomes or subjects people to immoral processes. Whether a certain outcome or process is unethical depends upon what is true about morality. Differing opinions about morality or outright skepticism about the objective truth of moral propositions make the claims I present below about excessive punishments wrought by petty conspiracy charges tendentious and unlikely to persuade certain readers. If one thinks that there is no such thing as desert and that criminal laws should be shaped to maximize safety or overall utility, then one will be unmoved by my appeal to retributive limits on the criminal law below. I am careful to mark and segregate these two types of arguments in my work because of their differing persuasive capacities with different audiences.

168. Krulewitch v. United States, 336 U.S. 440, 448 (1949) (Jackson, J., concurring).

169. *See generally* ANTONIA FRASER, FAITH AND TREASON: THE STORY OF THE GUNPOWDER PLOT (1996) (telling the story of the plot by the notorious Guy Fawkes to explode a cache of gunpowder hidden in the cellar of Parliament and thereby reverse the fortunes of Catholicism in England).

conspiracy can carry a separate sentence,[170] and that extra punishment is undeserved where the "conspiracy" consisted of nothing more than men shouting "let's get 'em" to their fraternity brothers and rushing across a field to commit assault.

This is especially problematic when the *Pinkerton* doctrine is invoked to hold conspirators liable for the crimes of coconspirators.[171] *Pinkerton* makes each conspirator vicariously liable for those crimes of the other conspirators that are committed in furtherance of the conspiracy and reasonably foreseeable.[172] Essentially a negligence standard,[173] *Pinkerton* can be used to quickly turn a robber into a murderer when, as in the case of the brawling collegians or the foolish liquor store robbers, someone ends up being killed. As prior scholarship shows, this can subject defendants who did not intend or believe that anyone would be killed or hurt to vicarious liability for the most serious crimes.[174] Punishment in these cases can quickly rise above the level of the defendant's culpability and his or her just deserts.[175]

The existence of prosecutorial discretion is not the solution to the trouble; it aggravates it. Where there is a petty conspiracy, the prosecution can charge the substantive crime (or the attempt to commit it), solicitation, and aiding and abetting in addition to conspiracy. The ability to mix and match the charges at the discretion of the prosecution—and even add new substantive crimes thanks to *Pinkerton*—gives prosecutors substantial leverage in plea negotiations.[176] The availability of a broadly defined conspiracy offense is one more manifestation of the power of prosecutors to influence outcomes by picking from a menu of possible charges to assign to the facts of a defendant's case.[177] As prior research documents, the result is a shift in power towards prosecutors and away from judges and juries to determine the correct characterization of and the correct level of punishment for a defendant's criminal behavior.[178] Permissive

170. *See supra* notes 48–49 and accompanying text.

171. *See generally* Pinkerton v. United States, 328 U.S. 640 (1946) (making conspirators vicariously liable for the reasonably foreseeable crimes of their coconspirators committed in furtherance of the conspiracy).

172. *Id.* at 647.

173. Ingram, *supra* note 18, at 92.

174. *Id.* at 71–72.

175. *See, e.g.*, *id.* at 83–85 (illustrating how vicarious liability leads to excessive, undeserved punishment of less culpable conspirators).

176. *See, e.g.*, Graham, *supra* note 27, at 703–05 (explaining the phenomenon of "vertical overcharging" by prosecutors); William Ortman, *Second-Best Criminal Justice*, 96 WASH. U. L. REV. 1061, 1072 (2019) ("A prosecutor's discretion to choose what charges to file, and what charges to threaten to file, is a principal source of her control over criminal adjudication.").

177. *See, e.g.*, Graham, *supra* note 27, at 703–05 (describing how prosecutors use their power to vary the charge to persuade a defendant to plead guilty); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004) (describing the contents of contemporary penal codes as "items on a menu from which the prosecutor may order as she wishes").

178. *E.g.*, Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004) (explaining prosecutor's power to decide outcomes); Erik Luna, *Prosecutor*

doctrine thus drives a procedural and strategic power imbalance that facilitates longer sentences and a bureaucratized approach to justice that depreciates and dwindles trials.[179] This, in turn, helps make the United States the world's number one country for incarcerating its citizens.[180]

A. *Does Doctrine Make a Difference?*

Of course, faulty doctrine is not the only cause of the high prison population in the United States: A full reckoning would consider, at a minimum, criminal procedure, politics, poverty, and race. I nonetheless believe that substantive criminal law—including old-fashioned, lawyerly analysis that aspires to value neutral premises—has a role to play in diagnosis and reform.[181] More than fifteen years ago, William Stuntz identified the fulsome, vineal expansion of the substantive criminal law as a source of prosecutorial power during plea bargaining.[182] As new statutes sprouted from legislative halls, the profusion of available crimes changed the function of the criminal statutes themselves.[183] No longer were these criminal statutes the adjudicative rules that provided the strategic background for any plea bargaining negotiations.[184] Rather, they became a menu of threats that the prosecutor could choose to cast at the

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King, 1 STAN. J. CRIM. L. & POL'Y 48, 57–70 (2014) ("[T]he European prosecutor is beginning to look like his American counterpart, with the de facto and sometimes de jure authority to adjudicate cases."); Andrew T. Ingram, *That's Not a Burglary! Classic Crimes and Current Codes*, 58 HOUS. L. REV. 1015, 1042 (2021) ("Even if a judge might see that a [crime] deserves a sentence at the bottom of the permissible range, the prosecutor carries the felony card in her hand and by threatening to play it, can keep the defendant from testing the court's views . . . .").

179. Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1396 (2017) (explaining the bureaucratization of American criminal justice); Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the* Brady *Safety-Valve*, 2012 UTAH L. REV. 51, 62 ("While prosecutors possessed the ability to control charging decisions and sentencing recommendations throughout the nineteenth and twentieth centuries, their power to control the criminal justice system and offer defendants deals increased throughout the 1900s. For example, as the number of criminal statutes grew during the early twentieth century, prosecutors had more choices when charging defendants and more discretion when selecting reduced charges in return for guilty pleas." (footnote omitted)).

180. *See* Kyle Conley, Note, *Universal Suffrage: The Case for Complete Voting Rights Restoration in Kentucky*, 60 U. LOUISVILLE L. REV. 331, 346 (2021) (recognizing that the United States has the most prisoners in the world and the world's highest rate of incarceration); Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L.J. RACE RELIGION GENDER & CLASS 191, 194 (2015) (arguing that problems with substantive criminal law drive unbalanced plea bargaining and, in turn, mass incarceration in the United States).

181. *See* Chaim Saiman, *The Law Wants to Be Formal*, 96 NOTRE DAME L. REV. 1067, 1070 (2021) ("American formalism is based on a structural analysis of legal relationships and aims to confine legal analysis and limit recourse to broader political values.").

182. *See* Stuntz, *supra* note 177, at 2549–50.

183. *See id.* at 2550.

184. *See id.* at 2548 ("Most bodies of substantive law define citizens' obligations. Criminal law is different. Its primary role is not to define obligations, but to create a menu of options for prosecutors.").

defendant, as the prosecutor saw fit, to achieve the outcome the prosecutor desired.[185]

Cynthia Alkon has taken Stuntz's work and developed multiple proposals to alter criminal codes to restore balance in the criminal courtroom and pretrial negotiations.[186] For instance, Alkon describes how many criminal fact patterns can alternatively be charged as misdemeanors or felonies.[187] Backed by empirical research from Ronald Wright and Rodney Engen,[188] she claims that such a disjunctive situation made it more likely defendants would be charged at all and less likely they would attempt to mount a defense in court.[189] Similarly, Alkon proposes reducing the number of felonies and returning certain wrongs to the status of misdemeanors.[190]

Against the skepticism of certain legal realists and critical theorists, recent work by Michael Serota offers empirical evidence that changes to criminal law doctrine does impact rates of charging, conviction, and ultimately imprisonment.[191] Specifically, Serota's work showed that adding a mens rea requirement to a strict liability crime "can be expected to at least modestly reduce the charging and conviction rates for those statutes"[192] and that "people of color are likely to meaningfully (and perhaps disproportionately) benefit from the reductions in charging and convictions associated with adding culpable mental state requirements to individual criminal statutes."[193]

Serota proved these conclusions by taking advantage of a real-world experiment afforded by a change in doctrine.[194] When the Supreme Court added a culpable knowledge requirement to the federal felon in possession of a firearm statute in *Rehaif v. United States*,[195] he and a RAND corporation team studied the aftermath in district courts.[196] They found that charges for felon-in-possession decreased markedly after *Rehaif* tightened up the doctrine: the number of charges per month declined by 34.59%, preventing 2,365 convictions and 8,419 years of prison sentences.[197]

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185. *Id.*

186. Alkon, *supra* note 180, at 196 (citing William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506–07 (2001)).

187. *Id.* at 203.

188. Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1940 (2006).

189. Alkon, *supra* note 180, at 203.

190. *Id.* at 203–05.

191. Michael Serota, *Strict Liability Abolition*, 98 N.Y.U. L. REV. 112, 165–71 (2023).

192. *Id.* at 178.

193. *Id.* at 164.

194. *Id.* at 166–67.

195. Rehaif v. United States, 588 U.S. 225, 228–29 (2019).

196. Serota, *supra* note 191, at 167–68.

197. *Id.* at 168.

Not only can doctrinal reform be effective at reducing mass incarceration if implemented, but it also has a better chance of being implemented thanks to its lawyerly, technocratic character.

Returning to Stuntz, his work illustrates well the latent potential for technocratic reform of substantive criminal law. He begins his 2004 article, *Plea Bargaining and Criminal Law's Disappearing Shadow*, by establishing the stakes: The overgrowth of criminal law is not just tripping trumps into the prosecutor's hand in plea negotiations, it is making the contents of criminal law itself irrelevant.[198] "This points to a basic irony about criminal law: the more it expands, the less it matters."[199] He explains, "Criminal law is different. The greater the territory substantive criminal law covers, the smaller the role that law plays in allocating criminal punishment."[200] And so consequently, he says, "The law-on-the-street—the law that determines who goes to prison and for how long—is chiefly written by prosecutors, not by legislators or judges."[201]

Scholars, lawyers, and interested laypersons do not all believe that there are moral truths,[202] that moral truths are ascertainable by reason,[203] or that the moral claims propounded by retributivist philosophers of the criminal law are true.[204] Less philosophically, there is broad disagreement on "criminal justice policy" in the United States—Americans do not agree on whether crime is inadequately or excessively punished in their country.[205] So that my scholarly work on the criminal law can be as persuasive as possible, I attempt whenever possible to present both a moral and a doctrinal argument in favor of my law reform prescriptions.

The Golden Age, when the American Law Institute would release a Restatement of the Law or a Model Penal Code and lawyers, judges, and legislative staff throughout the forty-eight states would harken to hear the fruits of erudition has passed away for the time being.[206] Nonetheless, doctrinal critique is still possible and worthwhile even if the audience is smaller and more cynical than it used to be. Any good carpenter can appreciate an argument

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198. Stuntz, *supra* note 177, at 2550.

199. *Id.*

200. *Id.*

201. *Id.* at 2549.

202. *See generally* J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG (1977) (propounding moral error theory).

203. *See generally* MAX WEBER, *Science as a Vocation*, *in* THE VOCATION LECTURES 1 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., Hackett Publ'g Co. 2004) (1917) (arguing that reason cannot decide fundamental questions of value).

204. *See generally* Galen Strawson, *The Impossibility of Moral Responsibility*, 75 PHIL. STUD. 5 (1994) (arguing that moral responsibility is conceptually incoherent).

205. *E.g.*, John Gramlich, *U.S. Public Divided over Whether People Convicted of Crimes Spend Too Much or Too Little Time in Prison*, PEW RSCH. CTR. (Dec. 6, 2021), https://www.pewresearch.org/fact-tank/2021/12/06/u-s-public-divided-over-whether-people-convicted-of-crimes-spend-too-much-or-too-little-time-in-prison [https://perma.cc/S4ZW-N9ZS].

206. *See, e.g.*, Richard A. Posner, *Legal Scholarship Today*, 45 STAN. L. REV. 1647, 1648–49 (1993) (describing the former influence of the legal professoriate on the bench and bar).

that the desks their brothers and sisters are building ought to be constructed with dovetail joints. Not only do they last longer, but they are characteristic of fine woodworking, of doing the work the right way within the community of practice of which carpenters are members.

Any lawyer who cares about the law and the common law tradition ought to be distressed by Stuntz's observation that the substantive criminal law has grown itself into irrelevance. Lawyers might as well turn over the whole business of responding to malicious, harmful, and antisocial conduct to social workers, cops, and bureaucrats if that remains the case.

To point out that conspiracy is not working well as a crime because it is overbroad, because it overlaps with other metacrimes like complicity and solicitation, and because it fails to proscribe a distinct evil, is to make an appeal to a lawyer's sense of pride in craft and pride in the law. *Ceteris paribus*, the law ought to be as symmetrical, logical, consistent, simple, and elegant as a dovetail joint.[207] By the law's own lights—by the standards of good common law reasoning that every day makes the difference between good briefs and bad briefs—it is possible to say that some areas of the law should be changed and others guarded from change.[208]

To accept the foregoing values does not require one to believe in the truth of utilitarianism, the Noble Eightfold Path, the categorical imperative, the *Nicomachean Ethics*, Dirty Harry's diatribes, a Bernie Sanders 2024 comeback, or Mr. Spencer's Social Statics. Whenever three men impulsively rob a convenience store, and one of them unexpectedly shoots and kills the clerk, different people with different beliefs about ethics and what matters will come to different conclusions about how they should be punished. Thus, regardless of whether the legal reader is convinced by my moral arguments that petty conspiracy prosecutions can produce unjust, excessive punishments, I hope that they are convinced that it is lubberly law—asinine and sloppy—to call what they did a "conspiracy."

III. A SOLUTION

The law ought to be that a criminal conspiracy consists in more than an agreement to commit a crime and an overt act. Group crime should require substantial planning and organization before it is a conspiracy. This would answer the problem of petty conspiracies, eliminating mere concerted action by a heap of people committing crime together without planning or forethought from the scope of the crime.

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207. *Cf.* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 1013 (1988) ("Formalism stands for the possibility that the elaboration of law can be a coherent enterprise in justification. . . . The juridical function of legal ordering is to make transactions and distributions conform to their own latent unity.").

208. *See* Saiman, *supra* note 181, at 1072 ("[W]hen established doctrines do not provide a clear answer to novel legal questions, the answer can be derived by precise reasoning from the law's internal structure. We can see formalism as the process lawyers use to reach decisions, and conceptualism as the theoretical account of legal relationships articulated by academics and scholars.").

I am not proposing that every member of a conspiracy must participate in the planning and organization of it, nor am I affirming that each member must have engaged in substantial planning herself to be guilty.[209] The requisite organization and planning are meant to be features of the conspiracy itself and constituted by the actions and discussions of some or all of its membership.

I do not propose that substantial planning and organization be further defined. Standing alone, the words themselves are sufficient to convey the idea that there must be a combination of forethought, design, and structure to a criminal undertaking by more than one person before it will qualify as a conspiracy. That said, I do propose several factors that courts can look for when deciding motions to quash, sufficiency of the evidence appeals, and directed verdict motions. These factors could also be presented to juries in a list to help guide their deliberations.

The word "substantial" is a tell that the test I am proposing will be vague. Whenever we see this word in formulations like "substantial and unjustifiable risk,"[210] we know that we are witnessing the law waving its hands and gesturing in the direction of something big or severe. One hates to introduce such language to areas of doctrine where it is absent—here, it certainly complicates the abstract simplicity of requiring only an *agreement*, an *overt act*, and the *intent* to agree and to commit a crime. But, as I hope the Article convinces the reader, the problem of petty conspiracies is a real one and worth complicating the doctrine to extirpate. Certainly, we know that the criminal law can function with these burls embedded in it as it already does when it talks of "substantial and unjustifiable risk" to define recklessness and negligence[211] or "serious bodily injury" to characterize murder.[212]

A. *Implementation*

The reform I propose to conspiracy law could be introduced by legislation or by judicial interpretation. Congress and state legislatures obviously could add a fourth element to conspiracy so that it would require an agreement to commit a crime, the intent to agree and commit the object crime, an overt act, and substantial planning and organization. Less plainly, courts could

209. Thus, my proposal leaves untouched the large "hub and spoke" and "daisy chain" conspiracies in which clueless, peripheral actors are convicted as conspirators in plots they never comprehended. *See generally* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 12.3(b)(2), at 399 (3d ed. 2018) (describing "the so-called 'wheel' or 'circle' conspiracy, in which there is a single person or group (the 'hub') dealing individually with two or more other persons or groups (the 'spokes')" and "the 'chain' conspiracy, usually involving the distribution of narcotics or other contraband, in which there is successive communication and cooperation in much the same way as with legitimate business operations between manufacturer and wholesaler, then wholesaler and retailer, and then retailer and consumer"). Sacharoff's and Rosenberg's proposals to strengthen the agreement requirement are the better solution to the problem of roping all criminals who associate with a larger criminal enterprise into one big conspiracy. *See supra* notes 96–101 and accompanying text.

210. *E.g.*, TEX. PENAL CODE ANN. § 6.03(c) (West 2023) (defining recklessness).

211. *E.g.*, *id.* § 6.03.

212. *E.g.*, *id.* § 19.02(b)(2).

reinterpret the agreement element in order to introduce the requirement of substantial planning and organization.

As discussed above, Laurent Sacharoff previously documented how nebulous and mushy the agreement element of conspiracy has become in the hands of the judiciary.[213] Courts reasonably recognize that agreements need not be explicit or verbal but proceed from there to tell juries that they can find an agreement where there is "mutual understanding," a "working relationship," or a "partnership in crime."[214] Notably, they do not instruct jurors as they would in a contracts case by telling them to look for an exchange of promises or a meeting of the minds.[215] Sacharoff proposes to reform conspiracy law by borrowing such contract principles and instructing juries to consider whether the defendants agreed to commit a crime using those contract concepts.[216]

I have no quarrel with Sacharoff's proposed reform to the agreement element of conspiracy. Indeed, both my proposed reform and his could coexist were mine adopted by statute. Regardless, the fact that the agreement element has become so squishy means that there is potential to introduce a substantial planning and organization element via the canonical processes of common law accretion. Published opinions have already countenanced glossing the agreement element in terms of a "partnership in crime."[217] The suggestion of continuity, of a persisting criminal entity, lends itself to introducing a requirement of substantial planning and organization under the flag of agreement. Courts struggling to say what an agreement is could certainly improve the permissive status quo.

Furthermore, glossing "agreement" in terms of substantial planning and organization comports with the courts' seeming wish to transmute conspiracy from a crime of contract to a crime of status.[218] If partnerships in crime are the target of conspiracy law as court decisions suggest,[219] then it stands to reason that prosecutors should have to show indicia of a criminal partnership, i.e., the substantial planning and organization you would expect from a partnership engaged in lawful enterprise. While embracing "partnership" jargon would tend to erode the distinction between conspiracy and RICO,[220] it would comport with the judges' apparent disinterest in pinpointing who agreed to commit what crime and when and where they so agreed. Interpreting "agreement" to require substantial planning and organization would make sure that the joint criminality, the "partnership in crime," was serious enough *qua* combination to deserve treatment as conspiracy.

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213. *See supra* notes 83–99 and accompanying text.
214. *See supra* notes 87–88 and accompanying text.
215. *See supra* note 85 and accompanying text.
216. *See supra* notes 96–99 and accompanying text.
217. *See, e.g.*, United States v. Powell, 564 F.2d 256, 258 (8th Cir. 1977).
218. *See supra* notes 82–86 and accompanying text.
219. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253–54 (1940).
220. *See supra* notes 134–38 and accompanying text.

B. *Explaining Substantial Planning and Organization*

The following is not meant to be a definition of the substantial planning and organization requirement I propose. A definition breaks a concept into its component parts without residuum.[221] The following is instead meant to show what evidence would be relevant to a finding of substantial planning and organization. These factors could be included in jury instructions or in court opinions guiding judges on how to review motions for directed verdict challenging the presence of evidence that could support a jury finding of substantial planning and organization. Providing that guidance is a good reason to develop a list of factors.[222] While many of the below factors may seem too obvious to be worth stating, it helps to have a list that demystifies overused legal verbiage for juries who will hear it *ad nauseam* during a trial. Such a list also teaches courts what to look for in the record to review verdicts, articulating the commonsense juries would use to distinguish proper conspiracies from the petty ones that this article nominates for extirpative reform.

The factors presented are definitely not meant to substitute for the language "substantial planning and organization" in a statute or canonical recitation of the elements. These words are clear enough standing alone not to need definition. At the same time, readers may fairly have doubts about whether adopting "substantial planning and organization" would produce a workable standard or whether it indeed does possess intelligible content, as I have claimed. Thus, the second reason I present the following factors is to prove that there is substantive content to the phrase "substantial planning and organization."

1. Pattern of Criminal Activity

One way to tell when group criminality attains the level of substantial planning and organization that it should need to qualify as a conspiracy is to look for a pattern of criminal activity. A series of crimes linked together as part of a common scheme shows substantial planning and organization, as does a series of petty crimes performed in service of a larger object crime. I will look at the latter case first.

As the many prosecutions of conspirators under the *Pinkerton* theory of vicarious liability attest, conspiracies often involve committing smaller crimes in support of the arch iniquity. Imagine a group of criminals who are planning to rob a downtown bank. One member of the conspiracy has the task of obtaining

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221. *See, e.g.*, G.E. MOORE, PRINCIPIA ETHICA 8 (reprt. 1922) (1903) (explaining the nature of definition using the example of the horse: "We may mean that a certain object, which we all of us know, is composed in a certain manner: that it has four legs, a head, a heart, a liver, etc., etc., all of them arranged in definite relations to one another.").

222. The philosopher A.C. Ewing speaks of how a concept can be explained without defining it: When a concept cannot be defined without residuum, "[t]his does not imply that its nature cannot be known—it may be very distinctly known—only that it cannot be reduced to anything else." A.C. EWING, THE DEFINITION OF GOOD 78 (1947). He adds, "It may perhaps turn out possible to say a great deal more about it; only what is said will never exhaust its nature without residuum." *Id.*

a car that will be difficult to trace. So, his assigned mission is to steal a car (one subsidiary crime),[223] remove its tags to drive around (a further subsidiary crime),[224] and replace them with forged dealer tags (yet another subsidiary crime).[225] A second member of the conspiracy must blackmail one of the tellers to leave the time-delayed vault open so that the men can get away with more than just the cash in the tellers' drawers. The blackmail is one more subsidiary crime.[226] The presence of these secondary crimes indicates that the conspiracy is indeed an organized criminal scheme. Four men impulsively deciding to rob the next convenience store they see along a dark street, by contrast, does not involve a chain of auxiliary crimes in support of the object crime of a putative conspiracy.

A series of crimes can also show substantial planning and organization. Imagine a crew of bank robbers again, but this time, think of them as serial offenders who have conducted a string of brazen daylight holdups. The commission of multiple robberies by the same group of people, utilizing a discrete modus operandi,[227] is evidence of planning and organization to carry out the chain of robberies. Put simply, the continuity between the crimes is evidence of a plan to rob multiple banks. Unlike the impulsive convenience store robbers, there is a perduring criminal effort manifest by the multiple incidents conducted by the same people in a similar manner. Bank robberies conducted by the same people with the same MO are also clearly different from the case of John, Larry, and Mo, who rob one gas station, and John, Curly, and Shemp, who rob a different gas station the next month. The crimes of these stooges are far weaker evidence that John has conspired to rob filling stations because the facts are also consistent with the theory that John has twice decided to rob a gas station and found two sets of accomplices to do it with him.

2. Hierarchy and Division of Labor

Layers of leaders and followers are also good evidence of substantial planning and organization. The development of a hierarchy requires planning, and the existence of a tiered leadership structure is itself a form of organization. Hierarchy also facilitates the assignment of distinct roles to individual criminals participating in a scheme—a further marker of the planning that makes group criminality worthy of counting as conspiracy.[228]

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223. *E.g.*, TEX. PENAL CODE ANN. § 31.03 (West 2023) (defining theft).

224. *E.g.*, TEX. TRANSP. CODE ANN. § 502.473(a) (West 2023) ("A person commits an offense if the person operates on a public highway during a registration period a motor vehicle that does not properly display the registration insignia issued by the department that establishes that the license plates have been validated for the period.").

225. *E.g.*, *id.* § 502.475(a) (making it an offense to attach a fictitious registration insignia to a motor vehicle).

226. *E.g.*, N.Y. PENAL LAW § 155.05(2)(e) (McKinney 2024) (defining theft by extortion).

227. *Cf.* FED. R. EVID. 404(b)(2) (allowing, inter alia, evidence of prior acts to prove a defendant's distinct modus operandi).

228. Katyal, *supra* note 139, at 1332.

Not only does hierarchy require planning, but planning begets hierarchy. The implementation of a plan can call for the development of a hierarchy of authority and the assignment of special roles to different criminals. Return to the example of the serial bank robbers from the prior section. The criminals' plan called for someone to steal a car, someone to blackmail a teller, etc. The designation of individuals to carry out certain tasks is thus an outcome of and evidence of planning. Moreover, to assign the roles and coordinate the activities of the criminal functionaries, there needs to be a leader or group of leaders who delegate the task, or, at a minimum, meetings among the participants to decide on an overall strategy and divvy up jobs. By contrast, an impulsive trio robbing a convenience store need have no designated leaders, stable command structure, or assigned roles.

Without belaboring the point further, division of labor and a command structure are obvious examples of what distinguishes a conspiracy worthy of the name from a pile of unorganized criminals.

3. Institutionalization

There are many conspiracies that are not as coordinated and long-lasting as "organized crime"—i.e., the mafia, the Yakuza, the Colombian drug cartels, and like notorious exemplars of "the mob." These groups are notorious for mirroring legitimate businesses to an eerie extent with their own accountants, budgets, and bank accounts. To be sure, I am not arguing that conspiracy should only cover such criminal enterprises. Nonetheless, institutionalization is one factor to consider in deciding if group criminality exhibits substantial planning and organization.

The proposed institutionalization factor considers whether the alleged conspiracy has a bank account, whether it has initiation rituals, operating rules, a system for submitting disputes to authorities for a decision, a membership roster, and other characteristics that criminal groups can share with legitimate businesses, clubs, and nonprofits. Institutionalization is about whether a criminal group has put down roots to nourish its poisoned fruit, whether it is perduring like a trench coat or ephemeral like a poncho improvised from a plastic grocery sack. In digital terms, this could take the form of an email LISTSERV or a Slack channel used by the participants to discuss their maleficent designs. Just like Greek letter fraternities have ceremonies to mark when someone becomes a member and yuppies at a Silicon Valley startup have a Slack, the fact that a group of bank robbers all obtained the same tattoo to signify their commitment to the group or started a password protected account with Dropbox to share videos of shift changes is good evidence that they are a planned and organized conspiracy worthy of that title.

4. Overt Planning and Preparation

In some cases, there will be evidence of the alleged conspirators meeting, in person or electronically, to work out how to commit the crime that is the goal of the conspiracy. As Sacharoff has documented, the slobby swelling of conspiracy law has reached a point where courts no longer center the attention

of juries on finding the putative moment of agreement—i.e., when were the words spoken, the nods exchanged, or the first acts undertaken that signified the parties' agreement to commit a crime. It thus bears emphasizing that an indicator of substantial planning and organization is discussion—conversations among the alleged conspirators contriving how to carry out the object crime.

Other examples of overt planning could include drawing sketches, making maps (perhaps Google searches today), and outlining timetables. The physical and digital remains of these activities and all other paraphernalia of human coordination and preparation are fine evidence of the planning and organization I am contending should be required for a successful conspiracy prosecution.

Preparation can include assembling resources, practicing the crime, and observing the target. Consider again the three impulsive men who rob a convenience store. If one of them was already carrying a gun or keeping one in his car, as a matter of course, then no further preparation was needed to commit their crime. By contrast, a mark of a true conspiracy is marshaling resources (e.g., bank robbers buying large duffle bags to carry piles of banknotes), staking out a bank to record the shift changes, or practicing lockpicking skills. In plain terms, discovering a pile of notebooks filled with timetables for a bank robbery or a cache of accelerants in the home of a member of an alleged insurance fraud ring is good evidence that a proper conspiracy—a planned and organized criminal plot—is at issue.

5. Lapse of Time

Another simple marker of a conspiracy is the passage of time between the alleged agreement and the completion or attempt of the object crime. For there to be substantial planning and organization, there must be some lapse of time for the alleged conspirators to go from resolving to commit the crime (the agreement), to making plans to carry out the crime, and finally to actually committing it.

In the examples of petty conspiracy reviewed so far, the criminals do not pause to plan. Rather, when it comes to the brawling fraternity brothers or the convenience store robbers, there is only a short temporal gap between the formation of the intention to commit the crime, the nods of agreement, and the execution of the crime. Looking at bank robberies as an example of a proper conspiracy, there is a long period of preparation and many preliminary criminal acts (e.g., stealing the getaway car, blackmailing the bank teller), all of which necessitate that hours, days, or even weeks pass between the agreement to rob banks and the robberies themselves.

Not only is the lapse of time necessary for there to be preparation and organization, but demanding some temporal gap between the agreement and the crime is a good way to ensure that there was an agreement in the first place. As we saw above in reviewing Sacharoff's findings, the law's reasonable recognition that an agreement need not be verbal or explicit to be an agreement

has degenerated to a disinterest in identifying the moment of agreement at all.[229] As such, mere joint effort is taken to be enough for a jury to find an agreement based on a "mutual understanding," a "partnership in crime," or a defendant's "slight connection" to an admitted, extant criminal conspiracy.[230]

Though I have assumed that the brawling fraternity brothers exchange some words ("Let's get 'em!") that would qualify as an agreement before setting upon the gentlemen with the other Greek letters, the lack of material time between exhorting each other to attack the rivals and actually throwing punches at them shows I was being generous to call this an "agreement." Where there is no meaningful space in time between the alleged agreement and the commission of the alleged target crime, the idea that there are two distinct crimes—the conspiracy and the substantive crime it aimed at—becomes more of an abstract, metaphysical truth than an observable fact that someone not inured to the law's abstractions would recognize. In other words, lapse of time is not only necessary for planning and organization but is a good indicator of whether the facts describe an inchoate crime of conspiracy in addition to a substantive crime.

6. Complexity of the Object Crime

A final factor that juries could be instructed to consider is the complexity of the target crime of the alleged conspiracy. Certain crimes require more planning, preparation, and organization than others. Shoplifting a six-pack while a confederate distracts the clerk by asking for a lottery ticket requires little. Obtaining a pound of marijuana with your buddies to distribute in your neighborhood requires more. Smuggling tons of cocaine from Colombia or reenacting the bank robbery from *Heat*[231] *au cinéma vérité* takes serious planning and organization.

When the crime the defendant is accused of conspiring to commit with his friends is a barroom assault, asking the jury to consider the complexity of the offense should lead them to the right decision that this petty conspiracy is not worthy of the name. By contrast, if the defendant is accused of conspiring to fraudulently obtain tax refunds by soliciting the Social Security numbers of nursing home residents through email phishing and submitting returns with the names and numbers of the residents, the jury would be right to consider the complexity of the crime, and the planning it must have taken to accomplish it, in deciding that the substantial planning and organization requirement I propose has been met.

C. Benefits of Reform

Adopting a substantial planning and organization requirement for conspiracy will both purify doctrine and forfend injustice. While I do not claim

229. *See supra* Section III.B.4.

230. *See supra* notes 83–94 and accompanying text.

231. HEAT (Regency Enterprises 1995).

that my proposed reform is superior to the other proposals canvassed above, my proposal does preserve the features of conspiracy that Neal Katyal found appealing in his article. By subsuming the virtues that Katyal saw in conspiracy, I hope that my idea will be agreeable to conspiracy's legion of academic critics, its lonely academic defenders, and the numerous lawyers on the government's side of the bar who favor it as a trusted tool of criminal justice.

1. Conspiracy Will Not Be Able to Be Used Arbitrarily

The petty conspiracy is not petty because the crime aimed at is petty but because the coordination, the conspiring itself, is petty. The petty conspiracy is a conspiracy charged where there is little more than a group of people jointly engaged in committing the same crime without the planning and organization that make a conspiracy a distinct evil. When conspiracy is defined as an agreement, the intent to agree, an overt act, and the intent to commit the agreed upon crime, conspiracies become as ubiquitous as contracts.[232] Whether three men apprehended shoplifting together or burglarizing a home are charged with conspiracy is then in the hands of the prosecutor.

William Stuntz correctly identified the overgrowth of substantive criminal law as causing the irrelevance of substantive criminal law.[233] Stuntz wrote that criminal law becomes a "menu" for the prosecutor to order from when there are multiple possible charges for every set of facts.[234] The law is not driving outcomes in this situation—the prosecutor is.

Whatever its other faults, the old common law of crimes did not permit prosecution à la carte. There were a small number of total crimes, and each crime was defined with strict elements.[235] A larceny was the taking and carrying away of the chattels of another with the intent to steal.[236] To successfully prosecute a person under such a legal regime takes great care in ensuring that the provable conduct fits all of the elements.[237] However morally senseless it may seem to leave growing crops out of the definition of larceny, the prosecutor must have regard for the definition of larceny and meaning of the word "chattel" or the law will bite her with an acquittal. Whether or not a person

232. Contracts are everywhere in life, occurring where placing a legal gloss on the behavior would likely never occur to anyone watching it. "I'll trade you my Snickers for your Milky Way," one woman says to another, and a contract is formed. The breadth of contract principles reaches this far, just as current conspiracy principles cover practically any joint criminal activity where the parties have a "mutual understanding." *See supra* note 33 and accompanying text.

233. *See* Stuntz, *supra* note 177, at 2550.

234. *Id.* at 2549.

235. *See, e.g.*, Nicholas A. Serrano, *Vigilante Justice at the Home Depot: The Civilian Use of Deadly Force Under Michigan's Common Law Fleeing-Felon Rule*, 11 CHARLESTON L. REV. 159, 197 (2017) ("When the common law rule developed, the framework of felonies and misdemeanors was far more rigid than it is today and the concept of a felony carried with it a gravity of violence and severity that distinguished it from other crimes.").

236. *E.g.*, Commonwealth v. Adams, 73 Mass. 43, 44 (1856).

237. *See* Samuel A. Thumma, *State Anti-Lenity Statutes and Judicial Resistance: "What a Long Strange Trip It's Been,"* 28 GEO. MASON L. REV. 49, 55 (2020) (discussing the strict construction of criminal offenses in common law England).

can be successfully prosecuted under a system of criminal law like the common law once had does depend upon the details of the facts and the definitions of the crimes—the facts must fit one of them exactly. Under the common law of crimes, attempting to charge a daytime house breaker who steals a television with burglary is a nonstarter.[238] The law will decide that this person must be charged with larceny if she is charged with anything at all.

Changing the definition of conspiracy to require substantial planning and organization will take away its application to petty conspiracies. Rather than rely on prosecutors to exercise their discretion and avoid asinine or nakedly instrumental uses of the conspiracy charge, the law will preempt the use of a conspiracy charge for mere group criminality. The conduct that is worthy of being charged as conspiracy will be defined by law rather than the will of the district attorney.

Rehabilitating the decadence of current conspiracy law to stop its arbitrary use by prosecutors is a doctrinal and moral positive. Remolding a catch-all crime into an offense targeting a distinct evil ensures that conspiracy has a function other than modulating penalties to the prosecutor's taste. Moreover, reform would ensure that the law in this area matters—that the parties could meaningfully contest the existence of a conspiracy when the facts show group criminality.

Ethically, restricting the use of conspiracy to cases where group criminality presents a distinct evil prevents excessive, unjust punishments. Counting on prosecutors to use their discretion while avoiding the often subtle effects of racial bias has failed to prevent the current age of mass incarceration.[239] Prior research has shown the role that race plays in a prosecutor's use of discretion.[240] Recognizing that the burdens of mass incarceration fall disproportionately on African American and Hispanic people,[241] counting on prosecutors to only select certain options on their menu when it is just and warranted to do so has proven to be a poor substitute for rigorous definition of the crimes themselves.

2. Individual Assessment of Culpability

The shadow of conspiracy is *Pinkerton*, and with *Pinkerton*, there comes criminal responsibility for the actions of others. As previously explained, the *Pinkerton* rule makes each conspirator liable for the reasonably foreseeable criminal actions undertaken by his fellows in furtherance of the conspiracy.[242] *Pinkerton* is a negligence rule: The vicariously liable defendant need not have

238. *See, e.g.*, Pinson v. State, 121 S.W. 751, 753 (Ark. 1909) (giving the traditional definition of burglary).

239. *See* Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 305 (2017) (attributing the explosion in prison populations to aggressive charging decisions by prosecutors).

240. *See, e.g.*, Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1191, 1215–16 (2018) (discussing racial disparities in plea-bargaining).

241. *E.g.*, Cassia Spohn, *The Effects of the Offender's Race, Ethnicity, and Sex on Federal Sentencing Outcomes in the Guidelines Era*, 76 L. & CONTEMP. PROBS. 75, 91–92 (2013).

242. *See supra* notes 171–75 and accompanying text.

intended, known, or consciously suspected that his coconspirator would commit the subsidiary crime in question.[243]

When conspiracy charges are too readily available, prosecutors can too easily hold conspirators liable for additional crimes without considering their culpability for those additional crimes. As I described in a prior article, *Pinkerton* prosecutions can go so far as to permit conviction for capital murder of a person who never knew or intended that her coconspirator would kill someone but was only negligent about the possibility that a death would result from the crime she agreed to commit.[244] This bypasses a key tool the law uses to ensure that criminal liability and punishment track a defendant's culpability—the mens rea requirement. While I still support the reform to *Pinkerton* I proposed in my prior work, limiting the scope of conspiracy by dismissing petty conspiracies from it would ensure that petty conspirators would have their culpability individually assessed and not be held vicariously liable for the crimes of their confederates without regard for their own mental state.

3. Limiting Access to Special Procedural Rules

Downsizing conspiracy law would prevent prosecutors from accessing the special procedural advantages that come from a conspiracy charge. As discussed above, prosecutors benefit from the hearsay exception that treats coconspirator statements as if they were statements by the party's opponent.[245] Moreover, a conspiracy charge brings with it liberal joinder and venue rules that most defense attorneys bemoan and that prosecutors love.[246]

When prosecutors are targeting gangs and the mafia, these special procedural weapons may be critical to their success, which justifies deviations from regular order in the courtroom.[247] To combat the corruption, wealth, and willingness to threaten and kill witnesses of organizations like the mafia,[248] it may be necessary for prosecutors to bring these big guns to trial. But, hauling out the heavy artillery is too much when the alleged conspirators are impulsive convenience store robbers or a boyfriend and girlfriend scamming Walmart by returning shoplifted merchandise for cash.

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243. *See supra* notes 171–75 and accompanying text.

244. *See* Ingram, *supra* note 18, at 87–92 (describing how Texas defendants can be found guilty of capital murder and sentenced to life in prison without parole based on vicarious liability for homicides committed by their coconspirators that they did not consciously anticipate or intend for them to commit).

245. *See supra* notes 61–63 and accompanying text.

246. *See supra* notes 50–60 and accompanying text.

247. *See, e.g.*, Goldberg v. State, 351 So. 2d 332, 334 (Fla. 1977) ("We recognize that the charge of conspiracy is an excellent tool in combating organized crime . . . .").

248. *See, e.g.*, Emily A. Donaher, *From the Sophisticated Undertakings of the Genovese Crime Family to the Everyday Criminal: The Loss of Congressional Intent in Modern Criminal RICO Application*, 28 ST. THOMAS L. REV. 197, 232 (2016) (explaining that RICO was invented because "Congress was terrified that organized crime would destabilize the American economy and possibly even undermine the justice system through the use of bribery and intimidation").

Curtailing use of the special procedures connected with conspiracy is significant because those procedures come close to marching on ground hallowed by the Constitution or common law tradition. Joinder of all indicted conspirators is presumptively proper in federal conspiracy trials, and group trials carry inevitable risks that the jury will find the defendant guilty by association and neglect to apply the presumption of innocence to each individual defendant.[249] A trial in the location where the offense was committed is protected by the Constitution's Vicinage Clause,[250] but a conspiracy is considered committed in any location where at least one conspirator performed one act in support of it.[251] While the courts have upheld the constitutionality of these practices,[252] there is nonetheless a regrettable deviation from the spirit of the document's promises.

Hearsay rules and the Confrontation Clause are distinct areas of law.[253] The Clause only applies to statements that are not testimonial in character,[254] and as to testimonial statements, its protections inure to the benefit of all defendants, including conspirators.[255] With respect to nontestimonial statements by one's coconspirators, however, the exception to the hearsay rule applies to admit them into evidence.[256] Thus, prosecution witnesses are free to testify to the out-of-court assertions of a defendant's coconspirators.[257] This is not a constitutional violation, but it does go against the wisdom and tradition of the common law.

The tradition of the hearsay rule is broader than the Confrontation Clause. In Sir Walter Raleigh's famous case, one of the witnesses against him was "a boat pilot named Dyer."[258] Dyer testified against Raleigh that he had been in Lisbon and there heard a Portuguese gentleman tell him, "[Y]our King [James] [I] shall never be crowned, for Don Cobham and Don Raleigh will cut his throat before he come to be crowned."[259] Raleigh objected, but the evidence was

249. Marcus, *supra* note 26, at 7–8.

250. U.S. CONST. amend. VI.

251. *See supra* notes 50–55 and accompanying text.

252. *See, e.g.*, Zafiro v. United States, 506 U.S. 534, 537 (1993) ("[W]e repeatedly have approved of joint trials."); Bourjaily v. United States, 483 U.S. 171, 181–82 (1987) (putting to rest the Confrontation Clause issue).

253. *See, e.g.*, John C. O'Brien, *The Hearsay Within Confrontation*, 29 ST. LOUIS U. PUB. L. REV. 501, 503 (2010) ("Over time, however, they have come to be recognized as separate and distinct rights and grounds for objection.").

254. *Id.*

255. *See* Crawford v. Washington, 541 U.S. 36, 56 n.7 (2004) ("This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.").

256. *See supra* notes 61–63 and accompanying text.

257. *See* Giles v. California, 554 U.S. 353, 374 n.6 (2008) (accepting that coconspirator hearsay statements are usually admissible despite the Confrontation Clause because they are nontestimonial).

258. Charles R. Nesson & Yochai Benkler, Essay, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause*, 81 VA. L. REV. 149, 149 (1995).

259. *Id.* at 149–50 (first two alterations in original) (quoting DAVID JARDINE, THE LIVES AND CRIMINAL TRIALS OF CELEBRATED MEN 400, 436 (Phila. 1835)).

admitted anyway.[260] The statements of the hearsay declarant, the supposed Portuguese gentleman, were not testimonial in character and would not be barred by the Confrontation Clause today. These statements are, however, barred by the hearsay rule.

If the Portuguese gentleman in Raleigh's example were alleged to be his coconspirator, then the hearsay exemption would operate to admit the declarant's statement. Here again, while the hearsay exception does not offend the Constitution, it does go against a common law tradition that centuries of Anglo-American lawyers have absorbed through the story of the conspiracy accusations against Sir Raleigh.

3. Conspiracy's Virtues Preserved

Neal Katyal is one of the few people to defend conspiracy law in the pages of law reviews. His work is certainly the best defense that conspiracy has seen in academic circles in many decades. He argues that extant conspiracy doctrine already does society a good service by targeting the special dangers that conspiracies carry with them: the formation of a group criminal identity in the conspirators and the same set of advantages—economies of scale, division of labor, etc.—that legitimate businesses reap as they grow into large corporations.[261]

Eliminating petty conspiracies by imposing a substantial planning and organization requirement will not prevent conspiracy from being used to target the group criminality that Katyal shows is especially baleful. Indeed, the new requirement is tailored to focus conspiracy law on the conspiracies that are attaining the criminal benefits that Katyal wants the criminal law to disrupt. Recall the factors that juries could be instructed upon to decide whether an alleged conspiracy is substantially planned and organized: Institutionalization, hierarchy, and division of labor are all encompassed by the words "substantial planning and organization."

When a criminal conspiracy is set up with bosses and flunkies, it deserves to be charged as conspiracy under the reformed law for which I am advocating. The advantages of a formal leadership structure are one of the benefits that Katyal wants to cut criminals off from by preserving and growing conspiracy law.[262] Likewise, when a criminal gang features initiation rituals similar to those used in legitimate fraternal and philanthropic organizations, it is building a group identity that emboldens and inspires additional crime. However, this degree of institutionalization is one of the factors that juries should focus on to differentiate real conspiracies from the petty ones that I want to see left out of the definition. Lastly, when a group of bank robbers has a complex plan that requires each of them to handle a discrete, specialized task, Katyal regards them as exploiting division of labor—placing people where they are most useful—

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260. *Id.*

261. *See supra* notes 141–44 and accompanying text.

262. *See supra* notes 157–63 and accompanying text.

exactly what a corporation does when it assigns some people to be engineers, others to be accountants, and others to be lawyers.[263] Here again, my proposal to reform conspiracy law concentrates the crime on those cases that Katyal perceives to be most threatening to the well-being of society and citizens.

As opposed to abolishing conspiracy or replacing it with a narrowly drawn offense that would only apply to seditious conspiracy or conspiracy to violate civil rights, my proposal compromises with conspiracy's advocates like Katyal by preserving the offense as a metacrime of general applicability. At the same time, it stops prosecutors from using their heavy artillery where it is neither necessary (petty conspirators are much less likely to be able to conceal their crimes and obtain superlative defense counsel than leaders of the mob), sensible, nor just to do so.

Conclusion

Conspiracy law saw its last major reform in the early decades of the twentieth century when sustained criticism by law professors of the idea that noncrimes could be the goal of conspiracy helped bring an end to the days when a conspiracy to commit a tort or do something immoral could be a crime.[264] In the latter decades of the twentieth century and the two that have expired in this one, scholars have undertaken a new reform agenda to stop the overuse of conspiracy charges by prosecutors.[265] I mean this Article to be part of that reform agenda and do not put my proposal forward as the sole best solution. Rather, I wish to offer my idea as one more option that judges and legislators could choose from to tackle the messy, profligate state of conspiracy law.

The focus of this Article has been the misuse of conspiracy on petty conspiracies—crimes where the group activity lacks the planning and organization that make conspiracy a distinct wrong. I argued that petty conspiracies were both a doctrinal and a moral problem. They are a moral problem because they multiply convictions without multiplying wrongs, and via *Pinkerton*, can let the prosecutor impose vicarious liability on conspirators for the acts of others that they never intended or consciously anticipated.

The breadth of conspiracy law is a doctrinal problem because it leaves conspiracy without a distinct function to play in the criminal code. Where it can be used everywhere, its function becomes a creature of the prosecutor's whims, reducing the importance of the law in determining outcomes relative to the identity of the district attorney. Moreover, it is risible for the law to treat as a conspiracy of spontaneous and unplanned criminality that just so happens to involve more than one participant. The idea that there are two separate crimes when three friends see three supporters of a rival sports team and pick a fight with them—the conspiracy and the assault—is counterintuitive and contrary

263. *See supra* notes 151–53 and accompanying text.

264. *See supra* notes 71–78 and accompanying text.

265. *See supra* notes 96–103 and accompanying text.

to the ordinary meaning of the term "conspiracy." In the course of explaining the doctrinal problem with conspiracy, I offered a defense of the continued viability of doctrinal scholarship on substantive criminal law and the positive role it can play in diagnosing and ending mass incarceration.

After identifying the problem, I offered a new substantial planning and organization requirement as the solution. This could be implemented judicially by reinterpreting the agreement element or legislatively by statutory amendment to introduce an additional element. To prove that there was intelligible content to the admittedly vague idea of substantial planning and organization, I presented seven factors that courts and juries could look at to decide whether the evidence satisfies the proposed new requirement.

The benefits of my proposed solution are the inverse of the problem: tighter, more intuitive doctrine and a reduced chance of excessively charging and sentencing petty conspirators. Furthermore, my proposal has the advantage of maintaining those features of conspiracy law that its chief defender, Neal Katyal, values most highly.

* * *

The special business of lawyers, what Max Weber called "the logical analysis of meaning,"[266] is a field where legal academics can make a unique contribution to the diagnosis and cure of society's ills. An economist can show the impact of GDP and unemployment on crime rates; a historian can trace the origins of the modern prison system to the penal farms of the segregated South; a psychologist can explain how childhood trauma leads to antisocial conduct in adults; and a philosopher like me can articulate why it is unjust to put a shoplifter in prison for five years. But only a lawyer, who lives and breathes the common law, practices its special mode of reasoning by analogy to tease the principles out of disparate cases and knows its long traditions dating back to Blackstone and Bracton can say where the law is out of order and inconsistent on its own terms.

Legal academics with expertise in other disciplines should continue to press for the changes they believe in using all their scholarly powers. But, so long as the common law retains its influence on legal decision-makers, law professors should not cease to make conventional lawyer's arguments for the improvements they think are needed in the legal system. Not only will law professors thus provide something exceptional to public and scholarly discourse, but they will also have a chance to change the minds of other lawyers—lawyers in positions of power—who do not agree with them about morality and politics but who do care about the integrity of the law and being good stewards of it.

266. 2 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 657 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Univ. of Cal. Press 1978) (1921).