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Article

*483 REQUIRING PROOF OF CONSPIRATORIAL DANGEROUSNESS

Steven R. Morrison [FNa1]

It is overwhelmingly assumed that criminal conspiracies pose a "distinct evil" that justifies criminalizing them and providing prosecution-friendly rules of evidence in their proof. Neal Kumar Katyal's defense of conspiracy law rests on this assumption, but Abraham S. Goldstein's seminal critique notes that it has never been empirically shown to be true.

This Article argues that to impose criminal liability, prosecutors ought to be required to prove a conspiracy's dangerousness. In doing so, it also provides insight into conspiracy law that Katyal and Goldstein leave unilluminated. Their opinions on conspiracy's dangerousness diverge because they assume different group data sets: Katyal views only criminal conspiracies, and Goldstein views groups in general. This Article applies a neutral, systemic analysis where theirs do not and thus generates workable, effective reforms where theirs cannot.

To support its argument, the Article places the question of conspiratorial dangerousness in the relevant history. It then establishes a theory of group conduct and applies the Condorcet Jury Theorem and theory of group polarization to demonstrate that a required showing of dangerousness could increase the criminal process's outcome reliability, enhance the law's legitimacy, conserve judicial resources, and improve public safety.

***484** I. Introduction

In his defense of criminal conspiracy law, Professor and former Acting Solicitor General Neal Kumar Katyal pointed to the "distinct evil" that are criminal conspiracies. [FN1] He was citing the United States Supreme Court decision United States v. Jimenez Recio to justify the fact that conspiracies to commit crimes may be punished whether or not the

substantive crime results and that conspiracies do, in fact, represent an evil to society separate from their substantive target crimes. [FN2] Others have echoed Katyal's observation. [FN3] Indeed, courts have long presumed that conspiracies present a distinct evil. [FN4]

Contrast this presumption of dangerousness with Abraham S. Goldstein's accurate observation that such dangerousness has never been proven empirically. [FN5] Herbert Wechsler and his colleagues in creating the Model Penal Code (MPC) worked from this fact, acknowledging that conspiracies and other inchoate crimes entail ***485** "infinite degrees of danger." [FN6] For this reason, Wechsler and his colleagues included in the MPC a mitigation provision for inchoate crimes of reduced danger. Section 5.05(2) reads:

> If the particular conduct charged to constitute a criminal attempt, solicitation or conspiracy is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this Section, the Court shall exercise its power under Section 6.12 to enter judgment and impose sentence for a crime of lower grade or degree or, in extreme cases, may dismiss the prosecution. [FN7]

Four states--Arkansas, [FN8] Colorado, [FN9] New Jersey, [FN10] and Pennsylvania [FN11]--have passed laws inspired by section 5.05(2).

The Katyalians and Goldsteinians are both correct because each assumes a different data set. Katyal described the discrete dangers of group conduct: groups tend toward extremes and submerge individuals' interests to those of the group, and individuals act with greater loyalty within the group and take more risks. [FN12] These are, however, only nonnormative descriptors of all group conduct. They say nothing about whether people in groups will tend toward extreme law-abidingness or extreme criminality. To conclude correctly that criminal conspiracies are distinct evils, Katyal must assume a data set composed of criminal groups--the very groups he defines as dangerous. His set cannot include the Elks, church congregations, running clubs, and so forth-- groups that no one can argue present distinct evils.

Goldstein's argument that dangerousness is not an inevitable characteristic of groups must assume a data set composed of all groups. [FN13] Based on his global data set, it makes sense to conclude that groups--most of which are law-abiding--overwhelmingly do not present a distinct evil. In this context, to say that groups tend toward extremes and increased individual loyalty to the group mission says nothing but that criminal groups are likely to be particularly dangerous ***486** and that all groups are simply more likely to become more of what they already are. [FN14] Because Katyal and Goldstein refer to different data sets, both of their observations about the distinct evil assumption are correct and not very useful.

Because criminal groups tend toward criminal extremes, the Katyalian exigency of criminalizing conspiracies as stand-alone crimes is more normatively correct than Goldsteinian skepticism. But this depends upon the assumption that conspiracy charges are outcome-reliable (meaning primarily that innocent people are neither charged nor convicted). Critiques of conspiracy law from both the academy [FN15] and judiciary [FN16] suggest that this assumption is unfounded. These critiques amount to four points: the inchoate nature of conspiracy results in evidentiary uncertainties that lead to false convictions; [FN17] the use of conspiracy to pursue politically unpopular groups provides an initial negative assumption as to the legitimacy of many conspiracy indictments; [FN18] relaxed evidentiary standards in the conspiracy context ***487** undermine assurances of outcome reliability; [FN19] and the application of conspiracy law implicates First Amendment [FN20] and Confrontation Clause [FN21] concerns, meaning that convictions may be obtained in violation of defendants' constitutional rights and may therefore be unreliable as well. [FN22]

Reforms are called for that ensure the continued functioning of conspiracy law while bolstering its outcome

reliability. This Article responds, arguing that prosecutors should be required to make a dangerousness showing before criminal liability for conspiracy may attach. Such a required showing would not hinder the prosecution of dangerous Katyalian conspiracies, but would, in proper Goldsteinian form, effectively distinguish between dangerous and nondangerous conduct and would also increase outcome reliability because dangerous group conduct is much more likely to comprise a criminal conspiracy than nondangerous group conduct.

In arguing for a required showing of dangerousness, this Article provides insight into the various types of group conduct--innocent combinations, nondangerous conspiracies, and dangerous conspira-cies--and creates a neutral structure for adjudicating conspiracy charges in ways that satisfy venerable criminal law norms. This structural approach avoids the normative Katyalian confirmation bias that tends to view all suspicious group conduct as criminal ***488** conspiratorial conduct. This approach also avoids the opposite Goldsteinian bias, which may lead to a failure to indict and convict people for dangerous conspiracies.

Wechsler and his colleagues, as well as the Arkansas, Colorado, New Jersey, and Pennsylvania legislatures, recognized the value of a required showing of dangerousness. These legislative moves demonstrate the workability of the required showing. Although this showing would amount to an external check on a system of law that has many internal flaws, it is an important check that can increase outcome reliability. It can also increase efficiency by harmonizing the work of the criminal justice system with the pursuit of public safety; by requiring a showing of dangerousness, prosecutorial, defense, and judicial resources will be channeled to address truly dangerous conspiracies, thus increasing the level of public safety, and away from prosecuting group conduct that poses no danger to society.

Part II of this Article sets forth the history of conspiracy as a distinct evil. This Part provides the important historical background, but also suggests that because the distinct evil assumption is a historical product, its universal application to all groups at all times cannot be applied reliably. Part III sets forth five types of conduct that are important to understanding the proposed required dangerousness showing. The Article then discusses the prevalence of conspiracy law, as well as the Condorcet Jury Theorem and the theory of group polarization, to illustrate why conspiracies are not necessarily dangerous and why they may even tend to be nondangerous. This Part also shows why requiring a dangerousness showing would uphold criminal law norms and have other positive effects. Part IV discusses the MPC and the four state statutes regarding dangerousness. It shows that this Article's proposal is both useful and capable of being implemented with minimal disruption to the criminal justice system. This Article reaches three conclusions: (1) conspiracies are not per se dangerous, but where they are dangerous, they may be especially so; (2) the controversial outcomes associated with conspiracy charges call for systemic reform; and (3) reform that is focused on dangerousness addresses a central concern of conspiracy law critics and is possible, nuanced, and useful. In the conclusion, I suggest four moves that can effect this reform.

II. History

The distinct evil assumption emerged in a specific nineteenth-century historical context, so we ought to hesitate to conclude that all ***489** alleged conspiracies pose a distinct evil. Pre-nineteenth-century history, moreover, indicates that conspiracy was not generally seen as a distinct evil or punishable in itself.

A. Conspiracy's Origin: 1285-1305

The documented history of conspiracy law begins with a handful of Edwardian statutes, [FN23] dating from 1285 [FN24] to 1305. [FN25] During this period, conspiracy law was limited in two important ways. First, substantively, it

specifically applied only to abuses of legal process. The 1304 Definition of Conspirators defined conspirators as "they that do confeder or bind themselves by oath, covenant or other alliance that every of them shall aid and support the enterprise of each other falsely and maliciously to indite, or cause to be indited, or falsely to acquit people, or falsely to move or maintain pleas." [FN26] Second, philosophi-cally, the law was what I call "consequentialist," meaning that for liability to attach, the target crime of the conspiracy had to be realized. Thus, for example, an action by writ of conspiracy would be successful only if a person who was the target of a conspiracy to bring a false indictment had actually been indicted and acquitted. [FN27] One commentator noted that at its origin, conspiracy was "an offence of a strictly limited nature, embedded in the early system of legal procedure, and created to give a remedy for the abuse of a very small part of that system." [FN28]

B. The Deontological Shift: 1486-1611

By 1486, the potential threat to public safety associated with the consequentialist philosophy of conspiracy law was recognized, and what I call a "deontological" shift was underway, meaning that the conspiracy itself became actionable and the substantive crime need not have been committed. In that year, a conspiracy statute provided that "by the law of this land if actual deeds be not had, there is no remedy for such false compassings, imaginations, and confederacies against ***490** any Lord . . . and so great inconveniences might ensue if such ungodly demeanings should not be straitly punished before that actual deed be done." [FN29] Although the substantive focus continued to be on false prosecutions, the turn was toward condemning the conspiracy itself, rather than the executed result. [FN30] The turn, however, was not complete for many centuries. By the 1600s, then, two streams had emerged. An action of conspiracy could be brought for the deontological wrong of the conspiracy itself. [FN31] An action upon the case, in turn, could be brought for the executed result, with the conspiracy being an aggravating fact. [FN32]

During the fourteenth and fifteenth centuries, the English Court of Star Chamber worked to evolve conspiracy law. [FN33] In 1611, that court decided the Poulterers' Case, which is a watershed conspiracy case. [FN34] In the Poulterers' Case, the Star Chamber held finally that a bare conspiracy was punishable independent of any act done in execution of it. [FN35] The goal was, of course, to prevent the conspiracy's potential harm from being realized. [FN36]

Although the Poulterers' Case holding is a definitive statement of the deontological thread of conspiracy law that had existed prior to the case, its final authority was established only in subsequent rulings. [FN37] Its deontological turn has, post hoc, achieved the authority that created and informs common law conspiracy today. This is not to say that the Poulterers' Case settled the matter. Consequentialism retained currency throughout the seventeenth century in England [FN38] and even into the nineteenth century in the United States. [FN39] By furthering the deontological turn, however, the Poulterers' Case took conspiracy law away from targeting clearly dangerous and operative conspiracies and ***491** toward enabling the prosecution of many conspiracies and apparent conspiracies that may not in fact be dangerous.

C. The General Shift: 1611-Seventeenth Century

At the same time, the Poulterers' Case spurred a substantive move away from attaching conspiratorial liability only to combinations to abuse the legal process. This was a move toward a general theory that would prohibit conspiracies to commit any crime whatsoever. [FN40] As a result, one commentator has called deontological and general conspiracy law the "Seventeenth Century Rule in Conspiracy." [FN41]

D. The Moral Shift: 1717-1832

The Seventeenth Century Rule resembles conspiracy law today. The Hawkins and Denman doctrines, however, added glosses that have confused and upset conspiracy law since their appearance. In 1717, Lord Hawkins asserted that to be punishable, conspiracies do not need to contemplate criminal acts only, but may also aim at "wrongful" conduct. [FN42] Similarly, Lord Denman in 1832 asserted, "[A] criminal conspiracy consists in a combination to accomplish an unlawful end, or a lawful end by unlawful means." [FN43] This brief announcement left for interpretation the meaning of the word "unlawful" and allowed for a moral turn in the law that enabled an expansive definition of what is a "dangerous" conspiracy. [FN44] In 1870, therefore, one court held, "It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful." [FN45]

E. The Rise of Labor and the Distinct Evil Assumption: Nineteenth Century

Courts would quickly refute this moral turn, but the gloss remained as courts began to struggle with the rise of labor in the nineteenth century. For the first time, large combinations of workers could apparently affect large swaths of the economy by engaging in action that would be legal if done individually. As the country entered ***492** the Lochner Era, courts clothed economic questions in the garb of moral imperatives, such as the freedom to bargain and the right to provide for one's family. [FN46] Conspiracy law was an integral part of this.

The history of conspiracy law suggests no basis for concluding that conspiracies are a distinct evil. Quite the contrary: originally, the law cared only about the substantive result. Having emerged in England in the thirteenth and fourteenth centuries, [FN47] the distinct evil assumption adhered to conspiracy in nineteenth-century United States, in response to the rise of the labor movement.

Economic structures in the United States underwent major changes in the nineteenth century that ultimately resulted in labor-capital strife and a fear of combinations. At the beginning of the century, early labor combinations were viewed under the Tudor Industrial Code, a Lochnerian theory that "viewed any combination of workingmen to improve their wages or conditions as a criminal conspiracy." [FN48] At that time courts, hostile to the labor movement, [FN49] were interested in preventing restraint of trade. [FN50]

As the nineteenth century progressed, rapid economic development, [FN51] the explosion of industrial growth, and the development of a national market [FN52] drove the migration of young people from rural to urban areas in search of work in plants, factories, mines, and other businesses. [FN53] These workers became more vocal about their own discontent [FN54] as they sought rights such as the eight-hour workday from the new corporations for which they worked. [FN55] The discourse began to change [FN56] as Lochnerian theories about restraint of trade started to give way to the right of laborers to associate. [FN57] Industrial capitalism in factories allowed skilled workers to determine to a significant degree ***493** the rate at which surplus value could be produced and the proportions in which it was distributed as wages and profits. [FN58] Capital ultimately did not accept this push and pursued its own interests. It found no relief in legislatures, which were generally populated in the late nineteenth century by progressive and farmer-labor coalitions. It therefore turned to the courts, [FN59] which applied conspiracy law to regulate against labor. [FN60] The Massachusetts Supreme Judicial Court was the first, in 1842, [FN61] to declare that labor unions were legal, [FN62] but both before then and after, the possibility of "riotous" and therefore illegal and dangerous combinations occupied judges' minds. [FN63]

From the beginning, American criminal courts were primarily concerned with harms that affected the public interest. In 1802, the Supreme Court of New Jersey held that moving the corner stone in a boundary line between two private properties was not indictable. [FN64] It was, rather, a private trespass, for which civil relief was available. In dicta, the

court noted that conspiracies that do not affect the public interest are also not indictable. [FN65] In 1807, the Massachusetts Supreme Judicial Court held that a conspiracy to manufacture inferior indigo was indictable, even if the product was never sold. [FN66] In support of its holding that the conspiracy may be indicted without an overt act, the court wrote that "combinations against law are always dangerous to the public peace and to private security." [FN67]

This was only the first word on the distinct evil question. In 1821, the Court of Appeals of Maryland held that a conspiracy might be charged even if the substantive crime was not achieved. [FN68] It so held, however, not because conspiracies are dangerous in themselves, but because "the law punishes the conspiracy, 'to the end to prevent the unlawful act.'" [FN69] There was, then, no consensus that conspiracies were ***494** distinct evils. Rather, the consequentialist concern was that a conspiracy could lead to an actual injury. Furthermore, if some conspiracies were dangerous in themselves, there was no consensus that they all were. In the Supreme Court of Pennsylvania in 1822, an attorney argued that conspiracies "in which the public were concerned" were indictable, but that those effecting a "private injury" were not subject to criminal sanction. [FN70] Both of these countervailing views were on display in the Court for the Correction of Errors of New York in 1827. In Lambert v. People, the New York court considered an indictment for conspiracy to defraud a company. [FN71] One judge concluded that an indictment could not lie for a conspiracy that does not affect the public, and another noted that conspiracy was indictable not for the conspiracy itself, but for the object that it was intended to effect. [FN72]

Despite these two countervailing views, the Lambert court concluded, "Combinations against individuals are dangerous in themselves, and prejudicial to the public interest." [FN73] This was seconded by the Superior Court of Judicature of New Hampshire in 1844. [FN74] That court collapsed conspiracies with public and private harms into one category, concluding, "Combinations against law or against individuals are always dangerous to the public peace and to public security." [FN75] The court then provided a defense of conspiracy law that foreshadowed contemporary defenses such as Katyal's. [FN76] Other cases during this time period mention the risk that conspiracies might "seduce" people into criminality. [FN77] And so, the notion that conspiracies are a distinct evil emerged in embryonic form.

As the country moved toward the 1880s, evidence emerged to reinforce the distinct evil notion. Attempts to form national trade unions began in the 1850s and resulted in more than thirty such unions in 1873. [FN78] By 1886, the Knights of Labor had 730,000 members, [FN79] ***495** sympathy strikes and communitywide boycotts flourished, [FN80] and on May 1, 350,000 laborers from coast to coast joined in a coordinated general strike for the eight-hour day. [FN81] The International Working People's Association, which formed in 1883, "rejected the political and incremental methods of its socialist predecessors and instead pledged itself to immediate revolutionary change by any means." [FN82] Some in the labor movement proposed "engaging in dramatic acts of violent resistance against state authorities," which included targeting the church, government, elections, courts, jails, bankers, policemen, and bosses as targets in a war of class liberation. [FN83]

Given the rise of labor and push-back from capital and the courts, violence seemed inevitable. "[L]abor militancy was alive and well," [FN84] as evidenced by a German workers' militia, which in 1877 "could marshal four companies with several divisions (each with forty men). Its officers explained that the militiamen would act only if workers' constitutional rights were violated." [FN85] The same year saw the largest strike up to that time in U.S. history. [FN86] This event began with walkouts of railroad crews on the Baltimore and Ohio lines, followed the next day by an armed clash at Martinsburg, West Virginia. [FN87] At the railroad's request, the governor deployed the state militia, which killed a locomotive fireman. As news of this spread, strikers garnered support from townspeople, farmers, and two companies of the state militia. President Rutherford B. Hayes sent in federal troops. Around the country, 20,000 troops were on riot duty and between 200 and 400 people died. [FN88]

Memories of the 1877 violence had to persist when the Haymarket Riot broke out in 1886. [FN89] On May 1, a mammoth general strike for the eight-hour workday began at the McCormick Reaper Works in Chicago. [FN90] Two days later, police charged a line of union ***496** members, killing two and wounding others. [FN91] The next day, on May 4, labor groups organized a rally at Haymarket Square. As police approached the protesters, someone threw a bomb that killed a policeman and wounded others. [FN92] Police opened fire, and some workers responded with gunfire of their own. Several people died and scores were injured. [FN93]

The Haymarket bombing, and the subsequent conspiracy trial of anarchist August Spies and others, created fear and political paranoia [FN94] and sparked the country's first red scare. [FN95] One judge in 1886 accused noncitizen labor agitators of "socialistic crimes" that were "gross breaches of national hospitality." [FN96] The Chicago Tribune was blunter, holding "aliens" responsible for the Haymarket deaths and calling on the government to deport the "ungrateful hyenas" and exclude other "foreign savages who might come to America with their dynamite bombs and anarchic purposes." [FN97] It seemed that the country was in a new civil war [FN98] against trade unionists as "irresponsible" and "alien" troublemakers. [FN99]

This notion solidified in the 1880s, as labor unions, corporations, and Lochnerian champions of laissez-faire economics and one-sided views of individual freedom rose to prominence. For the first time, large combinations of groups could collectively perform very harmful acts, which, if done individually, would be legal and harmless. Such acts included forming trusts and monopolies, against which the Sherman Antitrust Act of 1890 was passed, and operating strikes, walkouts, and boycotts, the criminality of which courts struggled to determine. [FN100] For the first time, conspiracies were seen as an existential threat to the nation.

The rhetoric of judicial opinions reflected this fear. In 1887, the Connecticut Supreme Court, then the Supreme Court of Errors of Connecticut, considered the legality of a conspiracy of workmen to ***497** boycott their company and distribute flyers. [FN101] Affirming the conviction, the court wrote, "The exercise of irresponsible power by men, like the taste of human blood by tigers, creates an unappeasable appetite for more." [FN102] If boycotts and distribution of flyers were legal, said the court, "The end would be anarchy, pure and simple." [FN103] The court took a Lochnerian turn, noting that the boycott was actually a combination not against capital, but against the defendants' fellow laborers. The capitalist may be driven from his business, said the court, but he has other resources. The "poor mechanic, driven from his employment, and, as is often the case, deprived of employment elsewhere, is compelled to see his loved ones suffer or depend upon charity." [FN104] Conspiracies become "subversive of the rights of others, and the law wisely says it is a crime." [FN105]

A series of subsequent cases involving labor and capital echoed the Connecticut Supreme Court's opinion. [FN106] For example, an Ohio court, the Superior Court of Cincinnati, considering a labor boycott, wrote, "[I]t is clear that the terrorizing of a community by threats of exclusive dealing in order to deprive one obnoxious member of means of sustenance will become both dangerous and oppressive." [FN107] Such a conspiracy "will be restrained and punished by the criminal law as oppressive to the individual, injurious to the prosperity of the community, and subversive of the peace and good order of society." [FN108] The distinct evil assumption appeared for the first time in a criminal law treatise, in 1897, [FN109] citing for support United States v. Cassidy, a conspiracy case against railway employees in the great Pullman Strike of 1894. [FN110]

***498** The distinct evil assumption emerged, therefore, in a specific historical context and in response to what people believed was an existential threat posed by labor unions and, to a lesser extent, corporations. As Goldstein noted, the distinct evil assumption was, and remains, unsupported by empirical data. It also shares with conspiracy law itself a "chameleon-like" hue, whose color changes with the unpopular group du jour. [FN111] The point is not that no

conspiracies are dangerous, but that not all of them are. In hindsight, one can discern a clear pattern of abusive or good-faith-but-mistaken conspiracy prosecutions. The distinct evil assumption encourages both.

Although nineteenth-century labor strife subsided, the distinct evil assumption did not. These early labor conspiracy cases became part of a "unified legal history stretching into the twentieth century." [FN112] The Hawkins doctrine, which criminalized conspiracies to engage in "wrongful" conduct, [FN113] continued to influence these prosecutions, [FN114] and "questionable practices [used during the Spies Haymarket trial], such as extensively using speeches and publications as evidence [and] viewing coconspirators as equal to principals . . . remain features of the judicial order in the twenty-first century." [FN115] Protestors in the 1880s, such as Eugene Debs, kept speaking and agitating into World War I, when a patriotic fervor swept the country and the government suppressed all types of protests, including strikes and May Day marches. [FN116] Although the use of conspiracy against the labor movement was gradually replaced by the injunction, [FN117] its successes were obvious, and its use was turned in the twentieth century to socialist and anarchist antiwar protestors and communists.

III. Theory

Is it possible that courts in the nineteenth century recognized for the first time conspiracies' truly distinct evil? If this is so, then ***499** normative condemnation of conspiracies qua conspiracies is justified. Recent "wisdom of the crowd" literature questions this possibility. [FN118] To show how, it is necessary first to establish the continuum upon which group conduct takes place as it relates to criminal conspiracy, as well as to discuss the prevalence of conspiracy charges and the outcome reliability problems associated with them.

A. The Continuum of Group Conduct

Six types of conduct relevant to conspiracy law form a continuum of group conduct. They are (1) individual and innocent conduct, (2) obviously innocent combinations, (3) apparently illegal but factually legal combinations, (4) nondangerous actual criminal conspiracies, (5) dangerous actual criminal conspiracies, and (6) substantive crimes. An example of number (1) conduct is a single person performing a legal act, such as purchasing groceries. If two people jointly agree to purchase groceries, they engage in number (2) conduct. If one or more people commit a substantive crime, such as robbing the grocery store, they engage in number (6) conduct (and may also commit conspiracy to rob the store). This Article is concerned primarily with numbers (4) and (5) conduct, and their external effects on the justice system's response to number (3) conduct.

The MPC and the four state statutes discussed below share a common definition of dangerousness, which this Article adopts. That is that a conspiracy is not dangerous when it "is so inherently unlikely to result or culminate in the commission of a crime that neither that conduct nor the offender presents a public danger." [FN119] In turn, a conspiracy is dangerous when it may result or culminate in the commission of a crime such that the conduct or the offender presents a public danger.

1. Number (4) Conduct: Nondangerous Actual Criminal Conspiracies

Number (4) conduct involves nondangerous actual criminal conspiracies. In 2002, for example, Ali Sher Khan was convicted of conspiracy to commit bulk-cash smuggling, making false statements, and conspiracy pursuant to 18 U.S.C. § 371. [FN120] Khan and two friends, legal immigrants from Pakistan, were engaged in the chicken ***500** restaurant business. [FN121] The three men intended to travel to Pakistan with money for their relatives, and they packed $293,266

in the interstices of Khan's bags. As the men were about to board the airplane, U.S. government representatives asked Khan to declare any cash he was carrying over $10,000. He said that he was carrying $12,800. There was no hint that this money was intended to fund terrorism or was involved in any other illegal activity. [FN122] The government appealed the sentence to United States Court of Appeals for the Second Circuit, but the defendants did not appeal the convictions themselves. [FN123] On remand, the district court concluded that despite Khan's conspiracy conviction, there was no conspiracy for purposes of sentencing. [FN124] In so finding, the court noted that the men were "not dangerous collaborators in crime, but individuals trying to do a good turn to their former countrymen and relatives. There [was] no reason to treat [Khan] as a dangerous conspiring gang member." [FN125]

Number (4) conduct often also includes politically tinged and therefore controversial conspiracies. For example, in 2011, eleven conspiracy defendants had their charges dropped and six pled guilty in connection with the protests during the 2010 G20 summit in Toronto. [FN126] All seventeen were initially charged with conspiracy even though none of them took part in the riots and none of their statements contributed to property damage or obstruction of police work. [FN127]

Number (4) conduct may also include conspiracies that are characterized more by their bluster than their obvious or true intent to commit a criminal act. In 2006, Tarik Shah was charged with conspiracy to provide material support to Al Qaeda. [FN128] Shah pled guilty to this charge. [FN129] Shah's arrest was the result of an FBI sting, which revealed Shah to be "a boastful, albeit somewhat bumbling, man, an almost inconceivable mix of bassist, ninja and would-be terrorist." [FN130] ***501** Shah allegedly agreed to provide Al Qaeda members with martial arts training, but the plot was almost entirely talk; no weapons were bought, and no martial arts training took place. Shah seemed more of an "angry braggart" who described himself as "doggone deadly." [FN131] He expressed interest in opening a martial arts studio, where he could teach people how to use swords, "knives and stars and stuff like that." [FN132] For a year, the FBI worked on Shah, who, as an accomplished jazz bassist, was busier with exercising, playing music, and nearly booking a show with the current incarnation of The Platters. Shah eventually pledged his support to Osama bin Laden, but then turned his attention to the two jazz shows he had back to back. He was arrested a week later. [FN133]

2. Number (5) Conduct: Dangerous Actual Criminal Conspiracies

Number (5) conduct involves clearly dangerous conspiracies. Such conspiracies can be shown to be dangerous by, for example, the commission of the substantive target crime, the commission of other crimes related to the conspiracy, the potential danger of the defendants themselves, or an overt act that clearly indicates progress toward commission of the target crime. The myriad ways that number (5) conspiracies can be shown to be dangerous suggests that if there is a danger, prosecutors will readily be able to prove it. Number (5) conspiracies, furthermore, comprise the majority of conspiracy cases, and are normally uncontroversial, because they demand justice and prosecutors for the most part seek justice.

In United States v. Milton, for example, Gregory Milton was convicted of conspiracy to traffick in crack cocaine. [FN134] Drug deliveries were actually made, [FN135] making this a number (5) dangerous conspiracy because the substantive crime was committed and because that crime entailed physical danger. Milton also, however, fell into an argument with a coconspirator about money that Milton believed he was owed. As a result, Milton robbed the coconspirator by breaking into his home, tying him up, beating him, and ultimately shooting him to death. [FN136]

***502** Number (5) conspiracies need not be physically dangerous; they may simply present a danger of the substantive crime being committed. In United States v. Brummett, James Brummett pled guilty to conspiring to traffick illegally in stolen cactus plants. [FN137] In that case, cacti were actually trafficked, comprising the substantive offense. [FN138]

Brummett was also a manager in this conspiracy, [FN139] suggesting the danger that he may have posed above that of the conspiracy.

Some might place Brummett in the number (4) category because stealing cacti does not seem to present a much greater danger than transporting over $10,000 internationally, as in Ali Sher Khan's case. There are a few important differences that bear mentioning. First, Brummett's criminal intent was clear, where Khan's was not obvious. Second, Brummett's crime deprived others of property, and so was a malum in se crime, where Khan's was more akin to a regulatory violation, and so was malum prohibitum. Third, Brummett was a manager of the conspiracy, where Khan appeared to be equal to his friends. Finally, Brummett's motive for committing the crime was apparently personal gain, where Khan's was to help out his countrymen and relatives with money he had legally earned. While this list of distinctions is probably not exhaustive, it should help to show both that number 4 and number 5 conduct can often be similar, but that there are nevertheless substantive differences between the two.

3. Number (3) Conduct: Apparently Illegal but Factually Legal Combinations

Number (3) conduct involves combinations of people that appear to be criminal, but ultimately are found not to be. In 1967, for example, Benjamin Spock and three others were convicted of conspiracy to counsel, aid, and abet draftees to avoid military service. [FN140] Their conduct consisted of producing a document, “A Call To Resist Illegitimate Authority,” and an accompanying cover letter requesting signatures and support and speaking at a press conference in New York City to launch the movement. [FN141] The men also attended a demonstration in Washington D.C. in a failed attempt to present ***503** collected draft cards to the Attorney General of the United States. [FN142] The United States Court of Appeals for the First Circuit in United States v. Spock vacated the convictions of Spock and a second defendant, [FN143] even though their conduct was intertwined with that of the other two men, for whom the First Circuit ordered new trials. The First Circuit's vacation was based on the district court's failure to abide by the principle of strictissimi juris in the context of “bifarious” conduct, meaning that it had a protected First Amendment component and an unprotected conduct component. [FN144] It is notable that the First Circuit did not reject the possible existence of a conspiracy entirely, but did find that Spock was not a part of one. In so finding, the court implicitly invoked the often obscure border between number (3) conduct and numbers (4) or (5) conspiracies. The Spock opinion was exceptional for its nuanced analysis of conspiracy law and how to prove conspirators' mens rea, something that most other courts considering such charges rarely evince. A dangerousness requirement would provide a more consistent and certain mechanism for dividing number (3) conduct from actual conspiracies, whether dangerous or not.

B. Why a Dangerousness Showing Should Be Required

Based on the prevalence and sustained criticism of conspiracy charges, it is likely that a substantial number of charges and ultimate convictions are based on numbers (3) and (4) conduct. [FN145] In 1980, Professor Paul Marcus suggested that severe problems persist in defending conspiracy cases, particularly in light of the frequency of the conspiracy charge at the federal level. [FN146] Between 1980 and 1990, conspiracy was in a group of offenses that constituted between 36% and 67% of the total criminal matters prosecuted in U.S. district ***504** courts. [FN147] In 1990, Judge Easterbrook of the United States Court of Appeals for the Seventh Circuit lamented that conspiracy charges are “inevitable because prosecutors seem to have conspiracy on their word processors as Count I; rare is the case omitting such a charge.” [FN148] Most recently, in 2003, Katyal suggested that more than 25% of all federal criminal prosecutions and a large number of state cases involved prosecutions for conspiracy. [FN149]

Many of these conspiracies may not be dangerous, evidenced by the fact that charging decisions have often not been based on a concern for public safety. In 1977, Marcus published the results of a comprehensive survey on conspiracy that

he performed of prosecutors, defense counsel, judges, and law professors. [FN150] Most notable of the prosecutors' answers were:

• 69% believed that conspiracies were neither per se more or less dangerous and that their dangerousness depended upon the facts. [FN151]

• 62.8% brought conspiracy charges where the target offense had been completed or attempted in order to obtain evidentiary advantages. [FN152]

• 35.3% brought conspiracy charges in order to obtain advantages in connection with plea bargaining. [FN153]

• 28.4% believed that doing away with conspiracy charges and replacing them with attempt charges would have little or no effect on convictions. [FN154]

• 30.3% believed that requiring a "substantial step" toward commission of the substantive crime for purposes of the overt act would have no effect on convictions. [FN155]

These responses suggest two things. First, altering conspiracy law by either eliminating it or enhancing prosecutors' burden of proof would not substantially negatively affect the rate of convictions. Second, ***505** conspiracies are not per se dangerous [FN156] and are often charged for reasons other than prosecutors' belief that they are dangerous. By requiring a dangerousness showing, therefore, it is possible that innocent groups would be protected from conviction and criminal conspirators would be convicted at similar (probably high) rates. Such a showing would amount to a regulation that encourages two normatively good results. First, it would ensure that number (3) (legal) combinations are separated from number (4) (criminal) conspiracies and result in acquittals or dismissed charges for the former. Second, it would encourage a separation of number (4) (nondangerous) conspiracies from number (5) (dangerous) conspiracies and a shifting of prosecutorial attention toward the latter. Prosecutorial, defense, and judicial resources would be diverted to dealing primarily with conspiracies that implicate public safety. The cost of obtaining the public safety benefit associated with increased prosecution of number (5) conspiracies would be reduced prosecution of nondangerous number (4) conspiracies. In a world of limited resources, [FN157] overcriminalization generally, [FN158] and the routine application of conspiracy law specifically, this is a result that society can abide.

C. Why Most Group Conduct Is Not Dangerous

The reason that so much group conduct--whether innocent combinations or criminal conspiracies--might not be dangerous lies in the Condorcet Jury Theorem, which states that the probability of a group producing the "correct" answer increases toward 100% as the size of the group increases, provided that the majority's decisions prevail and that each person is more likely than not to be correct. [FN159] If the best answer in the context of criminal law is to be law-abiding and ***506** nondangerous, the second-best answer is to withdraw from a formed conspiracy and remain nondangerous, and the third-best answer is to be steadfastly criminal but still nondangerous (so to avoid detection, a harsher sentence, harm inflicted on oneself by law enforcement, and the internal moral-psychological stress associated with being a source of potential harm), then groups in general should tend toward being law-abiding and nondangerous.

The Condorcet Jury Theorem depends upon a majority of the group having adequate knowledge to recognize the "correct" answer, and criminals are not known for being rational economic actors who possess adequate knowledge of the "correct" answer. [FN160] Nevertheless, they do possess the knowledge and often the intent to mitigate the dangerousness of their crimes, for the above-stated reasons. To the extent they want to minimize the danger they present

(and therefore the risk of being caught and punished and thus the potential cost of doing criminal business), they drift toward being law-abiding or at least nondangerous. If they achieve the quality of nondangerousness envisioned in this Article, the MPC, and the four states, the law should reward them. A required showing of dangerousness is, therefore, a regulation that encourages criminal conspirators to act safely and, at extremes, renounce criminality altogether.

The theory of group polarization supports this assertion. The theory states, "[M]embers of a deliberating group move toward a more extreme point in whatever direction is indicated by the members' predeliberation tendency." [FN161] Thus, a group of people who tend to believe that honest labor is the best way to earn money will, in a group setting, tend to reinforce this view in one another. A group of people who tend to believe that it is right to take money from someone else if they can get away with it will tend to reinforce one another's potentially criminal tendency. A group of people who wish to engage in concerted criminal activity but avoid harm will tend to reinforce individuals' aversion to presenting a danger.

While the Condorcet Jury Theorem implies that the "wisdom of the crowd" will result in the correct answer and group polarization ***507** assumes no normative advantage to group thinking, both of these theories suggest that conspiracies are not per se dangerous. Only the dangerous ones are dangerous; the group members, prior to entering the conspiracy, may have already determined the outcome of the group conduct, whether it results in no conspiracy forming, a vacuous conspiratorial agreement with no overt act, ultimate renunciation of a formed agreement, the performance of the conspiracy's intended substantive act, or violence or other harms accompanying that performance. An a priori assumption of conspiratorial dangerousness is, therefore, erroneous. A requirement to prove dangerousness reflects the complexity of group conduct and would make conspiracy law respond better to actual criminal events. It would also direct prosecutorial and judicial resources toward the most dangerous of crimes and provide an incentive to groups to move toward nondangerousness. Even if a group ultimately does not meet this Article's definition of nondangerousness, the requirement could have the positive external effect of nudging groups toward it. As a regulation on harmful group behavior, the requirement would operate to make criminals smarter, that is, more aware that the "correct" answer is at least to be nondangerous.

D. Further Benefits of a Dangerousness Showing Requirement

A dangerousness requirement would also serve to legitimize conspiracy law. It would police the wide margin between clearly dangerous criminal conspiracies and group combinations that tend toward law-abiding extremes, and so do not come to the attention of law enforcement. Groups in this margin are number (3) combinations and number (4) conspiracies. They may form around quotidian interests and then drift toward criminality. They may flirt with forming a criminal conspiracy, and they may actually do so. Undercover law enforcement agents may have goaded them into these conspiracies. [FN162] They may then think twice, realize they were not serious, or simply forget about their tentative agreement. In such cases, their conspiracy will have been criminal, but it was not dangerous. A required showing ***508** of dangerousness would limit broad prosecutorial discretion, which in "close call" conspiracy cases produces either serious outcome unreliability or, just as concerning, public perception of prosecutorial bad faith.

Prosecutions within the numbers (3) and (4) margin raise trenchant critiques of conspiracy law. [FN163] In this margin are found the most politically motivated of conspiracy charges. [FN164] Such cases include the Abrams v. United States, [FN165] Schenck v. United States, [FN166] and Frohwerk v. United States [FN167] trilogy after World War I; Dennis v. United States [FN168] and Yates v. United States [FN169] in the World War II era; and, more recently, United States v. Al-Hussayen, in which a Muslim man was tried and acquitted of conspiracy to provide material support to Hamas. [FN170] Government stings of would-be Islamist terrorists also create skepticism about conspiracies'

dangerousness and the legitimacy of these stings. [FN171] Conspiracies that have more bluster than criminal intent reside in this margin. These prosecutions also threaten defendants' constitutional and evidentiary rights. Because conspiracies are seen as a distinct and potent evil, evidentiary rules are relaxed: coconspirator statements are admissible against a defendant [FN172] with limitations only a prosecutor could love; [FN173] agreements can be ***509** inferred; [FN174] overt acts are often not required; [FN175] First Amendment rights are threatened, [FN176] as are Sixth Amendment confrontation rights; [FN177] and, normatively, acts that produce no harm are criminalized. [FN178] Not only would a dangerousness requirement improve the rate of accurate and just criminal procedure outcomes; it would also encourage prosecutors to think twice before pursuing cases that in hindsight appear to be politically motivated. This would legitimize the law of conspiracy and contribute to law enforcement efforts by encouraging individuals to report others in their community for suspicious activities. In short, conspiracy prosecutions would become fairer and, just as important, they would be increasingly perceived as fair by the public.

IV. Practice

As noted above, the MPC contains a provision that downgrades conspiracies that present little danger and allows courts to dismiss prosecutions in extreme cases. [FN179] Four states have followed the MPC's lead with related statutes. These legislative moves suggest that requiring prosecutors to prove dangerousness is a workable proposal. They, coupled with prosecutors' responses in Professor Marcus's survey, [FN180] imply that such a requirement would not undermine the ***510** public safety function of the criminal law and would likely lead to more just outcomes and efficient conservation of prosecutorial, defense, and judicial resources.

A. State Laws Requiring Dangerousness

Arkansas's statute provides an affirmative defense to a prosecution for attempt, solicitation, or conspiracy where the conduct charged is "inherently unlikely to result or to culminate in the commission of a crime" and "[n]either the conduct nor the defendant presents a public danger warranting imposition of criminal liability." [FN181]

Colorado's statute grants courts the power to downgrade or dismiss a conspiracy charge where "the particular conduct charged to constitute a criminal conspiracy is so inherently unlikely to result or culminate in the commission of a crime that neither that conduct nor the offender presents a public danger." [FN182] Pennsylvania's statute is nearly identical. [FN183]

New Jersey's statute is unique. It reads:

> b. Mitigation. The court may impose sentence for a crime of a lower grade or degree if neither the particular conduct charged nor the defendant presents a public danger warranting the grading provided for such crime under subsection a. because:
>
> (1) The criminal attempt or conspiracy charged is so inherently unlikely to result or culminate in the commission of a crime; or
>
> (2) The conspiracy, as to the particular defendant charged, is so peripherally related to the main unlawful enterprise. [FN184]

All four state statutes and the MPC provide for a downgrade or dismissal when both the conspiracy and the conspirators pose no danger. This dual requirement responds to Katyal's concern that conspiracies themselves are dangerous and that individual participants may, as conspirators, assume new and more dangerous individual identities. [FN185] As the Supreme Court put it, "[C] onspiracy poses a 'threat to the public' over and above the threat of the

commission of the relevant substantive crime . . . because the '[c]ombination in crime makes more likely the commission of [other] crimes."' [FN186] What the ***511** MPC and state laws suggest is that the danger conspiracies pose is not as monolithic as Katyal and the Court believe and that nuanced limitations to the law's application are possible without eviscerating its public safety function.

B. The Disuse of These State Laws

Despite their promise, these four state dangerousness statutes have virtually never been the topic of sustained or formal legal argument. Arkansas has seen one solicitation case in which the court denied a jury instruction on dangerousness; [FN187] in Pennsylvania, a defendant moved to dismiss a solicitation charge on dangerousness grounds; [FN188] and Colorado has seen no such case. A New Jersey case mentioned its dangerousness statute in combination with the fact that, pursuant to the New Jersey Code, there can be no guilty verdict on both conspiracy and its substantive offense if the conspiracy has no objective beyond that offense. [FN189] None of these cases offers a sustained discussion of dangerousness in the conspiracy context.

These statutes have, therefore, not been used in their intended, formal ways-- as affirmative defenses, bases for motions to downgrade or dismiss a charge, or as mitigation at sentencing. When I interviewed them for this Article, a number of experienced criminal defense attorneys in the four states informed me that they had never heard of these dangerousness statutes. This suggests that the statutes not only have no formal effect, but also have little informal effect. Despite this, there are a number of potential informal applications that can be mentioned. These informal uses include application of the statutes as mechanisms to nudge or obtain leverage during pretrial or precharge negotiations with prosecutors. They may, for example, be effective deterrents to a criminal charge, and they may provide the prosecutor with the justification one needs to drop an unsavory case.

One very experienced defense attorney in Arkansas told me that his state simply does not charge conspiracies. [FN190] He suggested at least two reasons for this. First, state prosecutors are more likely to charge attempt rather than conspiracy if multiple defendants engage in inchoate conduct. This is so, he said, because under Arkansas's law prohibiting inconsistent verdicts, if one of two defendants is acquitted ***512** of conspiracy, the second defendant cannot be convicted. [FN191] Charging an attempt would mean that the first defendant's acquittal does not affect the prospect of the second defendant's conviction. Second, Arkansas's rule on admission of coconspirator statements does not require that a conspiracy actually be charged. [FN192] All that is necessary is that a conspiracy be proved at trial by evidence independent of the statement itself. [FN193] Accomplices, furthermore, are treated as coconspirators for purposes of admitting their statements. [FN194] Both of these rules reduce prosecutors' need to charge conspiracies to obtain associated evidentiary advantages.

On the other hand, a Colorado attorney with whom I spoke immediately recognized the value of her state's statute. [FN195] She had not been aware of the law, but now plans to use it in defense of her client, who is charged with participation in a massive criminal conspiracy. Another attorney from Pennsylvania, learning of his state's statute, said that it could have been an effective tool against politically motivated charges, such as those leveled against protesters during the 2009 G20 summit in Pittsburgh. [FN196]

The remaining attorneys had never heard of the statutes, but were interested to learn about them. [FN197] As more defense attorneys (and prosecutors) learn about these statutes and apply them in creative ways, case law will emerge that protects defendants on the margins of criminality. It will help defendants who formed actual, but foolish and harmless, conspiracies, and it will help those who engaged in what one ***513** Arkansas attorney called "humorous chit chat" that was never meant to be taken seriously. [FN198]

V. Conclusion: Four Proposed Reforms

Arguing as it does that prosecutors should be required to prove a conspiracy's dangerousness, this Article provides a grounded proposal as well as theoretical insight into conspiracy law that Katyal's and Goldstein's works do not offer. This insight is threefold: (1) conspiracies are not per se dangerous, but where they are dangerous, they may be especially so; (2) the controversial outcomes associated with conspiracy charges call for systemic reform; and (3) reform that is focused on dangerousness addresses a central concern of conspiracy law critics and is possible, nuanced, and useful. There are four moves that can be taken to effect this reform.

First, and most immediately, defense attorneys in Arkansas, Colorado, New Jersey, and Pennsylvania should use their states' dangerousness statutes. They can use them to file motions to dismiss, to downgrade charges, and to request jury instructions. They can also use these statutes in pretrial negotiations with prosecutors. Quite often, prosecutors are actively looking for a way to get rid of unsavory cases. Alleged victims and intraoffice dynamics often drive prosecutors to pursue cases unwillingly. A statute that suggests a case should be dropped could provide to a prosecutor the leverage and cover they need.

In addition to these states' lawyers taking advantage of their statutes, attorneys in all jurisdictions can actively apply dangerousness arguments to conspiracy cases. They can, and do, apply them during the sentencing phase. Attorneys can also act creatively to present dangerousness arguments prior to and during trial. For example, attorneys may move to dismiss charges of nondangerous conspiracies on due process and other constitutional grounds. At the very least, these motions will frame the case for the court. If the conspiracy is not dangerous, the court may realize that the stakes are relatively low and may give more attention to the defendant's constitutional rights and evidentiary concerns throughout the process. Attorneys can also explore a conspiracy's dangerousness at trial as they attempt to show that no conspiracy existed. Because explicit agreements rarely exist, prosecutors can prove conspiracies by inference from evidence of ***514** concerted action [FN199] or a working relationship. [FN200] Defense attorneys should be able to match such liberal methods of proof with similarly liberal methods of defense. If the defense can show that an alleged conspiracy was never dangerous, the jury may not be convinced that it was an actual conspiracy.

In the longer term, Congress and legislatures in the remaining forty-six states should consider drafting their own dangerousness statutes. Recognizing that such statutes would not hamper police and prosecutors' attempts to pursue truly harmful conspiracies, the primary results would be that defendants who engaged in number (3) conduct would more likely escape erroneous criminal liability, defendants who engaged in number (4) (nondangerous) conspiracy would enjoy condign punishment or outright dismissal of charges, and defendants who committed dangerous number (5) conspiracy would continue to be convicted. Given that prosecutorial resources would shift toward number (5) conspiracies, it is possible that such defendants would be convicted at higher rates, which would better serve public safety. Such a regime would, furthermore, lend legitimacy to the law by reducing the number of “close call” cases, which tend to be politically tinged, and therefore controversial, and reinforce the (usually accurate) perception that prosecutors use the criminal law to ensure public safety rather than merely obtain convictions of or leverage over unpopular people.

As a distant goal, attorneys, government, and society can evolve conspiracy law to include a rule that for criminal liability to attach, conspiracies must be shown to be dangerous. This step would be nothing less than a paradigm shift. This shift would result in a system of conspiracy law that imposes no a priori negative Katyalian or positive Goldsteinian value to group conduct. It would, rather, treat group conduct as initially neutral, subject to proof of its danger. The benefits to this approach include outcome reliability, the law's increased legitimacy, judicial resource conservation, and greater public safety.

[FNa1]. © 2014 **Steven R**. **Morrison**. Assistant Professor of Law, University of North Dakota School of Law. I would like to thank Larry Alexander, R. Michael Cassidy, Roger S. Clark, Ronald K.L. Collins, Ellen Podgor, Aziz Huq, Andrew March, Paul Marcus, Peter S. Margulies, Wayne McCormack, Lawrence Rosenthal, Robin R. Runge, and SpearIt for their invaluable advice that led to this Article. Thanks also to the participants at the 2012 ABA CJS conference, where I workshopped this Article. They are Miriam Baer, Kim Buchanan, Gregory M. Gilchrist, Michael Rich, and Erin Sheley, and they all provided excellent comments. I am also grateful to the University of North Dakota School of Law and Dean Kathryn R.L. Rand for their support. A law school summer research grant made this Article possible. All errors are my own.

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[FN29]. Bryan, supra note 23, at 14-15 (quoting 1486, 3 Hen. 7, c.14 (Eng.) (alterations in original) (internal quotation marks omitted)).

[FN30]. Id. at 30-37.

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[FN34]. Developments in the Law: Criminal Conspiracy, supra note 15, at 923; Sayre, supra note 24, at 398.

[FN35]. Bryan, supra note 23, at 57-58.

[FN36]. Id.

[FN37]. Id. at 58-60.

[FN38]. Id. at 61-62.

[FN39]. See State v. Buchanan, 5 H. & J. 317, 337 (Md. 1821) ("[T]he law punishes the conspiracy, 'to the end to prevent the unlawful act."' (quoting The Poulterers' Case, (1611) 77 Eng. Rep. 813 (K.B.) 815; 9 Co. Rep. 55b, 57a)); Lambert v. People, 9 Cow. 578, 616-17 (N.Y. 1827) (noting that conspiracies are indictable not because of their inherent dangerousness, but for the object they are intended to effect).

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[FN68]. State v. Buchanan, 5 H. & J. 317, 356 (Md. 1821).

[FN69]. Id. at 337 (quoting The Poulterers' Case, (1611) 77 Eng. Rep. 813 (K.B.) 815; 9 Co. Rep. 55b, 57a).

[FN70]. Commonwealth v. McKisson, 8 Serg. & Rawle 420, 421 (Pa. 1822).

[FN71]. 9 Cow. 578, 578 (N.Y. 1827).

[FN72]. Id. at 588, 600.

[FN73]. Id. at 600.

[FN74]. State v. Burnham, 15 N.H. 396, 401 (1844).

[FN75]. Id. at 401 (emphasis added); see also Commonwealth v. Putnam, 29 Pa. 296, 296-97 (1857) (reasoning that the offense of conspiracy is the concert of two or more to effect an act, not the accomplishment of the act).

[FN76]. Burnham, 15 N.H. at 401-04.

[FN77]. Talbot v. Janson, 3 U.S. (3 Dall.) 133, 142-43 (1795); see also Twitchell v. Commonwealth, 9 Pa. 211, 211-13 (1848) (opining that the concert of several wills is dangerous to any individual).

[FN78]. Ballam, supra note 49, at 129-30.

[FN79]. Papke, supra note 56, at 9.

[FN80]. Ballam, supra note 49, at 143.

[FN81]. James Green, Death in the Haymarket: A Story of Chicago, the First Labor Movement and the Bombing That Divided Gilded Age America 145 (2006).

[FN82]. Timothy Messer-Kruse, The Trial of the Haymarket Anarchists: Terrorism and Justice in the Gilded Age 11 (2011).

[FN83]. Id. at 12-13.

[FN84]. Ballam, supra note 49, at 130.

[FN85]. Green, supra note 81, at 86.

[FN86]. Ballam, supra note 49, at 130.

[FN87]. Woodiwiss, supra note 48, at 74.

[FN88]. Id. at 75.

[FN89]. Green, supra note 81, at 9.

[FN90]. Id. at 3.

[FN91]. Id. at 5; Papke, supra note 56, at 16.

[FN92]. Smythe, supra note 53, at 648.

[FN93]. Id.

[FN94]. Papke, supra note 56, at 16.

[FN95]. Messer-Kruse, supra note 82, at 4.

[FN96]. Hattam, supra note 60, at 70 (quoting People v. Wilzig, 4 N.Y. Crim. 403 (1886) (internal quotation marks omitted)).

[FN97]. Green, supra note 81, at 8-9.

[FN98]. Id. at 114; Edward de Grazia, The Haymarket Bomb, 18 Law & Literature 283 (2006).

[FN99]. Green, supra note 81, at 11.

[FN100]. See Wechsler et al., supra note 6, at 957 (noting the early condemnation of the labor union as a criminal conspiracy and the use of the charge against political offenders).

[FN101]. State v. Glidden, 8 A. 890, 891 (Conn. 1887).

[FN102]. Id. at 894.

[FN103]. Id. at 895.

[FN104]. Id.

[FN105]. Id. at 896.

[FN106]. Callan v. Wilson, 127 U.S. 540 (1888); Arthur v. Oakes, 63 F. 310 (7th Cir. 1894); Consol. Steel & Wire Co. v. Murray, 80 F. 811 (C.C.N.D. Ohio 1897); In re Grand Jury, 62 F. 840 (N.D. Cal. 1894); Brunswick Gaslight Co. v. United Gas, Fuel & Light Co., 27 A. 525 (Me. 1893); San Antonio Gas Co. v. State, 54 S.W. 289 (Tex. Civ. App. 1899). But see United States v. E.C. Knight Co., 156 U.S. 1 (1895); Am. Fire Ins. Co. v. State, 22 So. 99 (Miss. 1897); Longshore Printing & Publ'g Co. v. Howell, 38 P. 547 (Or. 1894).

[FN107]. Moores & Co. v. Bricklayers' Union, 10 Ohio Dec. Reprint 665, 673 (Super. Ct. Cinn. 1889).

[FN108]. Id. at 674 (quoting Crump v. Commonwealth, 6 S.E. 620, 628 (Va. 1888) (alterations in original) (internal quotation marks omitted)).

[FN109]. 2 Emlin McClain, A Treatise on the Criminal Law as Now Administered in the United States 157 (1897).

[FN110]. 67 F. 698 (N.D. Cal. 1895).

[FN111]. Krulewitch v. United States, 336 U.S. 440, 447 (1949) (Jackson, J., concurring).

[FN112]. Marjorie S. Turner, The Early American Labor Conspiracy Cases: Their Place in Labor Law, A Reinterpretation 21 (1967).

[FN113]. Harrison, supra note 25, at 25; Developments in the Law: Criminal Conspiracy, supra note 15, at 923.

[FN114]. Hattam, supra note 60, at 47; see Papke, supra note 56, at 49; see also Petition for a Writ of Certiorari at 31, Elashi v. United States, 133 S. Ct. 525 (2012) (No. 11-1390), 2012 WL 1852054 (discussing the fact that conspiracy

requires an agreement between multiple persons to do something wrong).

[FN115]. Messer-Kruse, supra note 82, at 181.

[FN116]. Green, supra note 81, at 306.

[FN117]. Hattam, supra note 60, at 39.

[FN118]. See James Surowiecki, The Wisdom of Crowds (2005).

[FN119]. Colo. Rev. Stat. §18-2-206(3) (2013).

[FN120]. United States v. Khan, 325 F. Supp. 2d 218 (E.D.N.Y. 2004).

[FN121]. Id. at 220.

[FN122]. Id.

[FN123]. United States v. Khan, 94 F. App'x 33, 36 (2d Cir. 2004).

[FN124]. Khan, 325 F. Supp. 2d at 233.

[FN125]. Id.

[FN126]. Jennifer Yang & Peter Edwards, G20 Charges Dropped Against 11 as 6 Plead Guilty, Toronto Star (Nov. 22, 2011), http:// www.thestar.com/news/gta/2011/11/22/20-charges-dropped-against-11-as-6-plead-guilty.html.

[FN127]. Id.

[FN128]. Indictment at 1, United States v. Shah, 474 F. Supp. 2d 492 (S.D.N.Y. 2007) (No. 5405CR.673(LAP)).

[FN129]. Plea Agreement at 1, Shah, 474 F. Supp. 2d 492 (No. 5405CR.673(LAP)).

[FN130]. Alan Feuer, Tapes Capture Bold Claims of Bronx Man in Terror Plot, N.Y. Times (May 8, 2007), http:// www.nytimes.com/2007/05/08/nyregion/08terror.html?pagewanted=all.

[FN131]. Id.

[FN132]. Id.

[FN133]. Id.

[FN134]. 153 F.3d 724 (4th Cir. 1998) (per curiam) (unpublished table decision).

[FN135]. Id.

[FN136]. Id.

[FN137]. 947 F.2d 951 (9th Cir. 1991) (unpublished table decision).

[FN138]. Id.

[FN139]. Id.

[FN140]. United States v. Spock, 416 F.2d 165, 168 (1st Cir. 1969).

[FN141]. Id.

[FN142]. Id.

[FN143]. Id. at 176, 179.

[FN144]. Id. at 173-74.

[FN145]. Adequate statistics are lacking, because the Department of Justice (DOJ) does not maintain statistics indicating the frequency of prosecutions under 18 U.S.C. §371, the federal general conspiracy statute. The DOJ compiles statistics on the basis of the substantive offense, rather than any predicate conspiracy offense. Goldstein, supra note 5, at 440 n.125; Section 3: Nature and Distribution of Known Offenses, Sourcebook of Criminal Justice Statistics 2003, at 187 (2003), http:// www.albany.edu/sourcebook/pdf/section3.pdf (last visited Jan. 10, 2013) (providing the nature and distribution of known offenses).

[FN146]. Paul Marcus, Defending Conspiracy Cases: Mission Impossible?, Trial, Oct. 1980, at 61, 61, available at http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1061&context=popular_media.

[FN147]. See, e.g., Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics--1992, at 485 tbl.5.14 (Kathleen Maguire et al. eds., 1993) (compiling defendants prosecuted in U.S. district courts by type of offense).

[FN148]. United States v. Reynolds, 919 F.2d 435, 439 (7th Cir. 1990).

[FN149]. Katyal, supra note 1, at 1310.

[FN150]. Paul Marcus, Conspiracy: The Criminal Agreement in Theory and in Practice, 65 Geo. L.J. 925 (1977).

[FN151]. Id. at 934.

[FN152]. Id. at 942.

[FN153]. Id.

[FN154]. Id. at 931.

[FN155]. Id.

[FN156]. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 596 n.20 (1986) (stating that competitors suffer no harm from a conspiracy to raise prices); see also Nesses v. Shepard, 68 F.3d 1003, 1005 (7th Cir. 1995) (citing Niehus v. Liberio, 973 F.2d 526, 531-32 (7th Cir. 1992)) (reasoning that if a conspiracy does not cause harm, then there is no tort); Buckley v. Fitzsimmons, 20 F.3d 789, 796 (7th Cir. 1994) (same); Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 457 (Cal. 1994) (noting that under California law, “[s]tanding alone, a conspiracy does no harm and engenders no tort liability”).

[FN157]. Letter from Lanny A. Breuer, Assistant Att'y Gen., & Jonathan J. Wroblewski, Dir. Office of Policy & Legislation, to The Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n (July 23, 2012), http://www.justice.gov/criminal/foia/docs/2012-annual-letter-to-the-us-sentencing-commission.pdf.

[FN158]. See generally Douglas Husak, Overcriminalization: The Limits of the Criminal Law 3-4 (2008) (discussing the need for a theory of criminalization to help reverse the tendency to enact too many criminal laws and punish too many people).

[FN159]. Cass R. Sunstein, Infotopia: How Many Minds Produce Knowledge 25 (2006).

[FN160]. Eric Engle, Death Is Unconstitutional: How Capital Punishment Became Illegal in America--A Future History, 6 Pierce L. Rev. 485, 506 (2008); Robert A. Prentice, The Case of the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation, 95 Nw. U. L. Rev. 133, 178 (2000); Poonam Puri, Sentencing the Criminal Corporation, 39 Osgoode Hall L.J. 611, 617 (2001).

[FN161]. Cass R. Sunstein, The Law of Group Polarization 3-4 (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 91, 1999), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=199668 (emphasis omitted).

[FN162]. See Sahar F. Aziz, Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America, 47 Gonz. L. Rev. 429, 433 (2011-2012); Aziz Z. Huq, The Signaling Function of Religious Speech in Domestic Counterterrorism, 89 Tex. L. Rev. 833, 894 n.329 (2011); Peter Margulies, Guantanamo by Other Means: Conspiracy Prosecutions and Law Enforcement Dilemmas After September 11, 43 Gonz. L. Rev. 513, 526 (2007-2008); Petra Bartosiewicz, FBI Terror Plot: How the Government Is Destroying the Lives of Innocent People, AlterNet (June 14, 2012), http:// www.alternet.org/story/155880/fbi_terror_plot% 3A_how_the_government_is_destroying_the_lives_of_innocent&uscore;people.

[FN163]. See Krulewitch v. United States, 336 U.S. 440, 448-49 (1949) (Jackson, J., concurring); Goldstein, supra note 5, at 413; Sayre, supra note 24, at 393; Note, The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276, 279-80 (1948).

[FN164]. Yates v. United States, 354 U.S. 298, 301-02 (1957); Dennis v. United States, 341 U.S. 494, 497 (1951); Abrams v. United States, 250 U.S. 616, 617 (1919); Frohwerk v. United States, 249 U.S. 204, 205 (1919); Schenck v. United States, 249 U.S. 47, 48-49 (1919).

[FN165]. 250 U.S. 616.

[FN166]. 249 U.S. 47.

[FN167]. 249 U.S. 204.

[FN168]. 341 U.S. 494.

[FN169]. 354 U.S. 298.

[FN170]. See Verdict at 1, United States v. Al-Hussayen, No. CR03-048-C-EJL (D. Idaho June 10, 2004).

[FN171]. Margulies, supra note 162, at 526; Mark C. Niles, Preempting Justice: “Precrime” in Fiction and in Fact, 9

Seattle J. for Soc. Just. 275, 276-77 (2010).

[FN172]. Fed. R. Evid. 801(d)(2)(E).

[FN173]. In at least half of federal jurisdictions, it is only after the jury has heard coconspirator statements that the judge will rule on whether these people were in fact coconspirators and, therefore, whether their speech is admissible. United States v. Quinones-Cedeno, 51 F. App'x 558, 569 (6th Cir. 2002); United States v. Gonzalez-Balderas, 11 F.3d 1218, 1224 (5th Cir. 1994); United States v. Monaco, 702 F.2d 860, 878 (11th Cir. 1983); United States v. Pilling, 721 F.2d 286, 294 (10th Cir. 1983); United States v. Ciampaglia, 628 F.2d 632, 638 (1st Cir. 1980); United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978); United States v. Petrozziello, 548 F.2d 20, 22 (1st Cir. 1977).

[FN174]. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 263 (1986).

[FN175]. Title 21 drug conspiracies, for example, require no overt act, United States v. Shabani, 513 U.S. 10, 11 (1994); United States v. Pumphrey, 831 F.2d 307, 307 (D.C. Cir. 1987), nor do some conspiracies to provide material support to a foreign terrorist organization, see 18 U.S.C. §2339B (2012); United States v. Abdi, 498 F. Supp. 2d 1048, 1064 (S.D. Ohio 2007), or conspiracies to commit money laundering, Whitfield v. United States, 543 U.S. 209, 211 (2005).

[FN176]. See Samuels v. Mackell, 401 U.S. 66, 75 (1971) (Douglas, J., concurring); Epton v. New York, 390 U.S. 29 (1968) (per curiam) (Douglas, J. dissenting); Geoffrey R. Stone, Perilous Times: Free Speech in Wartime 479-81 (2004) ("[T]he crime of conspiracy has routinely been used by prosecutors to 'get' union organizers, political dissenters, radicals, and other 'dangerous' individuals who could not otherwise be convicted of an offense."); Thomas I. Emerson, Freedom of Association and Freedom of Expression, 74 Yale L.J. 1, 1 (1964); David B. Filvaroff, Conspiracy and the First Amendment, 121 U. Pa. L. Rev. 189, 190 (1972); Morrison, supra note 20, at 865.

[FN177]. See Giles v. California, 554 U.S. 353, 374 n.6 (2008) (noting that admission of coconspirator hearsay does not usually violate the Confrontation Clause because incriminating statements in furtherance of the conspiracy are rarely testimonial); Adrienne Rose, Forfeiture of Confrontation Rights Post-Giles: Whether a Co-Conspirator's Misconduct Can Forfeit a Defendant's Right To Confront Witnesses, 14 N.Y.U. J. Legis. & Pub. Pol'y 281, 299-305 (2011); Trachtenberg, supra note 21, at 1671-72.

[FN178]. Goldstein, supra note 5, at 405 ("It has long been our boast that we class as crimes only those acts that are recognizably dangerous to the community. Never, the maxim has it, do we punish an evil intent alone.").

[FN179]. Model Penal Code §5.05(2) (1962).

[FN180]. Marcus, supra note 150, at 931-61.

[FN181]. Ark. Code §5-3-101 (2013).

[FN182]. Colo. Rev. Stat. §18-2-206(3) (2013).

[FN183]. 18 Pa. Cons. Stat. §905(b) (2013).

[FN184]. N.J. Stat. §2C:5-4(b) (2013).

[FN185]. Katyal, supra note 1, at 1316.

[FN186]. United States v. Jimenez Recio, 537 U.S. 270, 275 (2003) (quoting Callanan v. United States, 364 U.S. 587,

593-94 (1961)).

[FN187]. Chronister v. State, 580 S.W.2d 676, 678 (Ark. 1979).

[FN188]. Commonwealth v. John, 854 A.2d 591, 593 n.5 (Pa. Super. Ct. 2004).

[FN189]. N.J. Stat. §2C:1-8(a)(2) (2013); State v. LeFurge, 502 A.2d 35, 44 (N.J. 1986).

[FN190]. Telephone Interview with Jeff Rosenzweig, Att'y at Law (Mar. 23, 2012).

[FN191]. Yedrysek v. State, 739 S.W.2d 672, 673 (Ark. 1987). But see Ark. Code §5-3-103(b)(3) (2013) (providing that a coconspirator's acquittal is not a defense to prosecution for conspiracy).

[FN192]. Moore v. State, 279 S.W.3d 69, 75 (Ark. 2008).

[FN193]. Henderson v. State, 953 S.W.2d 26, 31 (Ark. 1997); see also United States v. Portela, 167 F.3d 687, 703 (1st Cir. 1999) (reasoning that evidence of phone records was sufficient for the court to find that a conspiracy existed).

[FN194]. Foxworth v. State, 566 S.W.2d 151, 153 (Ark. 1978); see also Talley v. State, No. CACR 04-572, 2005 WL 605612, at *1 (Ark. Ct. App. Mar. 16, 2005) (providing Arkansas's broad definition of “accomplice”).

[FN195]. Telephone Interview with Christy Marlett, Att'y at Law (Mar. 23, 2012).

[FN196]. Telephone Interview with Thomas Farrell, Att'y at Law, Farrell & Reisinger, LLC (Mar. 23, 2012), see also Yang & Edwards, supra note 126 (discussing the G20 incident).

[FN197]. Telephone Interview with Tom Ashley, Att'y at Law (Mar. 23, 2012); Telephone Interview with Nathaniel Baca, Att'y at Law, Mountain Legal (Mar. 23, 2012); Telephone Interview with John Baker, Att'y at Law (Mar. 23, 2012); Telephone Interview with Brooke Barnett, Att'y at Law, Brooke M. Barnett & Associates P.C. (Mar. 23, 2012); Telephone Interview with Anthony Bittner, Att'y at Law, Joyce & Bittner (Mar. 23, 2012); Telephone Interview with Michael Boyce, Att'y at Law (Mar. 23, 2012); Telephone Interview with Doug Norwood, Att'y at Law, Norwood & Norwood P.A. (Mar. 23, 2012).

[FN198]. Telephone Interview with Jeff Rosenzweig, supra note 190.

[FN199]. United States v. Royal, 100 F.3d 1019, 1028 (1st Cir. 1996).

[FN200]. United States v. Weiner, 3 F.3d 17, 21 (1st Cir. 1993).
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