Catholic University Law Review

Volume 63
Issue 2 *Winter 2014*

Article 7

6-24-2014

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Cover Page Footnote

The author is an Assistant Professor of Law at the University of North Dakota School of Law. He can be reached at steven.r.morrison@gmail.com. This Article benefitted greatly from its presentation at the South Texas College of Law's Fifth Annual National Security Law Faculty Workshop, May 2012. Many thanks go to Jeff Bellin, R. Michael Cassidy, Bobby Chesney, Geoff Corn, Jennifer Daskal, Ashley Deeks, Donald Dripps, Andrew Ferguson, Margaret Hu, Aziz Huq, Todd Huntley, Kate Jastram, Eric Jensen, David Luban, Paul Marcus, Peter Margulies, Helen Norton, Deborah Pearlstein, Neomi Rao, Dru Stevenson, Stephen Vladek, and Jamie Williamson for their invaluable comments on earlier drafts. This Article could not have been possible without the support of the University of North Dakota School of Law and Dean Kathryn R. L. Rand. All errors are my own.

THE SYSTEM OF MODERN CRIMINAL CONSPIRACY

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"Every idea is an incitement."
Justice Oliver Wendell Holmes, 1925[1]

Something has changed in the modern system of American criminal conspiracy law. This Article explores that change, arguing that the modern system of criminal conspiracy now gives the government such great discretion to charge and prove a conspiracy that unpopular ideas, and the speech that expresses them, have become ready subjects of prosecution.

It is important to understand this change because of the contemporary prevalence of conspiracy charges. In 1980, Professor Paul Marcus suggested that severe problems persist in defending conspiracy cases—problems that are made worse because of the large number of conspiracy charges that exist at the federal level.[2] Between 1980 and 1990, conspiracy was in a group of offenses that constituted between thirty-five and sixty-seven percent of the total criminal matters prosecuted in U.S. District Courts.[3] In 1990, Judge Easterbrook of 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."[4] Most recently, in 2003, Professor Neal Kumar Katyal suggested that over twenty-five percent of all federal criminal prosecutions, as well as a significant number of state cases, involved conspiracy charges.[5]

The reasons for which prosecutors charge conspiracy are particularly troubling. In his 1977 study, Professor Marcus found that sixty-three percent of prosecutors brought conspiracy charges in cases in which the object offense had been completed or attempted not because the conspiracy demanded criminal justice, but to obtain evidentiary advantages.[6] Moreover, thirty-five percent of prosecutors brought conspiracy charges to obtain advantages in plea bargaining.[7]

This Article aims to explore the evolution of conspiracy law by first setting forth the relevant history of conspiracy law leading to the modern system. This account begins with the law's origin in England, at the turn of the fourteenth century, and continues through the post-9/11 War on Terror.

Next, this Article defines and describes the system of modern criminal conspiracy. It shows that this system's normative, evidentiary, and

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1. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

2. Paul Marcus, *Defending Conspiracy Cases: Mission Impossible?*, TRIAL, Oct. 1980, at 61.

3. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS–1992 485 (Kathleen Maguire et al. eds., 1993).

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

5. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1310 (2003).

6. *See* Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925, 942 (1977).

7. *See id.*

constitutional problems ultimately arise from the system's uniformity. Dynamic systems contain separate components that work at least partially independently to produce just outcomes. Conspiracy, on the other hand, is a uniform system with component parts. These parts include elements, evidence to prove these elements, and the evidentiary and constitutional rules that determine what types of evidence prosecutors can use to prove particular elements. Unfortunately, these parts do not perform truly distinct duties that combine to produce an effective result. Consider the following analogy: a car is a dynamic system because different raw materials—rubber, steel, and cloth and leather—are used for different parts of the car—tires, a chassis, and the interior. If a car were a uniform system, it would be made entirely of one type of raw material, and it would be a very poor-performing system. Conspiracy law is like that poor-performing car. In conspiracy cases, prosecutors can use virtually all types of evidence to prove the elements. Furthermore, proof of one element usually constitutes proof of all other elements, and evidentiary and constitutional rules—referred to in this Article as "gatekeepers"—do not effectively promote defendants' rights or ensure accurate outcomes. The problems resulting from this system sound in the First Amendment, the Sixth Amendment's Confrontation Clause, the evidentiary rules dealing with relevance, prejudice, and hearsay, and traditional approaches to proving individual elements of a crime beyond a reasonable doubt, most especially mens rea.

This Article offers normative solutions that address conspiracy's systemic uniformity. These solutions have, at least in part, been tested in the real world and have produced no apparent negative externalities. This Article suggests that courts should adopt the definition of conspiracy's overt act that applies in treason trials, namely that the act must be conduct and not speech; adopt the First Circuit's rule for the use of protected speech to prove a defendant's mens rea;[8] adopt a rule, in partial force in four states and the Model Penal Code, that conspiracies must be dangerous for criminal liability to attach; and adopt a broader, more theoretical approach that uses the category of speech integral to criminal conduct to determine which types of speech may be used in which circumstances to prove certain aspects of conspiracy.

This Article also has a national security bent. This is because the Article necessarily discusses law enforcement methods against alleged terrorists, and because counterterrorism activities ultimately cannot be understood without reference to federal criminal law. Domestic criminal law and national security law are two parts of the same system, and it is important for prosecutors in both arenas to know their options. Indeed, as overt war fades, but terrorist threats remain—often in the guise of "homegrown terrorists"—domestic conspiracy law will become more important to national security.[9] For example, the D.C.

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8. *See* United States v. Spock, 416 F. 2d 165, 173 (1st Cir. 1969).

9. *See* Aziz Z. Huq et al., *Why Does the Public Cooperate With Law Enforcement?*, 17 PSYCHOL. PUB. POL'Y & L. 419, 423 (2011). The move towards integrating domestic conspiracy law with national security law has created some controversy, as a number of observers believe the

Circuit applies principles of conspiracy law to make detention determinations under the Authorization for Use of Military Force and the National Defense Authorization Act.[10] However, in military courts, conspiracy is generally not an available charge.[11] Thus, it is an ironic twist that members of Congress who, seeking tough juries, serious charges, and severe sentences, attempt to restrict Article III courts from trying terrorism suspects,[12] even though conspiracy charges are available and these courts tend to be prosecution friendly.[13]

This Article has seven parts. Part I sets forth conspiracy law's history from 1285 to the nineteenth century. Part II discusses conspiracy law in the nineteenth century, when forces of industrial capital enlisted the courts and conspiracy charges to fight nascent and ultimately powerful labor combinations. Because speech rights, which emerged substantively in 1919, are intertwined with modern conspiracy, Part III sets forth the relevant First Amendment law. Part IV illustrates the maturation of modern conspiracy from the *Abrams v. United States*,[14] *Schenck v. United States*,[15] and *Frohwerk v. United States*[16] line of First Amendment cases—which were also conspiracy cases—in 1919 to the terrorist attacks of September 11, 2001, which continue to alter the criminal law landscape in fundamental ways. Part V describes conspiracy in the twenty-first century, in the context of terrorism and the Internet. Part VI provides a theoretical definition and description of the system of modern criminal conspiracy, which is supported by the preceding history. Finally, Part VII offers

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"homegrown" terrorist threat is exaggerated. *See* Romesh Ratnesar, *The Myth of Homegrown Islamic Terrorism*, TIME (Jan. 24, 2011), *available at* http://www.time.com/time/world/article/0,8599,2044047,00.html; *see also* CENTER FOR HUM. RTS. & GLOBAL JUST., TARGETED AND ENTRAPPED: MANUFACTURING THE "HOMEGROWN THREAT" IN THE UNITED STATES 28 (2001), *available at* http://chrgj.org/wp-content/uploads/2012/07/targetedandentrapped.pdf (arguing that the government has abused its power in its attempts to substantiate its claim that a homegrown terrorist threat exists).

10. *See generally* Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Obaydullah v. Obama, 609 F.3d 444 (D.C.Cir. 2010), *superseded by statute*, Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2601 (2006); *see also* Allison M. Danner, *Defining Unlawful Enemy Combatants: A Centripetal Story*, 43 TEX. INT'L L.J. 1, 9–10 (2007) (noting that the term "unlawful enemy combatant" is most commonly defined by using concepts from domestic conspiracy law rather than from the law of war).

11. *See Hamdan*, 548 U.S. at 603–04 (noting that "[t]he crime of 'conspiracy' has rarely if ever been tried as such in this country by any law-of-war military commission").

12. *See* Jonathan Hafetz, *Hamdan and the Continuing Quandary of Military Commissions*, BALKINIZATION (Oct. 17, 2012), http://balkin.blogspot.com/2012/10/hamdan-and-continuing-quandary-of.html.

13. *See* Blumenthal v. United States, 332 U.S. 539, 556–57 (1947); United States v. Brodie, 403 F.3d 123, 134 (3d Cir. 2005); United States v. Dazey, 403 F.3d 1147, 1159 (10th Cir. 2005); Laurie R. Blank, *The Consequences of a "War" Paradigm for Counterterrorism: What Impact on Basic Rights and Values?*, 46 GA. L. REV. 719, 732–33 (2012) (arguing that the War on Terror upends delicate legal balances and thus threatens individual rights).

14. 250 U.S. 616 (1919).

15. 249 U.S. 47 (1919).

16. 249 U.S. 204 (1919).

practical solutions that respond to the uniform system of conspiracy and its history.

I. CONSPIRACY LAW'S FIRST SIX HUNDRED YEARS

A. Origin: 1285–1304

Most scholars identify the origin of conspiracy law in a handful of Edwardian statutes dating from 1285[17] to 1305.[18] During this period, the system of conspiracy law had two defining characteristics. First, substantively, it applied only to abuses of legal processes.[19] Second, philosophically, the law was "consequentialist," meaning that for liability to attach, the aim of the conspiracy had to be realized. For example, an action by writ of conspiracy would be successful only if a person at whom a conspiracy to falsely indict was aimed had actually been indicted and acquitted.[20] 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."[21] Consequentialist conspiracy law differs from "deontological" conspiracy law, which emerged later and applied to the conspiracy itself, regardless of whether the substantive target crime was committed.[22]

By 1486, courts recognized the potential threat to public safety associated with the consequentialist philosophy of conspiracy law, and began to shift towards a deontological philosophy.[23] 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 any Lord . . . and so great inconveniences might ensue if such ungodly demeanings should not be straitly punished before that actual deed be done."[24] Although

17. *See, e.g.*, Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 394–95 (1922) (identifying a 1285 statute as a first step in conspiracy law's development).

18. *See Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 922, 922–23 (1959) (citing a 1305 Edwardian statute as the origin of conspiracy law); *see also* DAVID HARRISON, CONSPIRACY AS A CRIME AND AS A TORT IN ENGLISH LAW 7 (1924). One commentator has suggested that conspiracy predates 1285. JAMES WALLACE BRYAN, THE DEVELOPMENT OF THE ENGLISH LAW OF CONSPIRACY 142 (1909). However, the record is scant.

19. BRYAN, *supra* note 18, at 18–19. The 1304 Definition of Conspirators defined conspirators as those who "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." *Id.*

20. *See id.* at 23.

21. HARRISON, *supra* note 18, at 6.

22. *See, e.g.*, BRYAN, *supra* note 18, at 71 (observing that the British government enacted law punishing criminals as felons without committing overt acts).

23. *See id.* at 14 (discussing a 1486 law that made it a felony to conspire "to destroy the king" regardless of whether the king was actually destroyed).

24. *Id.* at 14–15.

courts continued to focus substantively on false prosecutions, they began condemning the conspiracy itself, rather than the executed result.[25] This eliminated the need to prove substantive conduct, and therefore brought about uniformity within the system of conspiracy law. The requirement of a substantive crime was a check on the system; without the substantive crime, criminal liability could not attach. This check helped to make conspiracy law a dynamic system over the course of many centuries. By the 1600s, two approaches had emerged. An action of conspiracy could be brought for the deontological wrong of the conspiracy itself.[26] An action upon the case, in turn, could be brought for the executed result, with the conspiracy being an aggravating fact.[27]

Class and social power relations also factored into the shift in approaches to conspiracy law. For instance, Egnlih law specifically protected "Lord[s]"[28] and the 1486 statute referenced "conspiracies to destroy the king or his great officers."[29] Such class and power relations figured prominently into eighteenth and nineteenth century conspiracy cases against "treasonable or seditious societies,"[30] and nineteenth century cases against combinations of labor[31] and, to a much lesser extent, capital.[32] In fact, for one commentator, labor-capital relations have informed conspiracy since its birth in 1285-1305.[33] The system of modern criminal conspiracy, which allows prosecutors to target unpopular ideas rather than only dangerous conspiracies, thus emerges as a descendant of class- and power-shaped conspiracy law. Its uniformity facilitates abusive—or good faith but biased and mistaken—prosecutions by increasing prosecutorial discretion, lowering evidentiary standards, and altering evidentiary and constitutional standards in ways that favor the government and increase conspiracy's uniformity.

B. Poulterers' Case*: 1611–1716*

During the fourteenth and fifteenth centuries, the English Court of the Star Chamber played a significant role in the development of conspiracy law.[34] In

25. *See id.* at 15.

26. *See id.* at 57 (observing that a conspiracy could be punishable apart from any resulting criminal acts).

27. *See id.* at 45–46.

28. *Id.* at 15 (citing 3 Henry 7, c. 14 (1486)).

29. *Id.* at 14 (citing 3 Henry 7, c. 14 (1486)).

30. SIR ROBERT SAMUEL WRIGHT, THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS 23 (1873).

31. *See* HARRISON, *supra* note 18, at 32.

32. *Cf.* FREDERICK HALE COOKE, THE LAW OF TRADE AND LABOR COMBINATIONS iv–v (1898) (discussing the rise of anti-trust laws and providing causes of action to eliminate illegal combinations of capital).

33. *See* HARRISON, *supra* note 18, at 12–13 (noting the role of "trade conspiracy" statutes in the Middle Ages).

34. *See* BRYAN, *supra* note 18, at 22.

1611, the Court of the Star Chamber decided the *Poulterers' Case*, a watershed conspiracy case,[35] holding that "a bare conspiracy was punishable independently of any act done in execution of it."[36] The goal was to promote recognition of the conspiracy's potential harm.[37] Although the *Poulterers'* 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 by subsequent rulings.[38] Its deontological turn has, *post hoc*, achieved the authority that created and continues to inform the system of modern criminal conspiracy. This is not to say that *Poulterers'* eliminated consequentialism entirely. Consequentialism retained currency throughout the seventeenth century in England,[39] and even into the nineteenth century in the United States.[40] However, by furthering the deontological turn, *Poulterers'* moved conspiracy law away from targeting clearly dangerous and operative conspiracies and toward enabling the prosecution of merely unpopular thoughts expressed to others.[41]

At the same time, *Poulterers'* spurred a substantive move away from attaching conspiratorial liability only to combinations to abuse legal processes. This began a move toward a general theory that would prohibit conspiracies to commit any crime whatsoever.[42] As a result, one commentator called deontological and general conspiracy law the "Seventeenth Century Rule in Conspiracy."[43] This encouraged the development of the system of modern criminal conspiracy by further unmooring conspiracy law from an alleged conspiracy's factual context.[44] Consequently, prosecutors are able to observe unpopular or suspicious speech or conduct and, from that often-ambiguous evidence, determine the substantive crime that it is supposed to portend. Modern federal criminal law includes over four thousand crimes and thus provides prosecutors a virtually endless menu of substantive crimes to choose from.[45]

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35. *See Developments in the Law—Criminal Conspiracy*, *supra* note 18, at 923 (citing *Poulterers' Case*, (1611) 77 Eng. Rep. 813 (K.B.); 9 Co. Rep. 55b) (noting that the *Poulterers' Case* was a watershed conspiracy decision); Sayre, *supra* note 17, at 398 (noting that the *Poulterers' Case* was the first of many steps toward conspiracy law's expansion).

36. BRYAN, *supra* note 18, at 57.

37. *See id.*

38. *See id.* at 58–59.

39. *Id.* at 61–62.

40. *See* State v. Buchanan, 5 H. & J. 317, 337 (Md. 1821) ("The law punishes the conspiracy, 'to the end to prevent the unlawful act.'"); Lambert v. People, 9 Cow. 578, 604 (N.Y. Sup. Ct. 1827) (explaining that one judge noted that conspiracies are indictable not because of their inherent dangerousness, but for the object they are intended to effect).

41. *Cf.* Kenneth A. David, *The Movement Toward Statute-Based Conspiracy Law in the United Kingdom and the United States*, 25 VAND. J. TRANSNAT'L L. 951, 954–55 (1993) (describing how prosecutors furthered political agendas using conspiracy law after *Poulterers' Case*).

42. *See Developments in the Law—Criminal Conspiracy*, *supra* note 18, at 923.

43. HARRISON, *supra* note 18, at 16.

44. *See id.* at 17–18 (explaining the growth of conspiracy charges in the seventeenth century).

45. *See* Steven Skurka, *Tilted: The Trials of Conrad Black*, 36-APR CHAMPION 34, 35 (2012).

The system of modern criminal conspiracy, which is deontological and general, lacks an external check that should lie between the crime itself and the facts it addresses and should rely on the norm that criminal liability may only attach to a set of facts that are predetermined to be criminal.[46] The divorce of conspiracy from its factual context also encourages the view that conspiracies are difficult to prove; with no substantive crime, no one can be sure that a defendant in fact conspired. This alleged difficulty drives lowered evidentiary standards and pro-government alterations to evidentiary and constitutional rules.[47] The result is a drift toward a uniform system of conspiracy.

C. Hawkins and Denman Doctrines: 1716–19th Century

The Hawkins and Denman doctrines added glosses to the Seventeenth Century Rule that have confused and upset conspiracy law since their inception. 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.[48] Similarly, in 1832 Lord Denman asserted in dicta that "a criminal conspiracy consists in a combination to accomplish an unlawful end, or a lawful end by unlawful means."[49] This statement left open to interpretation the meaning of the word "unlawful," and allowed for a moral turn in the law.[50] Thus, in 1870 one court held that in order for an act to constitute conspiracy, "[i]t is not necessary . . . 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."[51]

Courts quickly refuted this moral turn, but the gloss remained as courts began to struggle with the rise of labor movements. For the first time, large combinations of workers could affect significant segments of the economy by engaging in action that would be legal if performed individually.[52] As the country entered the *Lochner* era, courts clothed economic questions in the garb

46. *Cf.* Bouie v. City of Columbia, 378 U.S. 347, 354–55 (1964) (requiring fair warning of what the law requires); Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926) (establishing the vagueness doctrine, which requires penal statutes to be clear enough for people to abide by them).

47. *See, e.g.*, Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925) (describing conspiracy law, with its pro-government tilt, as the "darling of the modern prosecutor's nursery").

48. *See Developments in the Law—Criminal Conspiracy*, *supra* note 18, at 923 (noting that eighteenth century courts, including the Star Chamber, were eager to broaden conspiracy law, which most likely led to the "widespread and permanent acceptance" of the Hawkins doctrine); *see also* HARRISON, *supra* note 18, at 25.

49. HARRISON, *supra* note 18, at 23 (quoting R. v. Jones, (1832) 110 Eng. Rep. 485 (K.B.) 487; 4 B. & AD. 349).

50. *See id.*

51. *Id.* at 35 (quoting R. v. Warburton, L.R. 1 C.C. 274, 275 (1870)).

52. *See id.* at 36–37.

of moral imperatives, such as the freedom to bargain and the right to provide for one's family.[53] Conspiracy law was an integral part of these developments.

II. THE RISE OF LABOR: THE NINETEENTH CENTURY

Economic structures in the United States underwent major changes in the nineteenth century that ultimately drove the development of the system of modern criminal conspiracy. At the beginning of the century, early labor combinations were understood under the Tudor Industrial Code, a Lochnerian theory that "viewed any combination of workingmen to improve their wages or conditions as a criminal conspiracy."[54] At that time, courts, hostile to the labor movement,[55] were interested in preventing the restraint of trade.[56] As the nineteenth century progressed, rapid economic development,[57] the explosion of industrial growth, and the emergence of a national market[58] drove young people to migrate from rural to urban areas in search of employment in factories, mines, and various other industries.[59]

These workers became increasingly vocal about their own discontent[60] and sought rights such as an eight-hour workday from the new corporations for which they worked.[61] The discourse began to change[62] as Lochnerian theories about restraint of trade started to give way to the right of laborers to associate.[63] Industrial capitalism a gave voice to skilled workers by allowing "them to determine to a significant degree both the rate at which surplus value could be produced and the proportions in which it was distributed as wages and profits."[64] Employers did not accept these workers' push for rights, and pursued their own interests.[65] These employers found no relief in legislatures, which were generally populated in the late nineteenth century by progressive and

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53. *See id.* at 35–36; *see also* Lochner v. New York, 198 U.S. 45, 56 (1905) (suggesting that a state's limitation on hours worked in a bakery is "an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty," particularly when these contracts relate to "labor which may seem to him appropriate or necessary for the support of himself and his family").

54. *See* ANTHONY WOODIWISS, RIGHTS V. CONSPIRACY 21 (1990).

55. *See* Deborah A. Ballam, *Commentary: The Law as a Constitutive Force for Change: The Impact of the Judiciary on Labor Law History*, 32 AM. BUS. L.J. 125, 126–27 (1994).

56. WOODIWISS, *supra* note 54, at 42–43.

57. Ballam, *supra* note 55, at 127.

58. *Id.* at 129.

59. *See* Donald J. Smythe, *The Rise of the Corporation, the Birth of Public Relations, and the Foundations of Modern Political Economy*, 50 WASHBURN L.J. 635, 647 (2011).

60. *See id.*

61. *Id.* at 638–39.

62. *See, e.g.*, DAVID RAY PAPKE, THE PULLMAN CASE 15 (1999) (describing how theories about restraint of trade gave way to new labor law ideas during the industrial revolution).

63. WOODIWISS, *supra* note 54, at 42–43.

64. *Id.* at 118.

65. *Id.*

farmer-labor coalitions.[66] Therefore, employers turned to the courts,[67] which used conspiracy law to regulate labor.[68] In 1842, the Massachusetts Supreme Judicial Court was the first court to declare that labor unions were legal.[69] However, the possibility of "riotous" and therefore illegal and dangerous combinations occupied judges' minds, both before and after the rise of labor unions.[70]

From the beginning, American criminal courts were primarily concerned with harms that affected the public interest. In 1802, the New Jersey Supreme Court held that moving the corner stone in a boundary line between two private properties was not indictable.[71] Rather, it was a private trespass, for which civil relief was available.[72] In dicta, the court noted that "all misdemeanors whatsoever of a public evil . . . may be indicted."[73] In 1807, the Massachusetts Supreme Judicial Court held that a conspiracy to manufacture inferior indigo was indictable, even if the product was never sold.[74] In support of its conclusion that the conspiracy may be indicted without an overt act, the court wrote that "combinations against [the] law are always dangerous to the public peace and to private security."[75] It was in the context of labor movements that courts began to view conspiracies as distinct evils, which would come to justify the system of modern criminal conspiracy and its associated prosecutor-friendly characteristics.

The Massachusetts court had only the first word on the distinct evil question. In 1821, the Maryland Court of Appeals held that an individual may be charged with conspiracy even if the substantive crime was not achieved.[76] However, it so held not because conspiracies are dangerous in themselves, but because "the law punishes the [conspiracy] . . . to the end to prevent the unlawful act."[77]

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66. *Id.*

67. *Id.*

68. VICTORIA C. HATTAM, LABOR VISIONS AND STATE POWER 30 (1993) (arguing that regulation by the courts was crucial to the development of "labor strategy" in the United States); *see* PAPKE, *supra* note 62, at 29; Ballam, *supra* note 55, at 136; John T. Nockleby, *Two Theories of Competition in the Early 19th Century Labor Cases*, 38 AM. J. LEGAL HIST. 452, 471 (1994) (explaining that courts used conspiracy law to prohibit labor associations).

69. Commonwealth v. Hunt, 45 Mass. (4 Met.) 111, 134 (Mass. 1842) (adding that "[t]he legality of such an association . . . will depend upon the means to be used for its accomplishment"); WOODIWISS, *supra* note 54, at 23.

70. *See* HATTAM, *supra* note 68, at 49 (mentioning concerns that workers' actions would destroy trade); *see also* WOODIWISS, *supra* note 54, at 87 (explaining that this fear led courts to bar actions such as strikes regardless of how peaceful the actions were intended to be).

71. State v. Burroughs, 7 N.J.L. 426, 427–28 (N.J. 1802).

72. *See id.* at 427.

73. *Id.*

74. Commonwealth v. Judd, 2 Mass. 329, 337 (Mass. 1807).

75. *Id.*

76. State v. Buchanan, 5 H. & J. 317, 367 (Md. 1821).

77. *Id.*

Therefore, there was no consensus among courts that conspiracies were distinct evils. Rather, the consequentialist concern was that a conspiracy could lead to an actual injury. Furthermore, even if some conspiracies were dangerous in themselves, there was no consensus that this was true for all conspiracies. In 1822 an attorney argued, before the Supreme Court of Pennsylvania, that conspiracies "in which the public were concerned" were indictable, but that those producing a "private injury" were not subject to criminal sanction.[78] In 1827, the New York Supreme Court considered this agrument[79] in *Lambert v. People*, in the context of an indictment for conspiracy to defraud a company.[80] 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.[81]

Despite these countervailing views, the *Lambert* court concluded that "[c]ombinations against individuals are dangerous in themselves, and prejudicial to the public interest."[82] The New Hampshire Superior Court agreed with this holding in 1844.[83] In a decision that collapsed conspiracies with public and private harms into one category, the court concluded that "[c]ombinations against law or against individuals are *always* dangerous to the public peace and to public security."[84] Other cases during this time period mentioned the risk that conspiracies might "seduce" people into criminality.[85] Thus the notion that conspiracies are a distinct evil had emerged in embryonic form.

As America moved toward the 1880s, developments in the labor movement reinforced the distinct evil theory. Workers' attempts to form national trade unions began in the 1850s and resulted in more than thirty such unions by 1873.[86] By 1886, the Knights of Labor had 730,000 members,[87] and sympathy strikes and community-wide boycotts were flourishing.[88] On May 1, 350,000 laborers across the county joined in a coordinated general strike for the eight-hour workday.[89] The International Working People's Association was formed

78. Commonwealth v. McKisson, 8 Serg. & Rawle 420, 421 (Pa. 1822).

79. *See* Lambert v. People, 9 Cow. 578, 580 (N.Y. Sup. Ct. 1827).

80. *Id.*

81. *Id.* at 595, 610.

82. *Id.* at 610.

83. *See* State v. Burnham, 15 N.H. 396, 401 (N.H. 1844).

84. *Id.*; *see also* Commonwealth v. Putnam, 29 Pa. 296, 297 (Pa. 1857) (holding that every conspiracy is inherently dangerous).

85. Talbot v. Jansen, 3 U.S. 133, 142–43 (1795); *see also* Twitchell v. Commonwealth, 9 Pa. 211, 212 (1848) (describing the danger of an "unwary and unsuspecting" individual confronted with "concentrated energy of several combined wills, operating simultaneously, and by concert").

86. Ballam, *supra* note 55, at 129–30.

87. *See* PAPKE, *supra* note 62, at 9. The Knights of Labor was one of several well-know labor organizations that existed at that time. *Id.*

88. Ballam, *supra* note 55, at 143 (noting that local business owners and elected officials often supported these efforts).

89. *See* JAMES GREEN, DEATH IN THE HAYMARKET 145 (2006).

in 1883 and "rejected the political and incremental methods of its socialist predecessors and instead pledged itself to immediate revolutionary change by any means."[90] Some in the labor movement even proposed "engaging in dramatic acts of violent resistance against state authorities."[91]

Given the rise of the labor movement and the pushback from capitalists and the courts, violence seemed inevitable. In 1877, the largest strike up to that time in United States history occurred.[92] It began with walkouts of railroad crews on the Baltimore and Ohio line, followed the next day by an armed clash at Martinsburg, West Virginia.[93] At the railroad's request, the West Virginia governor deployed the state militia, which killed a locomotive fireman.[94] This casualty earned workers further support from townspeople, farmers, and two companies of the state militia.[95] President Hayes sent in federal troops to quell the strike, which led to the death of between 200 and 400 people.[96]

An even greater strike, the Haymarket Riot, occurred in 1886.[97] On May 1, 1886, a massive general strike for the eight-hour workday began at the McCormick Reaper Works in Chicago.[98] Two days later, police charged toward a group of striking union members, killing two and injuring several others.[99] The next day, labor groups organized a rally at Haymarket Square.[100] As police approached the protesters, someone threw a bomb that killed a policeman and wounded others.[101] The police and protesters exchanged gunfire, and several people died with scores more injured.[102]

The Haymarket bombing, and the subsequent conspiracy trial of anarchist August Spies and others, engendered fear and political paranoia[103] and sparked the country's "first red scare."[104] One judge in an 1886 sentencing hearing accused non-citizen labor agitators of "socialistic crimes" that were "gross

90. TIMOTHY MESSER-KRUSE, THE TRIAL OF THE HAYMARKET ANARCHISTS 11 (2011).

91. *Id.* at 12–13 (explaining that these actions included "targeting the church, government, elections, courts, jails, bankers, policemen, and bosses as targets in a war of class liberation").

92. Ballam, *supra* note 55, at 130.

93. *See* WOODIWISS, *supra* note 54, at 74.

94. *See id.*

95. *See id.*

96. *See id.* at 3.

97. GREEN, *supra* note 89, at 9–10.

98. *See id.* at 3.

99. *Id.* at 162–63; PAPKE, *supra* note 62, at 15–16.

100. *See* GREEN, *supra* note 89, at 5.

101. *Id*. at 6; PAPKE, *supra* note 62, at 16.

102. Smythe, *supra* note 59, at 648; *see also* GREEN, *supra* note 89, at 6–7.

103. PAPKE, *supra* note 62, at 16; *see also* GREEN, *supra* note 89, at 10; MESSER-KRUSE, *supra* note 90, at 3–4.

104. MESSER-KRUSE, *supra* note 90, at 4 (adding that these trials and the resulting paranoia disrupted labor movements and forced them onto more conservative paths for decades).

breaches of national hospitality."[105] 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."[106] According to Joseph Medill at the *Chicago Tribune*, it seemed that the country was in a new civil war against trade unions full of "irresponsible" and "alien" troublemakers.[107]

This anti-immigrant sentiment solidified in the 1880s as labor unions, corporations, Lochnerian champions of *laissez-faire* economics, and one-sided views of individual freedom rose to prominence.[108] The Sherman Antitrust Act of 1890 was passed to combat the rise of trusts and monopolies.[109] Labor groups conducted strikes, walkouts, and boycotts, the criminality of which courts struggled to determine.[110] For the first time, conspiracies were seen as an existential threat to the nation. Therefore it made sense to interdict them at the earliest stage possible, even if doing so meant mistaken prosecutions based only on the expression of unpopular ideas.

The general rhetoric of judicial opinions reflected this fear. In 1887, the Connecticut Supreme Court in *State v. Glidden* considered the legality of a conspiracy of workmen to boycott their company and distribute flyers.[111] Affirming the conviction, the court wrote that if boycotts and the distribution of flyers were deemed legal, "[t]he end would be anarchy, pure and simple."[112] The court took a Lochnerian turn, noting that the boycott was actually a combination not against capital, but against the defendants' fellow laborers.[113] The capitalist may be driven from his business, said the court, but he has other resources.[114] On the other hand, "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."[115] Therefore, the court explained

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105. HATTAM, *supra* note 68, at 70 (quoting People v. Wilzia, 4 N.Y. Cr. 403, 425 (N.Y. 1886)).

106. GREEN, *supra* note 89, at 8–9.

107. *Id.* at 10–12 (noting the acerbic, anti-immigration mood that washed over the country following the Haymarket event).

108. WOODIWISS, *supra* note 54, at 24–25, 27–28.

109. Sherman Antitrust Act, ch. 647, § 1, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. § 1 (2006)).

110. *See* Herbert Wechsler, William Kenneth Jones, & Harold L. Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy, Part Two*, 61 COLUM. L. REV. 957, 957 (1961) (noting "the early condemnation of the labor union as a criminal conspiracy and the use of the charge against political offenders").

111. State v. Glidden, 8 A. 890, 891–92 (Conn. 1887).

112. *Id.* at 895. According to the court, "[t]he exercise of irresponsible power by men, like the taste of human blood by tigers, creates an unappeasable appetite for more." *Id.* at 894.

113. *Id.*

114. *Id.*

115. *Id.*

that conspiracies become "subversive of the rights of others, and the law wisely says [they are] crime[s]."[116]

A series of subsequent cases involving labor and capital echoed the Connecticut Supreme Court's opinion.[117] For example, an Ohio Superior Court, considering a labor boycott, wrote that "it 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."[118] 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."[119]

The distinct evil assumption appeared for the first time in a criminal law treatise in 1897.[120] The treatise cited *United States v. Cassidy*, a conspiracy case against railway employees who participated in the great Pullman strike of 1894.[121] The Pullman strike turned violent when President Cleveland deployed federal troops to restore order and railroad traffic, which had been stopped nationwide due to the strike.[122] Across the country, clashes left forty people dead,[123] and Chicago was described as resembling a war zone[124] In the strike, President Cleveland saw "proof that conspiracies existed against commerce between the States."[125] 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 corporations. As Professor Abraham S. Goldstein noted, the distinct evil assumption was, and remains, unsupported by empirical data.[126] It also shares with conspiracy law itself a "chameleon-like"[127] hue, meaning that the system of modern criminal conspiracy is adaptable

116. *Id.* at 896.

117. *See* Callan v. Wilson, 127 U.S. 540, 555 (1888); Consol. Steel & Wire Co. v. Murray, 80 F. 811, 823 (C.C.N.D. Ohio 1897); Arthur v. Oakes, 63 F. 310, 322–23 (7th Cir. 1894); *In re* Grand Jury, 62 F. 840, 845 (N.D. Cal. 1894); Brunswick Gaslight Co. v. United Gas, Fuel & Light Co., 27 A. 525, 528 (Me. 1893); San Antonio Gas Co. v. State, 54 S.W. 289, 293 (Tex. Civ. App. 1899).

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

119. *Id.* at 674 (quoting Crump v. Commonwealth, 6 S.E. 620, 628 (Va. 1888)).

120. EMLIN MCCLAIN, A TREATISE ON THE CRIMINAL LAW AS NOW ADMINISTERED IN THE UNITED STATES, VOLUME II 157 (1897).

121. *See id.* at 157 n.1 (citing United States v. Cassidy, 67 F. 698, 701–03 (N.D. Cal. 1985)).

122. *See* PAPKE, *supra* note 62, at 20.

123. *Id.* at 35.

124. *Id.* at 34.

125. *Id.* at 31.

126. Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 414 (1959) (explaining also that a large number of participants might actually make conspiracies less dangerous, because it could increase the chances that someone would leak the plan).

127. Krulewitch v. United States, 336 U.S. 440, 446–47 (1949) (Jackson, J., concurring).

not only to pursue actual criminals but also to impose social control on unpopular groups.[128]

The new, nineteenth century conspiracy was, therefore, at its extremes general, deontological (rather than consequentialist), and moral (because it enabled prosecution for Hawkinsian "wrongful" conduct).[129] This allowed courts to quash entirely peaceful and otherwise lawful labor combinations to boycott, strike, and bargain for better wages and working conditions.[130] Courts did so within the milieu of the Lochner Era. English conspiracy statutes were based on economic theories that "all attempts to alter prices of labour were economically unsound."[131] American conspiracy sounded more in common law, but courts on this side of the Atlantic were no less willing to engage in Lochnerian reasoning.[132]

The conceptual problem posed by this nineteenth century turn was whether "an act, entirely lawful if done by a single individual, may be unlawful by reason of being done in pursuance of a combination of individuals to do the same act."[133] Although courts ostensibly abandoned this Hawkinsian moral turn in conspiracy law, specifically as it pertained to labor combinations, the turn left its mark.[134] These early labor conspiracy cases became part of a "unified legal history stretching into the twentieth century."[135] The Hawkins doctrine continued to influence labor conspiracy prosecutions,[136] and "questionable tactics [used during the Spies Haymarket trial], such as extensively using speeches and publications as evidence, [and] viewing coconspirators as equal to principles . . . remain features of the judicial order in the twenty-first century."[137] Protestors in the 1880s, such as Eugene Debs, kept speaking and agitating into World War I, when patriotic fervor swept the country and the government suppressed all types of protests.[138] Although injunction has generally replaced

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128. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 402–03 (1970) ("[T]he issues [involving the interaction between inchoate crimes and the First Amendment] are gradually beginning to emerge as the increasingly complex controls of modern society range further into inchoate conduct in the effort to punish or prevent ultimate action.").

129 *See* HATTAM, *supra* note 68, at 30; Ballam, *supra* note 55, at 61; Nockleby, *supra* note 68, at 471.

130. *Id.*

131. HARRISON, *supra* note 18, at 37.

132. BRYAN, *supra* note 18, at 247.

133. *See* COOKE, *supra* note 32, at 14.

134. *See* BRYAN, *supra* note 18, at 288.

135. MARJORIE S. TURNER, THE EARLY AMERICAN LABOR CONSPIRACY CASES 21 (1967).

136. *See* HATTAM, *supra* note 68, at 47 (describing the 1806 Philadelphia Cordwainers case, in which the prosecution argued that *Hawkins* was still good law in Pennsylvania); *see* PAPKE, *supra* note 62, at 49 (noting the judge's comments in the Philadelphia Cordwainers case that conspiracies by workers to do lawful acts that would likely end in "violence and wrong" are still legally culpable).

137. MESSER-KRUSE, *supra* note 90, at 181.

138. *See* GREEN, *supra* note 89, at 306. Included in this ban on protests were more peaceful activities such as strikes and May Day marches. *Id.*

conspiracy as a means to regulate the labor movement, conspiracy's successes in this arena eventually led to its use in the twentieth century against socialist and anarchist anti-war protestors and communists.[139]

Entering the twentieth century, conspiracy law at its extremes continued to be general, deontological, and moral.[140] This jurisprudence, coupled with the belief that conspiracies pose serious and existential threats, encouraged early interdiction and justifies the system of modern criminal conspiracy.[141] This jurisprudence has also allowed for conspiracies to be proven by speech alone, which is a relatively unreliable substitute for actual conduct.[142] Prosecutors' use of alleged co-conspirator' speech at trial, when the co-conspirators are not available for cross-examination, also adds a layer of outcome unreliability and introduces a new Confrontation Clause concern to modern conspiracy.[143] The system of modern conspiracy enables prosecutors to pursue war protestors,[144] civil rights agitators,[145] and alleged terrorist "wann-abe[s],"[146] whether it is clear

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139. *See* HATTAM, *supra* note 68, at 39.

140. One labor historian believes that the landmark 1842 case *Commonwealth v. Hunt*, which signaled the legalization of labor combinations, also resulted in "judicial empiricism," or, what Sayre called "law with predictability, i.e. law based on judges' 'personal predilections and peculiar dispositions.' . . . It is largely on this basis of judicial empiricism that the conspiracy doctrine is available to American judges today." TURNER, *supra* note 135, at 72 (citing Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (Mass. 1842)).

141. *See* TURNER, *supra* note 135, at 72.

142. *See* Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833, 837 (2011) (arguing that one's associations, rather than religious speech, are better indicators of future engagement in terroristic acts).

143. *See, e.g.*, Lilly v. Virginia, 527 U.S. 116, 134 (1999) (plurality opinion) (holding that the admission of a non-testifying accomplice's confession violated the Confrontation Clause because the confession shifted blame to the defendant and was not against declarant's penal interest); United States v. Chandler, 326 F.3d 210, 223 (3d Cir. 2003) (holding that the government's interest in shielding the jury from information that could influence its sentencing decision did not trump the defendant's right to confront the witness); Lyle v. Koehler, 720 F.2d 426, 433 n.12 (6th Cir. 1983) (stating that it is a violation of defendant's Confrontation Clause right to admit statement of co-conspirator when statement was not made in furtherance of the conspiracy). *See generally* Ben Trachtenberg, *Confronting Coventurers: Coconspirator Hearsay, Sir Walter Raleigh, and the Sixth Amendment Confrontation Clause*, 64 FLA. L. REV. 1669, 1673–74 (2012). *But see* Giles v. California, 554 U.S. 353, 374 n.6 (2008) (opining that the admission of co-conspirator hearsay does not usually violate the Confrontation Clause because incriminating statements in furtherance of the conspiracy are rarely testimonial).

144. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 623–24 (1919); Schenck v. United States, 249 U.S. 47, 49 (1919); Frohwerk v. United States, 249 U.S. 204, 205–07 (1919); United States v. Spock, 416 F.2d 165, 169 (1st Cir. 1969).

145. *See* N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 890–92 n.9 (1982).

146. *See* Alan Feuer, *Tapes Capture Bold Claims of Bronx Man in Terror Plot*, N.Y TIMES, May 8, 2007, *available at* http://www.nytimes.com/2007/05/08/nyregion/08terror.html?ex=1180238400&en=2050059f8a113bd9&ei=5070&_r=0; Benjamin Wittes, *David Cole and Peter Margulies: An Exchange on Tarek Mehanna*, LAWFARE, April 22, 2012, *available at* http://www.lawfareblog.com/2012/04/david-cole-and-peter-margulies-an-exchange-on-tarek-mehanna/.

that they are part of an actual conspiracy or not. Finally, at its most extreme, modern criminal conspiracy enables the discriminatory selection of defendants. "Agreements" that are mere bluster or loose talk, rather than intent to commit crime, or driven primarily by government informants, are now ready subjects of prosecution.[147]

III. 1919: FIRST AMENDMENT AND CONSPIRACY LAW INTERTWINED

Before 1919, the First Amendment had a very small jurisprudential footprint.[148] First Amendment jurisprudence was primarily concerned with freedom of religion,[149] freedom of the press,[150] incorporation of the amendment to the states,[151] and the right to assemble and petition the government for redress of grievances.[152] It was a collectivist amendment, concerned with the rights of groups, and a civic one, concerned with good citizenship and self-governance. There was little doubt that laws prohibiting dangerous or unpopular speech were constitutional.[153] Twentieth century notions of an individualist and boundary-pushing First Amendment did not exist.[154]

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147. *See* Petra Bartosiewicz, *FBI Terror Plot: How the Government is Destroying the Lives of Innocent People*, ALTERNET, June 14, 2012, *available at* http://www.alternet.org/story/155880/fbi_terror_plot%3A_how_the_government_is_destroying_the_lives_of_innocent_people (discussing the plight of a man charged with conspiracy following conversations with a government informant).

148. *See* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 1–2 (1997) (discussing free speech litigation prior to 1919).

149. *See generally* Selected Draft Law Cases, 245 U.S. 366, 390 (1918); Church of the Holy Trinity v. United States, 143 U.S. 457, 470 (1892); Davis v. Beason, 133 U.S. 333, 342 (1890) *overruled by* Romer v. Evans, 517 U.S. 620 (1996); Reynolds v. United States, 98 U.S. 145, 162 (1878).

150. *See* Lewis Publ'g Co. v. Morgan, 229 U.S. 288, 299 (1913) (noting that the First Amendment expressly prohibits laws that interfere with the freedom of the press).

151. *See generally* United States v. Cruikshank, 92 U.S. 542, 552 (1875); Permoli v. Mun. No. 1 of the City of New Orleans, 44 U.S. 589, 606 (1845).

152. *See* Patterson v. Colorado, 205 U.S. 454, 464 (1907); Logan v. United States, 114 U.S. 263, 287 (1892) (Harlan, J., dissenting); Logan v. United States, 144 U.S. 263, 287 (1892); Presser v. Illinois, 116 U.S. 252, 267 (1886).

153. *See, e.g.*, Kirchner v. United States, 255 F. 301, 302 (4th Cir. 1918) (upholding a defendant's conviction under the Espionage Act of 1917 as not violative of the First Amendment); Deason v. United States, 254 F. 259, 260 (5th Cir. 1918) (upholding an Espionage Act conviction without questioning its constitutionality); Doe v. United States, 253 F. 903, 906 (8th Cir. 1918) (failing to question the Espionage Act's constitutionality); Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917) (also failing to question the Espionage Act's constitutionality).

154. Compare this early conception of communal speech rights with Daniel Solove's conception of privacy rights in the digital age, which he argues should be re-envisioned as communal rights. Daniel J. Solove, *"I've Got Nothing to Hide" and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV., 745, 763 (2007). In the digital age-Fourth Amendment context, Solove argues that communal privacy rights offer the best potential protection for individuals' privacy rights. *Id.* at 762. Compared to early First Amendment jurisprudence, the individualist shift in 1919 provided the opportunity for citizens to litigate their First Amendment claims.

Absent such individualist notions, a conflict between speech rights, Confrontation Clause rights, and conspiracy law emerged in the period from 1867 through 1869, and remains unresolved in today's system of modern criminal conspiracy. Three events substantiated this conflict. The first was Congress's passage of the first general conspiracy statute,[155] which was the forerunner to 18 U.S.C. § 371, the contemporary "catch-all" conspiracy law.[156] With a general conspiracy law, prosecutors who wished to indict unpopular speakers could more easily do so by alleging a conspiracy to commit some crime that the unpopular speech seemed to portend.[157] Section 371 provided the skeletal structure of the system of modern criminal conspiracy, which led to prosecutor-friendly rules of evidence and the evisceration of "gatekeepers."[158] The second event was the advent of new hearsay exceptions that made it easier for prosecutors to prove conspiracies.[159] The exception relating to the admissibility of statements of co-conspirators as non-hearsay followed soon thereafter, with its recognition dating back at least to the 1880s[160] and raised as early as 1807, during legal proceedings against Aaron Burr.[161] In addition to avoiding evidentiary problems involving the admission of hearsay, this exception virtually removes the Confrontation Clause "gatekeeper" from conspiracy cases.[162] The third was the ratification of the Fourteenth Amendment, which raised the question of whether the Bill of Rights would apply to the states.[163] This permitted the First Amendment's incorporation against the states in 1925.[164]

The Supreme Court did not begin to shape the First Amendment into the highly speech-protective form existing today until 1919.[165] In that year, the

155. 18 U.S.C. § 371 (2006), Notes of Decisions, Generally, Historical (noting that the statute is based on the original conspiracy statute, Act of March 2, 1867, ch. 169, 14 Stat. L. 471 (1867)); *see also* Goldstein, note 126, at 418 & n.36.

156. 18 U.S.C. § 371 (2011).

157. *See* Goldstein, *supra* note 126, at 418–20 (describing the advantages that the new conspiracy statute offered to prosecutors).

158. *See* Lance Cole & Ross Nabatoff, *Prosecutorial Misuse of the Federal Conspiracy Statute in Election Law Cases*, 18 YALE L. & POL'Y REV. 225, 229–32 (2000).

159. *See* Thomas Y. Davies, *Not "The Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL'Y 349, 456–57 (2007) (describing the origins of these new hearsay exceptions).

160. *Id.* at 393 n.106.

161. *See* United States v. Burr, 25 F. Cas. 187, 193 (C.C.D.Va. 1807).

162. *See* Davies, supra note 159, at 433–34 (describing the connection between hearsay and the confrontation clause).

163. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

164. *See id.*

165. Thomas I. Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975, 975 (1968) (arguing that a collection of 1919 Supreme Court cases marked the first step toward modern First Amendment law); Mathieu J. Shapiro, Note, *When is a Conflict Really a Conflict? Outing and*

Supreme Court introduced the "clear and present danger" test in *Abrams v. United States*,[166] *Schenck v. United States*,[167] *Frohwerk v. United States*,[168] and *Debs v. United States*.[169] This test permitted the restriction of speech only if "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[170] This apparent victory for individual speech rights, however, was blunted by Section 371, the hearsay exceptions, and the readiness of prosecutors to use conspiracy charges to prosecute unpopular groups. Conspiracy enabled end-runs around new speech protections, and, in the process, created additional Confrontation Clause problems.[171]

The "clear and present danger" test gradually evolved into the *Brandenburg* test, which the Court set forth in the 1969 case of the same name.[172] Under *Brandenburg*, advocacy of the use of force or violating the law could be restricted only if it was "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[173]

The *Brandenburg* test highlights a First Amendment-related conceptual problem with the system of modern conspiracy. If the government suspects that someone is preparing, or has agreed with another, to commit a crime, speech that is purely advocacy will normally be admissible and may be enough to convict.[174] On one hand, the *Brandenburg* test should protect the speaker because protected speech is being used as the basis for punishment.[175] On the other hand, if the advocacy is part of the crime of conspiracy, then it may, in fact, be directed to producing the lawless action of criminal conspiracy.[176] In the War on Terror, for example, the government has obtained convictions for material support against people who have merely advanced viewpoints sympathetic to foreign

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the Law, 36 B.C. L. REV. 587, 589 (1995) (noting that modern First Amendment law originated in 1919).

166. 250 U.S. 616 (1919).

167. 249 U.S. 47 (1919).

168. 249 U.S. 204 (1919).

169. 249 U.S. 211 (1919).

170. *Schenck*, 249 U.S. at 52.

171. *See* Goldstein, *supra* note 126, at 418–20.

172. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

173. *Id.*

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

175. *See* Steven R. Morrison, *Conspiracy Law's Threat to Free Speech*, 15 U. PA. J. CONST. L. 865, 920 (2013) (arguing that conspiracy law threatens free speech even though *Brandenburg* should protect it).

176. *See id.* at 918 (introducing the majority view point that conspiracy itself is dangerous and, therefore, "any speech used to produce it" is likely to produce "imminent lawless action").

terrorist organizations.[177] Thus far, *Brandenburg* has not convinced courts to dismiss the charges.[178]

In addition to *Brandenburg* speech, the Court eventually restricted other categories of speech, including speech that is integral to criminal conduct.[179] It is unclear whether such speech is that which is necessary, facilitative, or merely related to criminal conduct.[180] This determination matters for the system of modern criminal conspiracy. If integral speech is that which is necessary to achieve a criminal aim, then pure advocacy speech is more likely to be protected than if integral speech is that which is facilitative or related.[181] However, the speech protections that the integral speech jurisprudence delineates are perhaps less certain than speech protected by *Brandenburg*. This is because speech used as evidence of a crime is not normally subject to First Amendment protection.[182] Therefore, even the purest and most abstract of advocacy speech can be used to prove a conspiracy.[183] This speech functions as inferential evidence of a conspiracy's agreement and/or overt act.[184] To the extent that individuals express their character through their speech, admission of such speech may also violate Federal Rule of Evidence 404.[185] Because a person's verbalized sympathies do not always reflect his intended actions, unfairly prejudicial and even irrelevant evidence may mistakenly be admitted, invoking Federal Rules

177. *See* Sahar Aziz, *Tarek Mehanna: Punishing Muslims for free speech only helps Al Qaeda*, CHRISTIAN SCIENCE MONITOR (April 19, 2012) *available at* http://www.csmonitor.com/Commentary/Opinion/2012/0419/Tarek-Mehanna-Punishing-Muslims-for-free-speech-only-helps-Al-Qaeda (reporting that Tarek Mehanna, a U.S. citizen, was convicted of conspiracy for expressing contempt for U.S. foreign policy in the Middle East); *Va. Man Pleads Guilty to Helping Terror Group*, NBC4 WASHINGTON (Dec. 2, 2011), http://www.nbcwashington.com/news/local/Va-man-expected-to-plead-to-helping-terror-group-134894608.html (discussing a Virgia man's guilty plea to charges of conspiracy for assisting the production of a propaganda video for a terrorist group).

178. *See* Transcript of Record, Day Thirty-Five at 24–25, United States v. Mehanna, (No. 09-10017-6A0 2011) WL 3511226 (Dec. 16, 2011); Jerry Markon, *Va. Muslim Lecturer Sentenced to Life*, WASH. POST, July 14, 2005, at B1, B9.

179. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

180. *See* Morrison, *supra* note 175, at 872.

181. *See id.* at 905–06.

182. *Giboney*, 336 U.S. at 498 (rejecting the idea that speech integral to crime is protected under the First Amendment).

183. *See* United States v. Summage, 575 F.3d 864, 872 (8th Cir. 2009) (upholding a search as valid despite that it sought First Amendment materials); United States v. Kufrovich, 997 F. Supp. 246, 263 (D.Conn. 1997) (*overruled in part by* United States v. Griffith, 284 F.3d 338, 351 (2d. Cir. 2002) (upholding the seizure of First Amendment material because of its role in criminal activity).

184. For example, this speech could constitute providing information or encouragement. *See* United States v. John, 597 F.3d 263, 283 (5th Cir. 2010) (concluding that the defendant's act of providing information constituted an overt act); United States v. Fernandez, 559 F.3d 303, 328 (5th Cir. 2009) (stating that the defendants' encouragement qualified as an overt act in furtherance of a conspiracy).

185. FED. R. EVID. 404.

of Evidence 401 and 403 problems.[186] Thus, speech can simultaneously be the evidence of conspiracy and the conspiracy itself.[187]

There are two problems with First Amendment law in the conspiracy context. First, although the *Brandenburg* test appears to protect unpopular speakers, it does not in fact protect them against conspiracy charges. The speech that provides the building blocks of a conspiracy charge may not be intended to lead to substantive and imminent lawless action, but it may appear to be closely connected to the lawless action of conspiracy.[188] Such speech may, in fact, constitute the crime itself.[189] Second, neither the *Brandenburg* test nor the integral speech jurisprudence protects people from the use of speech as evidence of a crime. At least in some cases, the use of protected speech as evidence chills speech.[190] This can be a First-Amendment violation.

IV. MODERN CONSPIRACY: 1919–SEPTEMBER 11, 2001

With the exception of *Debs*, all three of the 1919 cases were as much conspiracy cases as they were First Amendment cases, in which unpopular speech was the target of the prosecution and comprised the evidence thereof.[191] For example, the defendants in *Schenck* were socialist, anti-war protesters who were convicted of conspiracy to violate the Espionage Act of 1917 by sending leaflets to men who had been drafted into the military.[192] The leaflets proclaimed that the draft violated the Thirteenth Amendment, and that

186. FED. R. EVID. 401 (providing that evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action"); FED. R. EVID. 403 (allowing the court to exclude relevant evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice").

187. *See* Morrison, *supra* note 175, at 892–95, 900 (discussing the difficulty in protecting free speech in criminal conspiracy cases where evidence is presented of defendant's prior statements in order to prove intent to commit a crime or form a conspiracy).

188. *See id.* at 889–90.

189. *Id.*

190. *See* Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 360–61 (1991) (explaining that admitting speech as evidence of crimes results in self-sensorship); Tobias Barrington Wolff, *Political Representation and Accountability Under Don't Ask, Don't Tell*, 89 IOWA L. REV. 1633, 1696 (2004) (discussing First Amendment issues that arise from using speech as evidence).

191. *See* Abrams v. United States, 250 U.S. 616 (1919) (upholding as constitutional the Sedition Act of 1918, which made it a criminal offense to protest the production of war materials with the intent to obstruct the United States' war effort); Schenck v. United States, 249 U.S. 47 (1919) (affirming as constitutional a provision of the Espionage Act of 1917, which made it a criminal offense to obstruct the United States war effort by distributing leaflets urging drafters not to report for service); Debs v. United States, 249 U.S. 211 (1919) (finding constitutional a provision of the Espionage Act of 1917, which made it a criminal offense to obstruct the United States war effort and publicly protest U.S. involvement in World War I).

192. *Schenck*, 249 U.S. at 48–49.

conscription was "in the interest of Wall Street's chosen few."[193] It asked the inductees to "Assert Your Rights" by refusing to report for duty. [194] The Court ruled that this violated of the Espionage Act, which prohibited individuals from causing or attempting to cause insubordination in the military.[195] Later twentieth century cases indicated that the "clear and present danger" test and, ultimately, the *Brandenburg* test, would impose no First Amendment "gatekeeper" in conspiracy cases.[196]

Dennis v. United States, was striking to the extent to which the Court approved of the government reaching far into a crime's inchoateness to prosecute mere ideas.[197] In this case, the defendants— communists who did not advocate the overthrow of the government— were found guilty of *conspiring* to advocate the overthrow of the government.[198] The Court had no difficulty affirming the conviction for violating the Smith Act, rejecting "the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation." [199] According to the *Dennis* Court, "[i]t is the existence of the conspiracy which creates the danger."[200]

In *Yates v. United States*, Justice Black highlighted the First Amendment problems with conspiracy law, and suggested that the underlying problem with the system of modern conspiracy is that it has subjected unpopular ideas and the speech that expresses them to prosecution.[201] He observed that, when speech was at issue in a criminal trial, the prosecution was likely to focus not on criminality, but on the unpopularity of the speech.[202]

Justice Douglas later questioned the extent to which conspiracy charges might violate speech rights.[203] In 1968, the Court denied certiorari in *Epton v. New York*.[204] Dissenting from the denial, Justice Douglas observed that "[w]hether the overt act required to convict a defendant for conspiracy must be shown to be

193. *Id.* at 50–51.

194. *Id.* at 51.

195. *Id.* at 48–49, 52–53.

196. *See* Epton v. New York, 390 U.S. 29, 29–30 (1968) (per curiam) (Stewart, J., concurring); Yates v. United States, 354 U.S. 298 (1957), *overruled on other grounds by* Burks v. United States, 437 U.S. 1, 8–12 (1978); *Dennis v. United States*, 341 U.S. 494 (1951).

197. *Dennis*, 341 U.S. at 499–500.

198. *Id.* at 497–98, 516–17.

199. *Id.* at 511.

200. *Id.* at 511.

201. *See* Yates v. United States, 354. U.S. 298, 339 (1957) (Black, J., concurring in part and dissenting in part) *overruled on other grounds by* Burks v. United States, 437 U.S. 1, 8–12 (1978).

202. *Id.* "When the propriety of obnoxious or unorthodox views about government is in reality made the crucial issue, as it must be in cases of this kind, prejudice makes conviction inevitable except in the rarest circumstances." *Id.*

203. *See* Epton v. New York, 390 U.S. 29 (1968) (Douglas, J., dissenting).

204. *Id.*

constitutionally unprotected presents an important question."[205] His observation has gone unaddressed by the Court.

V. MODERN CONSPIRACY IN THE TWENTY-FIRST CENTURY: TERRORISM AND THE INTERNET

Hugo Black's opinion notwithstanding,[206] speech rights are not absolute. In almost every context, courts balance individual interests in free speech with other interests,[207] such as public safety[208] and freedom from libel.[209] In the conspiracy law context, courts do not engage in speech balancing tests. Rather, the exigencies of conspiracy law—public safety, evidentiary relevance, and probative value—always take precedence over speech rights.[210]

Because of this preference, the landmark twentieth-century-conspiracy-speech cases should no longer hold weight. In these cases, the government prosecuted unpopular defendants merely for their speech, and used laws that today would violate the First Amendment and restrict worthwhile speech. It was within that context that Justice Black, in his *Yates* dissent, pointed out the absurdity of these prosecutions and suggested a First Amendment limit to the admissibility of speech to prove conspiracy charges.[211]

Despite Justice Black's observations, the terrorist attacks of September 11, 2001, digital-age communicative realities, and the combination of the two in online "recruitment" speech[212] has given new impetus to the use of the system

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205. *Id.* at 31 (Douglas, J., dissenting). *See also* Samuels v. Mackell, 401 U.S. 66, 75 (1971) (Douglas, J., concurring) (discussing his dissent in *Epton*).

206. Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874, 879 (1960) (arguing that "[t]he phrase 'Congress shall make no law' is composed of plain words, easily understood" and that the language is "absolute").

207. *See, e.g.*, Watchtower Bible and Tract Soc'y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150, 162–63 (2002) (balancing First Amendment rights of individuals to canvass against town's interest in regulating the practice); City of Boerne v. Flores, 521 U.S. 507, 515 (1997) (noting that First Amendment rights can be infringed upon if there is compelling justification).

208. *See* Gillman v. Schlagetter, 777 F. Supp. 2d 1084, 1096 (S.D. Ohio 2010) ("The court must balance Gillman's First Amendment right with the interests of efficient operation of a public safety organization . . . .").

209. Tavoulareas v. Piro, 93 F.R.D. 35, 42 (D.D.C. 1981) (noting that a plaintiff may investigate a newspaper's methods only to the extent that it relates to the libel suit).

210. *See Dennis v. United States*, 341 U.S. 494, 533–37 (1951) (Frankfurter, J., concurring). Although Justice Frankfurter recognized that First Amendment interests were threatened, he deferred to legislatures' declarations that the public safety and national security interests underlying conspiracy law should prevail. *Id.* at 542. Similarly, Ali al-Tamimi was given a life sentence for telling others that the time had come to fight jihad. Markon, *supra* note 178. The judge failed to see the implications for free speech, stating after the trial that the case did not "violate any of Timimi's First Amendment rights. This is not a case about speech. This is a case about intent." *Id.*

211. *See* Yates v. United States, 354 U.S. 298, 339 (1957) (Black, J., dissenting) *overruled in part by* Burks v. United States, 437 U.S. 1 (1978).

212. *See* HOMELAND SECURITY INSTITUTE, THE INTERNET AS A TERRORIST TOOL FOR RECRUITMENT AND RADICALIZATION OF YOUTH (2009), *available at* http://www.homelandsecurity.org/hsireports/Internet_Radicalization.pdf.

of modern criminal conspiracy. Having largely defeated Al Qaeda as a hierarchical, physical structure, the government is now turning its attention to Al Qaeda as an ideology.[213] The government is concerned that the Al Qaeda brand is distributed over the Internet, and is particularly effective in gaining "homegrown" adherents in the United States, which will lead these adherents to perform actual violent acts.[214]

For example, prosecutors are attempting to establish that two or more "homegrown" terrorist "wannabes" in the United States can have as their co-conspirators Al Qaeda leader Ayman al-Zawahiri and, before he was killed, Osama bin Laden, simply because the "wannabes" learned of Al Qaeda's platform and adopted it as their own.[215] No actual connection between the "wannabes" and Al Qaeda needs to exist.[216]

This move is due, in part, to the persistent threat posed by terrorism combined with the new technological abilities in the digital age to form novel types of suspicious, disturbing, or criminal combinations (real or believed), and law enforcement's ability to detect these combinations.[217] It is also due to the increasing focus on homegrown terrorists. As the wars in Iraq and Afghanistan wind down, national security is increasinglyfocused on potential domestic

213. *See* NATIONAL SECURITY PREPAREDNESS GROUP, TENTH ANNIVERSARY POSTCARD: THE STATUS OF THE 9/11 COMMISSION RECOMMENDATIONS (2011), *available at* http://www.bipartisanpolicy.org/sites/default/files/CommissionRecommendations.pdf.

214. *See "Ten Years After 9/11: Are We Safer", Hearing Before the S. Comm. On Homeland Sec. and Governmental Affairs*, 112th Cong. 6 (2011), *available at* http://www.hsgac.senate.gov/hearings/ten-years-after-9/11-are-we-safer (testimony of the Hon. Matthew G. Olsen, Director, National Counterterrorism Center).

215. *See, e.g.*, Government's Opposition to Defendant's Motion to Dismiss Portions of Counts One Through Three of the Second Superseding Indictment at 1–2, United States v. Mehanna, No. 09-10017-6AO, 2011 WL 3511226 (D. Mass. July 29, 2011).

216. *See id*. at 7 (stating that "[w]hether the [terrorist organization] ever knew that the defendants agreed to support them through [advocacy by speech] is irrelevant in a conspiracy analysis; what matters is the intent and understanding of the conspirators"); United States v. Kassir, No. 04 Cr. 356 (JFK) 2009 WL 2913651 at * 1, 9.7, 10 (S.D.N.Y. Sept. 11, 2009) (arguing that, even assuming that Al Qaeda coincidentally sanctioned the defendant's "sharing al Qaeda's ideology," the material support statute "can criminalize the distribution of certain written materials," which includes "jihad propaganda."); United States v. Amawi, 552 F. Supp. 2d 669, 671 (N.D. Ohio 2008) (explaining that the government correctly charged the defendants with conspiracy to provide material support to terrorism by distributing "how to" videos and obtaining videos from the Internet even though "[t]he government [did] not allege that any organized terrorist or insurgent organization solicited the defendants to commit the crimes charged to them.").

217. *See* CATHERINE A. THEOHARY & JOHN ROLLINS, CONG. RESEARCH SERVICE, R41674, *Terrorist Use of the Internet: Information Operations in Cyberspace* 1–2 (2011) (reporting that the Internet provides a medium for terrorists to spread propaganda materials, recruit supporters, and raise money).

threats.[218] Conspiracy law lies at the heart of the governmental response to combatting terrorism domestically.[219]

In 1925, Justice Holmes wrote that "[e]very idea is an incitement,"[220] by which he meant that the purpose of speech is to persuade. Therefore, the government should not restrict speech because it might persuade someone to adopt an unpopular view. Americans have the right to persuade people through speech to adopt an anarchist or Communist viewpoint. Do we similarly have the right to persuade people to adopt a jihadist viewpoint, or even Al Qaeda's outlook? In *Holder v. Humanitarian Law Project*,[221] the Supreme Court held we have the right to do so.[222] However, the government does not appear to take the *Humanitarian Law Project* ruling seriously. Prosecutors continue to press charges against people who merely spoke out in favor of Al Qaeda, jihad, or the Iraqi or Afghani insurgencies.[223]

Prosecutors bring these charges in a series of three steps. First, prosecutors charge the defendants with conspiracy. This permits the government to obtain a conviction based upon speech alone, because in the context of a conspiracy charge, speech can serve as both *actus reus* and evidence of mens rea.[224] Indeed, even the same speech can prove both. Because those charged are often young males who communicate heavily online, prosecutors may have the opportunity to choose the most damning language from a wealth of digitally-preserved and lengthy conversations.[225] Frequently, these defendants talked a "good game," allowing the government to easily advance a conspiracy charge.[226] Whether

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218. Huq, *supra* note 142, at 840–42.

219. *See, e.g.*, United States v. Stewart, 686 F.3d 156, 166 (2d Cir. 2012) *cert. denied* 134 S. Ct. 54 (2013); United States v. Naidu, 480 Fed. App'x 180, 182 (4th Cir. 2012) (per curiam); United States v. Chandia, 675 F.3d 329, 332–33 (4th Cir. 2012); United States v. El-Mezain, 664 F.3d 467, 483 (5th Cir. 2011); United States v. Augustin, 661 F.3d 1105, 1115 (11th Cir. 2011); United States v. Al Kassar, 660 F.3d 108, 116, 118 (2d Cir. 2011); United States v. Jayyousi, 657 F.3d 1085, 1092 (11th Cir. 2011); United States v. Farhane, 634 F.3d 127, 134 (2d Cir. 2011); United States v. Awan, 607 F.3d 306, 309–10 (2d Cir. 2010); United States v. Al-Moayad, 545 F.3d 139, 145 (2d Cir. 2008).

220. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

221. 130 S. Ct. 2705 (2010).

222. *Id.* at 2722–23 (rejecting plaintiffs' claim that Congress prohibited their "pure political speech" and stating that "[u]nder the material-support statute, plaintiffs may say anything they wish on any topic.").

223. David Cole, *The First Amendment's Borders: The Place of* Holder v. Humanitarian Law Project *in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 152, 154 (2012) (critiquing the *Humanitarian Law Project* Court's reasoning that "teaching a group how to bring human rights claims before the United Nations human rights bodies" might result in those groups using those tactics to further terrorist activities). *See also* Huq, *supra* note 142, at 842 (arguing that prosecutors use religious speech to indicate and establish the defendant's ties to terrorist organizations).

224. Morrison, *supra* note 175, at 900.

225. Theohary & Rollins, *supra* note 217, at 2 (describing the various methods by which individuals can use the Internet to express sympathy with or support for terrorist organizations).

226. *See id.* at 2, 4.

those charged actually conspired to commit a substantive crime is doubtful. Dynamic systems of substantive crimes—like capital murder—ensure that doubt leads to acquittals. However, the uniform system of conspiracy law discourages this process. In fact, conspiracy law's very uniformity is based upon prosecution-friendly rules that discount juries' doubt. Thus, juries are permitted to convict on the basis of evidence that may only appear incriminating. For example, prosecutors are not required to prove any substantive act; rather, they need only convince juries that they can and should infer criminal agreement from suspicious words.[227]

Charging a defendant with conspiracy also allows prosecutors to admit the speech of terrorist luminaries, such as Osama bin Laden and Ayman al-Zawahiri, simply by alleging that these infamous terrorists are unindicted co-conspirators.[228] In at least half of federal jurisdictions, it is only *after* the jury hears this evidence that the judge will rule on whether such individuals actually served as co-conspirators, and therefore whether their statements are admissible against the defendant.[229] This *post-hoc* Confrontation Clause gatekeeper is just as useless as the clichéd bell-ringing metaphor suggests.

Second, prosecutors will define key terms in the government's favor within the charging document. For example, prosecutors invariably describe jihad as "violent jihad," which they define as "planning, facilitating, preparing for, and engaging in acts of physical violence, including murder, kidnaping, maiming, assault, and damage to and destruction of property, against civilian and government targets, in purported defense of Muslims or retaliation for acts committed against Muslims, in the United States and in foreign nations."[230] This definition is both inaccurate and the most prosecution-friendly possible definition.[231] It implies that when a defendant says, "jihad is obligatory," he

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227. *See* United States v. Spock, 416 F.2d 165, 173 (1st Cir. 1969) (holding that the prosecutor may establish specific intent to support a conspiracy charge through an individual's prior or subsequent statements).

228. *See* United States v. El-Mezain, 664 F.3d 467, 502 (5th Cir. 2011) (holding "a statement is not hearsay if it was made during the course and in furtherance of a common plan or endeavor with a party, regardless of the non-criminal nature of that endeavor.").

229. *See* 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, 878–79 (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, 22–23 (1st Cir. 1977).

230. See, e.g., Criminal Indictment (Third Superseding) at 1–2, United States v. Sadequee, No. 1:06-CR-147-WSD-GGB (N.D. Ga. Dec. 9, 2008), ECF No. 347. *See also* Superseding Indictment at 2, United States v. Hassoun, No. 04-60001-CR-COOKE (S.D. Fla. Nov. 17, 2005), ECF No. 141, 2005 WL 5680800, at *2 ("As used in this Superseding Indictment, the terms 'violent jihad' or 'jihad' include planning, preparing for, and engaging in, acts of physical violence, including murder, maiming, kidnapping, and hostage-taking.").

231. Jihad also can refer to: "a body of legal doctrine," MICHAEL BONNER, JIHAD IN ISLAMIC HISTORY: DOCTRINES AND PRACTICE 3 (2006); "disputation and efforts made for the sake of God and in his cause," *id.* at 21; speaking out, MALISE RUTHVEN, ISLAM: A VERY SHORT

simultaneously advances the idea that "terrorism is obligatory." Although the defense is typically responsible for rebutting this definition, when the government applies its own definition in its charging document, thus arguing that whenever the defendant says "jihad," he means "terrorism," the government poisons the jury and makes it nearly impossible for the defense to dissociate the defendant from the government's definition.

Third, the government presents pseudo-experts to testify on Al Qaeda, terrorism in general, Middle Eastern politics, the Internet, and the nature of recruitment speech.[232] The experts are, as Isaiah Berlin might say, "hedgehogs" for the war on terror in the digital age.[233] These experts testify that they read or listened to the defendant's recorded conversations, the defendant fits the profile of an extremist or violent jihadi, and therefore the defendant would engage in violent criminal conduct when given the opportunity.[234]

The experts even testify that by reading about Al Qaeda online and adopting Al Qaeda's viewpoint, a person can become part of the Al Qaeda conspiracy, even if the person never communicated with or otherwise contacted any member of Al Qaeda.[235] One of the government's favorite "hedgehogs," Evan Kohlmann,[236] has testified extensively on the idea of Al Qaeda as an ideology in which individuals can participate, regardless of actual contact with Al Qaeda members.[237]

INTRODUCTION 116 (1997); proselytizing, DAVID COOK, UNDERSTANDING JIHAD 122 (2005); and speaking truth to a tyrant, *id.* at 33–34.

232. *See* Petra Bartosiewicz, *Experts in Terror*, THE NATION, Feb. 4, 2008, at 18, 20–23 (describing the government's use of young, inexperienced, and ideological experts).

233. ISAIAH BERLIN, THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY 3 (1953).

234. *See* Transcript of Proceedings at 52–59, United States v. Ahmed, No. 1:06-cr-00147 -WSD-GGB (N.D. Ga. May 20, 2009), ECF No. 479.

235. *See* Bartosiewicz, *supra* note 232. The perceived danger of ideas is behind many government decisions today. Petra Bartosiewicz, *To Catch a Terrorist*, HARPER'S MAGAZINE (Aug. 2011), *available at* http://harpers.org/archive/2011/08/to-catch-a-terrorist/. After the sentencing of two terrorism defendants in 2008, the prosecuting attorney was asked whether the defendants were connected in any substantive way. *Id.* The prosecuting attorney's response was as follows: "Well, we didn't have the evidence of that, but he had the ideology." *Id.*

236. *See* United States v. Ali, No. 10-187, 2011 WL 4583826, at *7 (D. Minn. Sept. 30, 2011); United States v. Sedaghaty, No. 05-60008-H0, 2011 WL 3563145, at *3 (D. Or. Aug. 10, 2011); Benkahla v. United States, No. 1:06cr9 (JCC), 2010 WL 2721384, at *1 (E.D. Va. July 8, 2010); United States v. Kassir, No. 04 Cr. 356 (JFK), 2009 WL 2913651, at *2–3 (S.D.N.Y. Sept. 11, 2009); United States v. El-Hindi, No. 3:06CR719, 2009 WL 1373268, at *3 (N.D. Ohio May 15, 2009); United States v. Kassir, No. 52 04 Cr. 356(JFK), 2009 WL 910767, at *2 (S.D.N.Y. Apr. 2, 2009).

237. *Kassir*, 2009 WL 2913651, at *3. Specifically, Evan Kohlmann has testified that:

> al Qaeda is not just an organization. Al Qaeda also views itself as an ideology. It hopes to encourage people around the world who are unable to travel to places like Afghanistan or Somalia or wherever else, it hopes to encourage those people to do what they can at home.

The government's broad application of conspiracy charges in the context of terrorism results in important immediate and long-term consequences. Immediately, such terrorism-related indictments produce unreliable outcomes, especially in cases in which the prosecutor only or primarily charges conspiracy. Some high profile cases and twentieth-century conspiracy-speech cases suggest that the government often overreaches and pursues innocent, if unpopular, individuals.

Long-term, broad application of conspiracy charges will transform conspiracy into a broadly discretionary crime of chameleon-like hue. For example, the government's success in using the system of modern criminal conspiracy in the terrorism context means that if a person speaks out against the war on drugs, he could be charged with conspiracy to support a drug cartel, or someone critical of the administration could face charges of conspiracy to assault the President. The risk is that the government will base the decision to prosecute less on whether a person has committed a crime—or, more narrowly, whether there is a public safety danger—and more on whether a person's speech and conduct are unpopular. Good-faith but mistaken prosecutions can result from prosecutorial confirmation bias,[238] meaning systemic checks on prosecutorial bad faith—rather than across the board reductions in discretion—would not necessarily lower this decisional risk.

The case of Sami Omar Al-Hussayen is exemplary. Al-Hussayen was a doctoral student in computer science at the University of Idaho[239] when, in 2004, the government charged him with providing and conspiring to provide material support to Hamas, a designated Foreign Terrorist Organization (FTO).[240] The indictment indicated that between 1994 and 2003, Al-Hussayen provided "expert advice and assistance, communications equipment, currency, monetary instruments, financial services and personnel."[241] He did so "by, among other things, creating and maintaining Internet websites and other Internet media

> Particularly after 9/11, there was a tremendous emphasis on the training camps are closed [sic]. You can't just come to Afghanistan now to get training and go home. Now the battle is in your own backyard. The battle is what you yourself are able to do with your own abilities, so you should do whatever you can. It is an individual duty upon you to participate in the struggle. It is not about Usama Bin Laden and it's not about al Qaeda. It is about the methodology and the ideology behind them. If you follow the same methodology and the same ideology, then you too can be al Qaeda.

Id.

238. *See* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1594–97 (2006) (describing confirmation bias and its possible effects).

239. Maureen O'Hagan, *A Terrorism Case That Went Awry*, SEATTLE TIMES (Nov. 22, 2004), *available at* http://seattletimes.com/html/localnews/2002097570_sami22m.html.

240. Second Superseding Indictment at 2, United States v. Al-Hussayen, No. CR 03-0048-C -EJL (D. Idaho Mar. 4, 2004), ECF No. 486.

241. *Id.*

designed to recruit mujahideen and raise funds for violent jihad in Israel, Chechnya and other places."[242]

One of the websites Al-Hussayen maintained contained a hyperlink to another website that solicited donations for Hamas.[243] That website "invited [users] to sign up for an internet e-mail group, maintained and moderated by Al-Hussayen and others, in order to obtain 'news' of violent jihad on Chechnya."[244] As an administrator, Al-Hussayen controlled the content of information posted to the group.[245] The group was comprised of 2,400 users to whom materials such as the "Virtues of Jihad"[246] and instructions on how to train for jihad were distributed.[247]

At trial, the government argued that Al-Hussayen portrayed one personality to the public and a completely different personality in private.[248] The indictment defined "violent jihad" as

> the taking of action against persons or governments that are deemed to be enemies of a fundamentalist version of Islam. Historically, violent jihad has included armed conflicts and other violence in numerous areas of the world, including Afghanistan, Chechnya, Israel, the Philippines and Indonesia. The armed conflicts in these geographic areas and elsewhere have involved murder, maiming, kidnaping, and destruction of property.[249]

One juror later remarked that based, on the government's opening statement alone, he believed Al-Hussayen was "going to be in jail for life."[250]

At trial, the government's case collapsed. The government argued that Al-Hussayen was closely involved in the creation of the websites that supported violent attacks in the name of jihad.[251] However, the government presented no evidence demonstrating Al-Hussayen's belief in the violent message or of the sites' success in recruiting members.[252] Furthermore, the defense argued that the hyperlinks from Al-Hussayen's website to the website that facilitated donations to Hamas were removed before Al-Hussayen became involved.[253] Finally, the websites that Al-Hussayen maintained were those of Muslim

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242. *Id.* Then-Attorney General John Ashcroft, upon Al-Hussayen's arrest, called the defendant "part of 'a terrorist threat to Americans that is fanatical, and it is fierce.'" O'Hagan, *supra* note 239.

243. Second Superseding Indictment, *supra* note 240, at 8.

244. *Id.* at 8–9.

245. *Id.* at 9.

246. *Id.* at 9.

247. *Id.* at 9–10.

248. O'Hagan, *supra* note 239.

249. Second Superseding Indictment, *supra* note 240, at 2.

250. O'Hagan, *supra* note 239.

251. *Id.*

252. *Id.*

253. *Id.*

charities.[254] The government argued that the websites contained hidden messages encouraging violent attacks by terrorist organizations.[255]

By the end of the trial, the juror who thought Al-Hussayen would be going away for life had changed his mind.[256] He heard no evidence during the trial that Al-Hussayen supported terrorism.[257] The government's case, in the juror's opinion, "was a real stretch."[258] The other jurors agreed, and acquitted Al-Hussayen of all terrorism charges after only a few hours of deliberation.[259]

Al-Hussayen's case is not an aberration. In late 2011, Jubair Ahmad was charged with providing material support to Lashkar-e-Tayyiba (LeT), an FTO, for "producing and posting an LeT propaganda video glorifying violent jihad."[260] He received a twelve-year prison sentence for the five-minute video, which took him only one day to produce.[261] Ali al-Tamimi's case is another example of prosecutors proceeding with an unsubstantiated terrorism conspiracy charge. Al-Tamimi, a Muslim cleric, received a life sentence for encouraging a group of younger Muslims, five days after 9/11, to leave the United States to fight jihad.[262] Tarek Mehanna's case is also exemplary. Mehanna was convicted of conspiring to provide material support to Al Qaeda in part by translating religious texts relating to jihad that were publicly available on the Internet.[263] The government acknowledged it was possible Mehanna never had any connection to Al Qaeda or any other FTO, but nonetheless considered bin Laden an unindicted coconspirator.[264] The government did so because bin

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *See* Criminal Information at 1, United States v. Ahmad, No. 1:11-cr-00554-001 (E.D. Va. Dec. 2, 2011), ECF No.39; Affidavit in Support of Criminal Complaint, Arrest Warrant, and Search Warrant at 4, United States v. Ahmad, No. 1:11-mj-00742-JFA (E.D. Va. Sept. 1, 2011) (explaining and detailing the contents of the violent video, as well as the investigation that led the FBI to Ahmad).

261. *See* Judgment in a Criminal Case at 2, United States v. Ahmad, No. 1:11-cr-00554-001 (E.D. Va. Apr. 13, 2012); *Pakistani National Living In Woodbridge Pleads Guilty To Providing Material Support To Terrorist Organization*, U.S. ATTORNEY'S OFFICE: E.D. OF VA. (Dec. 2, 2011), http://www.justice.gov/usao/vae/news/2011/12/20111202ahmadnr.html; Affidavit in Support of Criminal Complaint, Arrest Warrant, and Search Warrant, *supra* note 260, at 7.

262. Markon, *supra* note 178, at 2.

263. *See* United States v. Mehanna, 669 F. Supp. 2d 160, 162 (D. Mass. 2009) (stating that "Mehanna translated into English the publication '39 Ways to Serve and Participate in Jihad'" which told the reader, among other instructions, to "go for jihad yourself, make jihad with your wealth, help prepare the fighter going for jihad . . . .").

264. Government's Opposition to Defendant's Motion to Dismiss Portions of Counts One through Three of the Second Superseding Indictment at 2, 22, United States v. Mehanna, No. 1:09-cr-10017-GAO (D. Mass July 29, 2011), ECF No. 200 (arguing that, in a conspiracy context, the government does not need to prove direct contact between Mehanna and Al Qaeda, but even

Laden issued a worldwide call to help Al Qaeda, which Mehanna *might* have heard and therefore followed.[265]

The 2010 Supreme Court decision *Humanitarian Law Project* has received significant attention from those concerned with its First Amendment implications.[266] In *Humanitarian Law Project*, a United Nations-recognized American organization wanted to train designated FTOs to pursue their grievances in lawful, non-violent ways.[267] The organization asked for a declaratory injunction, but the Court ultimately found that providing this type of training would constitute material support to an FTO.[268]

Although criticized by First Amendment advocates,[269] on its surface *Humanitarian Law Project* reasserted extant First Amendment rights in a way that could, if the government's concern about terrorism-advocacy speech is
well-founded,[270] threaten national security. The Court reiterated that the First Amendment allows people to voice support for FTOs and to be members of an FTO as long as they commit no crime.[271] As the facts of *United States v. Ahmad* and *United States v. Mehanna* reveal, however, prosecutors do not view *Humanitarian Law Project* as protecting free speech for FTOs; they

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still, Mehanna was responding to "a public call of Al [Qaeda] for specific types of assistance" which was a "direct one-way contact between the conspirators and the FTO.").

265. *Id.* at 22.

266. *See, e.g.*, Noam Chomsky, *Chomsky on Obama vs. Free Speech*, YOUTUBE (Jan. 16, 2011), http://www.youtube.com/watch?v=bjNtZnpDGjU; David Cole, *The Roberts Court's Free Speech Problem*, THE N.Y. REVIEW OF BOOKS (June 28, 2010), http://www.nybooks.com/blogs/nyrblog/2010/jun/28/roberts-courts-free-speech-problem/; Adam Serwer, *Does Posting Jihadist Material Make Tarek Mehanna a Terrorist?*, MOTHER JONES (Dec. 16, 2011, 3:00 AM), http://www.motherjones.com/politics/2011/12/tarek-mehanna-terrorist.

267. 130 S. Ct. 2705, 2714–16 (2010).

268. *Id.* at 2714.

269. *See* Cole, *supra* note 223, at 148–49 (2012) (discussing the potential "grave repercussions" of *Humanitarian Law Project* and its chilling effects on freedom of speech, political expression, and freedom of expression); Bernard E. Harcourt, *The Politics of Incivility*, 54 ARIZ L. REV. 345, 364 n.61 (2012) (comparing *Humanitarian Law Project* to when the potential "evil" of the communism era "outweighed First Amendment concerns"); Laura Rovner & Jeanne Theoharis, *Preferring Order to Justice*, 61 AM. U. L. REV. 1331, 1349 (2012) (noting the Supreme Court subjected speech that advocated lawful, nonviolent activity to criminal penalties because the speech was "potentially legitimizing" of the associations).

270. JEROME P. BJELOPERA, CONG. RESEARCH SERV., R41416, *American Jihadist Terrorism: Combating a Complex Threat*, 14–23 (2013), *available at* http://www.fas.org/sgp/crs/terror/R41416.pdf (providing a detailed description of social networking's effects on jihad terrorist group formation); HOMELAND SECURITY INSTITUTE, *supra* note 212, at 1–2 (2009), *available at* http://www.homelandsecurity.org/hsireports/Internet_Radicalization.pdf (providing specific examples of terrorist groups' use of the Internet for recruiting and radicalizing younger members); Theohary & Rollins, *supra* note 217, at 2–4 (explaining that terrorist groups use the Internet and social media as their primary recruiting method, resulting in cybercrime becoming the largest source for terrorist funding).

271. *Humanitarian Law Project*, 130 S. Ct. at 2722–23 (noting that "Congress has not . . . sought to suppress ideas or opinions in the form of 'pure political speech.'").

continue to initiate material support charges where pure speech is at issue. Either prosecutors do not take the *Humanitarian Law Project* holding seriously, or two constitutional rights—speaking in favor of an FTO and being a member of that FTO—make one constitutional wrong if exercised together. *Ahmad* stands for the proposition that one cannot legally be a member of an FTO and advocate for it.[272] *Mehanna* suggests that even when one has never communicated with an FTO, pro-jihadi speech may be the subject of indictment.[273] In this regard, the material support statute produces the perverse results seen in *Dennis*, *Yates*, and the 1919 cases; although the First Amendment protects politically-oriented speech, these protections do not stand in the face of conspiracy charges if the speaker supports an unpopular or outlawed group.[274]

The application of conspiracy law in the war on terror illustrates the concatenation of four individual concerns with the system of modern criminal conspiracy. These concerns include the material support statute's failure to protect unpopular speech,[275] the government's broad definition of "recruitment" speech,[276] the conceptualization of groups like Al Qaeda as ideologies,[277] and the fact that the government portrays the exhortation or advocacy as an agreement to do something illegal.[278] These four issues are compounded by

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272. *See* Affidavit in Support of Criminal Complaint, Arrest Warrant, and Search Warrant, *supra* note 260, at 4–5; Judgment in a Criminal Case, *supra* note 260.

273. *See* United States v. Mehanna, 735 F.3d 32, 44–47 (1st Cir. 2013).

274. *See* Harcourt, *supra* note 269, at 364 n.61 (noting that since *Humanitarian Law Project*, "arguably the fear surrounding terrorism and some [c]ourt decisions surrounding the Patriot Act have us sliding back toward the era of *Dennis* and the Alien and Sedition Acts.").

275. *See, e.g.*, Criminal Information at 1, United States v. Ahmad, No. 1:11-cr-00554-001 (E.D. Va. Dec. 2, 2011), ECF 39; Second Superseding Indictment at 3, 6–9, United States v. Mehanna, No. 1:09-cr-10017-GAO (D. Mass. June 17, 2010), ECF 83. Much like the Espionage Act and Smith Act before it, the material support statute protects unpopular speech, except when it falls short, such as when the speech is made as part of an organized attempt to exhort individuals to adopt an unpopular (and potentially dangerous) viewpoint. *See, e.g.*, Criminal Information at 1, United States v. Ahmad, No. 1:11-cr-00554-001 (E.D. Va. Dec. 2, 2011), ECF 39; Second Superseding Indictment at 3, 6–9, United States v. Mehanna, No. 1:09-cr-10017-GAO (D. Mass. June 17, 2010), ECF 83.

276. *See, e.g.*, Second Superseding Indictment, *supra* note 240, at 2–8; Wittes, *supra* note 146, at 1–2. The government is concerned with "recruitment" speech, especially online, and has successfully obtained convictions for such speech as "material support." *See, e.g.*, Second Superseding Indictment, *supra* note 240, at 2–8; Wittes, *supra* note 146, at 1–2. However, recruitment speech to one person can seem like advocacy or newsworthy information to another. HOMELAND SECURITY INSTITUTE, *supra* note 212, at 1–6. Furthermore, recruitment is a form of incitement that falls short of *Brandenburg*'s limit on freedom of speech, and evokes Justice Holmes' comment that "[e]very idea is an incitement." Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

277. *See supra* Part V. In the government's perspective of modern conspiracy law, if someone adopts an ideology, he becomes part of that group. This concept is contrary to traditional freedom of speech and conspiracy law, and threatens a number of evidentiary rules as well as the Confrontation Clause. *Id.*

278. Conspiratorial agreements are inferred upon speech evidence, leading to First Amendment concerns and outcome reliability problems. *See* Wittes, *supra* note 146, at 1.

conspiracy's failure to invoke the Confrontation Clause and Federal Rules of Evidence 401, 403, and 404 safeguards, and give substance to the system of modern criminal conspiracy.

VI. THE SYSTEM OF MODERN CRIMINAL CONSPIRACY

The definition of modern criminal conspiracy is similar to its prior limited iterations, including what one commentator in 1921 called the "Seventeenth Century Rule in Conspiracy."[279] Put simply, conspiracy is an inchoate crime, meaning that it contemplates the commission of a substantive crime.[280] Its usual elements are: (1) an agreement to commit a crime;[281] (2) an overt act taken in furtherance of the agreement;[282] (3) and the intent to both agree to and to commit the conspiracy's substantive target crime.[283]

Although apparently separate, close analysis of these elements reveals substantial overlap that undermines the traditional normative, constitutional, and evidentiary rules mentioned throughout this Article. This overlap in part creates the systemic problems of uniform systems detailed below.[284] The internal components of uniform systems do not result in any division of labor among what satisfies the different elements of a crime. Because a crime's elements should relate to different components of a crime—a killing is an *actus reus* and a defendant's mens rea indicates her guilty state of mind— uniform systems with substantial elemental overlap can produce unreliable or erroneous outcomes.[285] The system of modern criminal conspiracy reflects this pitfall.

This is not to say that uniform systems, like conspiracy, never produce reliable outcomes, or that dynamic systems always do. For example, crimes comprising dynamic systems are often proven on the strength of only a confession or eyewitness identification.[286] The probity that juries give to these forms of

279. HARRISON, *supra* note 18, at 16.

280. United States v. Williams, 553 U.S. 285, 300 (2008).

281. 18 U.S.C. § 371 (2012).

282. *Id.*

283. United States v. U.S. Gypsum Co., 438 U.S. 422, 443 n.20 (1978).

284. *See* DONELLA H. MEADOWS, THINKING IN SYSTEMS: A PRIMER 3–4 (2008) (explaining that diverse systems tend to be less volatile than uniform systems, and discussing possible unsavory outcomes that uniform systems can generate).

285. As an additional example of the functioning of a uniform system, consider that automobile manufacturers use different raw materials to produce different parts of a car. Rubber is used for the tires, steel for the chassis, and cloth and leather for the interior. This division of labor produces a car that operates very effectively. No such division of labor exists in the uniform system of modern conspiracy; it is as though the car factory attempts to make an entire car out of a single raw material. Using one raw material is like treating all forms of evidence the same. The former results in a very ineffective car; the latter results in a very unreliable or erroneous conviction that has probably violated numerous, constitutional, and evidentiary rules.

286. *See* Watkins v. Sowders, 449 U.S. 341, 352–57 (1981) (Brennan, J., dissenting).

evidence,[287] coupled with the relative unreliability of those forms of evidence, means that even in dynamic systems false convictions do occur. Similarly, many conspiracy charges are well grounded, and the evidence upon which many resulting convictions are based is fair and accurate.[288] However, these outcomes do not depend primarily on the nature of the systems involved. Rather, they depend upon externalities such as the perceived reliability of certain types of evidence or the wisdom of a prosecutor's charging decision. The uniform system of conspiracy arguably lacks the checks inherent in dynamic systems. This deficiency increases the range of prosecutorial discretion, changes the standards governing admission of evidence to facilitate the admission of inculpatory but unreliable evidence, and impoverishes systemic support for normative, constitutional, and evidentiary rules. Therefore, the system of conspiracy law is more likely to produce unreliable outcomes than dynamic systems; unpopular ideas and the speech that expresses them will become increasingly ready subjects of prosecution.

This argument does not discount the proposition that because individuals often form conspiracies in secret, resulting in little physical evidence, the law must be interpreted broadly to capture dangerous people.[289] Although the merits of the "secrecy" argument are susceptible to challenges,[290] it is important to recognize that conspiracies *can* be dangerous, and the government should have the tools necessary to thwart them. There are a number of reforms that can preserve the government's role in ensuring public safety while infusing conspiracy's uniform system with the dynamism that can better protect individuals' rights. There is no zero-sum game between public safety and individual rights, and the available reforms—most of which have been proven workable in the real world—are Pareto improvements.

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287. *Id.* at 352 (finding that "despite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries"); United States v. Moore, 42 F. App'x 394, 396 (10th Cir. 2002) (noting that "juries are likely to accept confessions uncritically.").

288. *See, e.g.*, Direct Sales Co. v. United States, 319 U.S. 703, 714–15 (1943) (affirming the conviction of a corporation on charges of conspiracy to violate the Harrison Narcotic Act based upon the large amount of drugs sold to the distributing doctor, the discount offered to the doctor, and the mass advertising campaign).

289. *See* United States v. Page, 580 F.2d 916, 920 (7th Cir. 1978) (explaining that "[c]onspiracies are by their nature carried out in secret, and direct evidence of agreement rarely is possible. Circumstantial evidence is permissible since as a practical matter that evidence is often all that exists.").

290. For example, might the "secrecy" argument be merely a justification for denying people their Constitutional rights, playing loose with the rules of evidence, and eluding traditional criminal law norms?

A. Conspiracy's Elements

1. Agreement

An agreement to commit a crime lies at the heart of conspiracy law.[291] It is a necessary *actus reus*[292] and can also indicate the mens rea of the conspirators.[293] Circumstantial evidence is admissible to prove an agreement.[294] There need not be an explicit offer and acceptance to engage in a criminal conspiracy; the agreement may be inferred from evidence of concert of action among people who work together to achieve a common end.[295] A tacit understanding may be sufficient,[296] as may be "the working relationship between the parties that has never been articulated but nevertheless amounts to a joint criminal enterprise."[297]

As Professor Goldstein observed, "[t]he illusory quality of agreement is increased by the fact that it, like intent, must inevitably be based upon assumptions about what people acting in certain ways must have had in mind."[298] Although mere presence, guilty knowledge, and even close association with an alleged co-conspirator are insufficient on their own to prove a conspiracy,[299] they may be considered to raise a permissible inference of participation in a conspiracy.[300] By piling on evidence of "bad" speech and associations, prosecutors can paint a picture of conspiracy when in reality no conspiracy exists.[301]

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291. *See* Iannelli v. United States, 420 U.S. 770, 777 (1975); Braverman v. United States, 317 U.S. 49, 53 (1942); Mendocino Envtl. Ctr. v. Mendocino Cnty., 192 F.3d 1283, 1301 (9th Cir. 1999); United States v. Roberts, 14 F.3d 502, 511 (10th Cir. 1993).

292. United States v. Shabani, 513 U.S. 10, 16 (1994).

293. *See* Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. INT'L L. 693, 695–96 (2011).

294. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553–54 (2007); Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954).

295. Am. Tobacco Co. v. United States, 328 U.S. 781, 809–10 (1946); United States v. Lopez, 979 F.2d 1024, 1029 (5th Cir. 1992); United States v. Hegwood, 977 F.2d 492, 497 (9th Cir. 1992); United States v. Simon, 839 F.2d 1461, 1469 (11th Cir. 1988); WRIGHT, *supra* note 30, at 69 (explaining that "generally speaking, there need not be any actual meeting or consultation [between co-conspirators], and . . . the agreement is to be inferred from acts furnishing a presumption of a common design.").

296. United States v. Paramount Pictures, Inc., 334 U.S. 131, 142 (1948); United States v. Rea, 958 F.2d 1206, 1213–14 (2d Cir. 1992); United States v. Concemi, 957 F.2d 942, 950 (1st Cir. 1991).

297. United States v. Weiner, 3 F.3d 17, 21 (1st Cir. 1993); *see also* United States v. Townsend, 924 F.2d 1385 (7th Cir. 1991).

298. Goldstein, *supra* note 126, at 410.

299. United States v. Lyons, 53 F.3d 1198, 1201 (11th Cir. 1995).

300. United States v. Hernandez, 896 F.2d 513, 518 (11th Cir. 1990).

301. *See* Theodore W. Cousens, *Agreement as an Element in Conspiracy*, 23 VA. L. REV. 898, 909 (1937) (explaining that there is confusion among the courts about what the concept of an "agreement" entails).

Return to the example of Tarek Mehanna, who was convicted of providing material support to Al Qaeda.[302] In that case, the government introduced the following evidence: pictures of the burning World Trade Center; Mehanna's thoughts on bin Laden; statements Mehanna made that were sympathetic to insurgent fighters in Iraq; angry and violent statements about American servicemen who were killed following their comrades' rape, mutilation, and murder of a fourteen-year-old Iraqi girl, and the murder of her family; proof of Mehanna's friend's trip to Fallujah, Iraq, which Mehanna could have joined but did not; and an invitation to Mehanna from another friend to join the fighting in Somalia on behalf of Islamic insurgents, an invitation Mehanna rejected.[303] All of this "bad" evidence may have convinced the jury that the defendant must have been part of a conspiracy to commit some crime. However, recognizing the difference between an agreement and what is mere presence or close association presents a difficulty for juries. Assuming jurors are able to do so, how are they to process the apparent contradiction that presence or association cannot be used alone to prove an agreement, but may be used to infer participation in the conspiracy? This problem is exacerbated by the fact that conspiracy is characterized by secrecy and, as stated above, is therefore usually difficult to prove except by inferences drawn from the parties' conduct.[304]

The practical result of this problem is twofold. First, prosecutors will introduce a massive amount of evidence regarding presence, knowledge, and association so as to inundate jurors[305] and compel them to find that an agreement existed.[306] This rests on an *a priori* assumption that a conspiracy exists. In effect, "[t]he trial becomes a vehicle for constant shaping and forming of the crime, through colloquies among court and counsel, as each new item of evidence is offered by the prosecution to fill out an agreement whose scope will be unknown until the entire process is completed."[307]

Second, given the difficulty in proving conspiracies because of their secrecy,[308] courts relax standards of proof in favor of the prosecution, thereby

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302. *See supra* notes 263–65 and accompanying text.

303. This, indeed, was much of the evidence against Tarek Mehanna.

304. United States v. Muse, No. 06 Cr. 600 (DLC), 2007 WL 1989313, at *4 (S.D.N.Y. July 3, 2007); United States v. Ailsworth, 948 F. Supp. 1485, 1506 (D. Kan. 1996); State v. Rosado, 39 A.3d 1156, 1160 (Conn. App. Ct. 2012); Lemons v. State, 32 A.3d 358, 362 (Del. 2011); State v. Burns, 9 N.W.2d 518, 521–22 (Minn. 1943); State v. Samuels, 914 A.2d 1250, 1255 (N.J. 2007).

305. Note, *Conspiracy and the First Amendment*, 79 YALE L.J. 872, 878 (1970) (noting that "the volume of evidence produced by a trial of several defendants may overwhelm the jury.").

306. *See* United States v. Dellosantos, 649 F.3d 109, 125 (1st Cir. 2011). *See also* EMERSON, *supra* note 128, at 410 ("[T]he wide sweep of a conspiracy charge, and the multiplicity of participants, make it possible for the prosecution to claim that broad areas of expression are relevant to the case.").

307. Goldstein, *supra* note 126, at 412.

308. *See* Blumenthal v. United States, 332 U.S. 539, 556–57 (1947); United States v. Brodie, 403 F.3d 123, 134 (3d Cir. 2005); United States v. Dazey, 403 F.3d 1147, 1159 (10th Cir. 2005).

impacting the relevance inquiry for determining admissibility of evidence.[309] The fact that co-conspirator hearsay is admissible facilitates this process[310] and engenders Confrontation Clause problems.[311] Observers have noted the existence of prosecution-friendly terrorism[312] and drug "exceptions"[313] that informally relax the rules of evidence in such cases.[314] These exceptions are only compounded by the so-called "conspiracy exception."[315] The exceptions mean that proof of agreement does not pose a significant barrier to a conspiracy charge, and is difficult for the defendant to disprove when multi-person activity is implicated in the criminal process.

2. Overt Act

In addition to an agreement, an overt act is usually required to prove conspiracy.[316] The primary purpose of the requirement is to show the operation of the conspiracy.[317] In other words, the requirement of an overt act represents an acknowledgement that talk (the agreement) is cheap. A second purpose of the overt act is to provide a *locus poenitentiae*, or a chance for a conspirator to withdraw from the conspiracy without accruing any liability.[318]

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309. *See* Morrison, *supra* note 175, at 869 (noting that "courts favor the government in conspiracy cases.").

310. *See* FED. R. EVID. 801(d)(2)(E); *Conspiracy and the First Amendment*, *supra* note 305, at 877.

311. *See* Georgia J. Hinde, Note, *Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Coconspirator Hearsay*, 53 FORDHAM L. REV. 1291, 1298–99 (1985).

312. *See* Blank, *supra* note 13, at 732.

313. *See* California v. Acevedo, 500 U.S. 565, 600–01 (1991) (Stevens, J., dissenting); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 641 (1989) (Marshall, J., dissenting); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 686–87 (1989) (Scalia, J., dissenting); Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 890 (1987).

314. *See* EMERSON, *supra* note 128, at 409 ("[T]he use of a conspiracy prosecution relaxes the ordinary rules of evidence . . . and usually affords the prosecuting officials other significant advantages."). *See also Conspiracy and the First Amendment*, *supra* note 305, at 877.

315. *See* Dennis v. United States, 341 U.S. 494, 568–69 (1951) (Jackson, J., concurring) (rejecting the clear and present danger test when a criminal charge involves "a well-organized, nation-wide conspiracy . . . .").

316. *Conspiracy and the First Amendment*, *supra* note 305, at 878. This is not always the case. Title 21 drug conspiracies, for example, require no overt act. *See, e.g.*, United States v. Shabani, 513 U.S. 10, 11 (1994); United States v. Pumphrey, 831 F.2d 307, 308 (D.C. Cir. 1987) (per curiam). Additionally, some conspiracies to provide material support to FTOs also do not require overt acts. *See* 18 U.S.C. § 2339B(a)(1) (2006); United States v. Abdi, 498 F. Supp. 2d 1048, 1064 (S.D. Ohio 2007). Overt acts are also not required to prove conspiracies to commit money laundering. Whitfield v. United States, 543 U.S. 209, 211 (2005).

317. United States v. Medina, 761 F.2d 12, 15 (1st Cir. 1985) (citing Yates v. United States, 354 U.S. 298, 334 (1957)).

318. United States v. Olmstead, 5 F.2d 712, 714 (D. Wash. 1925) (citing United States v. Britton, 108 U.S. 192, 204–05 (1883)).

The overt act requirement is intended to ensure that only those who actually conspired are indicted.[319] The requirement should, for example, prevent mere braggarts from being prosecuted for "agreeing" to rob a bank or kill a political figure with whom they particularly disagree. In reality, it is so easy to prove an overt act that the element has little meaning at all.[320]

An overt act need not be illegal in itself. It can be a very minor and constitutionally protected act, such as making a phone call,[321] traveling to another city,[322] watching a video,[323] sending a text message,[324] or asking for directions.[325] Almost anything that the prosecution can show furthered the alleged conspiracy will be admitted in evidence. Because the overt act can be something very minor, its role as a *locus poenitentiae* is not a strong one; if the government wants to prosecute someone, it can easily find an overt act to charge.[326]

If the prosecution proves an overt act, jurors may use it to infer an agreement.[327] This is circular logic that collapses the separate *actus reus* of agreement and overt act elements into one. For instance, a jury could find that defendants agreed to rob a bank because they bought ski masks. Buying ski masks constitutes an overt act because we know the defendants agreed to rob a bank. This logic encourages proof by sheer volume of evidence rather than by proof carefully analyzed for probative value.[328] As *actus rei* are admitted into evidence, the prosecutor simultaneously and effortlessly proves mens rea, and vice versa.[329]

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319. *See* Peter Buscemi, Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1155 (1975) (noting that the overt act requirement "assures that a credible threat of an actual substantive crime exists, and also guards against the unguaranteed indictment of innocent persons under the conspiracy rubric.").

320. *See id.* at 1157 (explaining that states that eliminated the overt act requirement did so because of the ease with which the requirement is fulfilled).

321. *See, e.g.*, Bartoli v. United States, 192 F.2d 130, 132 (4th Cir. 1951).

322. *See, e.g.*, United States v. Scallion, 533 F.2d 903, 911 (5th Cir. 1976).

323. *See, e.g.*, Second Superseding Indictment, *supra* note 275, at 3, 13.

324. *See, e.g.*, United States v. Stokes, No. 10-00244-04-CR-W-DW, 2011 WL 1585601, at *5 (W.D. Mo. Apr. 25, 2011).

325. *See* United States v. Rose, 315 F.3d 956, 958 (8th Cir. 2003) (noting that finding a stalking victim's address and directions to her home is an overt act); Kang v. Giurbino, No. CV 07-5693 -Attm, 2010 WL 3834884, at *10 (C.D. Cal.) (noting that forcing a rape and burglary victim to give her assailants directions to her home was an overt act); United States v. Gosselin, 62 M.J. 349, 354 (C.A.A.F. 2006) (explaining that giving directions to the location where psilocybin mushrooms could be purchased could be an overt act).

326. *Conspiracy and the First Amendment*, *supra* note 305, at 878 (noting that the overt act "requirement is seldom more than a formality.").

327. Fowler v. United States, 131 S. Ct. 2045, 2059 n.2 (2011) (Alito, J., dissenting).

328. *See* United States v. Dellosantos, 649 F.3d 109, 122–24 (1st Cir. 2011).

329. *See* Nathan R. Sobel, *The Anticipatory Offenses in the New Penal Law: Solicitation, Conspiracy, Attempt and Facilitation*, 32 BROOK. L. REV. 257, 264 (1966) ("[P]ractical experience

Protected speech can be used as an overt act. A defendant's statement that "the banking system is unjust and we need to do everything we can to undermine it," may help prove motive or intent to form a conspiracy to rob a bank. To say that this statement furthers the conspiracy, and is therefore an overt act, is a tenuous argument. However, it is one that courts accept.[330] Courts also accept evidence that might normally violate Federal Rules of Evidence 403[331] and 404.[332] Indeed, the same set of evidence may simultaneously be protected speech, unfairly prejudicial, confusing or misleading, evidence of prior bad acts, and improper character evidence, but nonetheless admissible in conspiracy cases.[333] Finally, hateful discussion, so long as it is not intended as or likely to lead to imminent lawless action, is normally protected by the First Amendment.[334] In conspiracy cases, all of these rules can be avoided—or violated—at once.

3. Mens Rea

Because conspiracy is an inchoate crime, proving the element of mens rea in conspiracy cases poses salient evidentiary and outcome reliability problems.[335] Without a substantive act, there is little substantive evidence, such as a dead body, a brick of drugs, or a crate of guns. This lack of solid evidence available during pursuit of a conspiracy conviction results in a disregard for the traditional criminal law norm that mens rea and *actus reus* are separate concepts.[336] The law elides this norm by allowing proof of both the *actus reus* of the agreement and mens rea to be found in the same, speech-based body of evidence.

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is convincing that the requisite mens rea is extremely difficult to establish absent an overt act which signals the intent to move the project forward from talk to action.").

330. *See* United States v. Elliott, 571 F.2d 880, 887 n.4 (5th Cir. 1978) (stating that words of encouragement may be an overt act).

331. *See* United States v. Carrillo-Lopez, 92 F. App'x 511, 512 (9th Cir. 2004) (explaining that unjustly prejudicial evidence should have been excluded at trial per Federal Rule of Evidence 403 *unless* the defendant was charged with conspiracy).

332. United States v. Carvajal, 206 F. App'x 391, 394 (5th Cir. 2006) (noting that evidence of other bad acts would normally violate Federal Rule of Evidence 404(b), but here, because acts committed in furtherance of a conspiracy are intrinsic to the crime charged, the evidence was admissible); United States v. Ward, 211 F.3d 356, 363 (7th Cir. 2000).

333. Consider again Tarek Mehanna. The many photographs and hateful statements regarding American service members were prejudicial, and given the volume of each were likely unfairly prejudicial. *See supra* note 303 and accompanying text (discussing the evidence admitted against Mehanna).

334. *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

335. *See* Christine L. Chinni, Note, *Criminal Law—Whose Head Is in the Sand? Problems With the Use of the Ostrich Instruction in Conspiracy Cases*, 13 W. NEW ENG. L. REV. 35, 53 (1991).

336. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 107 (1644). Lord Coke developed the principle, *actus non facit reum nisi mens sit rea*, or "an act does not make [a person] guilty unless [his] mind is also guilty." *Id. See also* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.1(a), at 239 (2d ed. 2003).

Compared to a dead body or brick of drugs, such evidence is unreliable as proof of culpability because speech can be difficult to classify as forbidden speech.

The concepts of *actus reus* and mens rea are meant to perform different tasks in determining whether a conspiracy was formed. The *actus reus* element should ensure that an act that is prohibited actually took place.[337] Mens rea, on the other hand, should ensure that when the act occurred, the actor had a guilty state of mind.[338] The two concepts have, for good reason, historically been conceptually separated. The system of modern conspiracy undermines that separation.

B. The Interpretation of Defendants' Speech

As aforementioned, conspiracy is an inchoate crime, meaning that at the time the conspiracy is formed, no substantive criminal act has yet taken place.[339] Resting as it does on proof of an agreement,[340] conspiracy is often proved only by speech.[341] The question, therefore, is what defendants mean when they use certain words. Arrangements to engage in a criminal conspiracy are rarely explicit, and often must be inferred. Thus, prosecutors are required to interpret speech.[342] This interpretive process undermines the traditional separation between mens rea and *actus reus*. The traditional separation of the two concepts operates in part to provide a check on prosecutions. When the separation is undermined, as it is in the conspiracy context, the check on prosecutors is compromised as well. Prosecutors are then able to use ideas, as expressed through speech, to prove all elements of the crime, thereby creating the uniform system of modern criminal conspiracy.

At times, the most accurate interpretation of defendants' ideas is obvious. For instance, a conversation between friends, in which they explicitly discuss the money they already pooled, and whether they should use it to go into either the marijuana or cocaine trafficking business, contains clear criminal meaning. Thus, a prosecutor would only need to make minimal inferences to establish the existence of the requisite agreement.

At other times, defendants' speech presents ambiguity. Consider the same friends, who question whether a restaurant's price for hamburgers is the best price they can obtain. One friend suggests driving to a neighboring town to get a better price. Are the friends using coded drug language, or are they merely hungry?

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337. LAFAVE, *supra* note 336, § 6.1, at 422.

338. People v. Torres, 848 P.2d 911, 914 (Colo. 1993); Garnett v. State, 632 A.2d 797, 800 (Md. 1993).

339. *See* Boyle v. United States, 556 U.S. 938, 949 (2009).

340. Iannelli v. United States, 420 U.S. 770, 777 (1975).

341. United States v. Gen. Ry. Signal Co., 110 F. Supp. 422, 425 (W.D.N.Y. 1952) (citing Interstate Circuit, Inc. v. United States, 306 U.S. 208, 225–26 (1939) (noting that prosecutors often must piece together evidence such as the parties' "conduct, speech, and writings" to prove a conspiracy).

342. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 263 (1986) (Brennan, J., dissenting).

Additionally, defendants' speech can be ambiguous but highly suspicious. Consider two Muslim men, in their early twenties, both of whom are very religious and oppose the United States' involvement in Iraq and Afghanistan. They chat online with each other and other like-minded Muslim men. In an often off-hand way characteristic of online communication, the men talk about the virtues of jihad and of how they feel that Muslims are obligated to "do jihad." They support the insurgents in Iraq and Afghanistan, and share videos showing paramilitary operations against coalition forces. They believe that bin Laden was an ideal Muslim because he gave up a life of wealth to fight against those who oppress Muslims. When the men talk of 9/11, they support it as a symbol, but equivocate when it comes to whether it was acceptable that civilians were killed. They agree that they will do whatever they can to support Muslims. The government suspects that these men plan to engage in some form of violent crime, and it records all of these chats.

These men are certainly engaging in provocative, suspicious, and unpopular speech. Have they conspired to do anything illegal? The answer to that question depends upon how prosecutors and defense counsel interpret the speech. Specifically, each side must define "jihad," articulate what it means to "do jihad" and "do whatever it takes" to support Muslims, and ultimately discern the existence or non-existence of criminal intent from the suspects' support for bin Laden and 9/11. The uniform system of modern conspiracy fails to check prosecutors' discretion with effective gatekeepers. Constitutional questions about the propriety of charging, corroded individual constitutional rights, and undermined evidentiary rules that may lead to erroneous outcomes are the result of this broad prosecutorial discretion.

The constitutional and evidentiary concerns arising in modern conspiracy combine to undermine the traditional criminal law norm that the government must prove any crime beyond a reasonable doubt.[343] Given the factual vagaries associated with proving conspiracies, it should be relatively easy for defendants to offer alternative explanations for their statements and conduct, and thus obtain acquittals. However, the vagaries operate to favor the government in meeting its burden of proof.

Consider the friends who want to purchase hamburgers. They can certainly argue that they were just hungry. However, what if two of the friends are marijuana traffickers, and a third, the defendant, is not? And further, what if the government could prove the word "hamburgers" is a slang term for marijuana? Under the modern system of criminal conspiracy, the statements of two friends can come in against the third. The First Amendment will protect no one in this case, and the statements will be admissible under Federal Rule of Evidence 801(d)(2)(E) to prove the defendant's mens rea, agreement, and overt act.[344] The

343. *In re* Winship, 397 U.S. 358, 361 (1970).

344. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724, 2730 (2010); *see also* FED. R. EVID. 801(d)(2)(E) (providing that "[a] statement is not hearsay if . . . [t]he statement is

defendant can argue that he was merely hungry, and was not conspiring to traffic drugs, but the judge could deny any motion to dismiss on First Amendment grounds. The judge can issue jury instructions to the effect that First Amendment concerns are not at play,[345] conspiracies are often secret and thus not provable by explicit statements, agreements can be inferred from the entirety of the evidence, and overt acts can be exceedingly minor.[346] To the extent that the jury does not nullify, these liberal iterations of evidentiary rules, the absence of constitutional gatekeepers, and permissive jury instructions will virtually guarantee the jury finds a conspiracy beyond a reasonable doubt.

C. The Uniform System of Conspiracy

As mentioned above, the system of modern conspiracy law is uniform. If a certain level of diversity in a system produces positive or fair outcomes,[347] a lack of real diversity is likely to produce negative or unfair outcomes. In the system of modern conspiracy, proof of one element of the crime often serves as proof of all elements, one piece of evidence may be used to prove all elements of the conspiracy, and all pieces of evidence may simultaneously serve to prove a particular element or elements of the conspiracy. Additionally, constitutional and evidentiary gatekeepers between evidence and elements are absent. The First Amendment does not operate to protect speech's use as evidence,[348] the Confrontation Clause does not restrict the admissibility of statements of alleged co-conspirators, even if they are available to testify, and evidence normally limited by evidentiary rules dealing with relevance, unfair prejudice, and character evidence becomes admissible.[349]

As an illustration, consider a scenario such as the *Mehanna* trial at which the government introduced the defendant's private statements expressing his desire to become Al Qaeda's "media wing."[350] Evidence like those conversations prove the existence of both a criminal agreement and the defendant's mens rea.[351] In the *Mehanna* case and others like it, because of the modern system of conspiracy law, courts are permitted to dismiss any questions regarding: the relevance of the statements; First Amendment protections of the conversations

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offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.").

345. *See* United States v. Francis, 164 F.3d 120, 123 n.4 (2d Cir. 1999). *See, e.g.*, Transcript of Record at 35-24, 35-25, *United States v. Mehanna*, No. 09-10017-GAO (D. Mass. Dec. 16, 2011) (demonstrating an instruction to the jury not to concern itself with the First Amendment).

346. *See supra* notes 321–25 and accompanying text.

347. *See* SCOTT E. PAGE, DIVERSITY AND COMPLEXITY 8–9 (2011).

348. Cole, *supra* note 266 (detailing how the First Amendment does not protect speech advocating FTOs).

349. *See* Transcript of Record, *supra* note 345, at 35—112 (discussing the admission of statements of co-conspirators as evidence against the defendant).

350. United States v. Mehanna, 735 F.3d 32, 41 (1st Cir. 2013).

351. *Id.*

or their translations;[352] Confrontation Clause or hearsay issues;[353] and questions of unfair prejudice.[354] So far, few, if any, courts have given these types of claims merit when advanced by defendants.

Thus, modern conspiracy law provides relatively unlimited discretion to prosecutors, much like *Whren v. United States*[355] provides similar discretion to police officers making pretextual traffic stops.[356] In *Whren*, police in a "high-crime" area affected an automobile stop for a minor traffic infraction, secretly hoping to find drugs.[357] The officers did, in fact, find drugs in the car.[358] Because the automobile's occupants were African-American, *Whren* now represents the problem of racial profiling in traffic stops and the fact that broad governmental discretion enables such profiling.

In holding that the police may effect a traffic stop for any pretextual reason so long as they have cause to make the stop, *Whren* also stands for the proposition that broad discretion in policing allows for abuses while also obscuring constitutional issues. In both situations like *Whren* and in the context of conspiracy, systems of broad discretion obscure evidentiary and constitutional rules. These systems produce high levels of governmental abuse (or, just as important, the appearance of abuse) and outcome unreliability.

D. Dynamic Systems

To further illustrate conspiracy law's problematic uniform nature, consider the character of dynamic systems. In dynamic systems, some or all elements are proven by discrete and different types of evidence,[359] only certain types of evidence may serve to prove a certain element or elements,[360] proof of one element may not be proof of any other element,[361] andconstitutional and evidentiary gatekeepers between evidence and elements limit the admission of evidence, ensuring fairness for the suspect and advancing the truth-seeking mission of criminal law. Dynamic systems, therefore, have effective

352. Epton v. New York, 390 U.S. 29, 30–32 (1968) (Douglas, J., dissenting) (arguing that the Court should grant certiorari to consider whether criminal convictions should be upheld where the charges arose from the exercise of free speech).

353. *See* United States v. Cameron, 699 F.3d 621, 639 (1st Cir. 2012), *cert denied*, 133 S. Ct. 1845 (2013).

354. *See Mehanna*, 735 F.3d at 59–64.

355. 517 U.S. 806 (1996).

356. *See id.* at 819.

357. *Id.* at 808.

358. *Id.* at 808–09.

359. *See, e.g.*, SUPREME JUDICIAL COURT, MODEL JURY INSTRUCTIONS ON HOMICIDE 38–42 (2013), *available at* http://www.mass.gov/courts/court-info/sjc/attorneys-bar-applicants/model-jury-inst-homicide-gen.html (explaining in detail the elements of murder with deliberate mediation and the different evidentiary requirements of each element).

360. *Cf. id.* (outlining what must be shown to prove each element of premeditated murder).

361. *Cf. id.* at 37 (noting that each individual element of murder must be proven beyond a reasonable doubt before there can be a conviction).

gatekeepers that allow prosecutors to use only certain types of evidence to be used to prove certain, discrete elements. Dynamic systems silo types of evidence and elements of a crime, whereas uniform systems allow many types of evidence that can prove all of the crime's elements.

Consider a typical capital murder statute, an exemplary dynamic system, requiring proof beyond a reasonable doubt of four primary elements. These elements are: "1. [an] unjustified killing or homicide; 2. [a]cts making the killing premeditated and deliberate (first degree); 3. [a]t least one statutory aggravator constituting capital murder; and 4. . . . aggravating factors [that] outweigh the mitigating factors."[362] Each of these elements is designed to prove a discrete fact necessary for criminal liability to attach. Therefore, each element performs a different task. Further, only certain types of evidence are relevant to prove each element.[363] For example, a dead body or evidence thereof may prove the first element, but it cannot prove the others. Additionally, a particularly heinous or gruesome murder scene can prove the third element, but it cannot prove that the defendant caused the death or caused the death with the requisite mens rea.

Between these forms of evidence and elements are important gatekeepers. For example, under Federal Rule of Evidence 404, a defendant's character is not normally admissible to prove mens rea at the time the crime charged occurred, and it is certainly not relevant or probative to prove a homicide was unjustified.[364] Under Federal Rule of Evidence 403, unfairly prejudicial, confusing, or misleading evidence is inadmissible.[365] Under Federal Rule of Evidence 801 and the Confrontation Clause, a statement made by an absent third party, testified to by another witness, is normally inadmissible.[366]

Finally, the first two elements of capital murder can be further broken into sub-elements.[367] Element one requires (a) a death, (b) caused by the defendant, (c) that is unjustified. Element two requires (a) acts, (b) done by the defendant, (c) exhibiting premeditation and deliberation. These sub-elements contribute to the murder statute's dynamism, because prosecutors can only prove each of them with certain types of evidence as well.[368] Therefore, as sub-elements develop over time, dynamic systems become more dynamic while uniform systems become increasingly uniform.

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362. Leona D. Jochnowitz, *Missed or Foregone Mitigation: Analyzing Claimed Error in Missouri Capital Clemency Cases*, 46 CRIM. L. BULL. 1, n.71 (2010).

363. *See supra* note 359 and accompanying text.

364. *See* FED. R. EVID. 404 (prohibiting character evidence generally except in the specific instances listed in the rule).

365. FED. R. EVID. 403.

366. *See* U.S. CONST. amend. VI (giving criminal defendants the right to confront witnesses against them); FED. R. EVID. 801 (defining specific exceptions to the hearsay rules).

367. *See, e.g.*, SUPREME JUDICIAL COURT, *supra* note 359, at 38–42 (breaking down each element of murder in detail and the proof required for each).

368. *See, e.g., id.* (explaining what evidence is required for each element).

However difficult it still remains to prove conspiratorial agreements, they have become easier to prove over time because courts permit inferences of agreements. This is true despite the fact that these inferences might be a stretch. Further, overt acts can be the most minor of acts, and are even provable by speech. While too much dynamism can cripple a system—just as too much uniformity can lead to perverse outcomes—in criminal law, too much dynamism works in favor of the defendant, who does not have the burden of proof. Too much uniformity works in favor of the government, which finds it comparatively easy to prove its case. In the case of conspiracy, which is excessively uniform, the challenge is to introduce dynamism so that the balance among public safety, and defendants' rights, and outcome reliability is restored.

VII. WHITHER THE SYSTEM OF MODERN CRIMINAL CONSPIRACY?

If the uniformity of the system of modern criminal conspiracy produces its normative, constitutional, and evidentiary failures, then making the system more dynamic will result in systemic improvements. The more that functioning gatekeepers are created and evidence and elements are siloed, the more failures will decline. Three normative reforms are already in partial legal force in conspiracy and the related area of treason law, but courts should pursue these approaches more vigorously. Additionally, courts can implement a fourth, First Amendment-based reform, to advance dynamism.[369]

A. Approach One: Redefining Overt Act

First, courts should adopt the definition of overt act that applies in treason cases. In such cases, only actual conduct, not speech, may be used to prove overt acts.[370] This would silo both evidence and one element of conspiracy law by requiring one type of evidence (conduct). However, this reform would amount to imperfect, one-way siloing. Speech would not be admissible to prove an overt

369. This is not an exhaustive list, and it is beyond the scope of this Article to propose and defend a holistic package of reforms.

370. Haupt v. United States, 330 U.S. 631, 645 (1947) ("The requirement of an overt act is to make certain a treasonable project has moved from the realm of thought into the realm of action."); Cramer v. United States, 325 U.S. 1, 7 n.7 (1945) ("[A]n overt act . . . means some physical action done for the purpose of carrying out or affecting [sic] the treason."); United States v. Werner, 247 F. 708, 710 (E.D. Pa. 1918) ("Words oral, written or printed, however treasonable, seditious or criminal of themselves, do not constitute an overt act of treason, within the definition of the crime."); *Ex parte* Vallandigham, 28 F. Cas. 874, 887 (C.C.S.D. Ohio 1863) (No. 16,816) ("[H]ow is it possible that words, merely as such, should 'amount' to treason? The crime requires an overt act."). *But see* Tom W. Bell, *Treason, Technology, and Freedom of Expression*, 37 ARIZ. ST. L.J. 999, 1027–30 (2005) (arguing that treason can be proven using merely speech); Kristen Eichensehr, *Treason's Return*, 116 YALE L.J. POCKET PART 229, 331–32 (2007), *available at* http://www.yalelawjournal.org/forum/treasona8217s-return (explaining the free speech issues inherent in treason charges because of the vagueness of "aid and comfort," an element of treason); Douglas A. Kash, *The* United States v. Adam Gadahn*: A Case for Treason*, 37 CAP. U. L. REV. 1, 23 (2008) (arguing that a radio broadcast, although mere speech, constitutes an overt act in treason cases).

act, and conduct used to prove an overt act could still be admissible to infer an agreement. But, the approach is a good partial solution because it restructures the core of the system of criminal conspiracy. William Stunz's "uneasy relationship" between criminal justice and criminal procedure suggests that such a core reform is preferable to second-best reforms that create gatekeepers or third-best ones that create external defenses.[371]

B. Approach Two: The United States v. Spock *Court's Solution*

Second, courts should adopt the salient points of the First Circuit's opinion in *United States v. Spock.*[372] In that case, the court addressed a criminal conspiracy conviction, which prosecutors proved using mainly evidence of protected speech.[373] Concerned that such use might violate the First Amendment, the Court limited the use of speech to three situations. To prove a defendant's intent to adhere to the illegal portions of an agreement, the First Circuit held there must be evidence of (1) the "individual defendant's prior or subsequent unambiguous statements," (2) the "individual defendant's subsequent commission of the very illegal act contemplated by the agreement," or (3) proof the individual defendant engaged in a subsequent act that was "clearly undertaken for the specific purpose of rendering effective the later illegal activity [that was] advocated."[374]

The *Spock* test itself is a gatekeeper with many facets. It implicates the Confrontation Clause problems inherent in conspiracy law by focusing on what the "individual defendant" has done.[375] It also clearly addresses Justice Black's First Amendment concerns in *Yates* and Justice Douglas' in *Epton*.[376] It implies awareness of Federal Rule of Evidence 401 relevance issues because it ties the admissibility of ambiguous speech evidence to other sets of unambiguous evidence.[377] Although conspiracy remains dependent on speech evidence, the *Spock* court recognized that conspiracy law needed a virtual dead body or smoking gun to assure that ambiguous speech is probative of criminal conduct. Other courts should consider adopting the First Circuit's nuanced approach to the use of protected speech to prove a defendant's mens rea. The *Spock* rule is a type of second-best reform that will provide effect to first-best solutions like the above-referenced treason-based reform.[378] The *Spock* approach would not

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371. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

372. 416 F.2d 165 (1st Cir. 1969).

373. *Id.* at 168–70.

374. *Id.* at 173.

375. *See id.*

376. *See id.* at 169–71.

377. *See* FED. R. EVID. 401.

378. *See* ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 30, 39 (2011) (arguing that the first-best solutions are generally internally driven reforms, but if they are not feasible, second-best solutions should be used to create more diversity in the system).

redefine conspiracy, which might be the most efficient of all solutions, but it would be an important First Amendment prophylactic. Normative first-best redefinitions of conspiracy's elements accompanied by second-best gatekeepers—like the *Spock* approach—may create a system of criminal conspiracy that contains important checks and balances such as those inherent in dynamic systems. Those checks and balances create the redundancy that is a virtue of dynamic systems.[379]

C. Approach Three: Adding a Dangerousness Requirement

Third, courts should require the government to prove that a conspiracy is dangerous in order for criminal liability to attach, or to determine the grade of conspiracy. This defense appears in the Model Penal Code[380] and in various forms in at least four state statutes.[381] This reform would not provide the type of gatekeeper or siloing the system of modern criminal conspiracy lacks. It would, however, provide an external check that would encourage prosecutors not to seek charges, or grand juries not to indict, on the front end of the criminal justice process. It would also provide defendants with a defense during trial, and juries a reason to acquit on the back end. A dangerousness requirement would therefore be both a formal and informal check on conspiracy's systemic failures. Third-best solutions, such as the dangerousness requirement, provide a formal external check on a system that has failed and an informal check on a system that might be mistakenly engaged by prosecutors or grand juries. However, to rely on defenses alone is inefficient because this fails to address fundamental systemic failures. Any holistic reform package should not rely on third-bests, but addition of a solution like the dangerousness requirement can provide a supplemental check. If the system to be checked is itself designed to produce normatively, constitutionally, and evidentiary just outcomes, then external defenses will be used rarely and only when necessary. They would not, therefore, produce greater inefficiency, and would be important protection for defendants from relatively rare failures of the internally checked system.

D. Approach Four: Defining "Integral" Speech

There is another more broad theoretical approach to gatekeeping and siloing that sounds in First Amendment jurisprudence. Speech integral to criminal conduct is not protected under the First Amendment.[382] The term "integral" is not clearly defined in law, yet matters greatly. "Integral" may mean speech that is *necessary* to achieving a criminal aim, *facilitative* of that aim, or

379. MEADOWS, *supra* note 284, at 3–4.

380. MODEL PENAL CODE § 5.05(2) (1985). *See also* Wechsler, et al., *supra* note 110, at 1029.

381. *See* ARK. CODE ANN. § 5-3-101 (2013); COLO. REV. STAT. ANN. § 18-2-206(3) (West 2013); N.J. STAT. ANN. § 2C:5-4(b) (West 2013); 18 PA. CONS. STAT. ANN. § 905(b) (West 2013).

382. United States v. Stevens, 559 U.S. 460, 468–69 (2010); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

merely *related* to that aim.[383] The definition of "integral" could determine how much speech and what type of speech is protected and thus inadmissible, or unprotected and thus admissible to prove agreement, an overt act, or intent.

The Supreme Court first explicated the integral speech category in the 1949 case of *Giboney v. Empire Storage & Ice Company*.[384] Although the Court adopted an acausal, absolutist approach to integral speech, it failed to define the term.[385] *Giboney* involved a labor dispute in which union members attempted to pressure a wholesale ice company to deal only with union peddlers.[386] They engaged in conduct violative of the state's antitrade restraint law,[387] operated peaceful pickets, and published only truthful information.[388] Although the conduct could have been analyzed separately, the Court found that these two activities—one illegal and one protected by the First Amendment—could not "be treated in isolation"[389] because the common objective was to compel Empire to stop selling ice to nonunion peddlers.[390] The Court refused to hold that the speech was protected, but not its associated illegal conduct.[391]

In 2010, the Court revived the integral speech category with *United States v. Stevens*.[392] In *Stevens*, the Court held that the First Amendment protected certain depictions of animal cruelty.[393] The Court did not, however, explain what the integral speech category meant, and mentioned it merely to illustrate that the First Amendment does not imply absolute protection for all speech.[394]

In other cases, the Court raised each of the three possible definitions of integral speech. In *New York v. Ferber*,[395] the Court held that child pornography was not protected because the market for the pornography was "intrinsically related" to the underlying abuse, and was therefore "an integral part of the production of such materials."[396] This approach to defining integral speech

383. Morrison, *supra* note 175, at 905–06.

384. 336 U.S. 490.

385. Morrison, *supra* note 175, at 904.

386. 336 U.S. at 492.

387. *Id.* at 491.

388. *Id.* at 491–94.

389. *Id.* at 498.

390. *Id.*

391. *See id.* at 501. *See also* United States v. Spock, 416 F.2d 165, 173 (1st Cir. 1969) (noting that First Circuit's limited use of speech "responds to the legitimate apprehension . . . that the evil must be separable from the good without inhibiting legitimate association in an orderly society."); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1317 (2005) (arguing that treating speech as equivalent to illegal conduct is inconsistent with *Brandenburg*, *Schenck*, and other modern First Amendment cases).

392. 559 U.S. 460.

393. *Id.* at 464, 481–82.

394. *Id.* at 468–69.

395. 458 U.S. 747 (1982).

396. *Id.* at 747, 761.

would manage the effect in order to thwart the underlying illegal cause.[397] In other words, child pornography itself was not intrinsically bad, but was made so because it provoked the victimization of children in the pornography's production. Although the *Ferber* Court reached the correct normative result, it confused the category of integral speech.[398]

Integral speech is more correctly considered an acausal, absolutist category.[399] In *Ashcroft v. Free Speech Coalition*,[400] the Court held that virtual child pornography was generally protected because its protection did not involve actual child sexual abuse.[401] The Court could have deferred to Congress's determination that virtual child pornography harms children in less direct ways.[402] Instead, the Court implicitly rejected the *Ferber* analysis and stated that the law prohibiting virtual child pornography unconstitutionally prohibited speech that was not attached to crime.[403]

Hence, *Giboney* and its progeny present three possible definitions of integral speech: that which is *necessary* to executing illegal conduct;[404] that which *facilitates* the illegal conduct;[405] and that which is *related* to the illegal conduct.[406] Assuming that the law evolves a jurisprudence limiting the use of

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397. *Id.* at 759–60, 761 n.13 (noting that "[t]he act of selling these materials is guaranteeing that there will be additional abuse of children.").

398. *See* Volokh, *supra* note 391, at 1325. Discussing *Ferber*, Volokh noted that "not all speech that provides a motive for illegal conduct can be outlawed simply because it is 'an integral part of conduct in violation of a valid criminal statute.'" *Id.* (quoting *Feber*, 458 U.S. at 762).

399. *See* United States v. Spock, 416 F.2d 165, 170 (1st Cir. 1969) (stating that the court must "start with the assumption that the defendants were not to be prevented from vigorous criticism of the government's program merely because the natural consequences might be to interfere with it, or even to lead to unlawful action.").

400. 535 U.S. 234 (2002).

401. *Id.* at 241.

402. *Id. See also* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2727 (2010) (noting "evaluation of the facts by the Executive, like Congress's assessment, is entitled to deference."); Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 247 (1997) (O'Connor, J., dissenting) (asserting that "Congress' reasonable conclusions are entitled to deference.").

403. *Free Speech Coalition*, 535 U.S. at 250–51.

404. *See* Cohen v. California, 403 U.S. 15, 27–28 (1971) (Blackmun, J., dissenting).

405. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (quoting *Giboney*: "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."). *See also* Rice v. Paladin Enters., Inc., 128 F.3d 233, 243 (4th Cir. 1997) (relying on *Giboney* in allowing liability for publishing a book that described how to commit contract murders); United States v. Savoie, 594 F.Supp. 678, 682, 685–86 (W.D. La. 1984) (relying on *Giboney* in issuing an injunction against, among other things, the distribution of any document explaining how taxpayers could commit tax fraud).

406. *See* Missouri v. Nat'l Org. for Women, 620 F.2d 1301, 1324 n.15 (8th Cir. 1980) (Gibson, J., dissenting) (citing *Giboney* and arguing that NOW's advocacy of a boycott of Missouri businesses, aimed at convincing Missouri to ratify the Equal Rights Amendment, might be constitutionally punishable as an antitrust law violation); Searle v. Johnson, 646 P.2d 682, 685 (Utah 1982) (citing *Giboney* and holding that the Utah Humane Society's advocacy of a tourist

protected speech as evidence of a crime (a big assumption), the definition of integral speech could provide a useful guidepost. In a sort of Goldilocks logic, perhaps if only speech necessary to execute a crime is admissible as integral speech, then the rule would exclude too much relevant and probative evidence. Conversely, if speech merely related to a crime is admissible, the rule would admit too much irrelevant and non-probative evidence, threatening freedom of speech. This is our jurisprudence today. Ultimately, the admissibility of facilitative speech—as well as necessary speech—but not related speech may be just right. This approach would admit substantially relevant and probative evidence—whatever its level of First Amendment protection—but exclude tangentially relevant speech. For example, if someone is accused of conspiracy to rob a bank, his necessary speech—"put the money in the bag"—would be clearly admissible. His facilitative speech—a statement to his co-conspirator, "let's use Acme ski masks; they're the most popular brand and so the hardest to trace back to us if they're found"—would be admissible as well. Merely related speech—"the banking system creates world poverty and needs to be hobbled"—would remain protected as First Amendment speech because it would be inadmissible as evidence.

The forms of speech admissible to prove an agreement may also be limited. For example, there is a difference between operational and aspirational speech. The phrase "put all the small bills in a bag and give it to me" is operational speech and is quasi-conduct because it directly results in a change in the position of the bank teller, the money, and the bag just as if the bank robber put the money in the bag himself. The phrase "if you were to steal money from the bank, you'd be striking a blow at the unjust banking system" is aspirational speech. It is meant to communicate and persuade, not to effect a specific change in position.

These categories of speech are reflected in Kent Greenawalt's work. He divides speech into three categories. Situation-altering utterances are words that "directly alter[] the social environment by 'doing' something rather than telling something or recommending something."[407] Weak imperatives are "requests and encouragements that do not sharply alter the listener's normative environment . . . . [They] often indicate beliefs about values and facts and cannot always be disentangled from them."[408] Assertions of fact and value are implied by the name of the category, but Greenawalt notes the nuance between general assertions of fact such as "physical objects have gravitational force,"[409] and motivational assertions made to achieve an end, such as "the breeze from the window is making me cold."[410] Although the nature of speech ultimately exists

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boycott of a county, aimed at persuading the county to improve its dog pound, could be constitutionally punishable as interference with prospective business advantage).

407. Kent Greenawalt, *Free Speech in the United States and Canada*, 55 LAW & CONTEMP. PROBS. 5, 12–13 (1992).

408. KENT GREENAWALT, SPEECH, CRIME, & THE USES OF LANGUAGE 57 (1989).

409. *Id.* at 43.

410. *Id.* at 47.

on a continuum, these categories can serve as guideposts to thoughtfully exclude from and include in evidence certain forms of speech for certain purposes.[411]

Based on this understanding of speech, courts should consider what types of speech ought to be admissible to prove certain elements of a conspiracy. To infer an agreement, perhaps necessary or facilitative speech should be required, with some exceptional carve-outs for the use of related speech. Given that the purpose of an overt act is to further the crime, it follows that related, aspirational, and fact-and-value-assertion speech should be excluded.

Courts should also prohibit the use of all aspirational speech, which includes assertions of fact and value, weak imperatives, and related speech, to prove all elements of conspiracy. The post-World War II Nuremburg Tribunal seems to have applied this type of prohibition.[412] A United Nations report detailing the work of the Tribunal noted:

> [t]he conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party programme such as are found in the [twenty-five] points of the Nazi Party, announced in 1920, or the political affirmations expressed in *Mein Kampf* in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.[413]

This meant that to be found guilty of conspiracy at Nuremburg under the London Charter, a defendant "had to have played a substantial role in planning the war, had knowledge of its illegality and intend that force be used, have been in a position to contribute to a decision to invade, and done these things between 1937 and 1939."[414] Nuremburg conspiracy had limits, but these limits were functional, rather than structural. Therefore, the law at the time of Nuremburg "was not aimed at fringe participants, nor was it an attempt to punish mental behavior without any underlying crime having been completed."[415] Rather, conspiracy doctrine was justified and used to prosecute "the most notorious German war criminals."[416] The selection of defendants depended upon whether they had committed significant criminal acts.[417] The purpose of conspiracy theory at Nuremburg was not to engage in a witch hunt of unpopular people, but

411. *Id.* at 57, 69. *See also* Volokh, *supra* note 391, at 1328.

412. *See* 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 46768 (1948), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XXII.pdf

413. *Id.*

414. Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremburg Really Said*, 109 COLUM. L. REV. 1094, 1162–63 (2009).

415. *Id.* at 1137.

416. *Id.*

417. *Id.* at 1138.

to obtain evidentiary advantages against those who were clearly guilty of substantive crimes.[418]

Thus, the same expansive system of conspiracy used today was used at Nuremburg, but was limited at that time by prosecutors' decisions to only pursue those who had committed substantive crimes. Nuremburg defendants were not charged with conspiracy as a mere thought crime.[419] The same conspiracy law is used today against those charged with crimes such as conspiracy to provide material support to terrorists, which raises the same due process concerns that existed at Nuremburg.[420] Prosecutorial discretion does not provide the limit now that it did then.

The system of modern criminal conspiracy suggests that systemic gatekeeping and siloing is necessary. Substantive criminal statutes contain their own normative, constitutional, and evidentiary failures. However, conspiracy law's obvious structural inadequacies, sustained critiques, prevalence, and the non-cognizability of many of its failures are particular concerns that demand reform.

VIII. CONCLUSION

In 1925, Justice Holmes wrote, "[e]very idea is an incitement."[421] While offering this spirited defense of broad First Amendment protections, he also unintentionally highlighted the central problem of modern criminal conspiracy, which is that if ideas can incite, they can also be evidence of an agreement to do something more, something criminal. It is more important than ever to push the reforms proposed in this Article because conspiracy charges remain exceedingly popular in their twentieth century applications. The drift toward a system of general, deontological, and moral conspiracy law, instantiated and strengthened by nineteenth century labor strife, has led to conspiracy's modern uniform nature, in which elements and the evidence in support of their proof merge, and evidentiary and constitutional gatekeepers do not perform a functional role. The result is a body of law that gives prosecutors such great discretion to charge and prove a conspiracy that unpopular ideas and the speech that expresses them have become ready subjects of prosecution. The dangers of this broad discretion are erroneous convictions and elision of important criminal law normative, evidentiary, and constitutional rules, making it difficult to distinguish between law-abiding protesters and criminal conspirators under the law.

418. *Id.*
419. *Id.* at 1207.
420. *Id.* at 1238.
421. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).