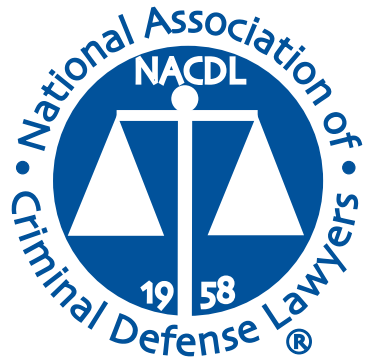

CRIMINAL CONSPIRACY: POSITION PAPER AND PROPOSALS FOR REFORM

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INTRODUCTION

Since the early 20th century, criminal conspiracy law has been the subject of great controversy. Some maintain that conspiracies pose a "distinct evil."[1] This danger, however, has never been empirically proven.[2] Herbert Wechsler and his colleagues in creating the Model Penal Code (MPC) worked from this failure of proof, observing that conspiracies and other inchoate crimes entail "infinite degrees of danger."[3]

This belief has led some to defend conspiracy law,[4] but many others to criticize it. As early as 1843, a Pennsylvania judge commented, "The law of conspiracy is certainly in a very unsettled state. The decisions have gone on no distinctive principle; nor are they always consistent."[5] In *Krulewitch v. United States*, Justice Jackson declared,

> The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid.[6]

Justice Learned Hand called conspiracy the "darling of the modern prosecutor's nursery."[7] Judge Coffin, in the First Circuit's landmark *United States v. Spock* case, commented, "[T]he absence of clear definitions of the elements of conspiracy creates a serious risk . . . . [Conspiracy] is . . . not well-defined and experience teaches that even its traditional limitations tend to disappear."[8] More recently, Seventh Circuit Judge Frank

H. Easterbrook lamented that "prosecutors seem to have conspiracy on their word processors as Count I; rare is the case omitting such a charge."[9]

While jurists have questioned the reliability of conspiracy, scholars as well have long appreciated its problems. Francis B. Sayre observed, "A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought."[10] David B. Filvaroff and others documented the law's use to attack political dissent.[11] In addition to vagueness and First Amendment issues, practitioners are also well aware of the Confrontation Clause problems associated with conspiracy.[12]

While not as common a charge in state courts, conspiracy continues to be widespread in federal courts and results in possible constitutional violations, effective elision of important evidentiary rules, and serious doubts about outcome reliability. Each of these three concerns, in fact, reinforces the other two and emerges from a law whose contours are ever-shifting. This has created a complex system of law, reforms of which have proven elusive.

This report discusses these problematic results of the application of conspiracy law and proposes a concrete set of systemic reforms. It takes the following route.

Part I introduces the basic doctrine of criminal conspiracy. This includes the general conspiracy statute, found at 18 U.S.C. § 371; specific statutory conspiracy provisions, such as Title 21 drug conspiracies, conspiracies to provide material support to foreign terrorist organizations, under 18 U.S.C. §2339B, and conspiracies to commit money laundering, under 18 U.S.C. § 1956; and specialized conspiracy provisions, such as those provided by the Racketeer-Influenced and Corrupt Organizations Act (RICO), at

18 U.S.C. § 1962, and charges involving a continuing criminal enterprise (CCE) under 21 U.S.C. § 848. Part I is purely descriptive; we describe conspiracy law as it is, not as we believe it should be.

Part II discusses the multitude of problems associated with all of the forms of conspiracy described in part I. These problems include: an overt act requirement (when it is a requirement) that offers virtually no protection to defendants; use of circumstantial evidence and inference to prove an individual defendant's intent and/or agreement; the use of alleged co-conspirator and "co-venturer" statements under Fed. R. Evid. 801(d)(2)(E) (and the procedural rules for their admissibility) and the impact on the Confrontation Clause; the use of First Amendment-protected speech or activity to prove conspiracy's elements; the *Pinkerton*[13] doctrine; the expansion of the law on conspiracy to defraud the United States[14]; the fact that jury instructions involving conspiracy are expansive, confusing, and unfairly favorable to the prosecution; the unfulfilled promise of the doctrine of *strictissimi juris* to address many of conspiracy's problems; and the problem of multiple conspiracy charges arising from one agreement-in-fact, enabled by the Supreme Court's *Albernaz v. United States*[15] opinion.

Part III presents NACDL's proposals for reforming conspiracy law. These proposals include the following: requiring an overt act for every form of conspiracy, requiring that the overt act be a "real and substantive step toward accomplishment of the conspiratorial objective," and requiring that overt acts be actual conduct and not speech, and conduct that is not protected by the Constitution; requiring that the overt act be accompanied by the specific intent to achieve the conspiratorial objective (already required in some jurisdictions, while in others it is required but not always given the

attention it deserves); requiring hearings to determine conspiracy membership — and thus admissibility of members' statements under Fed. R. Evid. 801(d)(2)(E) — before trial and not during trial after the alleged co-conspirator statement has been conditionally admitted; limiting the conduct of co-conspirators that is attributable to defendants; requiring new jury instructions on conspiracy; replacing *Pinkerton* liability with liability set forth in 18 U.S.C. § 2; advocating for the application of the doctrine *strictissimi juris*; and legislatively abrogating the Supreme Court's 1981 opinion *Albernaz v. United States* by providing that multiple conspiracy charges merge where there is only one agreement-in-fact.

PART I: THE BASIC DOCTRINE OF CRIMINAL CONSPIRACY

It is misleading to refer to *the* basic doctrine of criminal conspiracy, since there are multiple versions of the law. While they differ in some important respects, they are similar enough that they all point to a uniform doctrine of conspiracy susceptible to a uniform set of proposals. These versions include the general conspiracy statute, found at 18 U.S.C. § 371; specific statutory conspiracy provisions, for example Title 21 drug conspiracies, conspiracies to provide material support to foreign terrorist organizations, under 18 U.S.C. §2339B, and conspiracies to commit money laundering, under 18 U.S.C. § 1956; and specialized conspiracy provisions, for example those provided by the Racketeer-Influenced and Corrupt Organizations Act (RICO), at 18 U.S.C. § 1962, and charges involving a continuing criminal enterprise (CCE) under 21 U.S.C. § 848.

a. Section 371 Conspiracy

At common law, conspiracy entailed merely an agreement to commit a crime or an agreement to do something legal, but in an illegal way.[16] Conspiracy was codified in

1867 and ultimately resulted in 18 U.S.C. § 371, the "catch-all" federal conspiracy statute[17] that added the overt act requirement to the common law.[18] Section 371 reads:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Section 371 includes two distinct forms of conspiracy: conspiracies to commit a substantive offense, and conspiracies to defraud the United States. There are four elements to § 371 conspiracy to commit a substantive offense: an agreement to commit a substantive crime between two or more people, an overt act in furtherance of the conspiracy committed by at least one party to the agreement, the defendant's knowledge of the conspiracy, and the defendant's voluntary participation in it.[19]

The *corpus delicti* of conspiracy is the agreement and overt act.[20] Therefore, when a defendant commits a conspiracy and the resulting substantive act, she commits two separate crimes that do not merge.[21] The overt act is generally required because it provides a *locus poenitentiae*, or a chance for someone to withdraw from an agreement without accruing any liability.[22]

None of conspiracy's elements must be proven by direct evidence; they all can be inferred from circumstantial evidence.[23] This evidence includes use of statements of an alleged co-conspirator, which are admissible for their truth pursuant to the hearsay exception at Fed. R. Evid. 801(d)(2)(E).[24] Agreements, furthermore, need not be explicit; they can be inferred from tacit statements and actions.[25] Agreements must, however,

consist of a meeting of two or more minds; a conspiracy usually cannot be committed alone.[26]

Under current law, the overt act need not be illegal; it can be legal conduct,[27] or even constitutionally protected conduct.[28] The act, furthermore, may be proved with evidence used to prove the substantive crime.[29] It may be quite minor and have no tendency to effect the conspiracy, so long as it was performed in furtherance thereof.[30]

A defendant is normally vicariously liable for the criminal acts performed by co-conspirators during the course and in furtherance of the conspiracy while the defendant is in the conspiracy. A defendant will not normally be vicariously liable for co-conspirators' conduct that falls outside of these limits.[31] Once a defendant becomes part of a conspiracy, she becomes liable for actions the conspiracy took before her entry.[32] One may withdraw from the conspiracy and avoid liability for any subsequent actions,[33] but in order to withdraw effectively from a conspiracy, one must take affirmative action, either by informing law enforcement of the conspiracy or by communicating one's withdrawal in a manner reasonably calculated to reach co-conspirators.[34]

b. Other Statutory Conspiracy Provisions

In addition to § 371 conspiracy, there are statutes that provide for unique forms of conspiracy. Three major types of unique conspiracy are conspiracies to commit crimes under the Controlled Substances Act, conspiracies to provide material support to terrorists, and conspiracies to launder money.

Narcotics conspiracy under 21 U.S.C. § 846 criminalizes "conspir[ing] to commit any offense" under the Controlled Substances Act.[35] This statute, in effect, provides for a multitude of statutory drug conspiracies including conspiracy to distribute, conspiracy to

manufacture, conspiracy to possess, and conspiracy to possess with the intent to manufacture, distribute or dispense.[36]

All that is required for a conviction under § 846 is proof of an agreement between two or more persons to commit any offense under Subchapter I of the Controlled Substance Act.[37] Therefore, to prove that a defendant is guilty of conspiracy using any theory available under § 846, the government must prove beyond a reasonable doubt (1) the existence of an agreement between two or more persons to violate narcotics laws, (2) knowledge of the conspiracy, and (3) intent to join it.[38]

The essential element of a drug conspiracy is an agreement by two or more persons to violate the narcotics laws.[39] The existence of such an agreement may be proved by either direct or circumstantial evidence."[40] "[P]roof of a formal agreement is not necessary; a tacit or material understanding among the parties will suffice."[41] The government also need not prove that there was agreement as to the method of carrying out the crime.[42]

With regard to the knowledge element, the government must prove that the defendant "knowingly and voluntarily" joined the conspiracy.[43] As with the agreement element, knowing and voluntary participation need not be proved by direct evidence.[44] The government is also not required to prove that the defendant knew the type of the drug involved in the conspiracy.[45] It is sufficient for the government to prove knowledge by showing that the defendant knew the substance in question was "some type of controlled substance."[46]

As will be discussed later, unlike under 18 U.S.C. § 371, proof of conspiracy under 21 U.S.C. § 846 does not require an overt act.[47] Actual possession is also, of course, not an essential element.[48]

Conspiracy charges under Title 21 also leave defendants vulnerable to an underlying substantive charge.[49] For example, conspiracy to distribute is a separate offense from the overt act of distribution,[50] just as conspiracy to possess is separate from actual possession.[51]

18 U.S.C. § 2339B criminalizes conspiring to "provide material support or resources to a foreign terrorist organization."[52] The U.S. Secretary of State designates certain groups to be FTOs. No overt act is needed to prove this conspiracy.[53]

The government also need not prove that a defendant had any contact with the FTO. As one government expert testified:

> 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. 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.[54]

The point is that any two people, anywhere in the world, can "conspire" to support Al Qaeda or any other FTO, even if the likelihood of ever helping the organization is remote or even non-existent. In one case, *United States v. Mehanna*, the government argued that the defendant's translation of pro-jihad religious texts, publicly available online, from Arabic to English was part of his conspiracy to support Al Qaeda,

and constituted the substantive offense of providing *actual* material support — even though the defendant never knew or spoke with any member of Al Qaeda.[55]

The § 2339B conspiracy concept leads to absurd results, just as general conspiracy charges in the terrorism context do. In *United States v. Cromitie*, the defendant was charged with conspiracy to use a weapon of mass destruction, conspiracy to acquire and use anti-aircraft missiles, and conspiracy to kill U.S. officers.[56] Cromitie was wary of participating in the scheme, which was orchestrated by undercover FBI agents, and dodged a confidential informant for months.[57] It was only after Cromitie lost his job that he took the government's bait: nearly $250,000, a BMW, and a two-week vacation in Puerto Rico.[58] At sentencing, the judge made it clear that Cromitie was no threat, and would not have committed any crime but for the government's sting.[59] The court wrote, "Only the government could have made a terrorist out of Mr. Cromitie, a man whose buffoonery was positively Shakespearean in its scope . . . . I believe beyond a shadow of a doubt that there would have been no crime here except the government instigated it, planned it and brought it to fruition."[60] Even the FBI acknowledged this.[61]

Whereas material support conspiracy charges can be absurd, conspiracy to commit money laundering shows how routine conspiracy charges can become. 18 U.S.C. § 1956 sets forth a broad range of conduct that can satisfy the elements of money laundering. Very broadly speaking, moving money that is the proceeds of an illegal activity to hide it is money laundering, as is transferring money from a clean source so that it can be used to assist in the commission of a crime. In addition, § 1956(h) provides that conspiracy liability is punished as though the substantive object of the conspiracy were completed.

In *Whitfield v. United States*,[62] the Supreme Court held that no overt act is required to violate the conspiracy subsection of § 1956. As a result, a person has completed the crime of conspiracy to commit money laundering merely by agreeing to do something that constitutes money laundering with someone else, but without taking any action to actually do any money laundering.

This provision has wreaked havoc on criminal prosecutions. In many cases, criminal activity involves money. By allowing prosecutions for the underlying criminal offense, the associated crime of money laundering in connection with that underlying offense, and conspiracy to money launder, § 1956 allows the government to tack on, in many cases, a money laundering conspiracy charge with all of the infirmities discussed in the rest of this report.

This problem can be seen in *United States v. Rosbottom*.[63] In that case, two people were charged with both money laundering and conspiracy to commit money laundering based on statements made during the course of a bankruptcy proceeding. They were acquitted of money laundering by a jury, but convicted of conspiracy to commit money laundering.[64] Though juries do not explain their verdicts, presumably they found that the *Rosbottom* defendants agreed to try to launder money, but took no steps to accomplish that goal.

c. Specialized Conspiracy Provisions

In addition to the above statutory conspiracies, there are specialized conspiracy provisions, which include most prominently criminal provisions under the Racketeer-Influenced and Corrupt Organizations Act (RICO), at 18 U.S.C. § 1962, and Continuing Criminal Enterprise (CCE), at 21 U.S.C. § 848.

RICO prohibits conspiracy to perform a number of actions connected to racketeering. RICO permits law enforcement to cast a wider net than traditional conspiracy by replacing "wheel" and "chain" rationales for conspiracy with the new statutory concept of "enterprise."[65] This allows law enforcement to infer a common objective from "the commission of highly diverse crimes by apparently unrelated individuals"; RICO ties together these diverse parties and crimes.[66]

To prove a RICO conspiracy, the government need only prove that the defendant agreed with another person to conduct the affairs of the "enterprise" through a pattern of rackeering activity. No predicate offense needs to be proven,[67] nor must the government prove an overt act, which is another reason that RICO is more comprehensive than § 371 conspiracy.[68]

CCE participation, in turn, is defined by commission of certain enumerated felonies as "a part of a continuing series of violations"[69] of federal narcotics laws.[70] The commission of these felonies and the overall CCE charge do not merge,[71] meaning that the very same series of conduct can result in two sets of sentences. Although CCE does merge with conspiracy, if the conspiracy is one of the underlying felonies, a conspiracy conviction may be reinstated if a concomitant CCE prosecution fails.[72] Thus, while a dual conviction for conspiracy and CCE violates double jeopardy,[73] the potential for reinstatement of CCE if the conspiracy charge fails encourages prosecutors to charge both crimes. This risks improper multiplicity of charges.

PART II: CONSPIRACY'S PROBLEMS

Conspiracy law in all its forms suffers from a number of constitutional, evidentiary, and outcome reliability problems. These include an overt act requirement

(when it is a requirement) that offers virtually no protection to defendants; use of circumstantial evidence and inference to prove an individual defendant's intent and/or agreement; the use of alleged co-conspirator and "co-venturer" statements under Fed. R. Evid. 801(d)(2)(E) (and the procedural rules for their admissibility) and the impact on the Confrontation Clause; the use of First Amendment-protected speech or activity to prove conspiracy's elements; the *Pinkerton* doctrine; the expansion of the law on conspiracy to defraud the United States[74]; the fact that jury instructions involving conspiracy are expansive, confusing, and unfairly favorable to the prosecution; the unfulfilled promise of the doctrine of *strictissimi juris* to address many of conspiracy's problems; and the problem of multiple conspiracy charges arising from one agreement-in-fact, enabled by *Albernaz v. United States*.

a. The Overt Act Requirement

To prove conspiracy at common law, all that the government was required to prove was the "act of conspiring under a condition of liability."[75] It was not required that the government prove that there was an "overt act" taken in furtherance of the conspiracy.[76] Insertion of the overt act requirement came when some jurisdictions incorporated it statutorily.

Under current law, an overt act is any act performed by any conspirator for the purpose of accomplishing the objectives of the conspiracy.[77] The overt act does not have to be unlawful; "it can be any act, innocent or illegal, as long as it is done in furtherance of the object or purpose of the conspiracy."[78] An overt act of one conspirator is imputed to all without any new agreement specifically directed to that act.[79] Finally, the overt act

requirement can be used to establish venue "in any district where an overt act in furtherance of the conspiracy was performed."[80]

Courts will not find an overt act requirement unless a statute expressly requires it.[81] Section 371, for example, expressly requires proof of an overt act.[82]

Congress has, in fact, enacted a number of specific conspiracy statutes omitting the overt act requirement. One such statute is the Comprehensive Drug Abuse Prevention and Control Act of 1970.[83] The Supreme Court refrained from finding legislative intent to include an overt act element into this statute because the common law required no overt act to prove a conspiracy.[84]

Similarly, RICO does not require proof of an overt act in furtherance of a conspiracy or even an agreement to commit the predicate acts necessary for a RICO conspiracy conviction.[85]

As with the Narcotics and RICO statutes, the money laundering statute does not require an overt act.[86] The Court in *Whitefield v. United States* explained that in every case where a statute operates, no overt act requirement will be inferred if the statute does not expressly provide one.[87]

b. Use of Circumstantial Evidence and Inference

The core of a conspiracy is, of course, the agreement. "An agreement need not be formal and may instead be a 'tacit or mutual understanding between the defendant and his accomplice.'"[88] Of course, when one alleged co-conspirator is cooperating with the government against another alleged co-conspirator, the "tacit understanding" of the cooperator is going to be the one that the government believes and that the jury hears.

Because direct evidence of a conspiracy may be hard to obtain,[89] courts routinely

allow conspiracies to be proven through circumstantial evidence and inference.[90] Given that circumstantial evidence is allowed at trial, this, in itself, is not surprising. The evidentiary difficulty entailed in using circumstantial evidence to prove a conspiracy is that there is no substantial act that can give a reliable imprimatur to circumstantial evidence. For example, to prove a premeditated murder, the government might present evidence that the defendant A killed victim B, and that the day before killing the defendant was heard to exclaim, "I hate B. I wish he were dead!" This statement is probably reliable to prove premeditation if the government is able to prove that the defendant indeed did kill the victim. If, however, the defendant was charged only with conspiracy to kill the victim — and there was no actual killing — the defendant's statement may become quite unreliable in proving conspiracy. The defendant could have been inviting his listener to agree to kill the victim, or he could have been making a hostile statement made countless times everyday by agitated — but innocent — people.

As the Seventh Circuit has held, "[W]hile mere association with an individual involved in a criminal enterprise is not sufficient, 'presence or a single act will suffice if circumstances show that the act was intended to advance the ends of the conspiracy.'"[91] Under current law, therefore, being present with someone doing something that is a substantive crime — giving a bribe, for example — can be sufficient for a conspiracy conviction. The Eighth Circuit has elaborated, "Although not sufficient by itself, association or acquaintance among the defendants supports an inference of conspiracy."[92] While guilt by association is nominally condemned by all, it is alive and well in the conspiracy context.

Moreover, courts have held that membership in a conspiracy does not require that a person know everything else going on in a conspiracy. It does not defeat a conspiracy conviction to be able to prove, for example, that you do not know or had no contact with the people who are running the conspiracy or planning it. As the Fourth Circuit has explained, "[W]hile many conspiracies are executed with precision, the fact that a conspiracy is loosely-knit, haphazard, or ill-conceived does not render it any less a conspiracy — or any less unlawful."[93] Or, put another way, "[A] defendant properly may be convicted of conspiracy without full knowledge of all of [the conspiracy's] details, but if he joins the conspiracy with an understanding of the unlawful nature thereof and willfully joins in the plan on one occasion, it is sufficient to convict him of conspiracy, even though he had not participated before and even though he played only a minor part."[94]

Under current law, therefore, to convict a person accused of conspiracy, the government must show merely that the person on one occasion did something that, through circumstantial evidence, could support the conclusion that she knew about the conspiracy and wanted to be a part of it. It may simply be an association with a person involved in the conspiracy when something was happening relevant to the object of the conspiracy. The person charged need not be aware of others in the conspiracy, need not be aware of all of the purposes of the conspiracy, and need not be aware of all of the ways the conspiracy is being carried out.

This standard can lead to a conviction for conspiracy on a thin reed. For example, the Fifth Circuit affirmed the conviction of a woman who used an alias to buy a plane ticket for her husband, who she knew was part of a drug conspiracy.[95] The Seventh

Circuit has affirmed the conviction of a man who drove to a drug dealer's house in a truck with two other people and a toolbox that was later found to contain drugs, touched the lid of the tool box, and, as he parked in the driveway backed into his driveway instead of driving in head first.[96] The Eighth Circuit affirmed a conspiracy conviction based solely on the fact that two men rode in a car together to a place where one of them was dealing drugs, and the other man warned him that police were arriving.[97] Finally, in *United States v. Njoku*, a woman was convicted of health care fraud because she performed health assessments on patients, knew her bosses were submitting some false Medicare claims, drove the woman primarily responsible for falsifying claims to home visits, and knew that the woman had submitted claims for some patients whom she had not been driven to visit.[98]

c. Federal Rule of Evidence 801(d)(2)(E)

Another of the challenges of defending criminal conspiracies is the so-called "co-conspirator exception" to the hearsay rule. This "exception,"[99] set forth in Fed. R. Evid. 801(d)(2)(E), allows admission of a declarant's out of court statements *if* the declarant was defendant's coconspirator *and* the statements were made during the course and in furtherance of the conspiracy.[100] These statements are not admissible until the government makes these showings by a preponderance of the evidence.[101] While the statement itself may be considered as part of the proof of the existence of the conspiracy, the Rule requires that independent corroborative evidence must be offered.[102]

The quantum of evidence required to prove the existence of the conspiracy and other prerequisites has varied from "substantial" to "slight."[103] Furthermore, it is not necessary that the conspiracy be charged, or that the defendant be a member of the

conspiracy at the time the statements were made.[104] Some courts have held that it is not even necessary for the government to identify the declarant.[105] Finally, as discussed above, the corroborating evidence required may be completely circumstantial.[106]

Though the prerequisite evidentiary rulings are intended to limit the "bootstrapping" effect disapproved by the Supreme Court in *Glasser v. United States*, the admission of these out of court statements still poses serious threats to the presumption of innocence and the protections of the Confrontation Clause.[107] This is especially true in cases where a court conditionally admits a coconspirator statement subject to later proof of the conspiracy and defers a final ruling on its admissibility until after hearing all evidence.[108] Thus, even before a judge has made her preliminary determination, and well before a jury has addressed the question of guilt, evidence that signals that a guilty verdict is the correct finding is heard by the jury.

The harm to the defendant is not ameliorated by the underlying reliability of the coconspirators' statements. In fact, reliability is not at issue; because a coconspirator's statement is a statutorily defined exception to the hearsay rule, reliability is presumed.[109] And while the rationale of the "admission of party-opponent" exception of Fed. R. Evid. 801(d)(2)(A) is based on the logic of the inherent reliability of a party's own statement, there is no such logical extension to be made to a coconspirator's statement, as the defendant has no control over the declarant's statement and has not adopted it.[110] In sum, the co-conspirators' rule presents a dangerous risk to due process and to the fairness of the trial overall by permitting the jury to hear unreliable hearsay that, by its very nature, presumes guilt. As discussed below, some courts have exacerbated these dangers by admitting out-of-court statements under Rule 801(d)(2)(E) even where the defendant and

the declarant were involved in a *lawful* joint venture — an interpretation of the rule that ignores its text and history and vastly expands its potential scope.

d. First Amendment and Conspiracy

The impact of conspiracy law on the First Amendment is generally underestimated. When this impact is considered, observers usually only focus on the use of speech as conspiracy's *actus reus*, including both the agreement and overt act. But the very same speech is also used to prove *mens rea*. The upshot is that speech — often protected by the First Amendment — becomes the crime of conspiracy itself and evidence thereof.

While this collapse of *actus reus* and *mens rea* entails pressure on First Amendment rights, ways that conspiracy is proven exacerbate the problem. These include speech's ambiguity,[111] the fact that courts favor the government in conspiracy cases,[112] the fact that agreements can be inferred,[113] and the fact that overt acts, if they are required,[114] can be proven by the most minor and legal conduct or speech.[115]

This all allows and encourages proof of a conspiracy by verbosity of speech evidence, and prosecutors are rewarded with convictions by inundating juries with mounds of "bad" sounding speech[116] — "bad" speech being that which sounds indicative of criminal activity, but may or may not actually be so.[117] The evidentiary distinction between agreement, overt act, *mens rea*, and evidence of these elements fades; "bad" speech assumes the appearance of relevance to proving all of these things, and amounts to a normatively unacceptable blunderbuss approach[118] to evidence that implicates free speech concerns.[119] Put another way, in conspiracy trials, speech is the sole necessary building block, which works to prove conspiracy's homogenized set of ostensibly distinct

elements.

Case law is replete with conspiracy charges that impact First Amendment interests. Communist-related speech in the 1950s carried "bad" connotations that may or may not have portended the danger their stigma suggested.[120] Hip-hop lyrics have similarly been used against defendants in drug conspiracy trials. In one case, a twenty-minute video of the defendant rapping with another man about his involvement in the drug trade was used to prove his involvement in a narcotics conspiracy,[121] even though no drugs were actually seized.[122] The defendant testified that rapping was his art and that his lyrics were not true, but were meant to draw a response from the crowd.[123] The Eighth Circuit found that admission of the video did not violate the defendant's rights.[124]

In another case, the government introduced a rap video it had found on YouTube during the course of a defendant's drug conspiracy trial.[125] The Eleventh Circuit found error in the admission of this video, in part because the defendant was not in it, had not authored the lyrics, and had not adopted the views expressed.[126]

In a third case, a rap lyric was introduced, and the defendant argued that this music "'constitutes a popular musical style that describes urban life' . . . [and] the reality around its author."[127] The Seventh Circuit responded that the defendant's "knowledge of this reality . . . was relevant" to the charged crimes.[128]

In the war on terror, the government's definition of "jihad" illustrates the a priori assumption of speech's "badness."[129] In fact, jihad can mean a number of things. It can mean a body of legal doctrine pertaining to legitimate warfare;[130] "disputation and efforts made for the sake of God and in his cause";[131] "'internal,' 'spiritual' jihad [that is] every bit as old as its 'external,' 'fighting' counterpart";[132] and preaching the word of Islam.[133]

In pursuing inchoate offenses like conspiracy, less actual conduct means that the government must increasingly rely on speech to be simultaneously the agreement, overt act, evidence of these elements, and evidence of *mens rea*.[134] This encourages prosecutors to stretch the meaning of language to suit their purposes, but not First Amendment principles.

The Supreme Court had the opportunity to address one important aspect of the First Amendment-conspiracy law problem. In *Epton v. New York*, the Court denied *certiorari*, but a dissenting Justice Douglas observed: "[w]hether the overt act required to convict a defendant for conspiracy must be shown to be constitutionally unprotected presents an important question."[135] He went on: "Although the Court has indicated that the overt act requirement of the treason clause ensures that 'thoughts and attitudes alone cannot make a treason' it has never decided whether activities protected by the First Amendment can constitute overt acts for purposes of a conviction for treason."[136] His question[137] and the others presented in this section have gone unanswered.

e. The Pinkerton *Doctrine*

In *Pinkerton v. United States*, the U.S. Supreme Court held that a conspirator is liable for the substantive crimes of a co-conspirator that are performed in the course and furtherance of the conspiracy and are reasonably foreseeable.[138] There are a number of potential problems with this doctrine.

First, it is a doctrine with theoretical limits that are not practically enforced; almost *all* illegal conduct performed by one conspirator that is potentially related to the alleged conspiracy is attributed to all co-conspirators.

Second, while *Pinkerton* remains good law, its validity is in question, at least at

the federal level. Since the 1800s, federal courts have rejected common law theories of criminal liability.[139] *Pinkerton* represents the only exception to the rule barring common law federal criminal liability. In that case, the Supreme Court took the § 371 statutory basis for liability and expanded it via common law judicial lawmaking. The Court, in effect, ratified § 371 liability for conspiracy, but also *created* liability for the substantive crimes of alleged co-conspirators. This is an exceptional assault on the principle of separation of powers, and one that a future Supreme Court could revisit.

While *Pinkerton* violates the principle prohibiting federal common law (i.e. judicial) criminal lawmaking, it also appears directly to conflict with federal statutory law. 18 U.S.C. § 2 provides that:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

While contemporary courts have accepted the *Pinkerton* doctrine as a part of federal common law,[140] this view appears to contradict the prohibition on federal common law crimes articulated in *United States v. Hudson* and *United States v. Goodwin*.[141] Under the *Hudson-Goodwin* principle, the only valid basis for accomplice liability should be 18 U.S.C. § 2.[142]

Third, the *Pinkerton* doctrine violates the principle of individual criminal liability, especially in the context of conspiracies, whose proof is often notoriously uncertain. Put another way, convictions for conspiracies themselves often rest on dubious evidence. Proving that conduct committed by one person was related to the alleged conspiracy and

was reasonably foreseeable to the other person often rests on even more dubious evidence. *Pinkerton* thus further undermines the already questionable legitimacy of conspiracy law.

f. Expansion of Conspiracy to Defraud the United States

As malleable as conspiracy law is, expanding its reach for a certain class of victim is inadvisable. And in a system that prohibits common law criminal liability, grounding that expansion on judge-made policy concerns untethered to statutory text is worse than inadvisable. Yet both failings mar the crime of conspiracy to defraud the United States under 18 U.S.C § 371.

As noted above,[143] § 371 is written in the disjunctive; it criminalizes both conspiracies "to commit any offense against the United States," and conspiracies "to defraud the United States." The former clause addresses conspiracies to commit offenses defined in other federal statutes. The latter, of course, addresses conspiracies to defraud the United States government.

With the common law meaning of "defraud" long recognized as "depriving another of money or property through deceptive means,"[144] § 371's "defraud" clause would appear only to criminalize conspiracies to cheat the government out of money or property. But the judicial interpretation of that clause sweeps much more broadly, to any conspiracy for the purpose of "impairing, obstructing or defeating the lawful function of any department of government" by dishonest means.[145]

Although widely known as a "*Klein* conspiracy," named after a Second Circuit case applying it (and discussed below),[146] this theory of liability originated with two Supreme Court cases. The first, *Haas v. Henkel,*[147] held sufficient to charge an offense

the allegation that the defendants had bribed a Department of Agriculture employee to leak to them advance information about official crop reports. Acknowledging that the leak was not intended to cause pecuniary harm to the United States, and in fact caused none, the Court nonetheless held that "it is not essential that such a conspiracy shall contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government."[148]

Significantly, *Haas* cited *Curley v. United States*[149] as support for forgoing a pecuniary harm requirement. *Curley* had approved the concept of giving a broader interpretation to "a statute which has for its object the protection and welfare of the government alone" versus one that "had its origin in the desire to protect individual property rights."[150] And thus it was policy concerns identified by judges, not by Congress, that unmoored the defraud clause of § 371 from the common law underpinnings of its statutory text, broadening the definition of "defraud" when the victim is a government agency.[151]

Although barely into its teen years, *Haas* had already revealed its breathtaking reach. The Supreme Court reined it in somewhat in *Hammerschmidt*,[152] in which the defendants were antiwar activists who had printed and distributed fliers urging resistance to the draft — conduct no doubt intended to defeat a lawful function of the Department of Defense. The Supreme Court reversed their convictions. While citing *Haas*'s broad language with approval, *Hammerschmidt* restricted its application by holding that when charged conduct does not violate a separate federal statute (as the bribery conspiracy in *Haas* did), the intent to impair a government function is not enough. Rather, the

prosecution must prove that the defendants intended to impair a government function "by means of deceit, craft, or trickery, or at least by means that are dishonest."[153]

Even though *Hammerschmidt* announced a limiting principle, it quietly broadened the defraud clause beyond *Haas*'s facts when it made clear that the conspiracy's goal need not be independently illegal.[154] *Hammerschmidt* did specify that the means to achieve an otherwise-legal goal must include dishonesty, but it did not specify that the dishonesty must rise to the level of illegality. Thus, conspiracy to defraud the government may be proven when both the object of the conspiracy and the means to achieve it were perfectly legal, if shady.[155] Given that the overt act performed in furtherance of a conspiracy may also be legal,[156] the frightening potential of the defraud clause is patent.

As noted above, the Second Circuit's *Klein* decision, rendered more than thirty years after *Hammerschmidt*, has come to define the doctrine. *Klein* set the standard for the use of the defraud clause in tax prosecutions, which remains the arena in which the government apparently most frequently employs it. The defendants in *Klein* won directed verdicts of acquittal on four tax evasion counts, but were convicted of a "conspiracy to obstruct the Treasury Department in its collection of [] revenue."[157] The Second Circuit affirmed. While acknowledging that the "mere failure to disclose income would not be sufficient," the court explained that the conduct proven at trial — which included numerous false statements in tax returns and responses to Treasury Department interrogatories — was "directly in line" with the test articulated in *Hammerschmidt*.[158]

Interestingly, the *Klein* court never considered the fact that a conspiracy to defeat the government's collection of revenue *is* intended to deprive the government of money

or property — and thus fits neatly within the traditional definition of a conspiracy to defraud. Nor did the court acknowledge that the false statements that it cited to uphold the conviction violated separate federal statutes, and thus would have supported a conviction under the offense clause of § 371. Nevertheless, until recently *Klein*'s authoritative status has been unquestioned among the circuits.

The recent questioning has come out of the Second Circuit itself, in *United States v. Coplan*.[159] Assisted by thorough briefing by appellants' counsel and a NACDL amicus brief, the *Coplan* court acknowledged that *Klein*'s definition of "to defraud" is at odds with the term's common law meaning, with no justification for the deviation appearing in the statute.[160] Indeed, the court treated as implicitly conceded that a *Klein* conspiracy is a common law crime.[161] Noting that "considerable judicial skepticism" is warranted when scrutinizing a theory of criminal liability defined by courts rather than Congress, the court observed that policy concerns articulated in case law appear to be the only rationale for deviating from the common law meaning of the text of § 371.[162] The court also acknowledged appellants' "forceful[]" argument that the Supreme Court's decision in *Skilling v. United States*[163] provides authority for "par[ing]" decades of precedent to the "core" of the statutory text.[164] But then the court checked its own momentum with a reminder that an intermediate appellate court must follow Supreme Court precedent, "no matter how persuasive we find arguments for breaking loose from [its] moorings."[165] The court all but invited the Supreme Court to grant certiorari, noting that the appellants' arguments "are properly directed to a higher authority."[166] Unfortunately, the Supreme Court declined the invitation.[167] Future challenges are certain to follow.

g. Jury Instructions

Conspiracy jury instructions are a mess. Because the law is so vague and shifting and exactly what counts as sufficient evidence of a tacit agreement is so ephemeral, the conspiracy jury instructions allow — and sometimes even encourage — jurors to find a conspiracy where the evidence is thin.

Consider the model jury instructions from the Third Circuit. First, a jury is instructed on what a conspiracy essentially is:

> It is a federal crime for two or more persons to agree or conspire to commit any offense against the United States, even if they never actually achieve their objective. A conspiracy is a kind of criminal partnership.[168]

That's straightforward enough, as is the start of the instruction for the first element, the existence of an agreement:

> The first element of the crime of conspiracy is the existence of an agreement. The government must prove beyond a reasonable doubt that two or more persons knowingly and intentionally arrived at a mutual understanding or agreement, either spoken or unspoken, to work together to achieve the overall objective of the conspiracy . . .[169]

The instruction becomes murkier, inviting the jury to consider all of the things that the government does not have to prove in order to prove that a conspiracy existed, capped off with a weak statement of what the government actually does have to prove:

> The government does not have to prove the existence of a formal or written agreement, or an express oral agreement spelling out the details of the understanding. The government also does not have to prove that all the members of the conspiracy directly met, or discussed between themselves their unlawful objective*(s)*, or agreed to all the details, or agreed to what the means were by which the objective*(s)* would be accomplished. The government is not even required to prove that all the people named in the indictment were, in fact, parties to the agreement, or that all members of the alleged conspiracy were named, or that all members of the conspiracy are even known. What the government must prove beyond a reasonable doubt is that two or more persons *in some way* or manner arrived at *some type* of agreement, mutual understanding, or meeting of the minds to try to accomplish a common and unlawful objective.[170]

The suggestion from this instruction is what veteran criminal defense lawyers already know — it's easy for the government to prove a conspiracy.

In assessing whether the government has shown that two or more people *in some way* came up with some kind of agreement or mutual understanding, the jury is instructed about all of the kinds of evidence and inference it is proper to consider:

> You may consider both direct evidence and circumstantial evidence in deciding whether the government has proved beyond a reasonable doubt that an agreement or mutual understanding existed. You may find the existence of a conspiracy based on reasonable inferences drawn from the actions and statements of the alleged members of the conspiracy, from the circumstances surrounding the scheme, and from evidence of related facts and circumstances which prove that the activities of the participants in a criminal venture could not have been carried out except as the result of a preconceived agreement, scheme, or understanding.[171]

The instructions of the rest of the elements of a conspiracy are similarly easy on the government. For example, the instruction on whether the person charged was a member of the conspiracy states that the government has to prove beyond a reasonable doubt that the person knew of the purpose of the conspiracy and willingly joined it, but that "[t]he government need not prove that [the person charged] knew everything about the conspiracy or that [she] knew everyone involved in it, or that [she] was a member from the beginning. The government also does not have to prove that [the person] played a major or substantial role in the conspiracy."[172]

The instruction continues in a way that can be confusing:

> Evidence which shows that [the person charged] only knew about the conspiracy, or only kept "bad company" by associating with members of the conspiracy, or was only present when it was discussed or when a crime was committed, is not sufficient to prove that [the person] was a member of the conspiracy even if [the person] approved of what was happening or did not object to it. Likewise, evidence showing that [the person] may have done something that happened to help a conspiracy does not

> necessarily prove that [she] joined the conspiracy. You may, however, consider this evidence, with all the other evidence, in deciding whether the government proved beyond a reasonable doubt that [the person] joined the conspiracy.[173]

The jury is told both that merely keeping "bad company" or being present when the conspiracy's business was discussed is not enough to convict and, at the same time, that it is something the jury can consider in deciding if the person is a member of the conspiracy. A lay jury, hearing this, may well reasonably conclude that what this means is that if a person charged keeps bad company that does not mean that the person is co-conspirator, but at the same time, it might be enough to convict. This allows precisely what the instruction shouldn't — a conviction for conspiracy where a defendant spends time with a person in a conspiracy, rather than actually agreeing to further some criminal activity.

h. Strictissimi Juris

When individuals are charged with crimes in a group setting — like conspiracy — it can be difficult to separate the individual from the group to accurately assign criminal liability. Special evidentiary and procedural rules are therefore necessary to reach an accurate outcome. Without these special rules, these charges often result in false convictions or true convictions that overstate a defendant's actual culpability.

When this group conduct involves substantial amounts of First Amendment activity, an individual defendant's guilt is supposed to be determined "*strictissimi juris*," or "of the strictest right or law."[174] *Strictissimi juris* is supposed to separate the individual from the group by attending to the evidentiary problems associated with circumstantial evidence[175]; attenuated inferences[176]; and improper imputation of guilt from the group to the individual.[177] It is also meant to impose a preference for direct

evidence, circumstantial evidence supported by direct evidence, and ambiguous First Amendment-protected evidence supported by direct or circumstantial evidence[178] (so-called "independent evidence" rules[179]).

Strictissimi juris' promise has gone unfulfilled because defense attorneys and courts have not adequately determined exactly what *strictissimi juris* requires or even where it fits into the criminal justice process. Some useful things, however, can be said.

Modern *strictissimi juris* arose from two 1961 Supreme Court cases, *Scales v. United States*[180] and *Noto v. United States*.[181] Both of these cases involved prosecutions under the anti-Communist Smith Act's membership clause. The *Noto* Court announced the core concept of *strictissimi juris*, which was that in membership clause prosecutions, the element of an individual defendant's criminal intent, like all of the other elements,

> must be judged strictissimi juris, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.[182]

This was meant to avoid improper imputation of the group's criminal *mens rea* or conduct to the individual.[183] *Strictissimi juris* is not, however, limited to Smith Act prosecutions.

In *United States v. Spock*, a 1969 case, the First Circuit considered a charge of conspiracy among anti-war activists to counsel and aid others to avoid the draft.[184] The Court ostensibly applied *strictissimi juris* because the alleged agreement was legal but the means to accomplish that end might be both legal and illegal.[185] Thus applied, *strictissimi juris* for the First Circuit required an individual defendant's specific intent to

adhere to the illegal portions of the undertaking to be proven with one of three types of direct evidence:

> by the individual defendant's prior or subsequent unambiguous statements; by the individual defendant's subsequent commission of the very illegal act contemplated by the agreement; or by the individual defendant's subsequent legal act if that act is 'clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated.'[186]

The *Spock* court went on to offer that conspiracy's "metastatic rules" violated the principle of *strictissimi juris*, specifically referring to co-conspirator hearsay.[187] It is clear that the court meant to imply that additional but unnamed rules also violated the principle.

In *United States v. Dellinger*, the Seventh Circuit considered the convictions of the Chicago Eight for conspiracy to riot during the 1968 Democratic National Convention.[188] All of the defendants had participated in legal protests, during which some crime and violence occurred.[189] The government claimed the defendants shared the common aim of producing violence,[190] and the defendants claimed that they merely wanted to protest and organize peacefully.[191] The court held that evidence of an individual defendant's participation in a group engaged in crime could not, standing alone, be probative of the defendant's unlawful intent.[192] That said, it is unclear what role *strictissimi juris* played in the court's analysis[193]; indeed, the court took steps to declare what *strictissimi juris* did *not* require.[194]

Finally, in *Castro v. Superior Court of California*, prosecutors charged protestors with conspiracy during a school protest.[195] Reversing the convictions, the court rejected the state's "slavish adherence to" the use of circumstantial evidence, which chilled the exercise of free speech, and its attempt to circumvent the First Amendment by charging

conspiracy.[196] The state, said the court, could not use conspiracy as a First Amendment work-around.[197] The state's dependence on circumstantial evidence, said the court, violated the principle of *strictissimi juris*.[198]

i. The Albernaz *Problem*

In *Albernaz v. United States*, the United States Supreme Court considered the conviction of defendants on two counts, one a conspiracy to import marijuana and the second a conspiracy to distribute marijuana.[199] Although they only entered into one conspiracy, which covered both of the counts,[200] they received consecutive sentences on each count.[201] The Supreme Court rejected the defendants' double jeopardy argument[202] and also found that Congress intended to permit consecutive sentences.[203]

This case is a problem from substantive liability and sentencing points of view. As for substantive liability, *Albernaz* stands for the proposition that two conspiracies can be charged, though only one was committed. While charging conspiracy as well as its completed conspiratorial objective is defensible because a defendant who both conspires and commits the objective substantive crime in fact commits two crimes, charging two conspiracies from one is a different matter. As for sentencing, two consecutive sentences arising from one criminal act seems excessive, and certainly does not respond to retributivist imperatives.

The *Albernaz* problem persists, and is yet another way to heap liability and punishment onto conspiracy defendants.

PART III: PROPOSALS FOR REFORM

While versions of conspiracy are disparate and the problems myriad, there is a set of reforms that apply to all versions and can minimize or eliminate most of the problems.

While outright abolition of conspiracy law in the United States is politically unrealistic,[204] contemporary concerns with overcriminalization, emanating even from the Department of Justice itself, suggest that targeted reforms could be enacted. These reforms include: requiring overt acts to prove all forms of conspiracy and requiring that overt acts be actual conduct and not speech, and conduct that is not protected by the Constitution; in the context of co-conspirator statements, requiring hearings to determine conspiracy membership before trial and not during trial after the statements have been conditionally admitted; limiting the conduct of co-conspirators that is attributable to defendants; requiring new jury instructions on conspiracy; replacing *Pinkerton* liability with liability set forth in 18 U.S.C. § 2; advocating for the application of the doctrine *strictissimi juris*; and advocating for legislatively overturning *Albernaz v. United States*.

a. Require an overt act for every form of conspiracy, require that the overt act be a "real and substantial step toward accomplishment of the conspiratorial objective," and require that overt acts be actual conduct and not constitutionally protected (and clarify that this overt act must be accompanied by specific intent to commit the conspiratorial objective

Some forms of conspiracy require no overt act. All forms should require such an element. Furthermore, under current law overt acts can be comprised of the most minor of conduct, mere speech, constitutionally protected acts, and even constitutionally protected speech. To be a meaningful element, the overt act — like the "substantive step" element of attempt — should consist of a "real and substantial step toward accomplishment of the conspiratorial objective." In addition, while recognizing that speech and other constitutionally protected conduct can be, in some cases, relevant, it should not be permitted to comprise a very element of the crime of conspiracy. The ease with which the government can prove an overt act should, *a fortiori*, require it find *some*

overt act that is an actual, unprotected act. Finally, prosecutors and courts should be reminded that this overt act must be accompanied by specific intent to commit the conspiratorial objective. This element is all too often discounted or even ignored.

b. Require hearings to determine conspiracy membership prior to trial

In order admit co-conspirators' statements against a defendant for the truth of the matter asserted under Fed. R. Evid. 801(d)(2)(E) — trial courts must determine that the defendant and the declarant were members of a conspiracy. Surprisingly, courts usually make this determination mid-trial, *after* alleged co-conspirators' statements have been conditionally admitted (and therefore published to the jury). There is no practical reason for this. Rather, such mid-trial determinations are inefficient, interrupt the trial, and ring an evidentiary bell for jurors that cannot be unrung. As a practical matter, such determinations often leave trial judges with the choice of admitting the statements or declaring a mistrial after days or even weeks of trial. Faced with such a choice, the trial judge has an enormous incentive to admit the statements.

The determination whether the defendant and the declarant were members of a conspiracy at the time of the out-of-court statement should be made in a pretrial hearing. At the pretrial hearing, the government should be required to present admissible evidence, independent of the statements themselves, sufficient to establish the foundation for admission under Rule 801(d)(2)(E) by a preponderance of the evidence.

c. Limit the conduct of co-conspirators that is attributable to defendants

Under *Pinkerton*, a defendant can be convicted of reasonably foreseeable substantive crimes committed by a co-conspirator during the course and in furtherance of a conspiracy.[205] The Supreme Court should discard this impermissible common law

theory of criminal liability, or Congress should overrule it legislatively. Accomplice liability should be determined solely by the standards set forth in 18 U.S.C. § 2.

d. Require new jury instructions on conspiracy

Currently, jury instructions on conspiracy are primarily dedicated to what prosecutors need not prove, rather than what they need *to* prove. This turns the normal structure of jury instructions on its head and effectively shifts the burden of proof to a defendant. Conspiracy instructions should be reformulated to resemble other jury instructions.

For example, instead of informing the jury that "the government does not have to prove the existence of a formal or written agreement, or an express oral agreement spelling out the details of the understanding," a proper jury instruction could read, "the government must prove the existence of an agreement beyond a reasonable doubt. The absence of a formal or written agreement does not necessarily mean there is no agreement, but the jury must ensure that an agreement is proven." Instead of informing the jury that, "What the government must prove beyond a reasonable doubt is that two or more persons *in some way* or manner arrived at *some type* of agreement, mutual understanding, or meeting of the minds to try to accomplish a common and unlawful objective," a jury might be told, "What the government must prove beyond a reasonable doubt is that the defendant conspired with one or more other people to commit a crime. All of the conspirators must have agreed to commit that crime. While the manner or means to commit the crime need not have been agreed to, every conspirator must have agreed to commit a specific crime. At the time of the agreement, all conspirators must be aware of the nature of the crime they are agreeing to commit."

e. Advocate for the application of the doctrine strictissimi juris

As noted above, the doctrine of *strictissimi juris* ought to function to separate a defendant from her group, so that the group's *mens rea* or *actus reus* is not imputed to the defendant. This doctrine has not, however, been developed enough to so function.

Defense attorneys should understand *strictissimi juris* and should seek to have it applied where appropriate. Because the doctrine is relatively undeveloped, its early application will be inconsistent. Over time, however, its individual instances of application have the potential collectively to generate a consistent doctrine that protects accused persons by ensuring that any criminal liability is individual, rather than imputed from the conduct of defendants' groups.

f. Albernaz *should be legislatively overruled*

The Supreme Court in *Albernaz* rested most of its decision on congressional intent. Congress, therefore, can and should address the liability and sentencing problems inherent in that case. It should do so by legislatively mandating merger of multiple conspiracy counts where only one agreement-in-fact exists. So, for example, if *A* and *B* are charged with (1) conspiracy to import marijuana, (2) conspiracy to distribute marijuana, (3) possession of marijuana with intent to distribute, and (4) distribution of marijuana, and *A* and *B* only had one agreement to obtain and sell marijuana, then counts (1) and (2) would merge, and *A* and *B* could be charged with and sentenced to one count of conspiracy plus the two substantive counts, (3) and (4). This would accord more closely with *A* and *B*'s actual criminal conduct as well as retributivist principles.[206]

CONCLUSION

While criminal conspiracy law can reach conduct that ought to be criminalized

because it poses a serious, substantial, albeit inchoate risk of danger, its structure generates pervasive problems. Improper convictions, evidentiary unreliability, potential constitutional violations, and basic issues of justice are all implicated by conspiracy law. Many think that conspiracy law is a necessary law enforcement tool, and that any reforms to it will reduce its effectiveness. It has been the goal of this white paper to illustrate both the problems with conspiracy law and the fact that reasonable, effective reforms are available that will protect defendants while ensuring the law's continued use as an effective tool of measured, intelligent law enforcement.

[1] United States v. Recio, 123 S. Ct. 819, 822 (2003) (quoting Salinas v. United States, 522 U.S. 52, 65 (1997)); Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1315 (2003); *see also* Kathleen F. Brickey, *Conspiracy, Group Danger and the Corporate Defendant*, 52 U. CIN. L. REV. 431, 443 (1983); Catherine E. Smith, *The Group Dangers of Race-Based Conspiracies*, 59 RUTGERS L. REV. 55, 57 (2006).
[2] Abraham S. Goldstein, *Conspiracy To Defraud the United States*, 68 YALE L.J. 405, 414 (1959).
[3] Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 1029 (1961).
[4] Katyal, *supra* note 1.
[5] Mifflin *v.* Commonwealth, 5 Watts & S. (Pa.) 461 (1843) (Gibson, C.J.).
[6] 336 U.S. 440, 446-47 (1949) (Jackson, J., concurring).
[7] Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).
[8] 416 F.2d 165, 188 (1st Cir. 1969) (Coffin, J., dissenting).
[9] United States v. Reynolds, 919 F.2d 435, 439 (7th Cir. 1990).
[10] *Criminal Conspiracy*, 35 HARV. L. REV. 393, 393 (1922).
[11] David B. Filvaroff, *Conspiracy and the First Amendment*, 121 U. PA. L. REV. 189 (1972); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 481 (2004) ("[T]he crime of conspiracy has routinely been used by prosecutors to 'get' union organizers, political dissenters, radicals, and other 'dangerous' individuals who could not otherwise be convicted of an offense."); Note, *Conspiracy and the First Amendment*, 79 YALE L.J. 872, 872 (1970) (explaining that cases involving the use of conspiracy law to prevent individuals from joining controversial groups have attained notoriety).
[12] Nancy Hollander & Barbara E. Bergman, *Co-conspirator's statements and the confrontation clause*, EVERYTRIAL CRIMINAL DEFENSE RESOURCE BOOK § 30:11 (2013).
[13] *See* Pinkerton v. United States, 328 U.S. 640, 647-48 (1946) (establishing that a defendant is responsible for substantive crimes committed by a co-conspirator that are performed in furtherance of the conspiracy and are reasonably foreseeable).
[14] Especially after Hammerschmidt v. United States, 265 U.S. 182 (1924).
[15] 450 U.S. 333 (1981).
[16] Deacon v. United States, 124 F.2d 352 (1st Cir. 1941).
[17] 18 U.S.C. § 371 (2011), Notes of Decisions, Generally, Historical.
[18] *Deacon*, 124 F.2d 352.

[19] United State v. Jobe, 101 F.3d 1046 (5th Cir. 1996).
[20] Anderson v. United States, 124 F.2d 58 (6th Cir. 1941).
[21] Valdez v. United States, 249 F.2d 539 (5th Cir. 1957).
[22] United States v. Olmstead, 5 F.2d 712, 714 (W.D. Wash. 1925).
[23] United States v. Schmick, 904 F.2d 936 (5th Cir. 1990).
[24] Discussed *infra*, Part II.c.
[25] United States v. Murphy, 957 F.2d 550 (8th Cir. 1992); United States v. Boone, 951 F.2d 1526 (9th Cir. 1991).
[26] Herman v. United States, 289 F.2d 362 (5th Cir. 1961). In some states, notably New York, conspiracies can be committed alone, permitting criminal liability when a defendant "conspires" with an undercover law enforcement agent who, naturally, does not share the defendant's criminal intent. People v. Lanni, 95 Misc.2d 4 (June 19, 1978).
[27] United States v. Alvarez, 610 F.2d 1250 (5th Cir. 1980).
[28] Steven R. Morrison, *Conspiracy Law's Threat to Free Speech*, 15 U. PA. J. CONST. L. 865 (2013).
[29] United States v. Watson, 677 F.2d 689 (8th Cir. 1982).
[30] Hall v. United States, 109 F.2d 976 (10th Cir. 1940).
[31] United States v. Mothersill, 87 F.3d 1214, 1219 (11th Cir. 1996).
[32] United States v. Cerrito, 413 F.2d 1270 (7th Cir. 1969).
[33] United States v. Read, 658 F.2d 1225 (7th Cir. 1981).
[34] United States v. Parnell, 581 F.2d 1374 (10th Cir. 1978).
[35] Smith v. United States, 133 S. Ct. 714, 719 (2013).
[36] 21 USC §841(a)(1) (2015).
[37] *See* United States v. Umentum, 547 F.2d 987, 990 (7th Cir. 1976) (citing United States v. Cortwright, 528 F.2d 168, 172 n. 1 (7th Cir. 1975)).
[38] United States v. Navar, 611 F.2d 1156, 1159 (5th Cir. 1980); United States v. Harbin, 601 F.2d 773, 781 (5th Cir. 1979).
[39] United States v. Diaz, 655 F.2d 580, 584 (5th Cir. 1981); United States v. Sliwo, 620 F.3d 630 (6th Cir. 2010).
[40] United States v. Ayala, 643 F.2d 244 (5th Cir. 1981).
[41] United States v. Deitz, 577 F.3d 672, 677 (6th Cir. 2009) (interior quotations omitted) (quoting United States v. Martinez, 430 F.3d 317, 330 (6th Cir. 2005) and citing United States v. Welch, 97 F.3d 142, 148-49 (6th Cir. 1996)).
[42] *See, e.g.*, United States v. Schultz, 855 F.2d 1217, 1221 (6th Cir. 1988).
[43] United States v. Young, 553 F.3d 1035, 1050 (6th Cir. 2009).
[44] United States v. Harbin, 601 F.2d 773, 781 (5th Cir. 1979).
[45] United States v. Villarce, 323 F.3d 435, 439 n. 1 (6th Cir. 2003) (quoting United States v. Garcia, 252 F.3d 838, 844 (6th Cir. 2001)).
[46] United States v. Stapleton, 297 Fed.Appx. 413, 426 (6th Cir. 2008) (unpublished) (citing *Villarce*, 323 F.3d at 439).
[47] United States v. Shabani, 513 U.S. 10, 16 (1994); United States v. Covos, 872 F.2d 805, 810 (8th Cir. 1989); United States v. Cardona, 650 F.2d 54, 57 (5th Cir. 1981).
[48] United States v. Holler, 411 F.3d 1061, 1065 (9th Cir. 2005); Argencourt v. United States, 78 F.3d 14, 16-17 (1st Cir. 1996).
[49] United States v. Williams, 385 F. Supp. 897, 898 (N.D. Ind. 1974).
[50] United States v. Toombs, 497 F.2d 88, 94 (5th Cir. 1974).
[51] *Id*.
[52] 18 U.S.C. § 2339B(a)(1) (2015).
[53] United States v. Abdi, 498 F.Supp.2d 1048, 1064 (S.D. Ohio 2007).
[54] United States v. Kassir, No. 04 Cr. 356 (JFK), 2009 WL 2913651, at *3 (S.D.N.Y. Sept. 11, 2009).
[55] United States v. Mehanna, 735 F.3d 32 (1st Cir. 2013); *See* Government's Opposition to Defendant's Motion to Dismiss Portions of Counts One through Three of the Second Superseding Indictment, United States v. Mehanna, No. 09-10017-GAO, 2011 WL 3511226 (D. Mass 2011) ("Whether 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.").
[56] United States v. Cromitie, 727 F.3d 194, 199 (2d Cir. 2013).

[57] T. Ward Frampton, *Predisposition and Positivism: The Forgotten Foundations of the Entrapment Doctrine*, 103 J. CRIM . L. & CRIMINOLOGY 111, 142 (2013).
[58] *Id*.
[59] *Id*.
[60] *Id*. at 143.
[61] Kendall Coffey, *The Lone Wolf — Solo Terrorism and the Challenge of Preventative Prosecution*, 7 FIU L. REV. 1, 17 (2011).
[62] 543 U.S. 209 (2005).
[63] 763 F.3d 408 (5th Cir. 2014).
[64] *Id* at 417-18.
[65] United States v. Elliott, 571 F.2d 880, 902 (5th Cir. 1978).
[66] *Id*.
[67] *Id*.
[68] Salinas v. United States, 522 U.S. 52, 63 (1997).
[69] 21 U.S.C. § 848(c)(2) (2015).
[70] United States v. Witek, 61 F.3d 819, 822 (11th Cir. 1995).
[71] United States v. Jones, 918 F.2d 909, 911 (11th Cir. 1990).
[72] United States v. Ward, 37 F.3d 243, 251 (6th Cir. 1994).
[73] United States v. Jelinek, 57 F.3d 655, 660 (8th Cir. 1995).
[74] Especially after Hammerschmidt v. United States, 265 U.S. 182 (1924).
[75] Whitfield v. United States, 543 U.S. 209, 213-214 (2005).
[76] *Id*.
[77] *See* United States v. Falcone, 311 U.S. 205, 207 (1940) ("[T]he gist of the offense of conspiracy . . . is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy").
[78] United States v. Tzolov, 642 F.3d 314, 320 (2d Cir. 2011) (*citing* Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975)).
[79] United States v. Walls, 225 F.3d 858, 864 (7th Cir. 2000).
[80] United States v. Scaife, 749 F.2d 338, 346 (6th Cir. 1984).
[81] For example, to obtain a conspiracy conviction under 18 U.S.C. § 371, "the [g]overnment must prove (1) that an agreement existed between two or more persons to commit a crime; (2) that the defendant[s] knowingly and voluntarily joined or participated in the conspiracy; and (3) a conspirator performed an overt act in furtherance of the agreement." United States v. Ndiaye, 434 F.3d 1270, 1294 (11th Cir. 2006).
[82] 18 U.S.C. § 371 (2014).
[83] United States v. Shabani, 513 U.S. 10, 13 (1994).
[84] *Id*. at 13-14.
[85] Salinas v. United States, 522 U.S. 52, 63-64 (1997) ("There is no requirement of some overt act or specific act in the [RICO statute], unlike the general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an 'act to effect the object of the conspiracy.'").
[86] Whitfield v. United States, 543 U.S. 209, 213-14 (2005).
[87] *Id*. at 213.
[88] United States v. Gomez-Jimenez, 750 F.3d 370, 378 (4th Cir. 2014) (*quoting* United States v. Hackley, 662 F.3d 671, 679 (4th Cir. 2011)); *see also* United States v. Paramount Pictures, 334 U.S. 131, 142 (1948); United States v. Rea, 958 F.2d 1206 (2d Cir. 1992); United States v. Concemi, 957 F.2d 942 (1st Cir. 1991).
[89] *See, e.g.,* United States v. Burgos, 94 F.3d 849, 857 (4th Cir. 1996) ("By its very nature, a conspiracy is clandestine and covert, thereby frequently resulting in little direct evidence of such an agreement.") (*citing* Blumenthal v. United States, 332 U.S. 539, 557 (1947)); United States v. Wilson, 721 F.2d 967, 973 (4th Cir.1983).
[90] *Burgos*, 94 F.3d at 857-58 ("a conspiracy generally is proved by circumstantial evidence and the context in which the circumstantial evidence is adduced.") (*citing* Iannelli v. United States, 420 U.S. 770, 777 n. 10 (1975)); United States v. Dozie, 27 F.3d 95, 97 (4th Cir.1994) (per curiam); United States v. Andrews, 953 F.2d 1312, 1318 (11th Cir. 1992); *see also* United States v. Houser, 754 F.3d 1335, 1349 (11th Cir. 2014) ("direct evidence of an agreement is unnecessary; the existence of the agreement and a defendant's

participation in the conspiracy may be proven entirely from circumstantial evidence.") (*quoting* United States v. McNair, 605 F.3d 1152, 1195 (11th Cir. 2010); United States v. Flanders, 752 1317, 1329 (11th Cir. 2014) ("Because conspiracies are secretive by nature, the existence of an agreement and [the defendant's) participation in the conspiracy may be proven entirely from circumstantial evidence.") (*quoting* United States v. White, 663 F.3d 1207, 1214 (11th Cir. 2011)).

[91] United States v. Cejas, 761 F.3d 717, 727 (7th Cir. 2014) (*citing* United States v. Crowder, 36 F.3d 691, 695 (7th Cir. 1994)).

[92] United States v. Conway, 754 F.3d 580, 587 (8th Cir. 2014) (*quoting* United States v. Jackson, 345 F.3d 638, 648 (8th Cir. 2003)).

[93] United States v. Burgos, 94 F.3d 849, 858 (4th Cir. 1996).

[94] Id. (*quoting, in part,* United States v. Roberts, 881 F.2d 95, 101 (4th Cir. 1989)).

[95] United States v. Sanchez, 961 F.2d 1169, 1178 (5th Cir. 1992).

[96] United States v. Cejas, 761 F.3d 717, 727 (7th Cir. 2014) ("A reasonable jury could interpret this [parking] move as indicative of his intent to hide the toolbox from passersby and put the car in a position to facilitate a quick getaway if things went awry.").

[97] United States v. Sparks, 949 F.2d 1023, 1027-28 (8th Cir. 1991).

[98] 737 F.3d 55, 63 (5th Cir. 2013) ("It is reasonable to infer that Caroline Njoku knew [her boss] had not completed in-person assessments of these patients partly because Njoku usually drove [her boss] to each patient's home.").

[99] Rule 801(d)(2)(E) is not actually an exception to the hearsay rule; it defines co-conspirator statements as non-hearsay. Nonetheless, it is routinely referred to as the "co-conspirator exception."

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

[101] United States v. Leonard-Allen, 739 F.3d 948, 955 (7th Cir. 2013), *as amended on denial of reh'g and reh'g en banc* (Aug. 29, 2013); United States v. Patterson, 713 F.3d 1237, 1245 (10th Cir. 2013).

[102] Fed.R.Evid. 801(d)(2)(E), *superseding* Bourjaily v. United States, 483 U.S. 171, 175 (1987) ("[I]n making a preliminary factual determination under Rule 801(d)(2)(E), (the court) may examine the hearsay statements sought to be admitted."); *compare* Glasser v. United States, 315 U.S. 60, 75 (1942) (The common enterprise cannot be established solely by the words of the self-proclaimed participant, since "[o]therwise, hearsay would lift itself by its own bootstraps to the level of competent evidence …").

[103] *See* United States v. Perez, 658 F.2d 654, 658 (9th Cir.1981) ("In order for the statement of a coconspirator to be admissible against his fellow conspirators under Rule 801(d)(2)(E), the government must establish substantial independent proof of the existence of the conspiracy."); United States v. Provenzano, 620 F.2d 985, 999 (3d Cir. 1980) (The necessary quantum of evidence has been characterized as "some" and "slight.").

[104] *See* United States v. DiRosa, 761 F.3d 144, 155 (1st Cir. 2014) ("…(T)he applicability of the co-conspirator exception is not conditioned on a conspiracy being charged in the indictment."); United States v. Jackson, 757 F.2d 1486, 1490 (4th Cir. 1985) (" . . . it is of no import that Victor may not have joined the conspiracy at the time the statements were made because 'upon joining the conspiracy, earlier statements made by co-conspirators after inception of the conspiracy become admissible against the defendant.'").

[105] *See* United States v. Squillacote, 221 F.3d 542, 564 (4th Cir. 2000) (admitting an unsigned document under Rule 801(d)(2)(E) "notwithstanding the government's inability to identify the declarants"), *accord* United States v. Helmel, 769 F.2d 1306, 1313 (8th Cir. 1985) (government need only "show that the unknown declarant was more likely than not a conspirator").

[106] United States v. Martin, 866 F.2d 972, 980 (8th Cir.1989).

[107] When a statement of a co-conspirator is admitted, the hearsay exception allows the statement to be used against the defendant for the truth of the matter asserted, and does not require the co-conspirator's appearance in court. The defendant, therefore, has no opportunity to cross-examine such a witness.

[108] United States v. Young, 753 F.3d 757, 771 (8th Cir. 2014); United States v. Pedigo, 12 F.3d 618, 628 (7th Cir. 1993) (court may declare mistrial or issue limiting instruction to jury if government fails to connect evidence); *see also* United States v. Blevins, 960 F.2d 1252, 1256 (4th Cir. 1992) (same).

[109] *See* Bourjaily v. United States, 483 U.S. 171, 182-83 (1987) (Confrontation Clause does not require inquiry into independent indicia of reliability of statement). It is also interesting to note that, while the exception seems premised on an agency rationale, coconspirators' statements are not considered

"statements of the defendant" for the purpose of Rule 16 discovery. *See Discovery and Access to Evidence*, 42 GEO. L.J. ANN. REV. CRIM. PROC. 370, 411 (2013).

[110] *See* Patrick J. Sullivan, *Bootstrapping of Hearsay Under Federal Rule of Evidence 801(d)(2)(E): Further Erosion of the Coconspirator Exemption*, 74 IOWA L. REV. 467, 474 (1989) ("There has always been uncertainty about why out of court statements by coconspirators are not prohibited by the hearsay rule.").

[111] *See* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1185-86 (2005) ("So most speakers of crime-facilitating speech will know that the speech may facilitate crime, but relatively few will clearly intend this. For many speakers, their true mental state will be hard to determine, because their words may be equally consistent with intention to facilitate crime and with mere knowledge. This means that any conclusion about the speaker's purpose will usually just be a guess.").

[112] *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 955 (1963) ("The natural balance of forces in society today tends to be weighted against individual expression."); *see also* Goldstein, *supra* note 2, at 412 (noting how the ambiguous nature of a conspiracy makes it difficult for defendants to object to evidence on relevance grounds); Note, *Conspiracy and the First Amendment*, supra note 11, at 875 (explaining that the broad contours of conspiracy law yield "chaotic procedures which favor the prosecution's case"); Note, *The Objects of Criminal Conspiracy — Inadequacies of State Law*, 68 HARV. L. REV. 1056, 1056 (1955) (noting that conspiracy law allows prosecutors to sidestep certain technical impediments to conviction).

[113] American Tobacco v. United States, 328 U.S. 781, 809-10 (1946); United States v. Lopez, 979 F.2d 1024, 1029 (5th Cir. 1993); United States v. Hegwood, 977 F.2d 492, 497 (9th Cir. 1992); United States v. Simon, 839 F.2d 1461, 1469 (11th Cir. 1988); SIR ROBERT SAMUEL WRIGHT, THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS 54 (1873) ("[G]enerally speaking, there need not be any actual meeting or consultation, and that the agreement is to be inferred from acts furnishing a presumption of a common design.").

[114] Title 21 drug conspiracies, for example, require no overt act, United States v. Shabani, 513 U.S. 10, 11 (1994); United States v. Pumphrey, 831 F.2d 307, 308 (D.C. Cir. 1987), nor do some conspiracies to provide material support to a foreign terrorist organization, *see* 18 U.S.C. §2339B (2006); United States v. Abdi, 498 F. Supp. 2d 1048, 1064 (S.D. Ohio 2007), nor conspiracies to commit money laundering, Whitfield v. United States, 543 U.S. 209, 211 (2005).

[115] *See* United States v. Scallion, 533 F.2d 903, 911 (5th Cir. 1976) (traveling to another city is an overt act); Bartoli v. United States, 192 F.2d 130, 132 (4th Cir. 1951) (making a phone call is an overt act); Goldman v. United States, 245 U.S. 474, 477 (1918) (finding sufficient evidence of an overt act to allow the jury to rule); Emerson, *supra* note 112, at 409 (explaining that in conspiracy law, the overt act "need not consist of action and tends to be a mere fiction").

[116] *See* Note, *Conspiracy and the First Amendment*, *supra* note 11, at 878 ("[T]he volume of evidence produced by a trial of several defendants may overwhelm the jury.").

[117] *See* Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833, 837 (2011) (questioning reliability of religious speech as a proxy for determining potential terror threats); Peter E. Quint, *Toward First Amendment Limitations on the Introduction of Evidence: The Problem of United States v. Rosenberg*, 86 YALE L.J. 1622, 1636 (1977) (questioning reliability of pro-communism speech as an indication of a illegal act by the speaker).

[118] This approach arises in part from "[t]he fact that it is almost impossible to supply a correct definition of the crime" of conspiracy, because of the "unsettled" law on the subject, Benjamin F. Pollack, *Common Law Conspiracy*, 35 GEO. L.J. 328, 330 (1947), and that conspiracy law "is so vague that it almost defies definition." Krulewitch v. United States, 336 U.S. 440, 446 (1949) (Jackson, J., concurring). *See also* Note, *The Objects of Criminal Conspiracy — Inadequacies of State Law*, *supra* note 112, at 1056 ("[T]he objects of conspiracy . . . are defined so vaguely and broadly in the majority of states that both predictability of what will constitute an offense and objectivity by the courts in applying the law have been greatly undermined." (footnote omitted)).

[119] *See generally* Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 J. CRIM. L. & CRIMINOLOGY 147 (2007); *see also* United States v. Spock, 416 F.2d 165, 188 (1st Cir. 1969) (Coffin, J., dissenting) ("[T]he absence of clear definitions of the elements of conspiracy creates a serious risk . . . . [Conspiracy] is . . . not well-defined and experience teaches that even its traditional limitations tend to disappear.").

[120] *See* Huq, *supra* note 117, at 891-92 (observing that courts in the 1950s and 60s, concerned with anti-Communist overreach, crafted criminal conspiracy doctrine such that associational conduct could only be criminally punishable where the defendant had "specific intent" to commit the crime ascribed to the associated organization, thus preventing juries from "using unpopular associational ties as a proxy for dangerousness").
[121] United States v. Moore, 639 F.3d 443, 445, 448 (8th Cir. 2011).
[122] *Id*. at 446.
[123] *Id*.
[124] *Id*. at 448.
[125] United States v. Gamory, 635 F.3d 480, 488 (11th Cir. 2011).
[126] *Id*. at 493.
[127] United States v. Foster, 939 F.2d 445, 456 (7th Cir. 1991).
[128] *Id*.
[129] Criminal Indictment (Third Superseding) at 1-2, United States v. Sadequee, No. 1:06-CR-147-WSD GGB (N.D. Ga. Dec. 9, 2008) ("'Violent jihad,' as used in this Indictment, refers to 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."); Superseding Indictment at 2, United States v. Hassoun, No. 04-60001-CR-COOKE (S.D. Fla. Nov. 17, 2005) ("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. The term 'mujahideen' means warriors engaged in violent jihad.").
[130] MICHAEL BONNER, JIHAD IN ISLAMIC HISTORY: DOCTRINES AND PRACTICE 3 (2006); MALISE RUTHVEN, ISLAM: A VERY SHORT INTRODUCTION (1997).
[131] BONNER, *supra* note 130, at 21.
[132] *Id*. at 22.
[133] DAVID COOK, UNDERSTANDING JIHAD 122 (2005).
[134] *See* United States v. Spock, 416 F.2d 165, 188 n.9 (1st Cir. 1969) (Coffin, J., dissenting in part) ("Counsel for the defendants were faced . . . with theories that the Call was the agreement and ipso facto proof of the conspiracy . . . . ").
[135] 390 U.S. 29, 31 (1968) (Douglas, J., dissenting); *see also* Samuels v. Mackell, 401 U.S. 66, 75 (1971) (Douglas, J., concurring) ("There is a question concerning some of the overt acts — whether . . . a constitutionally protected right such as speech or assembly may be used as an overt act in furtherance of a conspiracy.").
[136] *Epton*, 390 U.S. at 31 (internal citations omitted).
[137] *See* Tom W. Bell, *Treason, Technology, and Freedom of Expression*, 37 ARIZ. ST. L.J. 999, 1030 (2005) (noting that the Supreme Court has not decided whether protected speech can constitute an overt act).
[138] Pinkerton v. United States, 328 U.S. 640, 647-48 (1946).
[139] United States v. Hudson, 11 U.S. 32 (1812); United States v. Goodwin, 11 U.S. 108 (1812).
[140] United States v. Lopez, 271 F.3d 472, 481 (3d Cir. 2001).
[141] 7 Cranch 32 (1812).
[142] Indeed, at least one attorney makes a practice of objecting in writing to *Pinkerton* instructions with this language:

> Recognizing that this argument is currently foreclosed by existing precedent, [the defendant] wishes to preserve an objection that the *Pinkerton* doctrine violates the prohibition on federal common law crimes articulated in *United States v. Hudson & Goodwin*, 7 Cranch 32 (1812), and its progeny. *Pinkerton* creates a basis for criminal liability that is not prescribed by statute, permitting the conviction of a defendant for acts of a co-conspirator when certain conditions are met. Yet "without a doubt, *Pinkerton* is part of federal common law." *United States v. Lopez*, 271 F.3d 472, 481 (3d Cir. 2001). The only valid basis for accomplice liability is 18 U.S.C. § 2, on which the Court will separately instruct.

[143] *See* discussion *supra*, at Part I.a.
[144] *See* McNally v. United States, 483 U.S. 350 (1987).

[145] Hammerschmidt v. United States, 265 U.S. 182 (1924).
[146] United States v. Klein, 247 F.2d 908 (2d Cir. 1957).
[147] Hass v. Henkel, 216 U.S. 462 (1910).
[148] *Id*. at 253-54.
[149] 130 F. 1 (1st Cir. 1904).
[150] *Id*.
[151] The Supreme Court has continued to cite those policy concerns as a justification for interpreting Section 371's defraud clause more broadly than the equivalent statutory language in other fraud statutes. *See* McNally v. United States, 483 U.S. 350, 359 n.8 (1987).
[152] Hammerschmidt v. United States, 265 U.S. 182 (1924).
[153] *Id*. at 188. United States v. Caldwell, 989 F.2d 1056, 1059-60 (9th Cir. 1993), includes an interesting "parade of horribles" that would be criminal absent this requirement, including a hypothetical agreement between Elliott Richardson and William Ruckelshaus to quit their jobs if asked by President Nixon to fire Archibald Cox. Reversing a conviction in which the jury instructions omitted the dishonesty requirement, the Caldwell court trenchantly observed that courts should not lightly infer that Congress intended to criminalize all actions that make the government's job harder. *See id*. at 1061.
[154] Of course when the goal of the conspiracy is independently illegal, the conspiracy may be prosecuted under the offense clause of Section 371; the defraud clause need not come into play at all. Although noting that the object of the conspiracy in *Haas* was itself a crime, *Hammerschmidt* did not address the charging decision made in *Haas*.
[155] *E.g.*, United States v. Jackson, 33 F.3d 866, 870 (7th Cir.1994); *Caldwell*, 989 F.2d at 1059.
[156] *See* discussion *supra*.
[157] *Klein*, 247 F.2d 908, 910 (2d Cir. 1957).
[158] *Id*. at 916.
[159] United States v. Coplan, 703 F.3d 46 (2d Cir. 2012).
[160] *Id*. at 59 (*citing* Neder v. United States, 527 U.S. 1, 21 (1999), for proposition that statutory terms must be given their common law meaning unless the statute otherwise dictates).
[161] The court observed that the government's 325-page appellate brief contained nothing resembling statutory interpretation. *Id*.
[162] *See id*. at 61.
[163] ___ U.S. ___, 130 S. Ct. 2896, 2928 (2010).
[164] *Coplan*, 703 F.3d at 61-62.
[165] *Id*. at 62.
[166] *Id*.
[167] Mem. Op. denying *certiorari*, 134 S.Ct. 71 (Oct. 7, 2013).
[168] Third Circuit Model Jury Instruction 6.18.371A.
[169] Third Circuit Model Jury Instruction 6.18.371C.
[170] Third Circuit Model Jury Instruction 6.18.371C (emphasis added).
[171] Third Circuit Model Jury Instruction 6.18.371C.
[172] Third Circuit Model Jury Instruction 6.18.371D.
[173] Id.
[174] For a complete dissertation on *strictissimi juris*, *see* Steven R. Morrison, *Strictissimi Juris*, 67 ALA. L. REV. __ (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535115.
[175] Richards v. United States, 175 F. 911, 941 (8th Cir. 1909) (Philips, J., dissenting); $165,524.78 v. Texas, 47 S.W.3d 632, 647 (App.Ct. Tex, 14th Dist. 2001); Castro v. Superior Court of California, 9 Cal.App.3d 675, 685-86 (1970).
[176] United States v. Markiewicz, 978 F.2d 786, 813 (2d Cir. 1992); United States v. Montour, 944 F.2d 1019, 1024 (2d Cir. 1991); United States v. Red Feather et al., 541 F.2d 1275, 1280 (8th Cir. 1976) (Heaney, J., concurring in part and dissenting in part); Hellman v. United States, 298 F.2d 810, 812-13 (9th Cir. 1962); Richards v. United States, 175 F. 911, 941 (8th Cir. 1909); Supplemental Brief in Support of Motion for Judgment of Acquittal . . . , United States v. Siegelman, 2006 WL 6610448 (M.D.Ala., Aug. 7, 2006); United States v. Marzook, 2005 WL 3095543, *6 (N.D.Ill. 2005); United States v. Homeyer, 2 Bond 217, 26 F.Cas. 278, 280 (S.D.Ohio 1868); United States v. Martindale, 146 F. 280, 285 (D.Kan. 1903); $165,524.78 v. Texas, 47 S.W.3d 632, 647 (App.Ct. Tex, 14th Dist. 2001); Castro v. Superior Court of California, 9 Cal.App.3d 675, 685-86) (1970); Order Granting Defendants' Motions for Judgment of

Acquittal on Counts 1-7 at 9, 12, United States v. Stone, 2012 WL 1034937 (E.D.Mich., Mar. 27, 2012); Brief for Appellants Sanders and Sanders at 61-62, 64, United States v. Sanders, 2000 WL 33980799 (2d Cir. 2000).

[177] Noto v. United States, 367 U.S. 290, 300 (1961); United States v. Dellinger, 472 F.2d 340, 392 (7th Cir. 1973); United States v. Marzook, 2005 WL 3095543, *6 (N.D.Ill. 2005); United States v. Martindale, 146 F. 280, 285 (D.Kan. 1903).

[178] Noto v. United States, 367 U.S. 290, 298 (1961); United States v. Dellinger, 472 F.2d 340, 393 (7th Cir. 1973).

[179] Bourjaily v. United States, 483 U.S. 171, 177 (1987).

[180] 367 U.S. 203 (1961).

[181] 367 U.S. 290 (1961).

[182] *Noto*, 367 U.S. at 299-30.

[183] *Id*. at 300.

[184] 416 F.2d 165, 168 (1st Cir. 1969).

[185] *Id*. at 169.

[186] *Id*.

[187] *Id*. at 173.

[188] United States v. Dellinger, 472 F.2d 340, 348 (7th Cir. 1973).

[189] *Id*. at 349-53.

[190] *Id*. at 353.

[191] *Id*. at 354.

[192] *Id*. at 393.

[193] *Id*. at 394-407.

[194] *Id*. at 393-94 ("We do not view the *strictissimi juris* doctrine as requiring clear, direct, and sufficient proof of unlawful intent at each stage, wholly independently of the proof at the other.").

[195] 9 Cal.App.3d 675, 678 (1970).

[196] *Id*. at 684-86 (conspiracy could "claim no talismanic immunity from constitutional limitations," and had to be tested against standards that satisfied the First Amendment.).

[197] *Id*. at 694 ("[I]t must be that the First Amendment prohibits conspiracy prosecutions in this are where the People's case that the demonstrations, as planned, involved illegal means, rests entirely on circumstantial evidence . . . . [T]he People's attempt to reach the evil by the 'conspiracy-circumstantial evidence' route is 'too blunt an instrument.'").

[198] *Id*. at 685-86.

[199] 450 U.S. 333, 335 (1981).

[200] *Id*. at 336.

[201] *Id*. at 335.

[202] *Id*. at 342.

[203] *Id*. at 343.

[204] But not impracticable, as other countries function without conspiracy law, such as Japan, or virtually never resort to it, such as Germany.

[205] Pinkerton v. United States, 328 U.S. 640, 647-48 (1946).

[206] While there is an argument that conspiracy counts should merge with any completed substantive crimes, advocating for such a fundamental change that goes beyond the confines of conspiracy law is beyond the scope of this report.