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Requiring Dangerousness: An Idea Whose Time Has Come (Again)

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Abstract

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

This Article rejects the distinct evil assumption by showing how Katyal’s and Goldstein’s respective frames lead to their divergent conclusions. It argues that to satisfy both commentators’ legitimate concerns, conspiracies must be shown to be dangerous before criminal liability can attach.

This requirement was included in the first Model Penal Code in 1962 and appears in statutes in Arkansas, Colorado, New Jersey, and Pennsylvania. Despite this initial legislative interest, attorneys in these states have largely never heard of these statutes. These laws do, however, hold out the promise of addressing conspiracy law’s legitimate concerns and upholding venerable criminal law norms.

This Article challenges the distinct evil assumption as a product of the rise of labor unions and corporations in the middle to late 19th century. It then discusses how the Model Penal Code and state legislatures have approached dangerousness. It then turns to why attorneys in these states may not be aware of these legislative moves, and also how these statutes may be useful. Finally, it prescribes four moves we should take to reform conspiracy law immediately and in the longer term.
I. Introduction

In his excellent defense of criminal conspiracy law, Professor and former Acting Solicitor General Neal Kumar Katyal pointed to the “distinct evil” that are criminal conspiracies.\(^1\) He was citing the U.S. Supreme Court decision \textit{United States v. Recio}\(^2\) to justify the fact that conspiracies to commit crimes may be punished whether or not the substantive crime ensues. Others have echoed Professor Katyal’s observation.\(^3\) Indeed, courts have long presumed that conspiracies pose a distinct danger.\(^4\)

Contrast this presumption of dangerousness with Abraham S. Goldstein’s accurate observation that such dangerousness has never been proven empirically.\(^5\) Herbert Wechsler and his colleagues in creating the Model Penal Code (“MPC”) seconded this fact, acknowledging that conspiracies and other inchoate crimes entail “infinite degrees of danger.”\(^6\) For this reason, Wechsler et al. included in the MPC a mitigation provision for inchoate crimes of lesser danger. Section 5.05(2) reads:

\begin{quote}
If the particular conduct charged to constitute a criminal attempt, solicitation or conspiracy is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this Section, the Court shall exercise its power under Section 6.11 to enter judgment
\end{quote}

and impose sentence for a crime of lower grade or degree or, in extreme cases, may dismiss the prosecution.\(^7\)

Four states—Arkansas,\(^8\) Colorado,\(^9\) New Jersey,\(^10\) and Pennsylvania\(^11\)—have passed similar laws.

Depending upon how one views the situation, both camps can be correct. Professor Katyal deftly presented the particular dangers of group conduct: groups tend toward extremes and submerge individuals’ interests to those of the group, and individuals act with greater loyalty within the group and take more risks.\(^12\) Although this sounds like a recipe for increased criminality in the group context, Katyal’s argument remains merely descriptive of group behavior, and says nothing about whether groups are more likely to tend toward criminal or law-abiding extremes. If the data set is criminal conspiracies, then Katyal’s observations are cause for treating such conspiracies quite severely.

If the data set, however, is all combinations of people, then the “dangers” of group activity become non-normative descriptors. Consider the U.S. military presence in Iraq and Afghanistan. Millions of soldiers have served in those two countries, in hundreds of millions of group formations, from massive battle groups, to divisions, squadrons, platoons, down to two-soldier fire teams. Add to these combinations the fact that their individual members are heavily armed and face a hostile and often hidden force. Despite these combinations and conditions, criminal conspiracies in these war zones occur at a statistically insignificant rate. In fact, they are virtually non-existent. The

\(^7\) Model Penal Code § 5.05(2).
\(^8\) A.C.A. § 5-3-101 (2012).
\(^10\) N.J.S.A. 2C:5-4(b) (2012).
\(^12\) Katyal, supra note 1, at 1315-18.
experience of the U.S. military, then, suggests that groups are more likely to tend toward law-abiding, not criminal, behavior.

The reason may lie in Condorcet’s jury theorem, which states that the probability of a group producing the “correct” answer increases toward one hundred percent as the size of the group increases, provided that the majority’s decisions prevail and that each person is more likely than not to be correct.\textsuperscript{13} If the “correct” answer in criminal law is to be law-abiding, and the incorrect answer is to commit a crime, then groups in the U.S. military tend toward the correct, law-abiding extreme.

This theorem operates on a more mundane, anecdotal level. When I was a college freshman, I returned home for thanksgiving break. I was spending an evening with six close high school friends, when one announced that he had tried cocaine at college. None of us were saints, but we immediately rejected and ridiculed his decision. In that case, my wayward friend’s individual interest in breaking the law was submerged in the group’s law-abiding interest. We all turned out fine, even the prodigal.

The conceptual problem with Katyal’s analysis is that it either assumes that all groups tend toward criminal extremes, or that his analysis applies only to those conspiracies that in fact tended toward their substantive crimes. The conceptual problem with Goldstein’s skepticism about conspiracy is that Katyal’s analytic frame is useful. When considering the merits of criminalizing an act (combinations that tend toward crime), the law normally should not consider unrelated acts (combinations that do not tend toward crime). Katyal’s defense of conspiracy is well placed because when conspiracies are criminal, they partake in the characteristics of all groups, and so become dangerous. Criminalizing them is justified.

\textsuperscript{13} CASS SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE 25 (2006).
Difficulties arise in the margin between clearly dangerous criminal conspiracies and group combinations that tend toward law-abiding extremes, and so do not come to the attention of law enforcement. Groups may form around quotidian interests and then drift toward criminality. They may flirt with forming a criminal conspiracy, and they may actually do so. Undercover law enforcement agents may have goaded them into these conspiracies. They may then think twice, realize they were not serious, or simply forget about their tentative agreement. In such cases, their conspiracy will have been criminal, but it was not dangerous.

Prosecutions within this margin raise the most trenchant critiques of conspiracy law. In this margin are found the most politically motivated of conspiracy charges. Government stings of would-be Islamist terrorists create skepticism over conspiracies’ dangerousness. Conspiracies that have more bluster than criminal intent are in this margin. These prosecutions also threaten defendants’ fundamental rights. Because conspiracies are seen as a distinct and potent evil, evidentiary rules are relaxed: co-conspirator statements are admissible against a defendant with limitations only a prosecutor could love, agreements can be inferred, overt acts are often not required, 

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18 In at least half of federal jurisdictions, it is only after the jury has heard co-conspirator statements that the judge will rule on whether these people were in fact co-conspirators, and therefore whether their speech is admissible. United States v. Quinones-Cedeno, 51 Fed.Appx. 558, 569 (6th Cir. 2002); United States v. Gonzalez-Balderas, 11 F.3d 1218, 1224 (5th Cir. 1994); United States v. Monaco, 702 F.2d 860, 878 (11th Cir. 1983); United States v. Pilling, 721 F.2d 286, 294 (10th Cir. 1983); United States v. Ciampaglia, 628
First Amendment rights are threatened, as are Sixth Amendment confrontation rights, and, most fundamentally, acts that produce no harm are criminalized. Quite simply, the belief that conspiracies are distinct evils justifies criminalizing them ab initio.

The result is a category of criminal law that is seen as vague, expansive, and constantly evolving throughout the criminal process to suit the prosecutor’s needs. Whether conspiracy law is valuable or not—and it is, at base, valuable—it is often seen as illegitimate, and perhaps just as often, produces convictions and sentences whose severity far exceeds the crime’s dangerousness.

Wechsler and his colleagues, as well as Arkansas, Colorado, New Jersey, and Pennsylvania, recognized that a conspiracy’s dangerousness, or lack thereof, should impact the outcome of the criminal process. This is an idea whose time has, once again, come. Evidentiary “exceptions” have historically exempted charges relating to

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23 Goldstein, supra note 5, at 405 (“It has long been our boast that we class as crimes only those acts that are recognizably dangerous to the community. Never, the maxim has it, do we punish an evil intent alone.”).
25 Goldstein, supra note 5, at 412.
socialism,\textsuperscript{26} communism,\textsuperscript{27} and drugs\textsuperscript{28} from normal legal rules designed to ensure fairness for defendants.\textsuperscript{29} Post-9/11 terrorism prosecutions enjoy a similar exception.\textsuperscript{30} Added to this is the fact that the government has adopted a “prevention paradigm” of terrorism law enforcement, meaning that it seeks less to prosecute clearly guilty parties and more to prevent terrorist attacks by prosecuting at the earliest possible stage.\textsuperscript{31} Conspiracy is often this paradigm’s vehicle, and earlier interdiction of alleged conspiracies increases the risk of prosecutorial error.\textsuperscript{32} Now, more than ever, the dangerousness of a charged conspiracy must play a central role in criminal procedure.

II. A Short History of Conspiracy as a Distinct Evil

If post-9/11 conspiracy charges present a contemporary reason for requiring dangerousness, history undermines the notion that conspiracies are a distinct evil. Although conspiracy law began in England in the twelfth and thirteenth centuries,\textsuperscript{33} it appears that the distinct evil assumption emerged in the United States, and came into its

\begin{itemize}
\item \textsuperscript{26} Abrams v. United States, 250 U.S. 616 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).
\item \textsuperscript{27} Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951).
\item \textsuperscript{29} Erik Luna, Criminal Justice and the Public Imagination, 7 OHIO ST. J. CRIM. L. 71, 102 (2009).
\item \textsuperscript{32} See Jeremy M. Miller, RICO and the Bill of Rights: An Essay on a Crumbling Utopian Ideal, 104 COM. L.J. 336, 345 n. 40 (1999).
\item \textsuperscript{33} Sayre, supra note 14, at 395; Developments in the Law: Criminal Conspiracy, 72 HARV. L. REV. 922, 922-23 (1959).
\end{itemize}
own as a result of the development of labor unions and corporations in the middle to late
nineteenth century.

From the beginning, American criminal courts were primarily concerned with
harms that affected the public interest. In 1802, the New Jersey Supreme Court held that
moving the corner stone in a boundary line between two private properties was not
indictable. It was, rather, a private trespass, for which civil relief was available. In dicta,
the court noted that conspiracies that do not affect the public interest are also not
indictable. 34 In 1807, the Massachusetts Supreme Judicial Court held that a conspiracy
to manufacture inferior indigo was indictable, even if the product was never sold. In
support of its holding that the conspiracy may be indicted without an overt act, the court
wrote that “combinations against the law are always dangerous to the public peace and to
private security.”35

This was only the first word on the distinct evil question. In 1821, the Maryland
Court of Appeals held that a conspiracy may be charged even if the substantive crime
was not achieved. 36 It so held, however, not because conspiracies are dangerous in
themselves, but because “the law punishes the conspiracy, ‘to the end to prevent the
unlawful act.’” 37 There was, then, no consensus that conspiracies were distinct evils.
Rather, the consequentialist concern was that a conspiracy could lead to an actual injury.
Furthermore, if some conspiracies were dangerous in themselves, there was no consensus
that they all were. In 1822, before the Supreme Court of Pennsylvania, an attorney
argued that conspiracies “in which the public were concerned” were indictable, but that

37 Id. at *9.
those effecting a “private injury” were not subject to criminal sanction.\textsuperscript{38} Both of these countervailing views were on display in the New York Supreme Court in 1827. In \textit{Lambert v. People}, the court considered an indictment for conspiracy to defraud a company. One judge concluded that an indictment could not lie for a conspiracy that does not affect the public, and another noted that conspiracy was indictable not for the conspiracy itself, but for the object that it was intended to effect.\textsuperscript{39}

Despite these two countervailing views, the \textit{Lambert} court concluded that “[c]ombinations against individuals are dangerous in themselves, and prejudicial to the public interest.”\textsuperscript{40} This was seconded by the New Hampshire Superior Court in 1844. That court collapsed conspiracies with public and private harms into one category, concluding that “[c]ombinations against law or against individuals are always dangerous to the public peace or public security.”\textsuperscript{41} The court then provided a defense of conspiracy law that echoes in contemporary defenses like Katyal’s. Other cases during this time period mention the risk that conspiracies might “seduce” people into criminality.\textsuperscript{42} And so, the notion that conspiracies are a distinct evil emerged in embryonic form.

This notion solidified in the 1880s, as labor unions, corporations, and Lochnerian champions of \textit{laissez-faire} economics and one-sided views of individual freedom rose to prominence. For the first time, large combinations of groups could collectively perform very harmful acts, which, if done individually, would be legal and harmless. Such acts included forming trusts and monopolies, against which the Sherman Antitrust Act of 1890 was passed, and operating strikes, walkouts, and boycotts, the criminality of which

\begin{footnotes}
\item[38] Com. v. McKisson, 1822 WL 1942, *1 (Penn.).
\item[39] 9 Cow. 578 (Sup. Ct. N.Y. 1827).
\item[40] \textit{Id}.
\item[42] Talbot v. Jansen, 3 U.S. 133, 142-43 (1795); \textit{see also} Twitchell v. Com., 9 Pa. 211, *2 (1848).
\end{footnotes}
courts struggled to determine. For the first time, conspiracies were seen as an existential threat to the nation.

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

A series of subsequent cases involving labor and capital echoed the Connecticut Supreme Court’s opinion. An Ohio superior court, for example, considering a labor boycott, wrote, “It is clear that the terrorizing of a community by threats of exclusive dealing in order to deprive one obnoxious member of means of sustenance will become

43 See Wechsler et al., supra note 6, at 957 (noting “the early condemnation of the labor union as a criminal conspiracy and the use of the charge against political ofenders.”).
44 State v. Glidden, 8 A. 890, 894 (Conn. 1887).
45 Id. at 895.
46 Id.
47 Id. at 896.
48 Callan v. Wilson, 127 U.S. 540 (1888); Consolidated Steel & Wire Co. v. Murray, 80 F. 811 (Cir. 1897); Arthur v. Oakes, 63 F. 310 (7th Cir. 1894); In re Grand Jury, 62 F. 840 (N.D. Cal. 1894); Brunswick Gaslight Co. v. United Gas, Fuel & Light Co., 27 A. 525 (Me. 1893); San Antonio Gas Co. v. State, 22 Tex.Civ.App. 118 (1899); but see United States v. E.C. Knight Co., 156 U.S. 1 (1895); American Fire Ins. Co. v. State, 75 Miss. 24 (1897); Longshore Printing & Pub. Co. v. Howell, 38 P. 547 (Or. 1894).
both dangerous and oppressive.” 49 Such a conspiracy “will be restrained and punished by the criminal law as oppressive to the individual, injurious to the prosperity of the community, and subversive of the peace and good order of society.” 50 The distinct evil assumption appeared for the first time in a criminal law treatise, in 1897, 51 citing for support U.S. v. Cassidy, a conspiracy case against railway employees in the great Pullman strike of 1894. 52

The distinct evil assumption emerged, therefore, in a specific historical context and in response to what people believed was an existential threat posed by labor unions and corporations. As Goldstein noted, the distinct evil assumption was, and remains, unsupported by empirical data. It also shares with conspiracy law itself a “chameleon-like” hue, whose color changes with the unpopular group, be it socialists, anarchists, communists, drug traffickers, or Islamic terrorists. The point is not that no conspiracies are dangerous, but that not all of them are. In hindsight, we can discern a clear pattern of abusive conspiracy prosecutions. The distinct evil assumption justifies them.

III. Why the Distinct Evil Assumption is Wrong, and Why Dangerousness Should be Required

There are five approaches to illustrate why the distinct evil assumption is wrong and why a dangerousness showing ought to be required for criminal liability to attach.

The first approach is historical. It has already been discussed that the distinct evil assumption emerged, unsupported, from a specific historical context. There is no indication that the distinct evil assumption drawn from this recent history applies to all

50 Id. at 10 (quoting Crump v. Com., 84 Va. 927)
51 EMLIN MCCLAIN, A TREATISE ON THE CRIMINAL LAW AS NOW ADMINISTERED IN THE UNITED STATES, VOLUME II 157 (1897).
52 67 F. 698 (N.D. Cal. 1895).
conspiracies. The more complete history of conspiracy indicates that the crime was not dangerous in itself. Originally, it was an indictable offense only if the substantive crime was executed.\textsuperscript{54} This consequentialist approach gave rise to the application of merger at common law, which was abandoned only in modern times.\textsuperscript{55} For most of its history, then, conspiracy was dangerous only because of its consequences, not \textit{per se}.

The second approach is criminal law normative. American criminal law and society are founded upon the maxim that we punish harmful acts, and never evil intent alone.\textsuperscript{56} Conspiracies that are not dangerous are composed of so many Hamlets, whose only crime are evil thoughts and “[w]ords, words, words.”\textsuperscript{57} Criminal law norms require more than this. At the very least, they require that these thoughts and words constitute a real danger.

The third approach is constitutional. As noted above, First Amendment and Sixth Amendment rights are threatened. In addition, conspiracy law may eviscerate a defendant’s fundamental right to a presumption of his innocence.\textsuperscript{58} Given, for example, that conspiracies may be, and often must be, liberally inferred, Justice Jackson opined that there is no way “in which an accused against whom the presumption [of participation in a conspiracy] is once raised can terminate the imputed agency of his associates to incriminate him.”\textsuperscript{59}

The fourth approach is pragmatic. Whether conspiracy law is \textit{in fact} fair is important, but just as important is whether it is \textit{perceived} to be fair. This perception is

\textsuperscript{54} Sayre, \textit{supra} note 14, at 397.
\textsuperscript{55} Wechsler et al., \textit{supra} note 6, at 960.
\textsuperscript{56} Goldstein, \textit{supra} note 5, at 405.
\textsuperscript{57} \textit{WILLIAM SHAKESPEARE, HAMLET, PRINCE OF DENMARK} act 2, sc. 2.
\textsuperscript{58} Krulewitch v. United States, 336 U.S. 440, 456 (1949) (Jackson, J., concurring); \textit{see also} In re Winship, 397 U.S. 358, 363 (1970); Coffin v. United States, 156 U.S. 432, 453 (1895).
\textsuperscript{59} \textit{Krulewitch}, 336 U.S. at 456 (Jackson, J., concurring).
what lends legitimacy to the system of law, and therefore is what encourages people to abide by it. A requirement that dangerousness be shown would address the long-standing critiques of conspiracy law without undermining its important role in substantive crime prevention.

The fifth approach is consequentialist. This means that a dangerousness requirement could improve the rate of accurate and just criminal procedure outcomes. Dedicated conspirators would still be criminally liable, but conspiracy charges of politically unpopular people, which, in hindsight, we view as wrongly decided, would be thwarted. Such cases include the Abrams, Schenck, and Frohwerk trilogy after World War I, Dennis and Yates in the World War II era, and, more recently, United States v. Sami Al-Hussayen, in which a Muslim was tried and acquitted of conspiracy to provide material support to Hamas. The only inaccurate outcome that might be produced would be acquittals for actual criminal conspiracies that posed no danger. This would probably amount to only a small number of conspiracies, which, by definition, are harmless.

IV. Legislative Moves Toward Requiring Dangerousness

The idea of requiring dangerousness is not a radical one. As noted above, the MPC contains a provision that downgrades conspiracies that present little danger and allows courts to dismiss prosecutions in extreme cases. Four states have followed the MPC’s lead with related statutes.

Arkansas’ statute provides an affirmative defense to a prosecution for attempt, solicitation, or conspiracy where the conduct charged is “inherently unlikely to result or

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60 Case No. 3:03-cr-00048-EJL-1, (D. Idaho 2004).
to culminate in the commission of a crime” and “[n]either the conduct nor the defendant presents a public danger warranting imposition of criminal liability.”[^61]

Colorado’s statute grants the court the power to downgrade or dismiss a conspiracy charge where “the particular conduct charged to constitute a criminal conspiracy is so inherently unlikely to result or culminate in the commission of a crime that neither that conduct nor the offender presents a public danger.”[^62]

Pennsylvania’s statute allows a court to dismiss a prosecution where “the particular conduct charged to constitute a criminal attempt, solicitation or conspiracy is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense.”[^63]

New Jersey’s statute is unique. It reads:

b. Mitigation. The court may impose sentence for a crime of a lower grade or degree if neither the particular conduct charged nor the defendant presents a public danger warranting the grading provided for such crime under subsection a. because:

(1) The criminal attempt or conspiracy charged is so inherently unlikely to result or culminate in the commission of a crime; or

(2) The conspiracy, as to the particular defendant charged, is so peripherally related to the main unlawful enterprise.[^64]

There are, therefore, at least six variables that define the scope of these statutes. They include the crimes covered, whether grading is available, whether dismissal is available, whether the statutes must be invoked by the court or by the defendant, whether the fact that conspiracy is peripheral to the main unlawful enterprise is a consideration,

[^63]: 18 Pa.C.S.A. § 905(b) (2012).
[^64]: N.J.S.A. 2C:5-4(b) (2012).
and, most importantly, whether the statutes are concerned with the danger posed by the conspiracy, by participants in the conspiracy, or both.

All four state statutes and the MPC provide for grading or dismissal when both the conspiracy and the conspirators pose no danger. This dual requirement responds to Katyal’s concern that conspiracies themselves are dangerous and that individual participants may, as conspirators, assume new and more dangerous individual identities.65

Put another way, “[C]onspiracy poses a ‘threat to the public’ over and above the threat of the commission of the relevant substantive crime . . . because the ‘[c]ombination in crime makes more likely the commission of [other] crimes’.”66

Despite the normative and constitutional problems with criminalizing inchoate conduct because it might lead to collateral substantive crimes, this expansive definition of dangerousness does encompass legitimate concerns that conspiracy law has come to address. This is good for prosecutors and for public safety, but it may not be good for defendants or accurate criminal procedure outcomes. The dangerousness requirement can provide a valuable check, which furthers everyone’s interests.

V. The Non-Application of Legislative Moves

Interestingly, the state dangerousness statutes have virtually never been the topic of sustained and formal legal argument. Arkansas has seen one solicitation case in which the court denied a jury instruction on dangerousness67; a defendant moved to dismiss a solicitation charge on dangerousness grounds in a Pennsylvania case68; and Colorado has seen no such case. A New Jersey case mentioned its dangerousness statute in

65 Katyal, supra note 1, 1316.
combination with the fact that, pursuant to New Jersey code, there can be no guilty verdict on both conspiracy and its substantive offense, if the conspiracy has no objective beyond that offense.\(^{69}\)

It is possible that these statutes are used in informal ways, such as during pre-trial or pre-charge negotiations with prosecutors. They may be effective deterrents to a criminal charge, and they may provide the prosecutor with the justification she needs to drop an unsavory case. It appears, however, that these statutes are not used even in such informal ways. When I interviewed them for this article, a number of experienced criminal defense attorneys in Arkansas, Colorado, New Jersey, and Pennsylvania had never heard of their states’ dangerousness statutes. Their responses suggested one reason for this lack of knowledge, as well as the statutes’ potential positive effect.

One very experienced defense attorney in Arkansas told me that the state simply does not charge conspiracies. He suggested at least two reasons for this. First, state prosecutors are more likely to charge attempt rather than conspiracy if multiple defendants engage in inchoate conduct. This is so, he said, because under Arkansas’ law prohibiting inconsistent verdicts, if one of two defendants is acquitted of conspiracy, the second defendant cannot be convicted.\(^{70}\) Charging an attempt would mean that the first defendant’s acquittal does not affect the prospect of the second defendant’s conviction. Second, Arkansas’ rule on admission of co-conspirator statements does not require that a conspiracy actually be charged.\(^{71}\) All that is necessary is that a conspiracy be proved at trial by evidence independent of the statement itself.\(^{72}\) Accomplices, furthermore, are

\(^{70}\) Yedrysak v. State, 293 Ark. 541 (1987); but see A.C.A. § 5-3-103(b)(3) (2012).
treated as co-conspirators for purposes of admitting their statements. Both of these rules reduce prosecutors’ need to charge conspiracies and thereby obtain associated evidentiary advantages.

On the other hand, a Colorado attorney with whom I spoke immediately recognized the value of her state’s statute. She had not been aware of the law, but now plans to use it in defense of her client, who is charged with participation in a massive criminal conspiracy. Another attorney from Pennsylvania, learning of his state’s statute, said that it could have been an effective tool against politically motivated charges, such as those leveled against protesters during the 2009 G-20 summit in Pittsburgh.

The remaining attorneys had never heard of the statutes, but were interested to learn about them. One New Jersey attorney expressed her intent look into the law further. As more defense attorneys learn about these statutes and apply them in creative ways, case law will emerge that protects defendants on the margins of criminality. It will help defendants who formed actual, but foolish and harmless, conspiracies, and it will help those who engaged in what one Arkansas attorney called “humorous chit chat” that was never meant to be taken seriously.

VI. What Needs to Be Done

Having called into question the notion that conspiracies pose a distinct evil, there are a number of things we should do.

First, and most immediately, defense attorneys in Arkansas, Colorado, New Jersey, and Pennsylvania should use their states’ dangerousness statutes. They can use them to file motions to dismiss, to downgrade charges, and to request jury instructions.

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They can also use these statutes in pre-trial negotiations with prosecutors. Quite often, prosecutors are actively looking for a way to get rid of unsavory cases. Alleged victims and intra-office dynamics often drive prosecutors unwillingly to pursue cases. A statute that suggests a case should be dropped could provide to a prosecutor the leverage and cover she needs.

In addition to these states’ lawyers leading the charge, attorneys in all jurisdictions should actively apply dangerousness arguments to conspiracy cases. They can, and do, apply them during the sentencing phase. One Texas attorney, for example, learning of these statutes, now intends to argue lack of her client’s conspiratorial dangerousness at sentencing. Attorneys can also act creatively to present dangerousness arguments during trial and before. For example, attorneys may move to dismiss charges of non-dangerous conspiracies on due process and other constitutional grounds. At the very least, these motions will frame the case for the court. If the conspiracy is not dangerous, the court will realize that the stakes are relatively low, and may be more attentive to the defendant’s rights throughout the process. Attorneys can also explore a conspiracy’s dangerousness at trial as they attempt to show that no conspiracy existed.

Because explicit agreements rarely obtain, prosecutors can prove conspiracies by inference from evidence of concerted action or a working relationship. Defense attorneys should be able to match such liberal methods of proof with similarly liberal methods of defense. If an alleged conspiracy was never dangerous, how can the jury be sure it was an actual conspiracy?

74 United States v. Royal, 100 F.3d 1019 (1st Cir. 1996).
75 United States v. Weiner, 3 F.3d 17, 21 (1st Cir. 1993).
In the longer term, Congress and legislatures in the remaining forty-six states should consider drafting their own dangerousness statutes. Recognizing that such statutes would not hamper police and prosecutors’ attempts to pursue truly harmful conspiracies, the only results would be that defendants would have an escape hatch at the margins, the accuracy of procedural outcomes would be improved, and legitimate criticisms of conspiracy law would be blunted.

As a distant goal, attorneys, government, and society should evolve conspiracy law to include a rule that for criminal liability to attach, conspiracies must be shown to be dangerous. This step would be nothing less than a paradigm shift, which, by my count, has taken place only five times in conspiracy’s 700-year history. This shift, however, would respond to the unproven assumption of dangerousness that has justified American conspiracy law since the 19th century.

VII. Conclusion

Conspiracy law exists as two tectonic plates colliding, with the pressure ever increasing. One plate consists of the likelihood that groups engaged in joint criminal activity do pose a distinct evil, in all of the ways Professor Katyal has described. The other plate consists of Professor Goldstein’s observation that the distinct evil assumption lacks even a scintilla of empirical evidence. The fact that crime is committed by a group may simply pose no unique threat. One lesson of the U.S. military’s involvement in Iraq and Afghanistan is that groups may be overwhelmingly likely to tend toward law-abiding extremes.

We need to release this tectonic pressure. The question of dangerousness is the fault line, a narrow margin between clearly lawful combinations and illegal, and harmful,
conspiracies. However narrow this margin may appear, it is where the controversy lies, and thus where solutions are found. By requiring the prosecution to prove a conspiracy’s dangerousness, we continue to address the government’s interests in public safety and punishment for producing harm, but we also further criminal law norms of lenity, punishment only for harmful conduct, and the presumption of innocence. Requiring dangerousness is the important next step for criminal conspiracy law.