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The System of Modern Criminal Conspiracy

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THE SYSTEM OF MODERN CRIMINAL CONSPIRACY

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Abstract

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

At its center, this article defines the system of modern conspiracy law, which is one of uniformity rather than dynamism. Where dynamic systems of law contain distinct components that perform different tasks (proving actus reus and mens rea, for example), the uniform system of conspiracy law permits virtually all types of evidence to be admitted to prove all of conspiracy’s elements, with almost nonexistent evidentiary and constitutional rules to limit this admission. The result is elision of important normative, constitutional, and evidentiary rules designed to ensure both outcome reliability and individuals’ rights.

This article provides a history of conspiracy law that illustrates the law’s qualitative and quantitative expansion toward its modern iteration. That history begins in 1285 England, when conspiracy was limited to agreements to falsely prosecute another and could be charged only where the victim was in fact prosecuted and acquitted. I call this type of conspiracy specific and consequentialist. During its subsequent evolution, the law became what I call general in that it applied to agreements to commit any crime whatsoever and deontological because the substantive target crime no longer had to have been achieved—the conspiracy itself became unmoored from its factual context and a crime. The 18th and 19th century Hawkins and Denman doctrines introduced a moral aspect to conspiracy—condemning agreements that aimed at “wrongful” conduct as much as criminal conduct. The ultimate result was the uniform system of modern conspiracy.

This article also provides four normative reforms that respond to conspiracy’s systemic uniformity. These reforms are grounded in extant law on conspiracy, treason, and, because speech is the primary type of proof, First Amendment law. These reforms are meant to create dynamism in the system, which should serve both accurate outcomes and defendants’ rights.

It is important to understand the current system of criminal conspiracy both because of its pervasive use in prosecutions and the growing consensus that the law targets unpopular ideas and speech and produces erroneous outcomes. Now more than ever, reforms to the system of criminal conspiracy are necessary to ensure a legitimate criminal justice system that protects individual rights and ensures reliable outcomes.
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“Every idea is an incitement.” Justice Oliver Wendell Holmes, 1925.1

INTRODUCTION

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

It is important to understand this change because of the contemporary prevalence of conspiracy charges. In 1980, Professor Paul Marcus suggested that severe problems persist in defending conspiracy cases, particularly in light of the frequency of the conspiracy charge at the federal level.2 Between 1980 and 1990, conspiracy was in a group of offenses that constituted between 36% and 67% of the total criminal matters prosecuted in U.S. District Courts.3 In 1990, Judge Easterbrook of the Seventh Circuit lamented that conspiracy charges are “inevitable because prosecutors seem to have conspiracy on their word processors as Count I; rare is the case omitting such a charge.”4 Most recently, Professor Neal Kumar Katyal in 2003 suggested that more than 25% of all federal criminal prosecutions and a large number of state cases involved prosecutions for conspiracy.5

More troubling than the law’s prevalent use are the reasons for charging conspiracy. In Professor Marcus’ 1977 study, he found that 62.8% of prosecutors brought conspiracy charges where the object offense had been completed or attempted not because the conspiracy demanded criminal justice, but in order to obtain evidentiary advantages.6 Moreover, 35.3% of prosecutors brought conspiracy charges in order to obtain advantages in connection with plea bargaining.7

To explore conspiracy law’s change, this article has three goals. First, it sets forth the relevant history of conspiracy law leading to the modern system, from the law’s origin in England at the turn of the fourteenth century into the post-9/11 war on terror in order to show the gradual expansion of the law to its modern definition.

Second, this article defines and describes the system of modern criminal conspiracy. It shows that this system’s normative, evidentiary, and constitutional problems ultimately come from the system’s uniformity. Contrary to dynamic systems, which contain siloed components that work at least partially independently to produce good outcomes, conspiracy, as a uniform system, has component parts—elements, evidence to prove these elements, and the evidentiary and constitutional rules that determine what types of evidence can be used to prove which elements—that do not perform truly different duties that combine to produce a good result. Consider the following analogy: a car is a dynamic system because different raw materials—rubber, steel, and cloth and leather—

4 United States v. Reynolds, 919 F.2d 435, 439 (7th Cir. 1990).
6 Id. at 942.
7 Id.
are used for different parts of the car—tires, a chassis, and the interior. If a car were a uniform system, it would be made entirely of one type of raw material, and would be a very poor-performing system. Conspiracy law is like that poor-performing car because in conspiracy cases, virtually all types of evidence can be used to prove all elements, proof of one element usually constitutes proof of all other elements, and evidentiary and constitutional rules—what I call “gatekeepers”—are not effective at promoting defendants’ rights or accurate outcomes. The problems resulting from this system sound in the First Amendment, Confrontation Clause, evidentiary rules dealing with relevance, prejudice, and hearsay, and traditional approaches to proving individual elements of a crime beyond a reasonable doubt, most especially mens rea.

This article’s third goal is to offer normative solutions that respond to conspiracy’s systemic uniformity. These solutions have, at least in part, been tried in the real world, and have produced no apparent negative externalities. They include adopting the definition of conspiracy’s overt act that applies in treason trials, namely that the act must be conduct and not speech; adopting the First Circuit’s rule for the use of protected speech to prove a defendant’s mens rea, set forth in United States v. Spock8; adopting a rule, in partial force in four states and the Model Penal Code, that conspiracies must be dangerous for criminal liability to attach; and engaging a broader, more theoretical approach that uses the category of speech integral to criminal conduct to determine which types of speech may be used in which circumstances to prove certain aspects of conspiracy.

The article also has a national security bent. Although not intended as such, national security scholars have read the work in this way. This is because the article necessarily involves current law enforcement methods against alleged terrorists, and because counterterrorism moves ultimately cannot be understood without reference to federal criminal law. Domestic criminal law and national security law are two parts of the same system, and it is important for prosecutors in both arenas to know their options. Indeed, as overt war fades, but the terrorist threat remains, often in the guise of “homegrown terrorists,” domestic conspiracy law will become more important to national security.9

The DC Circuit, for example, applies principles of conspiracy law to make detention determinations under the Authorization for Use of Military Force and the National Defense Authorization Act.10 In addition, in military courts, conspiracy is generally not an available charge.11 It is an ironic twist that members of Congress who, in seeking tough juries, serious charges, and severe sentences, push to restrict Article III courts from

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8 United States v. Spock, 416 F.2d 165 (1st Cir. 1969).
11 Hamdan, 548 U.S. at 603-04.
trying terrorism suspects, where conspiracy charges are available and tend to be prosecution-friendly.

This article has seven parts. Part I sets forth conspiracy law’s ancient history, from 1285 to the nineteenth century. Part II discusses conspiracy law in the nineteenth century, when forces of industrial capital enlisted the courts and conspiracy charges to fight nascent and ultimately powerful labor combinations. Because speech rights, which emerged substantively in 1919, are intertwined with modern conspiracy, Part III sets forth the relevant First Amendment law. Part IV illustrates the maturation of modern conspiracy from the Abrams v. United States, Schenck v. United States, and Frohwerk v. United States line of First Amendment cases (which were also conspiracy cases) in 1919 to the terrorist attacks of September 11, 2001, which continue to alter the criminal law landscape in fundamental ways. Part V describes conspiracy in the twenty-first century, which is located in large part in the context of terrorism and the Internet. Part VI provides a theoretical definition and description of the system of modern criminal conspiracy, which is supported by the preceding history. Part VII offers the real-world solutions that respond to the uniform system of conspiracy and its history.

I. CONSPIRACY LAW’S FIRST 600 YEARS

A. ORIGIN: 1285-1304

Most commentators identify the origin of conspiracy law in a handful of Edwardian statutes, dating from 1285 to 1305. During this period, the system of conspiracy law was dynamic in two important ways. First, substantively, it specifically applied only to abuses of legal process. The 1304 Definition of Conspirators defined conspirators as “they that do confeder or bind themselves by oath, covenant or other alliance that every of them shall aid and support the enterprise of each other falsely and maliciously to indite, or cause to be indited, or falsely to acquit people, or falsely to move or maintain pleas.” Second, philosophically, the law was what I call “consequentialist,” meaning that for liability to attach, the aim of the conspiracy had to be realized. Thus, for example, an action by writ of conspiracy would be successful only if a person at whom a
conspiracy to falsely indict was aimed had actually been indicted and acquitted.20 One commentator noted that at its origin, conspiracy was “an offence of a strictly limited nature, embedded in the early system of legal procedure, and created to give a remedy for the abuse of a very small part of that system.”21 Compare consequentialist conspiracy law with what I call “deontological” conspiracy law, which emerged later and applied to the conspiracy itself, whether the substantive target crime was committed or not.

By 1486, courts recognized the potential threat to public safety associated with the consequentialist philosophy of conspiracy law, and a deontological shift was underway. In that year, a conspiracy statute provided that “by the law of this land if actual deeds be not had, there is no remedy for such false compassings, imaginations, and confederacies against any Lord . . . and so great inconvenience might ensue if such ungodly demeanings should not be straitly punished before that actual deed be done.”22 Although the substantive focus continued to be on false prosecutions, the turn was toward condemning the conspiracy itself, rather than the executed result.23 This eliminated the need to prove substantive conduct, inviting the uniformity of the system of conspiracy law. Put another way, the requirement of substantive crime was a check on the system: without the substantive crime, criminal liability could not attach. This check helped to make conspiracy law a dynamic system.

This turn was not complete for many centuries. By the 1600s, then, two streams had emerged. An action of conspiracy could be brought for the deontological wrong of the conspiracy itself. An action upon the case, in turn, could be brought for the executed result, with the conspiracy being an aggravating fact.24

Class and social power relations as factors also emerged. “Lord[s]” were specifically protected. Indeed, the 1486 statute involved “conspiracies to destroy the king or his great officers.”25 Such class and power relations would figure prominently in eighteenth and nineteenth century conspiracy cases against “treasonable or seditious societies,”26 and nineteenth century cases against combinations of labor27 and, to a much lesser extent, capital.28 For one commentator, in fact, labor-capital relations have informed conspiracy since its birth in 1285-1305.29 The system of modern criminal conspiracy, which allows prosecutors to target unpopular ideas, rather than only dangerous conspiracies, thus emerges as a descendant of class- and power-shaped conspiracy law. Its uniformity facilitates abusive (or good faith but biased and mistaken) prosecutions by increasing prosecutorial discretion and, as will be seen, lowering evidentiary standards and altering evidentiary and constitutional standards in ways that favor the government and increase conspiracy’s uniformity.

20 \textit{Id.} at 155.
21 \textsc{Harrison, supra} note 18, at 6.
22 \textsc{Bryan, supra} note 18, at 146-47.
23 \textit{Id.} at 165.
24 \textit{Id.} at 177.
25 \textit{Id.} at 146.
26 \textsc{Sir Robert Samuel Wright, The Law of Criminal Conspiracies and Agreements} 20 (1873).
27 \textsc{Harrison, supra} note 18, at 32.
29 \textsc{Harrison, supra} note 18, at 12.
B. **Poulterers’ Case: 1611-1716**

During the fourteenth and fifteenth centuries, the English Court of Star Chamber worked to evolve conspiracy law.\(^{30}\) In 1611, that court decided the *Poulterers’ Case*, which is a watershed conspiracy case.\(^{31}\) In *Poulterers’*, the Star Chamber held finally that a bare conspiracy was punishable independently of any act done in execution of it.\(^{32}\) The goal was, of course, to prevent the conspiracy’s potential harm from being realized.\(^{33}\) Although the *Poulterers’* holding is a definitive statement of the deontological thread of conspiracy law that had existed prior to the case,\(^{34}\) its final authority was established only in subsequent rulings.\(^{35}\) Its deontological turn has, *post hoc*, achieved the authority that created and informs the system of modern criminal conspiracy. This is not to say that *Poulterers’* settled the matter. Consequentialism retained currency throughout the seventeenth century in England,\(^{36}\) and even into the nineteenth century in the United States.\(^{37}\) By furthering the deontological turn, however, *Poulterers’* took conspiracy law away from targeting clearly dangerous and operative conspiracies and toward enabling the prosecution of merely unpopular thoughts, expressed to others.

At the same time, *Poulterers’* spurred a substantive move away from attaching conspiratorial liability only to combinations to abuse legal process. This was a move toward a general theory that would prohibit conspiracies to commit any crime whatsoever.\(^{38}\) As a result, one commentator called deontological and general conspiracy law the “Seventeenth Century Rule in Conspiracy.”\(^{39}\) This encouraged the development of the system of modern criminal conspiracy by further unmooring conspiracy law from an alleged conspiracy’s factual context. Thus unmoored, prosecutors are able to observe unpopular or suspicious speech or conduct and from that often ambiguous evidence determine the substantive crime that it is supposed to portend. In modern federal criminal law, which includes over 4,000 crimes,\(^{40}\) there is a virtually endless menu of substantive crimes from which prosecutors can choose. The system of modern criminal conspiracy, which is deontological and general, thus lacks an external check that should lie between the crime itself and the facts it addresses and comprise the norm that criminal liability may only attach to a set of facts that are predetermined to be criminal.\(^{41}\) The divorce of conspiracy from its factual context also encourages the view that conspiracies

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\(^{30}\) **Bryan**, supra note 18, at 154.

\(^{31}\) *Developments in the Law: Criminal Conspiracy*, supra note 18, at 923; Sayre, *supra* note 17, at 398.

\(^{32}\) **Bryan**, supra note 18, at 189.

\(^{33}\) *Id.*

\(^{34}\) *Id.* at 190.

\(^{35}\) *Id.* at 191.

\(^{36}\) *Id.* at 194-95.

\(^{37}\) See State v. Buchanan, 5 H. & J. 317, *1 (App. Ct. MD 1821) (“the law punishes the conspiracy, ‘to the end to prevent the unlawful act.’”); Lambert v. People, 9 Cow. 578 (Sup. Ct. N.Y. 1827) (in which one judge noted that conspiracies are indictable not because of their inherent dangerousness, but for the object they are intended to effect.”).

\(^{38}\) *Developments in the Law: Criminal Conspiracy*, supra note 18, at 923.

\(^{39}\) **Harrison**, supra note 18, at 16.


\(^{41}\) Bouie v. City of Columbia, 378 U.S. 347, 354 (1964) (requiring fair warning of what the law requires); Connally v. General Const. Co., 269 U.S. 385, 391 (1926) (establishing vagueness doctrine, requiring that penal statutes be clear enough for people to abide by them).
are difficult to prove—with no substantive crime, no one can be sure that a defendant in fact conspired. This alleged difficulty drives lowered evidentiary standards and pro-government alterations to evidentiary and constitutional rules. The result is a drift toward a uniform system of conspiracy.

C. HAWKINS AND DENMAN DOCTRINES: 1716-19TH CENTURY

The Seventeenth Century Rule resembles the system of modern conspiracy law. The Hawkins and Denman doctrines added glosses that have confused and upset conspiracy law since their appearance. In 1717, Lord Hawkins in his treatise asserted that to be punishable, conspiracies do not need to contemplate criminal acts only, but may also aim at “wrongful” conduct. 42 Similarly, Lord Denman in 1832 asserted, “a criminal conspiracy consists in a combination to accomplish an unlawful end, or a lawful end by unlawful means.” 43 This brief announcement left open to interpretation the meaning of the word “unlawful,” 44 and allowed for a moral turn in the law. In 1870, therefore, one court held, “It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful.” 45

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

II. RISE OF LABOR: THE NINETEENTH CENTURY

Economic structures in the United States underwent major changes in the nineteenth century that ultimately drove the development of the system of modern criminal conspiracy. At the beginning of the century, early labor combinations were viewed under the Tudor Industrial Code, a Lochnerian theory that “viewed any combination of workingmen to improve their wages or conditions as a criminal conspiracy.” 46 At that time, courts, hostile to the labor movement, 47 were interested in preventing restraint of trade. 48 As the nineteenth century progressed, rapid economic development, 49 the explosion of industrial growth, and the development of a national market 50 drove the

42 Developments in the Law: Criminal Conspiracy, supra note 18, at 923; HARRISON, supra note 18, at 25.
43 HARRISON, supra note 18, at 23.
44 Id.
45 Id. at 35.
48 WOODIWISS, supra note 46, at 42-43.
49 Ballam, supra note 47, at 127.
50 Id. at 129.
migration of young people from rural to urban areas in search of work in plants, factories, mines, and other businesses.\(^{51}\)

These workers became more vocal about their own discontent\(^{52}\) as they sought rights such as the eight-hour workday from the new corporations for which they worked.\(^{53}\) The discourse began to change\(^{54}\) as Lochnerian theories about restraint of trade started to give way to the right of laborers to associate.\(^{55}\) Industrial capitalism in factories gave voice to skilled workers by allowing them to determine to a significant degree the rate at which surplus value could be produced and the proportions in which it was distributed as wages and profits.\(^{56}\) Capital did not accept these workers’ ultimate push for rights, and pursued its own interests. It found no relief in legislatures, which were generally populated in the late nineteenth century by progressive and farmer-labor coalitions. It therefore turned to the courts,\(^{57}\) which applied conspiracy law to regulate against labor.\(^{58}\) The Massachusetts Supreme Judicial Court was the first court, in 1842,\(^{59}\) to declare that labor unions were legal,\(^{60}\) but both before then and after, the possibility of “riotous” and therefore illegal and dangerous combinations occupied judges’ minds.\(^{61}\)

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.\(^{62}\) 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.”\(^{63}\) It was in the context of labor movements that courts began to view conspiracies as distinct evils, which would come to justify the system of modern criminal conspiracy and its associated prosecutor-friendly details.

The Massachusetts court had 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.\(^{64}\) It so held, however, not because conspiracies are

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52 Id.
53 Id. at 638-39.
55 Woodiwiss, supra note 46, at 42-43.
56 Id. at 118.
57 Id.
59 Commonwealth v. Hunt, 4 Metcalf 111 (1842).
60 Woodiwiss, supra note 46, at 23.
61 Hattam, supra note 58, at 49; Woodiwiss, supra note 46, at 87.
dangerous in themselves, but because “the law punishes the conspiracy, ‘to the end to prevent the unlawful act.’”\(^{65}\) 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 those producing a “private injury” were not subject to criminal sanction.\(^{66}\) Both of these countervailing views were on display in the New York Supreme Court in 1827. In *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.\(^{67}\)

Despite these two countervailing views, the *Lambert* court concluded that “[c]ombinations against individuals are dangerous in themselves, and prejudicial to the public interest.”\(^{68}\) 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.”\(^{69}\) The court then provided a defense of conspiracy law that foreshadowed the work of scholars like Professor Katyal.\(^{70}\) Other cases during this time period mention the risk that conspiracies might “seduce” people into criminality.\(^{71}\) The notion that conspiracies are a distinct evil had emerged in embryonic form.

As the country moved toward the 1880s, developments in the labor movement reinforced the distinct evil notion. Attempts to form national trade unions began in the 1850s\(^ {72}\) and resulted in more than thirty such unions in 1873.\(^ {73}\) By 1886, the Knights of Labor had 730,000 members,\(^ {74}\) sympathy strikes and community-wide boycotts flourished,\(^ {75}\) and on May 1, 350,000 laborers from coast to coast joined in a coordinated general strike for the eight-hour day.\(^ {76}\) The International Working People’s Association formed in 1883, which “rejected the political and incremental methods of its socialist predecessors and instead pledged itself to immediate revolutionary change by any means.”\(^ {77}\) Some in the labor movement proposed “engaging in dramatic acts of violent

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\(^{65}\) *Id.* at *9.

\(^{66}\) *Com. v. McKisson*, 1822 WL 1942, *1* (Penn.).

\(^{67}\) 9 Cow. 578 (Sup. Ct. N.Y. 1827).

\(^{68}\) *Id.*


\(^{70}\) *Katyal*, *supra* note 5.

\(^{71}\) *Talbot v. Jansen*, 3 U.S. 133, 142-43 (1795); *see also* *Twitchell v. Com.*, 9 Pa. 211, *2* (1848).

\(^{72}\) *Ballam*, * supra* 47, at 129.

\(^{73}\) *Id.* at 130.

\(^{74}\) *PAPKE, supra* note 54, at 9.

\(^{75}\) *Ballam, supra* note 47, at 143.


resistance against state authorities,” which included targeting the church, government, elections, courts, jails, bankers, policemen, and bosses as targets in a war of class liberation.

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

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

The Haymarket bombing, and subsequent conspiracy trial of anarchist August Spies and others, engendered fear and political paranoia and sparked the country’s first red scare. One judge in 1886 accused non-citizen labor agitators of “socialistic crimes” that were “gross breaches of national hospitality.” The Chicago Tribune was blunter, holding “aliens” responsible for the Haymarket deaths, calling on the government to deport the “ungrateful hyenas” and exclude other “foreign savages who might come to America with their dynamite bombs and anarchic purposes.” It seemed that the country

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78 Id. at 12.
79 Id. at 13.
80 Ballam, supra note 47, at 130.
81 GREEN, supra note 76, at 86.
82 Ballam, supra note 47, at 130.
83 WOODIWISS, supra note 46, at 74.
84 Id.
85 Id.
86 Id. at 75.
87 GREEN, supra note 76, at 9.
88 Id. at 3.
89 Id. at 5; PAPKE, supra note 54, at 16.
90 PAPKE, supra note 54, at 16.
91 Smythe, supra note 51, at 648.
92 PAPKE, supra note 54, at 16.
93 MESSEK-ROUSE, supra note 77, at 4.
94 HATTAM, supra note 58, at 70.
95 GREEN, supra note 76, at 8-9.
was in a new civil war against trade unions full of “irresponsible” and “alien” troublemakers.97

This notion solidified in the 1880s, as labor unions, corporations, and Lochnerian champions of laissez-faire economics and one-sided views of individual freedom rose to prominence. Trusts and monopolies were formed, against which the Sherman Antitrust Act of 1890 was passed,98 and labor acted with strikes, walkouts, and boycotts, the criminality of which courts struggled to determine.99 For the first time, conspiracies were seen as an existential threat to the nation. It made sense to interdict them at the earliest stage possible, even if that meant mistaken prosecutions based only on the expression of unpopular ideas.

The general rhetoric of judicial opinions reflected this fear. In 1887, the Connecticut Supreme Court in State v. Glidden considered the legality of a conspiracy of workmen to boycott their company and distribute flyers. 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.”100 If boycotts and distribution of flyers were legal, said the court, “The end would be anarchy, pure and simple.”101 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.” 102 Conspiracies become “subversive of the rights of others, and the law wisely says it is a crime.”103

A series of subsequent cases involving labor and capital echoed the Connecticut Supreme Court’s opinion.104 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 both dangerous and oppressive.”105 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.”106

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96 Edward de Grazia, The Haymarket Bomb, 18 LAW & LITERATURE 283 (2006); GREEN, supra note 76, at 114.
97 GREEN, supra note 76, at 11.
100 State v. Glidden, 8 A. 890, 894 (Conn. 1887).
101 Id. at 895.
102 Id.
103 Id. at 896.
104 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).
106 Id. at 10 (quoting Crump v. Com., 84 Va. 927).
assumption appeared for the first time in a criminal law treatise, in 1897, citing for support United States v. Cassidy, a conspiracy case against railway employees in the great Pullman strike of 1894. The Pullman strike turned violent, as President Cleveland deployed federal troops to restore order and railroad traffic, which had been stopped nationwide. In the strike, the President saw “proof that conspiracies existed against commerce between the States.” Around the country, clashes left forty people dead, and Chicago “seemed to many a war zone.”

The distinct evil assumption emerged, therefore, in a specific historical context and in response to what people believed was an existential threat posed by labor unions and corporations. As Professor Abraham S. Goldstein noted, the distinct evil assumption was, and remains, unsupported by empirical data. It also shares with conspiracy law itself a “chameleon-like” hue, meaning that the system of modern criminal conspiracy is adaptable to pursue actual criminals but also to impose social control on unpopular groups.

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

The conceptual problem posed by this nineteenth century turn was whether “an act, entirely lawful if done by a single individual, may be unlawful by reason of being done in pursuance of a combination of individuals to do the same act.” Although courts ostensibly abandoned this Hawkinsian moral turn in conspiracy law, specifically as it pertained to labor combinations, the turn left its mark. These early labor conspiracy cases became part of a “unified legal history stretching into the twentieth century.” The Hawkins doctrine continued to influence these prosecutions, and “questionable

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107 EMLIN MCLAIN, A TREATISE ON THE CRIMINAL LAW AS NOW ADMINISTERED IN THE UNITED STATES, VOLUME II 157 (1897).
108 67 F. 698 (N.D. Cal. 1895).
109 PAPKE, supra note 54, at 20.
110 Id. at 31.
111 Id. at 35.
112 Id. at 34.
114 THOMAS L. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 403-03 (1970) (“the issues [involving the interaction between inchoate crimes and the First Amendment] are gradually beginning to emerge as the increasingly complex controls of modern society range further into inchoate conduct in the effort to punish or prevent ultimate action.”).
115 HARRISON, supra note 18, at 38.
116 BRYAN, supra note 18, at 247.
117 COOKE, supra note 28, at 14.
118 BRYAN, supra note 18, at 288.
120 HATTAM, supra note 58, at 47; see PAPKE, supra note 54, at 49.
tactics [used during the Spies Haymarket trial], such as extensively using speeches and publications as evidence, [and] viewing coconspirators as equal to principles . . . remain features of the judicial order in the twenty-first century.”

Protestors in the 1880s, such as Eugene Debs, kept speaking and agitating into World War I, when patriotic fervor swept the country and the government suppressed all types of protests, including strikes and May Day marches. Although the use of conspiracy against the labor movement subsided in favor of the injunction, its successes were obvious, and its use was turned in the twentieth century to socialist and anarchist anti-war protestors and communists.

Entering the twentieth century, conspiracy law at its extremes continued to be general, deontological, and moral. This jurisprudence, coupled with the belief that conspiracies pose serious and existential threats, encourages early interdiction and justifies the system of modern criminal conspiracy. It has also allowed conspiracies to be proven by speech alone, which is a relatively unreliable substitute for actual conduct. The unconfronted speech of alleged co-conspirators, who are not presented for cross-examination, adds a layer of outcome unreliability while introducing a new Confrontation Clause concern to modern conspiracy. The system of modern conspiracy enables prosecutors to pursue war protestors, civil rights agitators, and alleged terrorist “wannabes,” whether it is clear that they are part of an actual conspiracy or not. Finally, at its extremes, modern criminal conspiracy enables the discriminatory selection of defendants. “Agreements” that are mere bluster or loose talk, postmodern expressions

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121 Messer-Kruse, supra note 77, at 181.
122 Green, supra note 76, at 306.
123 Hattam, supra note 58, at 39.
124 One labor historian believes that the landmark 1842 case Commonwealth v. Hunt, which signaled the legalization of labor combinations, also resulted in “judicial empiricism,” or what Sayre called “law with predictability, i.e. law based on judges’ ‘personal predilections and peculiar dispositions.’ . . . It is largely on this basis of judicial empiricism that the conspiracy doctrine is available to American judges today.” Turner, supra note 119, at 72.
125 See Aziz Z. Huq, The Signaling Function of Religious Speech in Domestic Counterterrorism, 89 Tex. L. Rev. 833, 837 (2011) (finding that one’s associations, rather than religious speech, are better indicators of future engagement in terrorist acts).
126 See Lilly v. Va., 527 U.S. 116, 134 (1999) (plurality opinion) (Confrontation Clause violated by admission of confession of nontestifying accomplice because confession shifted blame to defendant and was not against declarant’s penal interest); Lyle v. Koehler, 720 F.2d 426, 433 n.12 (6th Cir. 1983) (stating it is a violation of defendant’s Confrontation Clause right to admit statement of co-conspirator when statement was not made in furtherance of the conspiracy); see generally United States v. Chandler, 326 F.3d 210 (3d Cir. 2003); Ben Trachtenberg, Confronting Coventurers: Coconspirator Hearsay, Sir Walter Raleigh, and the Sixth Amendment Confrontation Clause, 64 Fla. L. Rev. 1669, 1673-74 (2012); but see Giles v. California, 128 S. Ct. 2678, 2691 n.6 (2008) (opining that admission of co-conspirator hearsay do not usually violate the Confrontation Clause because incriminating statements in furtherance of the conspiracy are rarely testimonial).
of opinion rather than intent to commit crime, or driven primarily by government informants, are now ready subjects of prosecution.

III. 1919: FIRST AMENDMENT AND CONSPIRACY LAW INTERTWINED

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

Absent such individualist notions, a conflict between speech rights (and, to a lesser extent, Confrontation Clause rights) and conspiracy law in the period from 1867 through 1869 emerged, which remains unresolved in today’s system of modern criminal conspiracy. Three events substantiated this conflict. The first was Congress’ passage of the first general conspiracy statute, which was the forerunner to 18 U.S.C. § 371, the contemporary “catch-all” conspiracy law. With a general conspiracy law, prosecutors who wished to indict unpopular speakers could more easily do so by alleging a conspiracy to commit some crime that the unpopular speech seemed to portend. Section 371 provided the skeletal structure of the system of modern criminal conspiracy, on which would hang prosecutor-friendly rules of evidence and the evisceration of gatekeepers. The second event was the advent of new hearsay exceptions that made

131 See DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997).
132 Arver v. United States, 245 U.S. 366, 390 (1918); Holy Trinity Church v. United States, 143 U.S. 457, 470 (1892); Davis v. Beason, 133 U.S. 333, 342 (1890); Reynolds v. United States, 98 U.S. 145, 162 (1878).
134 United States v. Cruikshank, 92 U.S. 542, 552 (1875); Permoli v. Municipality No. 1 of the City of New Orleans, 44 U.S. 589, 606 (1845).
136 See Espionage Act of 1917, ch. 30, 40 Stat. 217; Sedition Act, ch. 74, § 2, 1 Stat. 596, 596-97 (1798) (expired 1801); Kirchner v. United States, 255 F. 301 (4th Cir. 1918); Deason v. United States, 254 F. 259 (5th Cir. 1918); Doe v. United States, 253 F. 903 (8th Cir. 1918); Masses Pub. Co. v. Patten, 246 F. 24 (2nd Cir. 1917).
137 Compare this early conception of communal speech rights with Daniel Solove’s conception of privacy rights in the digital age, which he argues should be re-envisioned as communal rights. In the digital age, Fourth Amendment context, Solove argues that communal privacy rights offer the best chance to protect individuals’ privacy rights. The question is individuals’ standing is left unanswered. In early First Amendment jurisprudence, the individualist shift in 1919 at least held out the opportunity for citizens to litigate their First Amendment claims. See Daniel J. Solove, “I’ve Got Nothing to Hide” and Other Misunderstandings of Privacy, 44 SAN DIEGO L. REV. 745, 763 (2007).
proving conspiracies easier. The exception relating to the admissibility of statements of co-conspirators as non-hearsay followed soon thereafter, with its recognition dating back at least to the 1880s and raised as early as 1807, during legal proceedings against Aaron Burr. In addition to avoiding evidentiary problems involving the admission of hearsay, this move would virtually remove the Confrontation Clause gatekeeper from conspiracy cases. The third was the ratification of the Fourteenth Amendment, which raised the question of the incorporation of the Bill of Rights to the states. This would permit the First Amendment to be incorporated in 1925.

It was only in 1919 that the Supreme Court began to shape the First Amendment into the highly speech-protective form existing today. In that year, the Supreme Court in Abrams v. United States, Schenck v. United States, Frohwerk v. United States and Debs v. United States introduced the clear and present danger test, which permitted the restriction of speech only when “the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” This apparent victory for individual speech rights was blunted by section 371, the hearsay exceptions, and the readiness of prosecutors to use conspiracy charges to prosecute unpopular groups. Conspiracy enabled end-runs around new speech protections, and in the process created additional Confrontation Clause problems.

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

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

140 Id. at 393 n.106.
144 250 U.S. 616 (1919).
146 249 U.S. 204 (1919).
147 249 U.S. 211 (1919).
148 Schenck, 249 U.S. at 52.
organizations. Thus far, Brandenburg has not convinced courts to dismiss the charges.

In addition to Brandenburg speech, the Court came to restrict other categories of speech, including speech that is integral to criminal conduct. As I detail below, it is unclear whether such speech is that which is necessary, facilitative, or merely related to criminal conduct. This determination matters for the system of modern criminal conspiracy. If integral speech is that which is necessary to achieving a criminal aim, then pure advocacy speech is more likely to be protected than if integral speech is that which is facilitative or related. That said, the speech protections delineated by the integral speech jurisprudence are perhaps less certain than speech protected by Brandenburg. This is because speech used as evidence of a crime is not normally subject to First Amendment protection. Therefore, even the purest and most abstract of advocacy speech can be used to prove a conspiracy. It functions as inferential evidence of a conspiracy’s agreement and/or overt act (by constituting, for example, providing information or encouragement). To the extent that we express our character through our speech, admission of such speech may also violate Fed. R. Evid. 404. To the extent that our verbalized sympathies do not reflect what we intend to do or will do, unfairly prejudicial and even irrelevant evidence may mistakenly be admitted, invoking Fed. R. Evid. 401 and 403 problems. All of this means that speech can simultaneously be the evidence of conspiracy and the conspiracy itself, what I have detailed in a previous article.

There are, in the end, two problems with First Amendment law in the conspiracy context. First, the Brandenburg test, while appearing to protect unpopular speakers, in fact does not protect them against conspiracy charges. The speech that provides the building blocks of a conspiracy charge may be far from likely or intended to lead to substantive and imminent lawless action, but it may appear to be closely connected to the lawless action of conspiracy. Such speech may, in fact, constitute the crime itself. Second, neither the Brandenburg test nor the integral speech jurisprudence protects people from the use of speech as evidence of a crime. At least in some cases, the use of

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154 United States v. John, 597 F.3d 263, 283 (5th Cir. 2010).
155 United States v. Fernandez, 559 F.3d 303, 328 (5th Cir. 2009).
protected speech as evidence chills speech.\textsuperscript{157} This, of course, can be a First Amendment violation.

IV. MODERN CONSPIRACY: 1919—SEPTEMBER 11, 2001

With the exception of Debs, all three of the 1919 cases were conspiracy cases no less than they were First Amendment ones, in which unpopular speech was the target of the prosecutions and comprised the evidence thereof. The defendants in Schenck, for example, were socialist war protesters who were convicted of conspiracy to violate the Espionage Act of 1917 by sending leaflets to those entering the military. The leaflets proclaimed that the draft violated the Thirteenth Amendment, and that the war was in the interest of Wall Street’s chosen few. It asked the inductees to “assert your rights.” This was a violation of the Espionage Act, which prohibited causing or attempting to cause insubordination in the military.\textsuperscript{158} Later twentieth century cases indicated that the clear and present danger test and, ultimately, the Brandenburg test, would impose no First Amendment gatekeeper in conspiracy cases.

\textit{Dennis v. United States}, in 1951, was striking for the extent to which the Court approved of the government reaching far into crime’s inchoateness to prosecute mere ideas. In that case, the defendants were communists who did not advocate the overthrow of the government, but who were found guilty of \textit{conspiring} to advocate the overthrow of the government. The Court had no difficulty affirming the conviction for violating the Smith Act, rejecting “the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger.”\textsuperscript{159}

In \textit{Yates v. United States}, Justice Black highlighted the First Amendment problems with conspiracy law, which also suggested the underlying problem with the system of modern conspiracy, which is that it has made unpopular ideas and the speech that expresses them ready subjects of prosecution. He observed that when speech was at issue in a criminal trial, the prosecution was likely to turn not on criminality, but on the unpopularity of the speech. He wrote:

\begin{quote}
The kind of trials conducted here are wholly dissimilar to normal criminal trials. Ordinarily these ‘Smith Act’ trials are prolonged affairs lasting for months. In part this is attributable to the routine introduction in evidence of massive collections of books, tracts, pamphlets, newspapers, and manifestoes discussing Communism, Socialism, Capitalism, Feudalism and governmental institutions in general, which, it is not too much to say, are turgid, diffuse, abstruse, and just plain dull. Of course, no juror can or is expected to plow his way through this jungle of verbiage. The testimony of witnesses is comparatively insignificant. Guilt or innocence may turn on what Marx or Engels or someone else wrote or advocated
\end{quote}


\textsuperscript{158} Schenck, 249 U.S. at 48-49.

\textsuperscript{159} Dennis, 341 U.S. at 511.
as much as a hundred or more years ago. Elaborate, refined distinctions are drawn between ‘Communism,’ ‘Marxism,’ ‘Leninism,’ ‘Trotskyism,’ and ‘Stalinism.’ When the propriety of obnoxious or unorthodox views about government is in reality made the crucial issue, as it must be in cases of this kind, prejudice makes conviction inevitable except in the rarest circumstances.\textsuperscript{160}

Justice Douglas later questioned the extent to which conspiracy charges might violate speech rights. In 1968, the Court denied certiorari in \textit{Epton v. New York}.\textsuperscript{161} Dissenting from the denial, Justice Douglas observed that “[w]hether the overt act required to convict a defendant for conspiracy must be shown to be constitutionally unprotected presents an important question.”\textsuperscript{162} His observation has gone unaddressed by the Court.

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

Hugo Black’s opinion notwithstanding,\textsuperscript{163} speech rights are not absolute. In almost every context, courts balance individual interests in free speech with other interests,\textsuperscript{164} such as public safety,\textsuperscript{165} and freedom from being libeled.\textsuperscript{166} In the conspiracy law context, no speech balancing test is engaged. Rather, the exigencies of conspiracy law—public safety, evidentiary relevance, and probativeness—are always preferred to speech rights.\textsuperscript{167}

As a result of this preference, the landmark twentieth century conspiracy-speech cases can be seen now as normatively bad cases, because the government prosecuted unpopular defendants merely for their speech, and based on laws that today are seen to violate the First Amendment and restrict worthwhile speech. It was within that context that Justice Black in his \textit{Yates} dissent pointed out the absurdity of these prosecutions and suggested a First Amendment limit to admissibility of speech to prove conspiracy charges.

Despite Justice Black’s observations, the terrorist attacks of September 11, 2001, digital age communicative realities, and the concatenation of the two in online

\textsuperscript{161} 390 U.S. 29 (1968).
\textsuperscript{162} \textit{Id.} at 31 (Douglas, J., dissenting); \textit{see also} \textit{Samuels v. Mackell}, 401 U.S. 66, 75 (1971) (Douglas, J., concurring).
\textsuperscript{163} Hugo Black, \textit{The Bill of Rights}, 35 N.Y.U. L. Rev. 865, 874, 879 (1960) (“arguing that “[t]he phrase ‘Congress shall make no law’ is composed of plain words, easily understood” and that the language is “absolute”).
\textsuperscript{167} Justice Frankfurter addressed this conflict in \textit{Dennis v. United States}. 341 U.S. 494, 519-42 (1951). Although recognizing that First Amendment interests were threatened, he deferred to legislatures’ declarations that the public safety and national security interests underlying conspiracy law should prevail. \textit{Id.} at 542. Similarly, Ali al-Tamimi was given a life sentence for telling others that the time had come to fight jihad. The judge failed to see the implications for free speech, stating after the trial that the case did not “violate any of Timimi’s First Amendment rights. This is not a case about speech. This is a case about intent.” Markon, \textit{supra} note 151.
“recruitment” speech has given new impetus to the use of the system of modern criminal conspiracy. Having largely defeated Al Qaeda as a hierarchical, physical structure, the government is now turning its attention to Al Qaeda as an ideology. The government’s primary concern is that the Al Qaeda brand is distributed over the Internet, is particularly effective in gaining “homegrown” adherents in the United States, and will lead these adherents to perform actual violent acts.

Specifically, for example, prosecutors are attempting to establish that two or more “homegrown” terrorist “wannabes” in the United States can have as their co-conspirators Al Qaeda leader Ayman al-Zawahiri and (before he was killed) Osama bin Laden simply because the wannabes found Al Qaeda’s platform on the Internet, or heard it from someone else, and adopted it as their own. No actual connection between the men and Al Qaeda need exist.

This move is due in part to the persistent threat posed by terrorism combined with the new technological abilities in the digital age to form novel types of suspicious, disturbing, or criminal combinations (real or believed) and law enforcement’s ability to detect them. It is also due to the increasing focus on homegrown terrorists—as the wars in Iraq and Afghanistan wind down, national security is increasingly domesticated. Conspiracy law lies at the heart of the governmental response in this context.

Justice Holmes in 1925 wrote that “every idea is an incitement.” He meant that the purpose of speech is to persuade, therefore restricting speech because it might persuade someone to adopt an unpopular view should not be countenanced. We have the right to persuade people through speech to adopt an anarchist or Communist viewpoint. Do we have the right to persuade people to adopt a jihadist viewpoint, or even Al Qaeda’s outlook?

171 Government’s Opposition to Defendant’s Motion to Dismiss Portions of Counts One through Three of the Second Superseding Indictment, United States v. Mehanna, 2011 WL 3511226 (D.Mass July 29, 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.”); United States v. Kassir, 2009 WL 2913651, * 1, 9 n.7 (S.D.N.Y.) (even assuming that defendant’s “sharing al Qaeda’s ideology” merely coincidentally was sanctioned by al Qaeda, the material support statute “can criminalize the distribution of certain written materials,” which includes “jihad propaganda.”); United States v. Amawi, 552 F.Sup.2d 669, 671 (N.D.Ohio 2008) (defendants charged with conspiracy to provide material support to terrorism by distributing “how to” videos and obtaining videos from the Internet even though “[t]he government [did] not allege that any organized terrorist or insurgent organization solicited the defendants to commit the crimes charged to them.”).
172 See United States v. Stewart, 686 F.3d 156 (2d Cir. 2012); United States v. Naidu, 2012 WL 1560443 (4th Cir.); United States v. Chanda, 675 F.3d 329 (4th Cir. 2012); United States v. El-Mezain, 664 F.3d 467 (5th Cir. 2011); United States v. Augustin, 661 F.3d 1105 (11th Cir. 2011); United States v. Al Kassar, 660 F.3d 108 (2d Cir. 2011); United States v. Jayyousi, 657 F.3d 1085 (11th Cir. 2011); United States v. Farhane, 634 F.3d 127 (2d Cir. 2011); United States v. Awan, 607 F.3d 306 (2d Cir. 2010); United States v. Al-Moayad, 545 F.3d 139 (2d Cir. 2008).
The Supreme Court has held that we do, a ruling that the government seems not to take seriously. Prosecutors continue to press charges against people who have solely or primarily merely spoken out in favor of Al Qaeda, jihad, or the Iraqi or Afghani insurgencies. They do so in three steps.

First, prosecutors charge a conspiracy. This allows them to obtain a conviction based upon speech alone because speech can be both actus reus and evidence of mens rea. Indeed, the same speech can prove both. Dealing as they often are with young males who communicate heavily online, prosecutors may have a wealth of digitally preserved lengthy conversations from which they can pick the most damning language. Because these defendants have often talked a good game, the government can go far in proving a conspiracy charge. Whether these men actually conspired to commit some substantive crime is in doubt. Dynamic systems of substantive crimes, like capital murder discussed below, ensure that doubt leads to acquittals. The uniform system of conspiracy law discourages this process. In fact, its very uniformity is based upon prosecution-friendly rules that discount juries’ doubt, leaving them to convict based on apparently—but not necessarily actually—damning evidence. Prosecutors, for example, do not need to prove any substantive act; rather, they need to convince juries that suspicious words can and should be inferred to indicate a criminal agreement.

Charging a conspiracy also allows prosecutors to admit the speech of terrorist luminaries such as Osama bin Laden and Ayman al-Zawahiri against the defendant, simply by alleging that these infamous terrorists are unindicted co-conspirators. In at least half of federal jurisdictions, it is only after the jury has heard this evidence that the judge will rule on whether these people were in fact co-conspirators, and therefore whether their speech is admissible. This post-hoc Confrontation Clause gatekeeper is just as useful (that is, useless) as the clichéd bell-ringing metaphor suggests.

Second, prosecutors will define key terms in their favor in the charging document. Jihad, for example, is invariably defined as “violent jihad,” and is said to mean “planning, facilitating, preparing for, and engaging in acts of physical violence, including murder, kidnapping, 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.” This definition would be fine if it were accurate. It is, however, only the most damning possible definition of many. Therefore, whenever a defendant says, “jihad is

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174 Holder v. Humanitarian Law Project, 130 S.Ct. 2705, 2722-23 (2010) (“Under the material-support statute, plaintiffs may say anything they wish on any topic.”).

175 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 F.2d 632, 638 (1st Cir. 1980); United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978); United States v. Petrozzillo, 548 F.2d 20 (1st Cir. 1977).

176 Criminal Indictment (Third Superseding) at 1-2, United States v. Sadequee, No. 1:06-CR-147-WSD-GCB (N.D.Ga. Dec. 9, 2008); see also 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.”).

177 Jihad also can refer to a body of legal doctrine, MICHAEL BONNER, JIHAD IN ISLAMIC HISTORY: DOCTRINES AND PRACTICE 3 (2006); “disputation and efforts made for the sake of God and in his cause”
obligatory,” the government attempts to interpret, without supporting evidence, that this means, “terrorism is obligatory.” Although it is typically the defense’s job to rebut this definition, when the government applies its own definition in its charging document, and persists in its argument that whenever the defendant says “jihad,” he means “terrorism,” the government is defining terms in its favor rather than offering proof that the defendant actually meant “terrorism.” This poisons the jury and is incredibly difficult, if not impossible, for the defense to dissociate the defendant from the government’s definition.

Third, the government presents pseudo-experts to testify as all-knowing fonts of knowledge on Al Qaeda, terrorism in general, Middle East politics, the Internet, and the nature of recruitment speech. They are, as Isaiah Berlin might say, hedgehogs for the war on terror in the digital age. These experts seek to testify that they have read or listened to the defendant’s recorded conversations, that the defendant fits the profile of an extremist or violent jihadi, and that the defendant therefore would engage in violent criminal conduct when given the opportunity.

The experts will go so far as to testify that by reading about Al Qaeda online, and adopting Al Qaeda’s viewpoint, a person can literally become part of the Al Qaeda conspiracy, despite the fact that he has never communicated or otherwise been in contact with any actual Al Qaeda member. One of the government’s favorite hedgehogs, Evan Kohlmann, has testified that al Qaeda is not just an organization. Al Qaeda also views itself as an ideology. It hopes to encourage people around the world who are unable to travel to places like Afghanistan or Somalia or wherever else, it hopes to encourage those people to do what they can at home.

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.

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181 It is the perceived danger of ideas that drive many government stings today. After the sentencing of two terrorism defendants in 2008, the prosecuting attorney was asked whether the defendants were connected in any substantive way. His response: “Well, we didn’t have the evidence of that, but he had the ideology.” Petra Bartosiewicz, To Catch a Terrorist, HARPER’S MAGAZINE, August 2011, available at http://harpers.org/archive/2011/08/to-catch-a-terrorist/.
behind them. If you follow the same methodology and the same ideology, then you too can be al Qaeda.\textsuperscript{183}

This is important for one immediate and one downstream reason. Immediately, such terrorism-related indictments are outcome unreliable, and must be especially so when the charges are only or primarily conspiracy charges. Some high profile cases, discussed below, and the twentieth-century history of conspiracy-speech cases suggest that the government often overreaches and pursues innocent, if unpopular, people.

Downstream, the government’s success in using the system of modern criminal conspiracy in the terrorism context means that conspiracy to support a drug cartel may be pressed against someone who speaks out against the war on drugs. Conspiracy to assault the president may be charged to someone critical of the administration. Conspiracy to violate tax laws may be used to go after innocent tax protestors. The uniform system of modern criminal conspiracy provides for a broadly discretionary crime of chameleon-like hue. The risk is that the decision to prosecute will be made less on whether a crime has been committed (or, more narrowly, whether there is a public safety danger) and more on whether a person’s speech and conduct are unpopular. The fact of prosecutorial confirmation bias,\textsuperscript{184} and thus good-faith but mistaken prosecutions, means that systemic checks on prosecutorial bad faith (rather than across the board reductions in discretion) would not necessarily lower this decisional risk.

The case of Sami Omar Al-Hussayen is exemplary. Al-Hussayen was a doctoral student in computer science at the University of Idaho\textsuperscript{185} when, in 2004, he was charged with providing and conspiring to provide material support to Hamas, a designated Foreign Terrorist Organization (“FTO”).\textsuperscript{186}

His indictment indicated that between 1994 and 2003, al-Hussayen provided “expert advice and assistance, communications equipment, currency, monetary instruments, financial services and personnel.”\textsuperscript{187} He did so “by, among other things, creating and maintaining internet websites and other internet media designed to recruit mujahideen and raise funds for violent jihad in Israel, Chechnya and other places.”\textsuperscript{188} Then-attorney general John Ashcroft, upon al-Hussayen’s arrest, called the defendant part of “a terrorist threat to Americans that is fanatical, and it is fierce.”\textsuperscript{189}

The indictment detailed that al-Hussayen “helped create, operate and maintain various websites and internet media associated with” certain Islamic organizations\textsuperscript{190} that, said the government, had connections to Hamas. These websites and al-Hussayen’s assistance were used to support and justify violent jihad.\textsuperscript{191} For example, al-Hussayen

\begin{footnotes}
\item[187] Id.
\item[188] Id.
\item[189] O’Hagan, \textit{supra} note 185.
\item[191] Id.
\end{footnotes}
“published or broadcasted a wide variety of speeches, lectures and articles justifying and glorifying violent jihad, as well as graphic videos depicting mujahideen and other subjects relating to violent jihad, with the intent to inspire viewers to engage in and provide financial support for violent jihad.”

One of the websites with which al-Hussayen was involved contained a hyperlink to another website that solicited donations for Hamas. On that same website and another, users were “invited to sign up for an internet e-mail group, maintained and moderated by Al-Hussayen and others, in order to obtain ‘news’ of violent jihad on Chechnya.” As an administrator, al-Hussayen had the authority to accept, retain and delete messages posted to the group. The group grew to 2,400 people, and materials distributed included the “Virtues of Jihad” and instructions on how to train for jihad.

At trial, the government argued that al-Hussayen had a “dual persona. One face to the public and a private face of extreme jihad.” It defined “violent jihad” as the taking of action against persons or governments that are deemed to be enemies of a fundamentalist version of Islam. Historically, violent jihad has included armed conflicts and other violence in numerous areas of the world, including Afghanistan, Chechnya, Israel, the Philippines and Indonesia. The armed conflicts in these geographic areas and elsewhere have involved murder, maiming, kidnapping, and destruction of property.

The indictment and the government’s opening statement caused one juror to believe that al-Hussayen was “going to be in jail for life.”

At trial, the case began to collapse. The government argued that al-Hussayen’s “fingerprints were intricately involved in the building of Web sites that called on young people to go and kill themselves’ and to make donations for attacks.” In the event, however, there was no evidence that the websites actually recruited people, or that al-Hussayen believed their jihadi message. Furthermore, the defense argued that the hyperlinks from al-Hussayen’s website to the website that facilitated donations to Hamas were removed before al-Hussayen became involved. Finally, the websites that al-Hussayen volunteered for were those of Muslim charities. The government alleged that buried deep within them were a handful of violent messages—written by people

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192 Id.
193 Id. at 8.
194 Id. at 9.
195 Id. at 9.
196 Id. at 9.
197 Id. at 10.
198 O’Hagan, supra note 185.
200 O’Hagan, supra note 185.
201 Id.
202 Id.
203 Id.
204 Id.
other than al-Hussayen—that encouraged attacks on the United States and donations to terrorist organizations.205

By the end of the trial, the juror who thought al-Hussayen would be going away for life had changed his mind. In the course of the trial, he had heard no evidence that al-Hussayen supported terrorism.206 The government’s case, he said, “was a real stretch.”207 The entire jury agreed, acquitting al-Hussayen of all the terrorism charges after only a few hours of deliberation.208

Al-Hussayen’s case is not an aberration. In late 2011, Jubair Ahmad was charged with providing material support to Lashkar-e-Taiba (LeT), an FTO.209 He pleaded guilty to providing material support “by producing and posting an LeT propaganda video glorifying violent jihad.”210 For this five-minute video, which took him one day to produce, he received a twelve-year prison sentence.211 Ali al-Tamimi’s case is another example. Al-Tamimi is a Muslim cleric who was convicted and given a life sentence for telling a group of younger Muslims, five days after 9/11, that the “time had come” for them to leave the United States to fight jihad.212 Tarek Mehanna’s case is another. He was convicted of conspiring to provide material support to Al Qaeda in part by translating religious texts relating to jihad that were publicly available online.213 The government seems to have acknowledged that Mehanna never had any connection to Al Qaeda or any other FTO, but that Osama bin Laden was an unindicted coconspirator because he issued a worldwide call to help al Qaeda, which Mehanna might have heard and therefore followed.214

The 2010 Supreme Court case Holder v. Humanitarian Law Project (“HLP”) has received much attention from those concerned with its First Amendment implications.215 In that case, a United Nations-recognized American organization wanted to train designated FTOs to pursue their grievances in lawful, non-violent ways, in part by petitioning to bodies such as the U.N. They asked for a declaratory injunction from the Court, which ultimately found that providing this training would constitute material support to an FTO.

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205 Id.
206 Id.
207 Id.
208 Id.
212 Markon, supra note 151.
Although criticized by First Amendment advocates,\(^\text{217}\) *HLP* on its surface reasserted extant First Amendment rights in a way that could, if the government’s concern about terrorism-advocacy speech is well founded,\(^\text{218}\) threaten national security. The Court reiterated that the First Amendment allows people to voice support for FTOs and to be members of an FTO as long as they commit no crime.\(^\text{219}\) As the Ahmad and Mehanna cases reveal, however, this surface reading of *HLP* has not taken hold in prosecutors’ minds—they continue to initiate material support charges where pure speech is at issue. Either *HLP* is not being taken seriously, or two constitutional rights—speaking in favor of an FTO and being a member in that FTO—make one constitutional wrong if exercised together. The Ahmad case stands for the proposition that one cannot legally be a member of an FTO and advocate for it. The Mehanna case indicates that even when one is not a member of an FTO and has even had no contact with an FTO, pro-jihadi speech may be the subject of indictment. In this regard, then, the material support statute is producing the perverse results seen in *Dennis, Yates*, and the 1919 cases, which is that although the First Amendment protects politically-oriented speech, it does not do so in the face of conspiracy charges if the speaker is part of an unpopular or outlawed group.\(^\text{220}\)

The application of conspiracy law in the war on terror illustrates the concatenation of four individual concerns that illuminate the system of modern criminal conspiracy. First is the material support statute and its interpretations. Much like the Espionage Act and Smith Act before it, the material support statute protects unpopular speech, except when it does not, that is, when the speech is made as part of an organized attempt to exhort people to adopt an unpopular (and potentially dangerous) viewpoint.\(^\text{221}\) Second is the material support law as applied to speech. The government is concerned with “recruitment” speech, especially online, and has been successful in obtaining convictions for such speech as material support. Recruitment speech to one person, however, is advocacy or newsworthy information to another. Furthermore, recruitment is a form of incitement that falls short of *Brandenburg*’s limit on speech freedom, and evokes Justice Holmes’ comment, “Every idea is an incitement.”\(^\text{222}\) Third is the conceptualization of groups like Al Qaeda not as groups, but as ideologies. If someone adopts the ideology, he becomes part of the group. This is contrary to traditional speech and conspiracy law,

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\(^{219}\) 130 S.Ct. 2705, 2722-23 (2010).

\(^{220}\) See Harcourt, supra note 217, at 364 n.61 (in light of *Holder v. Humanitarian Law Project*, “arguably the fear surrounding terrorism and some Court decisions surrounding the Patriot Act have us sliding back toward the era of Dennis and Alien and Sedition Acts.”).


and implies systemic threats to a number of evidentiary rules as well as the Confrontation Clause. Fourth is the fact that exhortation or advocacy is being styled as an agreement to do something illegal and beyond the mere exhortation. This is the evidence upon which conspiratorial agreements are inferred, and it leads to First Amendment concerns and outcome reliability problems. These issues are compounded by conspiracy’s avoidance of Confrontation Clause and Fed. R. Evid 401, 403, and 404 concerns, and give substance to the system of modern criminal conspiracy.

VI. THE SYSTEM OF MODERN CRIMINAL CONSPIRACY

Modern criminal conspiracy appears to be similar to its prior, limited iterations, including what one commentator in 1921 called the “Seventeenth Century Rule in Conspiracy.”223 Put simply, conspiracy is an inchoate crime, meaning that it looks toward the commission of a substantive crime.224 Its usual elements are an agreement to commit a crime,225 an overt act taken in furtherance of the agreement,226 and the intent both to agree and to commit the conspiracy’s substantive target crime.227

Although these elements are apparently separate, their details reveal substantial overlap that undermines the traditional normative, constitutional, and evidentiary rules mentioned throughout this article. This overlap helps to create the systemic problems that I detail below. These problems are the problems of uniform systems,228 described as such because their internal components—in the case of conspiracy, evidence, elements, and evidentiary and constitutional rules that determine what types of evidence can be used to prove which elements—do not result in any division of labor. Where a crime’s elements are supposed to do different things (a killing is an actus reus and a defendant’s mens rea indicates her guilty state of mind), uniform systems with substantial elemental overlap lack a division of labor, which produces unreliable or erroneous outcomes.

In an automobile factory, for example, different raw materials are used to produce different parts of a car. Rubber is used for the tires, steel for the chassis, and cloth and leather for the interior. This division of labor produces a car that operates very effectively. In the uniform system of modern conspiracy, there is no such division of labor; it is as though the car factory tries to make the entire car out of a single raw material. Using one raw material is like treating all forms of evidence the same. The result in the former is a very ineffective car; the result in the latter is a very unreliable or erroneous conviction that has probably violated a number of normative, constitutional, and evidentiary rules.

This is not to say that uniform systems, like conspiracy, never produce reliable outcomes, or that dynamic systems always do so. Often, for example, crimes comprising dynamic systems are supposedly proven on the strength of only a confession or

223 HARRISON, supra note 18, at 16.
226 Id.
228 See DONELLA H. MEADOWS, THINKING IN SYSTEMS: A PRIMER 3-4 (2008).
eyewitness identification. The probity that juries give to these forms of evidence, and their relative unreliability, mean that false convictions do occur, even in dynamic systems. Similarly, many conspiracy charges are well grounded, and their evidence is reliable such that convictions are fair and accurate. These outcomes, however, do not depend primarily on the nature of the systems involved. Rather, they depend upon externalities such as the perceived reliability of certain types of evidence or the wisdom of a prosecutor’s charging decision. My argument is that the uniform system of conspiracy qua system lacks the checks that inhere in dynamic systems. This increases the range of prosecutorial discretion, changes the standards governing admission of evidence to facilitate the admission of inculpatory but unreliable evidence, and impoverishes systemic support for normative, constitutional, and evidentiary rules. The result is that the system of conspiracy law is more likely to produce unreliable outcomes than dynamic systems, namely that unpopular ideas and the speech that expresses them are increasingly ready subjects of prosecution.

This is also not to discount the argument that because conspiracies are often formed in secret, with little physical evidence, the law must be broader to capture dangerous people. While I am skeptical of the merits of this argument (is it not merely a justification for denying people their constitutional rights, playing loose with rules of evidence, and eliding traditional criminal law norms?), I also recognize that conspiracies can be dangerous and that the government should have the tools necessary to thwart them. I refer the reader to Part VII, below, in which I set forth a number of reforms that can preserve the government’s role in ensuring public safety while infusing conspiracy’s uniform system with some dynamism that can increasingly protect individuals’ rights. There is in my opinion no zero sum game between public safety and individual rights, and the reforms I put forward—most of which have been proven workable in the real world—are Pareto improvements.

A. CONSPIRACY’S ELEMENTS

1. AGREEMENT

An agreement to commit a crime lies at the heart of conspiracy law. It is a necessary actus reus and can also indicate the mens rea of the conspirators. Circumstantial evidence is admissible to prove an agreement. There need not be an explicit offer and acceptance to engage in a criminal conspiracy; the agreement may be

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230 United States v. Page, 580 F.2d 916, 920 (7th Cir. 1978) (“Conspiracies are by their nature carried out in secret, and direct evidence of agreement rarely is possible. Circumstantial evidence is permissible since as a practical matter that evidence is often all that exists.”).

231 Ianelli v. United States, 420 U.S. 770, 777 (1975); Braverman v. United States, 317 U.S. 49, 53 (1942); Mendocino Env. Ctr. v. Mendocino County, 192 F.3d 1283, 1301 (9th Cir. 1999); United States v. Roberts, 14 F.3d 502, 511 (10th Cir. 1993).


inferred from evidence of concert of action among people who work together to achieve a common end.\textsuperscript{235} A tacit understanding may be sufficient,\textsuperscript{236} as may be “the working relationship between the parties that has never been articulated but nevertheless amounts to a joint criminal enterprise.”\textsuperscript{237}

As Professor Goldstein observed, “[t]he illusory quality of agreement is increased by the fact that it, like intent, must inevitably be based upon assumptions about what people acting in certain ways must have had in mind.”\textsuperscript{238} Although mere presence, guilty knowledge, and even close association with an alleged co-conspirator are insufficient on their own to prove a conspiracy,\textsuperscript{239} they may be considered to raise a permissible inference of participation in a conspiracy.\textsuperscript{240} By piling on evidence of “bad” speech and associations, prosecutors can paint a picture of a conspiracy where in reality there is none.\textsuperscript{241} Return to the example of Tarek Mehanna, who was convicted of providing material support to Al Qaeda. In that case, the government introduced the following evidence: dozens of pictures of the burning World Trade Center and Osama bin Laden; statements the defendant made that were sympathetic to insurgent fighters in Iraq; angry and violent statements made about U.S. servicemen who were killed, in light of their comrades’ rape, mutilation, and murder of a fourteen-year-old Iraqi girl, and the murder of her family; the defendant’s friend’s trip to Fallujah, Iraq, which the defendant could have joined but did not; and another friend’s fighting in Somalia on behalf of Islamic insurgents and the friend’s invitation to the defendant to join (which the defendant rejected).\textsuperscript{242} All of this “bad” evidence may have convinced the jury that the defendant must have been part of some conspiracy to do some crime.

This presents difficulties for juries. How can they determine what is an agreement and what is mere presence or close association? Assuming jurors are able to do so, how are they to process the apparent contradiction that presence or association cannot be used alone to prove an agreement, but may be used to infer participation in the conspiracy? These problems are exacerbated by the fact that conspiracy is believed to be characterized by secrecy and is therefore usually difficult to prove except by inferences drawn from the conduct of the parties.\textsuperscript{243}

\textsuperscript{235} American Tobacco v. United States, 328 U.S. 781, 809-10 (1945); United States v. Lopez, 979 F.2d 1024, 1029 (5th Cir. 1992); United States v. Hegwood, 977 F.2d 492, 497 (9th Cir. 1992); United States v. Simon, 839 F.2d 1461, 1469 (11th Cir. 1988); Wright, supra note 26 ("generally speaking, there need not be any actual meeting or consultation, and . . . the agreement is to be inferred from acts furnishing a presumption of a common design.").

\textsuperscript{236} 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. Concerni, 957 F.2d 942 (1st Cir. 1991).

\textsuperscript{237} United States v. Wiener, 3 F.3d 17, 21 (1st Cir. 1993); see also United States v. Townsend, 924 F.2d 1385 (7th Cir. 1991).

\textsuperscript{238} Abraham S. Goldstein, Conspiracy to Defraud the United States, 68 YALE L. J. 405, 410 (1959).

\textsuperscript{239} United States v. Lyons, 53 F.3d 1198, 1201 (11th Cir. 1995).

\textsuperscript{240} United States v. Hernandez, 896 F.2d 513, 518 (11th Cir. 1990).

\textsuperscript{241} There has, in fact, been confusion about what agreement conceptually entails. Theodore W. Cousens, Agreement as an Element in Conspiracy, 23 VA. L. REV. 898, 909 (1937).

\textsuperscript{242} This, indeed, was much of the evidence against Tarek Mehanna.

The practical results of these problems are twofold. First, prosecutors will introduce as massive an amount of evidence as possible in the hope that more evidence of presence, knowledge, and association will inundate jurors and compel them to find an agreement. This rests on an *a priori* assumption that a conspiracy exists. “The trial becomes a vehicle for constant shaping and forming of the crime, through colloquies among court and counsel, as each new item of evidence is offered by the prosecution to fill out an agreement whose scope will be unknown until the entire process is completed.” Second, given the apparent difficulty in proving conspiracies because of their secrecy, courts relax standards of proof in favor of the prosecution in ways that affect the relevance inquiry for determining admissibility of evidence. The fact that co-conspirator hearsay is admissible facilitates these processes and engenders Confrontation Clause problems. Observers have noted the existence of prosecution-friendly terrorism and drug “exceptions” that informally relax the rules of evidence in such cases. These exceptions can only be compounded by what can be called the conspiracy exception.

The agreement is the lynchpin element in conspiracy cases. This could have led courts either to make it more or less difficult to prove. Given the widely held belief that conspiracies are covert and therefore difficult to demonstrate, courts have given prosecutors great advantages in proving an agreement. This means that proof of agreement does not pose a significant barrier to a conspiracy charge, and is difficult for the defendant to disprove whenever multi-person activity is implicated in the criminal process.

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

245 See United States v. Dellosantos, 649 F.3d 109 (1st Cir. 2011); EMERSON, supra note 114, at 410 (“the wide sweep of a conspiracy charge, and the multiplicity of participants, make it possible for the prosecution to claim that broad areas of expression are relevant to the case.”).

246 Goldstein, supra note 238, at 412.

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

248 Id.


251 Blank, *supra* note 13, at 732 (arguing that the War on Terror upends delicate legal balances and thus threatens individual rights).


253 See Dennis v. United States, 341 U.S. 494, 568 (1951) (Jackson, J., concurring) (rejecting the clear and present danger test when a criminal charge involves “a well-organized, nationwide conspiracy.”).

254 EMERSON, supra note 114, at 409 (“the use of conspiracy prosecution relaxes the ordinary rules of evidence . . . and usually affords the prosecuting officials other significant advantages.”); Note, *Conspiracy and the First Amendment, supra* note 244, at 877-78.
II. OVERT ACT

In addition to an agreement, proof of a conspiracy usually requires an overt act.\textsuperscript{255} Its primary purpose is to show the operation of the conspiracy.\textsuperscript{256} Put another way, the requirement of an overt act represents an acknowledgement that talk (the agreement) is cheap. A second purpose of the overt act is to provide a \textit{locus poenitentiae}, or a chance for a conspirator to withdraw from the conspiracy without accruing any liability.\textsuperscript{257}

The overt act requirement is intended to limit the definition of conspiracies and ensure that only people who have actually conspired are indicted. The requirement should, for example, prevent mere braggarts from being prosecuted for “agreeing” to rob a bank or kill a political figure with whom they particularly disagree. In fact, it is so easy to prove an overt act that the element has little meaning at all.

The overt act need not be illegal in itself. It can be a very minor and constitutionally protected act, including making a phone call,\textsuperscript{258} traveling to another city,\textsuperscript{259} watching a video,\textsuperscript{260} sending a text message,\textsuperscript{261} or asking for directions.\textsuperscript{262} Almost anything that the prosecution can show furthered the alleged conspiracy in any way will be admitted in evidence. Because the overt act can be something very minor, its role as a \textit{locus poenitentiae} is not a strong one; if the government wants to prosecute someone, it can easily find an overt act to charge.\textsuperscript{263}

If the prosecution proves up an overt act, jurors may use it to infer an agreement.\textsuperscript{264} This is circular logic that collapses the separate \textit{actus reus} of agreement and overt act into one: we know that defendants agreed to rob a bank because they bought ski masks. Buying ski masks constitutes an overt act because we know the defendants agreed to rob a bank. This logic encourages proof by sheer volume of evidence, meaning that prosecutors will inundate the jury with massive amounts of apparently damning evidence that may not be probative.\textsuperscript{265} As \textit{actus reus} are piled into evidence, the prosecutor simultaneously and effortlessly proves the \textit{mens rea}, and vice versa.\textsuperscript{266}


\textsuperscript{256} United States v. Medina, 761 F.2d 12, 15 (1st Cir. 1985).

\textsuperscript{257} United States v. Olmstead, 5 F.2d 712, 714 (D.C.Wash. 1925).

\textsuperscript{258} Bartoli v. United States, 192 F.2d 130 (4th Cir. 1952).

\textsuperscript{259} United States v. Scallion, 533 F.2d 903, 911 (5th Cir. 1976).


\textsuperscript{263} Note, \textit{Conspiracy and the First Amendment}, supra note 244, at 878 (the overt act “requirement is seldom more than a formality.”).

\textsuperscript{264} Fowler v. United States, 131 S.Ct. 2045, 2060 n. 2 (2011) (Alito, J., dissenting).

\textsuperscript{265} See United States v. Dellosantos, 649 F.3d 109 (1st Cir. 2011).

\textsuperscript{266} Hon. Nathan R. Sobel, \textit{The Anticipatory Offenses in the New Penal Law: Solicitation, Conspiracy, Attempt and Facilitation}, 32 BROOK. L. REV. 257, 264 (1966) (“practical experience is convincing that the requisite \textit{mens rea} is extremely difficult to establish absent an overt act which signals the intent to move the project forward from talk to action.”).
Protected speech can be used as an overt act. A defendant’s statement, “the banking system is unjust and we need to do everything we can to undermine it,” may be relevant to proving motive or intent to form a conspiracy to rob a bank. To say that this statement furthers the conspiracy, and is therefore an overt act, is often a tenuous argument, but one that courts accept. Courts also accept evidence that might normally violate Fed R. Evid. 403 and Rule 404. Indeed, the same set of evidence may be simultaneously protected speech, unfairly prejudicial, confusing, or misleading evidence, evidence of prior bad acts, and character evidence, but admitted in conspiracy cases, such that many constitutional or evidentiary rules are violated at once. Consider again Tarek Mehanna. The many photographs, hateful discussion regarding U.S. servicemembers, and so forth were all prejudicial, and given their amount were likely unfairly prejudicial. This evidence may also suggest that the defendant’s character is one of violent aggression. Finally, hateful discussion, as long as it is not intended and likely to lead to imminent lawless action, is normally protected by the First Amendment. In conspiracy cases, all of these rules can be avoided—or violated—at once.

III. Mens Rea

As an inchoate crime, proving conspiracy’s mens rea is thought to pose particularly salient evidentiary and outcome reliability problems. Without a substantive act, there is little substantive evidence, such as a dead body, a brick of drugs, or a crate of guns. This lack of solid evidence results in the elision of the traditional criminal law norm that mens rea and actus reus are separate concepts. The law elides this norm by locating proof of both the actus reus of the agreement and mens rea in the same, speech-based body of evidence. Relative to a dead body or brick of drugs, such evidence is unreliable.

The concepts of actus reus and mens rea are meant to perform different tasks. The actus reus is meant to ensure that an act that is prohibited actually took place. Mens rea is meant to ensure that if the act took place, the actor had a guilty state of mind. The two concepts have, for good reason, been conceptually separated from each other. The system of modern conspiracy undermines that separation.

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267 United States v. Elliott, 571 F.2d 880, 887 n.4 (5th Cir. 1978) (words of encouragement may be an overt act).
268 United States v. Carrillo-Lopez, 92 Fed.Appx. 511, 512 (9th Cir. 2004); see also United States v. Gougis, 432 F.3d 735, 743 (7th Cir. 2005).
272 EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 107 (London, Printed by M. Flesher for W. Lee & D. Pakeman 1644) (Lord Coke developed the principle, actus non facit reum nisi mens sit rea, or “an act does not make a person guilty unless (their) mind is also guilty.”); 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.1(a), at 239 (2d ed. 2003).
B. ON THE MERGING OF ELEMENTS

Conspiracy is an inchoate crime,\textsuperscript{274} which means that no criminal act has taken place. Resting as it does on proof of an agreement,\textsuperscript{275} conspiracy is often proved only by speech.\textsuperscript{276} The question, therefore, is what defendants mean when they use certain words. Rarely is an agreement explicit ("Want to rob a bank?", followed by, "Yes! Let’s do it!"). To prove agreements by inference\textsuperscript{277} requires prosecutors to interpret speech. This interpretive process undermines the traditional separation between mens rea and actus reus. The traditional separation of the two concepts operates in part to provide a check on prosecutions; when this separation is obliterated, as it is in the conspiracy context, this check is obliterated along with it. Prosecutors are then able to use ideas—expressed in speech—to prove all elements of the crime, creating the uniform system of modern criminal conspiracy.

At times, the most convincing interpretation of defendants’ ideas is also the accurate one. A conversation between two friends, in which they explicitly discuss the money they already pooled, and whether they should use it to go into either the marijuana or cocaine trafficking business, is particularly and reliably damning because the speech contains obvious criminal meaning. The prosecutor needs to make only the most minimal and mundane logical inferences to make her case.

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

At still other times, defendants’ speech is ambiguous but highly suspicious. Consider two Muslim men, in their early twenties, both of whom are very religious and oppose the United States’ involvement in Iraq and Afghanistan. They chat online with each other and other like-minded Muslim men. The government suspects that these men plan to engage in some form of violent crime, and it records all of these chats.

In an often offhand way characteristic of online communication, the men talk about the virtues of jihad, and of how they feel that Muslims are obligated to “do jihad.” They support the insurgents in Iraq and Afghanistan, and share videos showing paramilitary operations against coalition forces. They believe that Osama bin Laden was a Muslim ideal because he gave up a life of wealth to fight against those who oppress Muslims. When they talk of 9/11, they support it as a symbol, but equivocate when it comes to whether it was acceptable that civilians were killed. They agree that they will do whatever they can to support Muslims.

These men are certainly engaging in provocative, suspicious, and unpopular speech. Have they conspired to do anything illegal? The answer to that question depends upon how prosecutors and defense counsel interpret their speech. Specifically, each side must define “jihad,” say what it means to “do jihad” and “do whatever it takes” to support

\textsuperscript{274} Boyle v. United States, 129 S.Ct 2237, 2246 (2009).
\textsuperscript{275} Iannelli v. United States, 420 U.S. 770, 778 n.10 (1975).
Muslims, and ultimately discern either criminal intent or mere unpopular speech from the suspects’ support for bin Laden and 9/11. The uniform system of modern conspiracy fails to guide prosecutors’ discretion with effective gatekeepers. The results of this broad discretion are constitutional questions about the propriety of charging, undermined individual constitutional rights, and undermined evidentiary rules that may lead to erroneous outcomes.

The constitutional and evidentiary concerns arising in modern conspiracy combine to undermine traditional criminal law norms. For example, consider the fact that the government must prove any crime beyond a reasonable doubt.\footnote{In re Winship, 397 U.S. 358 (1970).} Given the factual vagaries associated with proving the types of conspiracies discussed in this article, it should be relatively easy for defendants to offer alternative explanations for their statements and conduct, and thus obtain acquittals. The vagaries, in fact, operate to favor the government in meeting its burden of proof.

Consider the friends who want to purchase chicken, hamburger, and steak. They can certainly argue that they were just hungry. What if, however, two of the friends are actively involved in the movement to legalize marijuana, and a third, the defendant, is not? The political statements of the two friends can come in against the third—the First Amendment will protect no one in this case, and Fed. R. Evid. 801(d)(2)(E) will allow the political statements to be admissible to prove the defendant’s mens rea (because he will be said to be sympathetic to the drug trade), agreement (because the agreement can be inferred from this protected speech), and overt act (because his friends’ political statements can be viewed as encouragement). The defendant can argue that he was merely hungry, and was not conspiring to traffic drugs, but the judge will likely deny any motion to dismiss on First Amendment grounds, and will issue jury instructions to the effect that the jury need not concern itself with the First Amendment.\footnote{See United States v. Francis, 164 F.3d 120, 123 n. 4 (2d Cir. 1999).} Conspiracies are often secret and so not provable by explicit statements, agreements can be inferred from the entirety of the evidence, and overt acts can be exceedingly minor. To the extent that the jury does not nullify, these liberal iterations of evidentiary rules, absence of constitutional gatekeepers, and jury instructions will virtually ensure the jury finds a conspiracy beyond a reasonable doubt.

C. THE UNIFORM SYSTEM OF CONSPIRACY

The system of modern conspiracy law is comparatively uniform, meaning not only that its elements merge, but that all of its component parts—elements, evidence, and gatekeepers—fail to produce a dynamic system in which unique parts perform different duties that combine to produce a good result. Put another way, if a certain level of diversity in a system produces good outcomes,\footnote{See Scott E. Page, Diversity and Complexity 8-9 (2011).} a lack of real diversity is likely to produce bad outcomes. This is the system of modern conspiracy, which has the following specific characteristics:

- All elements may be proven simultaneously usually by the same pieces of evidence.
• All pieces of evidence may simultaneously serve to prove a particular element or elements.
• Proof of one element is usually proof of all other elements.
• Constitutional and evidentiary gatekeepers between evidence and elements are absent. This means that the First Amendment does not operate to protect speech’s use as evidence, the Confrontation Clause does not restrict the admissibility of statements of alleged co-conspirators, even if they are available to testify, and evidence normally limited by evidentiary rules dealing with relevance, unfair prejudice, and character evidence becomes normally admissible.

Consider a two-count indictment for conspiracy to provide material support and providing material support to Al Qaeda. The material support in this case is the translation from Arabic to English of religious texts that are publicly available online and, although they do not reference Al Qaeda or terrorist acts such as 9/11, are widely accepted as “pro-jihad” texts. The defendant has never met, communicated with, or taken any direction from any member of Al Qaeda. On numerous occasions, the defendant has explicitly disavowed violence. Along with some people he knows (none of whom ever met, communicated with, or took any direction from Al Qaeda), the defendant talked of the importance of translating these documents in hopes that they will “lead to action.” One friend tells the defendant that someone else jokingly called them Al Qaeda’s “media wing.” These conversations comprise the conspiracy count. To bolster its case, the government closes the trial with the admission in evidence of twenty-nine photographs of the burning World Trade Center and Osama bin Laden, all found as thumbnails in the defendant’s computer’s cached space (meaning that he did not actively download the images).

At trial, the government introduces the conversations as evidence that the defendant conspired to become Al Qaeda’s media wing. These conversations prove the defendant’s agreement and *mens rea*. The fact that he actually translated documents comprises the overt act. The court dismisses any question of the relevance of the documents, First Amendment protections on the translations or the conversations, any Confrontation Clause or hearsay issues concerning the fact that an alleged co-conspirator reported to the defendant that an unnamed third party called them Al Qaeda’s media wing, and any questions of unfair prejudice arising from the fact that the reliability of this third party was not established and that this person appeared to be joking when he made his statement. The defendant is convicted of both counts.281

The results of conspiracy’s systemic uniformity are twofold: (1) a merging of conspiracy’s elements, which eliminates the requirement of proving discrete elements, each of which is traditionally necessary for imposing liability; and (2), following from the first, an inability to perceive, and thereby challenge, constitutional and evidentiary violations. Put another way, the elimination of constitutional and evidentiary boundaries produces a system in which all evidence is deemed relevant to prove all elements, and evidence of one element is evidence of all of them. With no boundaries, there can be no cognizable legal violation.

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281 This example is the real case of Tarek Mehanna. *See* United States v. Mehanna, 2011 WL 3652524 (D.Mass).
The system of modern conspiracy thus implies the violation of a number of general constitutional and specific criminal law norms. First is the norm that the law imposes checks and balances on actors within the legal system. Conspiracy law provides relatively unlimited discretion to prosecutors, much like Whren v. United States\textsuperscript{282} provides similar discretion to police officers in making pretextual traffic stops. In that case, police effected an automobile stop for a minor traffic infraction. They were in a “high-crime” area and hoped to find drugs, which they did. The automobile’s occupants were African-American, so Whren has come to represent the problem of racial profiling in traffic stops and the fact that discretion enables such profiling.

In holding that the police may effect a traffic stop for any pretextual reason, as long as they have cause to make the stop (and given the highly regulated nature of cars and driving, they virtually always have cause), Whren also stands for the proposition that broad discretion in policing produces abuses but also obscures constitutional issues (in Whren, the obscured issue was equal protection). In both Whren and conspiracy contexts, systems of broad discretion produce high levels of governmental abuse (or, just as important, the appearance of abuse) and outcome unreliability (in the form of innocent people charged and convicted) because gatekeeping evidentiary and constitutional rules are obscured and thus not cognizable. This is not to say that defendants do not notice these problems—many a pro se appellate brief contains non-starting arguments that should be taken seriously. Despite what the Court has said, Whren does implicate equal protection, just as McCleskey v. Kemp\textsuperscript{283} in which it was shown that African-Americans are sentenced to death at a higher rate than whites, could have been another successful equal protection case.\textsuperscript{284} Many conspiracy cases contain substantial First Amendment issues, as Justice Douglas observed in Epton v. New York.\textsuperscript{285} They also contain Confrontation Clause and hearsay issues, as the statements of alleged co-conspirators are admitted for their truth against the defendant, even if the declarant is available to testify.\textsuperscript{286} Thus far, few if any courts have given these claims merit.

**D. Dynamic Systems**

To further illustrate conspiracy law’s problematic uniform nature, consider the character of dynamic systems. Such systems have the following characteristics:

- Some or all elements are proven by discrete and different types of evidence.
- Only certain types of evidence may serve to prove a certain element or elements.
- Proof of one element may not be proof of any other element.
- Constitutional and evidentiary gatekeepers between evidence and elements limit the admission of evidence to ensure fairness for the suspect and the determination of truth.

\textsuperscript{283} 481 U.S. 279 (1987).
\textsuperscript{284} WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 121 (2011).
\textsuperscript{285} 390 U.S. 29 (1968).
\textsuperscript{286} See United States v. Cameron, 699 F.3d 621, 639-40 (1st Cir. 2012).
Dynamic systems, therefore, have effective gatekeepers that allow only certain types of evidence to be used to prove certain, discrete elements. These systems are, to put it another way, systems that silo types of evidence and crime’s various elements, whereas uniform systems are blobs, the same throughout, into which many types of evidence can be inserted at any point to prove all of the crime’s elements. Uniform systems are problematic for two reasons. First, as noted above, they obscure the important normative, evidentiary, and constitutional rules associated with criminal law. Second, because many of these rules are designed to improve the truth-finding function of the criminal law, uniform systems produce comparatively more erroneous outcomes. For example, consider alleged bank robbing conspirators. Police are alerted to them because one gave a public speech, in which he declared, “the banking system is unjust and we need to do anything we can to undermine it!” Police saw a friend of his, later that day, purchase two ski masks that are popular among bank robbers. At trial for conspiracy, the ski masks are introduced as evidence. They are admitted as relevant because the charge is conspiracy, and the charge is conspiracy in part because ski masks were purchased. This circular, self-fulfilling logic is a hallmark of uniform systems; they lack internal checks and balances and produce erroneous outcomes.

Consider an exemplary dynamic system, a typical capital murder statute, which requires proof beyond a reasonable doubt of four primary elements. These elements are (1) unjustified killing or homicide; (2) acts making the killing premeditated and deliberate; (3) at least one statutory aggravator constituting capital murder; and (4) aggravating factors outweigh the mitigating factors. Each of these elements is designed to prove a discrete fact necessary for criminal liability to attach. There must have been an actual killing, the defendant had to have had the requisite mens rea, the circumstances of the killing had to have been of a particular nature to justify capital punishment, and the circumstances cannot overwhelmingly suggest mitigating factors. Each element performs a different task.

Just as each element in a dynamic system is siloed and performs a different task, only certain types of evidence are relevant to proving each element. A dead body or evidence thereof may prove element (1), but it cannot prove the other elements. A particularly heinous or gruesome murder scene can prove element (3), but it cannot prove that the defendant caused the death (a sub-element of element (1)) or caused the death with the requisite mens rea. Mitigating circumstances may defeat the imposition of capital punishment, pursuant to element (4), but they may not determine a sub-element of element (1), namely that the killing was unjustified.

Between these forms of evidence and elements are important gatekeepers. For example, under Fed. R. Evid. 404, a defendant’s character is not normally admissible to prove his mens rea, and it is certainly not relevant or probative to prove element (1). Under Fed. R. Evid. 403, certain types of evidence can be unfairly prejudicial, confusing, or misleading, and will therefore be inadmissible to prove anything. Under Fed. R. Evid. 801 and the Confrontation Clause, a statement made by an absent third party, testified to by another witness, will not normally be admissible.

287 Leona D. Jochnowitz, Missed or Foregone Mitigation: Analyzing Claimed Error in Missouri Capital Clemency Cases, 46 NO. 3 CRIM. LAW BULLETIN ART 1, n. 71 (2010).
288 Id.
Finally, as has been suggested, the first two elements comprising capital murder can be further broken into sub-elements. Element (1) requires (a) a death, (b) caused by the defendant, (c) that is unjustified. Element (2) requires (a) acts, (b) done by the defendant, (c) exhibiting premeditation and deliberation. These sub-elements contribute to the murder statute’s dynamism because each of them may be proven only by certain types of evidence.

And so, one characteristic of dynamic systems is that they tend to become more dynamic over time. Uniform systems, on the other hand, tend toward greater uniformity. However difficult it may be to prove a conspiracy’s agreement, it has, over time, become easier to prove, as courts permit inferences of agreements, however much of a stretch those inferences are. Overt acts, in turn, can be the most minor of acts, and can even be proven by speech. While too much dynamism can cripple a system (this is why pure democracy, rather than representative democracy, does not function well) just as too much uniformity can lead to perverse outcomes (this is why pure dictatorships do not function well), in the criminal law too much dynamism works in favor of the defendant, who does not have the burden of proof. Too much uniformity works in favor of the government, which finds it comparatively easy to prove its case. In the case of conspiracy, which is excessively uniform, the challenge is to introduce dynamism so that the balance between public safety and defendants’ rights and outcome reliability is restored.

VII. WHITHER THE SYSTEM OF MODERN CRIMINAL CONSPIRACY?

If the uniformity of the system of modern criminal conspiracy produces its normative, constitutional, and evidentiary failures, then systemic improvements can be made by creating dynamism. The more that functioning gatekeepers can be created and evidence and elements siloed, the more failures should be reduced. In this section, I offer three normative reforms that are already in partial legal force in conspiracy and the related area of treason law. This is not an exhaustive list, and it is beyond the scope of this article to propose and defend a holistic package of reforms. I will, however, present a brief evaluation of these reforms. I also propose a more theoretical (thus less realistic) reform that, because conspiracy is proven primarily by speech, is based on the First Amendment jurisprudence on speech integral to criminal conduct.

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

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289 Haupt v. United States, 330 U.S. 631, 645 (1947) (“The requirement of an overt act is to make certain a treasonable project has moved from the realm of thought into the realm of action.”); Cramer v. United States, 325 U.S. 1, 8 n.7 (1945) (“an overt act . . . means some physical action done for the purpose of carrying out or affecting (sic) the treason.”); United States v. Werner, 247 F. 708, 710 (D.C.Pa. 1918) (“Words oral, written or printed, however treasonable, seditious or criminal of themselves, do not constitute an overt act of treason, within the definition of the crime.”); Ex parte Vallandigham, 28 F.Cas. 874, 886-87 (C.C.Ohio 1863) (“how is it possible that words, merely as such, should ‘amount’ to treason? The crime requires an overt act.”); but see Tom W. Bell, Treason, Technology, and Freedom of Expression, 37 ARIZ. ST. L.J. 999 (2005); Kristen Eichensehr, Treason’s Return. 116 YALE L.J. POCKET PART 229 (2007); Douglas A. Kash, The United States v. Adam Gadahn: A Case for Treason, 37 CAP. U. L. REV. 1, 23 (2008).
one-way siloing, because although speech would not be admissible to prove an overt act, conduct used to prove an overt act could still be admissible to infer an agreement. It is, however, a good partial solution.

Second, courts should adopt the salient points of the First Circuit’s opinion in United States v. Spock. In that case, the court addressed a criminal conspiracy conviction, proof of which was composed largely of protected speech. Concerned that such use might imply a First Amendment violation, the Court limited the use of speech to three situations. When an alleged agreement might be both legal (and political) and illegal, the First Circuit held that to prove a defendant’s intent to adhere to the illegal portions of the agreement, (1) there must be evidence of the “individual defendant’s prior or subsequent unambiguous statements,” (2) the individual defendant subsequently committed the very illegal act contemplated by the agreement, or (3) the individual defendant engaged in a subsequent act that was “clearly undertaken for the specific purpose of rendering effective the later illegal activity” that was advocated.

The Spock test itself is a gatekeeper with many avenues running through it. It suggests the Confrontation Clause problems inherent in conspiracy law, as it focuses on what the “individual defendant” has done. It clearly addresses Justice Black’s First Amendment concerns in Yates and Justice Douglas’ in Epton. It also implies awareness of Fed. R. Evid. 401 relevance issues because it ties the admissibility of ambiguous speech evidence to other sets of unambiguous evidence. Although conspiracy remains dependent on speech evidence, the Spock court recognized that conspiracy law needed a virtual dead body or smoking gun to assure that ambiguous speech is probative of criminal conduct. Courts other than the First Circuit should consider adopting its nuanced approach to the use of protected speech to prove a defendant’s mens rea.

Third, courts should require the government to prove that a conspiracy is dangerous in order for criminal liability to attach or to determine the grade of conspiracy. This defense appears in the Model Penal Code and in various forms in four state statutes. This reform would not provide a gatekeeper or siloing that is internal to the system of modern criminal conspiracy. It would, however, provide an external check that would encourage prosecutors not to seek charges, or grand juries not to indict, on the front end of the criminal justice process, provide those charged with a defense during the process, and juries a reason to acquit on the back end. A dangerousness requirement would therefore be both a formal and informal check on conspiracy’s systemic failures.

Solutions such as the treason-based reform may be the first-best solutions because they restructure the core of the system of criminal conspiracy. William Stuntz’ “uneasy relationship” between criminal justice and criminal procedure suggests that such core reforms are preferable to second-best reforms that create gatekeepers or third-best ones that create external defenses.

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290 United States v. Spock, 416 F.2d 165 (1st Cir. 1969).
291 Id. at 173.
292 MODEL PENAL CODE § 5.05(2); see also Wechsler, William Kenneth Jones, & Harold L. Korn, supra note 99, at 1029.
Such a first-best reform will, however, have little effect if not supported by second-best solutions that create gatekeepers. The Spock rule is such a second-best reform. It would not redefine conspiracy, which might be the most efficient of all solutions, but it would represent an important First Amendment prophylactic. Normative first-best redefinitions of conspiracy’s elements accompanied by second-best gatekeepers may comprise a system of criminal conspiracy that contains important checks and balances. Redundancy is a virtue and attribute of dynamic systems.

Third-best solutions—defenses such as the dangerousness requirement—provide a formal external check on a system that has failed and an informal check on a system that might be mistakenly engaged by prosecutors or grand juries. To rely on defenses alone is inefficient because they presume systemic failures and are non-responsive to fundamental problems. Any holistic reform package should not rely on third-bests, but third-bests can provide supplemental checks. If the system to be checked is itself designed to produce normatively, constitutionally, and evidentiarily just outcomes, then external defenses will be used rarely and only when necessary. They would not, therefore, produce greater inefficiency, and would be important to protecting defendants from relatively rare failures of the internally checked system.

There is another, broader and more theoretical, approach to gatekeeping and siloing that sounds in First Amendment jurisprudence. Speech integral to criminal conduct is not protected under the First Amendment. The term “integral” is not clearly defined in law, and matters greatly. “Integral” may mean speech that is necessary to achieving a criminal aim, facilitative of that aim, or merely related to that aim. The definition of “integral” could determine how much speech and what type of speech is protected and thus inadmissible, or unprotected and thus admissible to prove agreement, overt act, or intent.

The Supreme Court revived the integral speech category, first explicated in 1949, in United States v. Stevens, in which the Court held that certain depictions of animal cruelty were protected by the First Amendment. The Court did not, however, explain what the category meant, and mentioned it merely to illustrate that the First Amendment does not imply absolute protection for all speech.

In other cases, the Court raised each of the three possible definitions of integral speech. In New York v. Ferber, the Court held that child pornography was not protected because the market for this pornography “intrinsically related” to the underlying abuse, and was therefore “an integral part of the production of such materials.” This approach to defining integral speech would manage the effect in order to thwart the underlying illegal cause. In other words, child pornography itself was not intrinsically bad, but was made so because it provoked the victimization of children in the pornography’s

296 MEADOWS, supra note 228, at 3-4.
298 Giboney, 336 U.S. 490.
299 130 S.Ct. 1577, 1582, 1592 (2010).
300 Id. at 1584.
302 Id. at 762 n. 13 (“The act of selling these materials is guaranteeing that there will be additional abuse of children.”).
production. Although the Ferber Court reached the correct normative result, it confused the category of integral speech.\textsuperscript{303}

Integral speech is more correctly and elegantly an acausal, absolutist category.\textsuperscript{304} In Ashcroft v. Free Speech Coalition, the Court held that virtual child pornography was generally protected because it did not result in actual child sexual abuse.\textsuperscript{305} The Court could have given deference to Congress’ determination that virtual child pornography harms children in less direct ways.\textsuperscript{306} Instead, the Court implicitly rejected the Ferber analysis and stated that the law prohibiting child pornography unconstitutionally prohibited speech that was attached to no crime.\textsuperscript{307}

In Giboney v. Empire Storage & Ice Co., the Court first explicitly acknowledged the integral speech category.\textsuperscript{308} Although it adopted an acausal, absolutist approach, it left readers wanting a definition of integral speech. Giboney considered a labor dispute in which union members attempted to pressure a wholesale ice company to deal only with union peddlers.\textsuperscript{309} They engaged in conduct that was in violation of the state’s antitrade restraint law,\textsuperscript{310} and they also operated pickets that were peaceful and published only truthful information.\textsuperscript{311} Although they could have been separated, the Court found that these two activities—one illegal and one protected by the First Amendment—could not “be treated in isolation,”\textsuperscript{312} because the object of both was to compel Empire to stop selling ice to nonunion peddlers.\textsuperscript{313} The Court could have found, but did not, that the speech was protected, but not its associated illegal conduct.\textsuperscript{314}

Giboney and its progeny, then, present three possible definitions of integral speech: that which is necessary to executing illegal conduct,\textsuperscript{315} that which facilitates the illegal

\textsuperscript{303} See Eugene Volokh, Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones, 90 CORNELL L. REV. 1277, 1325 (2005) (Discussing Ferber, Volokh noted, “not all speech that provides a motive for illegal conduct can be outlawed simply because it is ‘an integral part of conduct in violation of a valid criminal statute.’”).\textsuperscript{304} See United States v. Spock, 416 F.2d 165, 170 (1st Cir. 1969) (“we start with the assumption that the defendants were not to be prevented from vigorous criticism of the government’s program merely because the natural consequences might be to interfere with it, or even to lead to unlawful action.”).\textsuperscript{305} 535 U.S. 234, 241 (2002).\textsuperscript{306} Id. at 241; see Holder v. Humanitarian Law Project, 130 S.Ct. 2705, 2727 (2010) (“That evaluation of the facts by the Executive, like Congress’s assessment, is entitled to deference.”); Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180, 247 (1997) (“Congress’ reasonable conclusions are entitled to deference”).\textsuperscript{307} Ashcroft, 535 U.S. at 250.\textsuperscript{308} 336 U.S. 490 (1949).\textsuperscript{309} Id. at 492.\textsuperscript{310} Id. at 491.\textsuperscript{311} Id. at 491, 493-94.\textsuperscript{312} Id. at 498.\textsuperscript{313} Id.\textsuperscript{314} United States v. Spock, 416 F.2d 165, 173 (1st Cir. 1969) (in which the First Circuit’s limited use of speech “responds to the legitimate apprehension. . .that the evil must be separable from the good without inhibiting legitimate association in an orderly society.”); Volokh, supra note 303, at 1317 (“If the course of conduct includes illegality, the theory would go, then the speech part of the course of conduct would be just as illegal as the action that the speech brings about. This might fit the facts of Giboney—in which the speaker was trying to pressure the employer into acting illegally—and of some of the lower court cases that cite Giboney. But such a reading would be inconsistent with Brandenburg, and with the modern repudiation of cases such as Schenck and Debs.”).\textsuperscript{315} See Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting).
and that which is related to the illegal conduct. Assuming that the law evolves a jurisprudence that limits the use of protected speech as evidence of a crime (a big assumption), the definition of integral speech could provide a useful guidepost. In a sort of Goldilocks logic, we might find that if only speech that is necessary to execute a crime is admissible as integral speech, then the rule excludes too much relevant and probative evidence. Conversely, if speech that is merely related to a crime is admissible, the rule would admit too much irrelevant and nonprobative evidence, which would threaten speech freedom. This is the jurisprudence we have today. We might find, ultimately, that the admissibility of facilitative speech (as well as necessary speech), but not related speech is just right. It admits substantially relevant and probative evidence—whatever its level of First Amendment protection—but excludes tangentially relevant speech. For example, if someone is accused of conspiracy to rob a bank, his necessary speech—“put the money in the bag”—would be clearly admissible. His facilitative speech—said to his co-conspirator, “let’s use Acme ski masks; they’re the most popular brand and so the hardest to trace back to us if they’re found”—would be admissible as well. Merely related speech—“the banking system creates world poverty and needs to be hobbled”—would remain protected as First Amendment speech because it would be inadmissible as evidence.

We may also limit the forms of speech admissible to prove an agreement. I distinguish between operational and aspirational speech. “Put all the small bills in a bag and give it to me” is operational speech and is quasi-conduct because it directly results in a change in the position of the teller, the money, and the bag just as if the bank robber were to have put the money in the bag himself. “If you were to steal money from the bank, you’d be striking a blow at the unjust banking system” is aspirational speech. It is meant to communicate and persuade, not to effect a specific change in any position.

This division of speech is reflected in Kent Greenawalt’s work. He divides speech into three categories. Situation-altering utterances are words that “directly alter[] the social environment by ‘doing’ something rather than telling something or recommending something.” Weak imperatives are “requests and encouragements that do not sharply alter the listener’s normative environment . . . [They] often indicate beliefs about values

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316 Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 456 (1978) (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)) (“[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”); see Rice v. Paladin Enters., Inc., 128 F.3d 233, 243 (4th Cir. 1997) (relying on Giboney in allowing liability for publishing a book that described how to commit contract murders); see also United States v. Savoie, 594 F. Supp. 678, 682, 685-86 (W.D. La. 1984) (relying on Giboney in issuing an injunction against, among other things, the distribution of any document explaining how taxpayers could “avoid the payment of, or to obtain the refund of, federal income taxes . . . based on the false proposition that wages, salaries or other forms of compensation for labor or services not specifically excluded from taxation under Title 26 of the United States Code are not taxable income”).

317 See Missouri v. Nat’l Org. for Women, 620 F.2d 1301, 1324 n.15 (8th Cir. 1980) (Gibson, J., dissenting) (arguing, citing Giboney, that NOW’s advocacy of a boycott of Missouri businesses, aimed at getting Missouri to ratify the Equal Rights Amendment, might be constitutionally punishable as an antitrust law violation); Searle v. Johnson, 646 P.2d 682, 685 (Utah 1982) (holding, citing Giboney, that the state Humane Society’s advocacy of a tourist boycott of a county, aimed at getting the county to improve its dog pound, could be constitutionally punishable as interference with prospective business advantage).

and facts and cannot always be disentangled from them.” Assertions of fact and value are what the name of the category implies, but Greenawalt notes the nuance between general assertions of fact—“Physical objects have gravitational force”—and motivational assertions, made to achieve an end—“The breeze from the window is making me cold.” Although the nature of speech ultimately exists on a continuum, these categories can serve as guideposts to thoughtfully exclude from and include in evidence certain forms of speech for certain purposes.

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

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

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

This meant that to be guilty of conspiracy at Nuremburg, one “had to have played a substantial role in planning the war, had knowledge of its illegality and intend that force be used, have been in a position to contribute to a decision to invade, and done these things between 1937 and 1939.” Nuremburg conspiracy had limits, but these limits were functional, rather than structural: the objections to using conspiracy at Nuremburg were the same ones against using conspiracy today, but the law “was not aimed at fringe participants, nor was it an attempt to punish mental behavior without any underlying crime having been completed. Rather, it was a procedural device to ensure successful prosecution of the most notorious war criminals.” The selection of

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320 Id. at 43.
321 Id. at 47.
322 Id. at 57, 69; Volokh, supra note 303, at 1328.
325 Id. at 1206 (one complaint was that people were being punished for their mere agreement, and that conspiracy was “essentially a thought crime.”).
326 Id. at 1137.
defendants depended upon them having committed significant acts; the advantage of conspiracy at Nuremburg was not to engage in a witch hunt of unpopular people, but to obtain evidentiary advantages against those who were clearly guilty of substantive crimes.327

At Nuremburg, then, essentially the same expansive system of conspiracy used today operated, but was limited by prosecutors’ decisions only to pursue those who had committed substantive crimes. Nobody was charged with conspiracy as a mere thought crime.328 The same conspiracy law is used today against those charged with crimes including conspiracy to provide material support to terrorists, and it raises the same due process concerns that existed at Nuremburg.329 Prosecutorial discretion does not provide the limit now that it did then. The system of modern criminal conspiracy suggests that systemic gatekeeping and siloing is necessary. This would produce a conspiracy law that increasingly resembles the dynamism of substantive crimes. To be sure, substantive criminal statutes contain their own normative, constitutional, and evidentiary failures. However, conspiracy’s obvious structural inadequacies, sustained critiques, prevalence of its use, and the non-cognizability of many of its failures are particular concerns that demand reform.

CONCLUSION

In 1925, Justice Holmes wrote, “every idea is an incitement.”330 While offering this spirited defense of broad First Amendment protections, he also, unintentionally, highlighted the central problem of modern criminal conspiracy, which is that if ideas can incite, then they can also be evidence of an agreement to do something more, something criminal.

The drift toward a system of general, deontological, and moral conspiracy law, instantiated and strengthened in nineteenth century labor strife, has led to conspiracy’s modern uniform nature, in which elements and the evidence in their proof merge, and evidentiary and constitutional gatekeepers perform virtually no functional role. The result is that the law gives prosecutors such great discretion to charge and prove a conspiracy that unpopular ideas and the speech that expresses them have become ready subjects of prosecution. The dangers of this are erroneous convictions and elision of important normative, evidentiary, and constitutional rules.

This article has traced conspiracy’s relevant history, defined its modern uniformity, and proposed four reforms that would create dynamism in the system. It is more important than ever to push these reforms, as conspiracy charges remain prevalent, their twentieth century applications reflect the prosecution of merely unpopular people, and the war on terror becomes a domestic police action, in which it is often difficult to distinguish between law-abiding protesters and criminal conspirators.

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327 Id. at 1138.
328 Id. at 1207.
329 Id. at 1238.