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Requiring Proof of Conspiratorial Dangerousness

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REQUIRING PROOF OF CONSPIRATORIAL DANGEROUSNESS

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Abstract

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

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

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

In his defense of criminal conspiracy law, Professor and former Acting Solicitor General Neal Kumar Katyal pointed to the “distinct evil” that are criminal conspiracies. He was citing the U.S. Supreme Court decision United States v. Recio to justify the fact that conspiracies to commit crimes may be punished whether or not the substantive crime results, and that conspiracies do, in fact, represent an evil to society separate from their substantive target crimes. Others have echoed Professor Katyal’s observation. Indeed, courts have long presumed that conspiracies present a distinct evil.

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

If the particular conduct charged to constitute a criminal attempt, solicitation or conspiracy is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this Section, the Court shall exercise its power under Section 6.11 to enter judgment and impose sentence for a crime of lower grade or degree or, in extreme cases, may dismiss the prosecution.

Four states—Arkansas, Colorado, New Jersey, and Pennsylvania—have passed laws inspired by section 5.05(2).

The Katyalians and Goldsteineans are both correct because each assumes a different data set. Professor Katyal described the discrete dangers of group conduct: groups tend toward extremes and submerge individuals’ interests to those of the group, and

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5 Conspiracy to Defraud the United States, 68 YALE L.J. 405, 414 (1959).
7 MODEL PENAL CODE § 5.05(2).
11 18 Pa.C.S.A. § 905(b) (2012).
individuals act with greater loyalty within the group and take more risks. These are, however, only non-normative descriptors of all group conduct. They say nothing about whether people in groups will tend toward extreme law-abidingness or extreme criminality. To correctly conclude that criminal conspiracies are distinct evils, Katyal must assume a data set composed of criminal groups—the very groups he defines as dangerous. His set cannot include the Elks, church congregations, running clubs, and so forth—groups that no one can argue present distinct evils.

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

Because criminal groups tend toward criminal extremes, the Katyalian exigency of criminalizing conspiracies as stand-alone crimes is more normatively correct than Goldsteinian skepticism. But this depends upon the assumption that conspiracy charges are outcome reliable (meaning primarily that innocent people are neither charged nor convicted). Critiques of conspiracy law from both the academy and judiciary suggest that this assumption is unfounded. These critiques amount to four points: the inchoate nature of conspiracy results in evidentiary uncertainties that lead to false convictions; the use of conspiracy to pursue politically unpopular groups provides an initial negative

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12 Katyal, supra note 1, at 1315-18.
15 Krulewitch v. United States, 336 U.S. 440, 446 (1949) (Jackson, J., concurring); United States v. Reynolds, 919 F.2d 435, 439 (7th Cir. 1990) (Judge Easterbrook lamenting that conspiracy add-ons are “inevitable because prosecutors seem to have conspiracy on their word processors as Count I; rare is the case omitting such a charge.”).
assumption as to the legitimacy of many conspiracy indictments; relaxed evidentiary standards in the conspiracy context undermine assurances of outcome reliability\textsuperscript{18}; and the application of conspiracy law implicates First Amendment\textsuperscript{19} and Confrontation Clause\textsuperscript{20} concerns, meaning that convictions may be obtained in violation of defendants’ constitutional rights, and may therefore be unreliable as well.\textsuperscript{21}

Reforms are called for that ensure the continued functioning of conspiracy law while bolstering its outcome reliability. This article responds, arguing that prosecutors should be required to make a dangerousness showing before criminal liability for conspiracy may attach. Such a required showing would not hinder the prosecution of dangerous Katyalian conspiracies, but would, in proper Goldsteinian form, effectively distinguish between dangerous and non-dangerous conduct, and would also increase outcome reliability because dangerous group conduct is much more likely to comprise a criminal conspiracy than non-dangerous group conduct.

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

Wechsler and his colleagues, as well as the Arkansas, Colorado, New Jersey, and Pennsylvania legislatures, recognized the value of a required showing of dangerousness. These legislative moves demonstrate the workability of the required showing. Although this showing would amount to an external check on a system of law that has many internal flaws, it is an important check that can increase outcome reliability. It can also increase efficiency by harmonizing the work of the criminal justice system with the pursuit of public safety; by requiring a showing of dangerousness, prosecutorial, defense, and judicial resources will be channeled to address truly dangerous conspiracies, thus


\textsuperscript{18} Erik Luna, \textit{Criminal Justice and the Public Imagination}, 7 OHIO ST. J. CRIM. L. 71, 102 (2009).


\textsuperscript{20} 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, \textit{Confronting Coconspirators: 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).

\textsuperscript{21} See United States v. Spock, 416 F.2d 165 (1st Cir. 1969) (regarding the unreliability of using protected speech to prove conspiratorial intent.).
increasing the level of public safety, and away from prosecuting group conduct that poses no danger to society.

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

I. History

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

The documented history of conspiracy law begins with a handful of Edwardian statutes, dating from 1285 to 1305. During this period, conspiracy law was limited in two important ways. First, substantively, it specifically applied only to abuses of legal process. The 1304 Definition of Conspirators defined conspirators as “they that do confeder or bind themselves by oath, covenant or other alliance that every of them shall aid and support the enterprise of each other falsely and maliciously to indite, or cause to be indited, or falsely to acquit people, or falsely to move or maintain pleas.” Second, philosophically, the law was what I call “consequentialist,” meaning that for liability to attach, the target crime of the conspiracy had to be realized. Thus, for example, an action by writ of conspiracy would be successful only if a person at whom a conspiracy to falsely indict was aimed had actually been indicted and acquitted. One commentator noted that at its origin, conspiracy was “an offence of a strictly limited nature, embedded

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22 JAMES WALLACE BRYAN, THE DEVELOPMENT OF THE ENGLISH LAW OF CONSPIRACY 142 (1909) (stating that conspiracy law pre-dates 1285).
23 Francis B. Sayre, Criminal Conspiracy, 35 HARV. L. REV. 393, 395 (1922).
25 BRYAN, supra note 22, at 150-51.
26 Id. at 155.
in the early system of legal procedure, and created to give a remedy for the abuse of a very small part of that system.”

By 1486, the potential threat to public safety associated with the consequentialist philosophy of conspiracy law was recognized, and what I call a “deontological” shift was underway, meaning that the conspiracy itself became actionable, and the substantive crime need not have been committed. In that year, a conspiracy statute provided that “by the law of this land if actual deeds be not had, there is no remedy for such false compassings, imaginations, and confederacies against any Lord . . . and so great inconvenience might ensue if such ungodly demeanings should not be straitly punished before that actual deed be done.”

Although the substantive focus continued to be on false prosecutions, the turn was toward condemning the conspiracy itself, rather than the executed result. The turn, however, was not complete for many centuries. By the 1600s, then, two streams had emerged. An action of conspiracy could be brought for the deontological wrong of the conspiracy itself. An action upon the case, in turn, could be brought for the executed result, with the conspiracy being an aggravating fact.

During the fourteenth and fifteenth centuries, the English Court of Star Chamber worked to evolve conspiracy law. In 1611, that court decided the Poulterers’ Case, which is a watershed conspiracy case. In Poulterers’, the Star Chamber held finally that a bare conspiracy was punishable independently of any act done in execution of it. The goal was, of course, to prevent the conspiracy’s potential harm from being realized. Although the Poulterers’ holding is a definitive statement of the deontological thread of conspiracy law that had existed prior to the case, its final authority was established only in subsequent rulings. Its deontological turn has, post hoc, achieved the authority that created and informs common law conspiracy today. This is not to say that Poulterers’ settled the matter. Consequentialism retained currency throughout the seventeenth century in England and even into the nineteenth century in the United States. By furthering the deontological turn, however, Poulterers’ took conspiracy law away from targeting clearly dangerous and operative conspiracies and toward enabling the prosecution of many conspiracies and apparent conspiracies that may not in fact be dangerous.

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

27 HARRISON, supra note 24, at 6.
28 BRYAN, supra note 22, at 146-47.
29 Id. at 165.
30 Id. at 177.
31 BRYAN, supra note 22, at 154.
32 Developments in the Law: Criminal Conspiracy, supra note 14, at 923 (1959); Sayre, supra note 23, at 398.
33 BRYAN, supra note 22, at 189.
34 Id.
35 Id. at 190.
36 Id. at 191.
37 Id. at 194-95.
38 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.”).
toward a general theory that would prohibit conspiracies to commit any crime whatsoever. As a result, one commentator has called deontological and general conspiracy law the “Seventeenth Century Rule in Conspiracy.”

The Seventeenth Century Rule resembles conspiracy law today. The Hawkins and Denman doctrines, however, added glosses that have confused and upset conspiracy law since their appearance. In 1717, Lord Hawkins asserted that to be punishable, conspiracies do not need to contemplate criminal acts only, but may also aim at “wrongful” conduct. 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.” This brief announcement left for interpretation the meaning of the word “unlawful,” and allowed for a moral turn in the law that enables an expansive definition of what is a “dangerous” conspiracy. 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.”

Courts would quickly refute this moral turn, but the gloss remained as courts began to struggle with the rise of labor in the nineteenth century. For the first time, large combinations of workers could apparently affect large swaths of the economy by engaging in action that would be legal if done individually. As the country entered 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.

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

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

As the nineteenth century progressed, rapid economic development, the explosion of industrial growth, and the development of a national market drove the migration of

40 HARRISON, supra note 24, at 16.
41 Developments in the Law: Criminal Conspiracy, supra note 14, at 923; HARRISON, supra note 24, at 25.
42 HARRISON, supra note 24, at 23.
43 Id.
44 Id. at 35.
48 WOODIWISS, supra note 46, at 42-43.
49 Ballam, supra note 47, at 127.
young people from rural to urban areas in search of work in plants, factories, mines, and other businesses. These workers became more vocal about their own discontent as they sought rights such as the eight-hour workday from the new corporations for which they worked. The discourse began to change as Lochnerian theories about restraint of trade started to give way to the right of laborers to associate. Industrial capitalism in factories allowed skilled workers 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. Capital ultimately did not accept this push, and pursued its own interests. It found no relief in legislatures, which were generally populated in the late nineteenth century by progressive and farmer-labor coalitions. It therefore turned to the courts, which applied conspiracy law to regulate against labor. The Massachusetts Supreme Judicial Court was the first, in 1842, to declare that labor unions were legal, but both before then and after, the possibility of “riotous” and therefore illegal and dangerous combinations occupied judges’ minds.

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. 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.”

This was only the first word on the distinct evil question. In 1821, the Maryland Court of Appeals held that a conspiracy might be charged even if the substantive crime was not achieved. It so held, however, not because conspiracies are dangerous in themselves, but because “the law punishes the conspiracy, ‘to the end to prevent the unlawful act.’” There was, then, no consensus that conspiracies were distinct evils.

50 Id. at 129.
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.
65 Id. at *9.
Rather, the consequentialist concern was that a conspiracy could lead to an actual injury. Furthermore, if some conspiracies were dangerous in themselves, there was no consensus that they all were. In the Supreme Court of Pennsylvania in 1822, an attorney argued that conspiracies “in which the public were concerned” were indictable, but that those effecting a “private injury” were not subject to criminal sanction.\textsuperscript{66} Both of these countervailing views were on display in the New York Supreme Court in 1827. In \textit{Lambert v. People}, the New York court considered an indictment for conspiracy to defraud a company. One judge concluded that an indictment could not lie for a conspiracy that does not affect the public, and another noted that conspiracy was indictable not for the conspiracy itself, but for the object that it was intended to effect.\textsuperscript{67}

Despite these two countervailing views, the \textit{Lambert} court concluded that “[c]ombinations against individuals are dangerous in themselves, and prejudicial to the public interest.”\textsuperscript{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.”\textsuperscript{69} The court then provided a defense of conspiracy law that foreshadowed contemporary defenses such as Professor Katyal’s. Other cases during this time period mention the risk that conspiracies might “seduce” people into criminality.\textsuperscript{70} And so, the notion that conspiracies are a distinct evil emerged in embryonic form.

As the country moved toward the 1880s, evidence emerged to reinforce the distinct evil notion. Attempts to form national trade unions began in the 1850s\textsuperscript{71} and resulted in more than thirty such unions in 1873.\textsuperscript{72} By 1886, the Knights of Labor had 730,000 members,\textsuperscript{73} sympathy strikes and community-wide boycotts flourished,\textsuperscript{74} and on May 1, 350,000 laborers from coast to coast joined in a coordinated general strike for the eight-hour day.\textsuperscript{75} 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.”\textsuperscript{76} Some in the labor movement proposed “engaging in dramatic acts of violent resistance against state authorities,”\textsuperscript{77} which included targeting the church, government, elections, courts, jails, bankers, policemen, and bosses as targets in a war of class liberation.\textsuperscript{78}

\textsuperscript{66} Com. v. McKisson, 1822 WL 1942, *1 (Penn.).
\textsuperscript{67} 9 Cow. 578 (Sup. Ct. N.Y. 1827).
\textsuperscript{68} Id.
\textsuperscript{70} Talbot v. Jansen, 3 U.S. 133, 142-43 (1795); see also Twitchell v. Com., 9 Pa. 211, *2 (1848).
\textsuperscript{71} Ballam, \textit{supra} 47, at 129.
\textsuperscript{72} Id. at 130.
\textsuperscript{73} PAPKE, \textit{supra} note 54, at 9.
\textsuperscript{74} Ballam, \textit{supra} note 47, at 143.
\textsuperscript{77} Id. at 12.
\textsuperscript{78} Id. at 13.
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. This event 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, and 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 the subsequent conspiracy trial of anarchist August Spies and others, created 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 was in a new civil war against trade unionists as “irresponsible” and “alien” troublemakers.

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79 Ballam, supra note 47, at 130.
80 Id.
81 Id. at 75.
82 Id. at 5; Papke, supra note 54, at 16.
83 Id. at 5; PAPKE, supra note 54, at 16.
84 Id. at 5; Smythe, supra note 51, at 648.
85 Id. at 5; PAPKE, supra note 54, at 16.
86 Id. at 75.
87 Id. at 3.
88 Id. at 75; PAPKE, supra note 54, at 16.
89 Id. at 5; PAPKE, supra note 54, at 16.
90 HATTAM, supra note 58, at 70.
91 Id. at 75.
92 Id. at 5; PAPKE, supra note 54, at 16.
93 Id. at 75.
94 Id. at 75.
95 Id. at 75.
96 Id. at 75.
97 Id. at 75.
98 Id. at 75.
99 Id. at 75.
100 Id. at 75.
This notion solidified in the 1880s, as labor unions, corporations, and Lochnerian champions of *laissez-faire* economics and one-sided views of individual freedom rose to prominence. For the first time, large combinations of groups could collectively perform very harmful acts, which, if done individually, would be legal and harmless. Such acts included forming trusts and monopolies, against which the Sherman Antitrust Act of 1890 was passed, and operating strikes, walkouts, and boycotts, the criminality of which courts struggled to determine.\(^97\) For the first time, conspiracies were seen as an existential threat to the nation.

The rhetoric of judicial opinions reflected this fear. In 1887, the Connecticut Supreme Court considered the legality of a conspiracy of workmen to boycott their company and distribute flyers. Affirming the conviction, the court wrote, “The exercise of irresponsible power by men, like the taste of human blood by tigers, creates an unappeasable appetite for more.”\(^98\) If boycotts and distribution of flyers were legal, said the court, “The end would be anarchy, pure and simple.”\(^99\) 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.”\(^100\) Conspiracies become “subversive of the rights of others, and the law wisely says it is a crime.”\(^101\)

A series of subsequent cases involving labor and capital echoed the Connecticut Supreme Court’s opinion.\(^102\) 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.”\(^103\) 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.”\(^104\) The distinct evil assumption appeared for the first time in a criminal law treatise, in 1897,\(^105\) citing for support *United States v. Cassidy*, a conspiracy case against railway employees in the great Pullman strike of 1894.\(^106\)

The distinct evil assumption emerged, therefore, in a specific historical context and in response to what people believed was an existential threat posed by labor unions and, to a

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\(^97\) See Wechsler et al., *supra* note 6, at 957 (noting “the early condemnation of the labor union as a criminal conspiracy and the use of the charge against political offenders.”).

\(^98\) *State v. Glidden*, 8 A. 890, 894 (Conn. 1887).

\(^99\) *Id.* at 895.

\(^100\) *Id.* at 896.

\(^101\) *Id.* at 896.


\(^104\) *Id.* at 10 (quoting *Crump v. Com.*, 84 Va. 927).

\(^105\) EMLIN MCCLAIN, *A TREATISE ON THE CRIMINAL LAW AS NOW ADMINISTERED IN THE UNITED STATES, VOLUME II* 157 (1897).

\(^106\) 67 F. 698 (N.D. Cal. 1895).
lesser extent, corporations. As Goldstein noted, the distinct evil assumption was, and remains, unsupported by empirical data. It also shares with conspiracy law itself a “chameleon-like” hue, whose color changes with the unpopular group du jour. The point is not that no conspiracies are dangerous, but that not all of them are. In hindsight, one can discern a clear pattern of abusive or good faith but mistaken conspiracy prosecutions. The distinct evil assumption encourages them.

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

II. Theory

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

Six types of conduct relevant to conspiracy law form a continuum of group conduct. They are: (1) individual and innocent conduct; (2) obviously innocent combinations; (3) apparently illegal but factually legal combinations; (4) non-dangerous actual criminal conspiracies; (5) dangerous actual criminal conspiracies; and (6) substantive crimes. An example of #1 conduct is a single person performing a legal act, such as purchasing groceries. If two people jointly agree to purchase groceries, they engage in #2 conduct.

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109 Developments in the Law: Criminal Conspiracy, supra note 14, at 923 (1959); Harrison, supra note 24, at 25.
110 Hattam, supra note 58, at 47; see Papke, supra note 54, at 49; see also Petition for a Writ of Certiorari at 31, Elashi v. United States, --- S.Ct. ----, 2012 WL 1833933 (2012) (No. 11-1390).
111 Messer-Kruse, supra note 76, at 181.
112 Green, supra note 75, at 306.
113 Hattam, supra note 58, at 39.
If one or more people commit a substantive crime, such as robbing the grocery store, they engage in #6 conduct (and may also commit conspiracy to rob the store). This article is concerned primarily with numbers 4 and 5 conduct, and has external effects on the justice system’s response to #3 conduct.

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

Number 4 conduct involves non-dangerous actual criminal conspiracies. In 2002, for example, Ali Sher Khan was convicted of conspiracy to commit bulk cash smuggling, making false statements, and conspiracy pursuant to 18 U.S.C. § 371. Khan and two friends, legal immigrants from Pakistan, were engaged in the chicken restaurant business. The three men intended to travel to Pakistan with money for their relatives, and they packed $293,266 in the interstices of Khan’s bags. As the men were about to board the airplane, U.S. Government representatives asked Khan to declare any cash he was carrying over $10,000. He said that he was carrying $12,800. There was no hint that this money was intended to fund terrorism or was involved in any other illegal activity. The government appealed the sentence to the Second Circuit, but the defendants did not appeal the convictions themselves. On remand, the district court concluded that, despite Khan’s conspiracy conviction, there was no conspiracy for purposes of sentencing. In so finding, the court noted that the men were “not dangerous collaborators in crime, but individuals trying to do a good turn to their former countrymen and relatives. There [was] no reason to treat [Khan] as a dangerous conspiring gang member.”

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

Number 4 conduct may also include conspiracies that are characterized more by their bluster than their obvious or true intent to commit a criminal act. In 2006, Tarik Shah

117 Id. at 220.
118 Id.
119 Id.
120 Id.
123 Id.
125 Id.
was charged with conspiracy to provide material support to Al Qaeda.\textsuperscript{126} Shah pleaded
guilty to this charge.\textsuperscript{127} Shah’s arrest was the result of an FBI sting, which revealed Shah
to be “a boastful, albeit somewhat bumbling, man, an almost inconceivable mix of
bassist, ninja and would-be terrorist.”\textsuperscript{128} Shah allegedly agreed to provide Al Qaeda
members with martial arts training, but the plot was almost entirely talk; no weapons
were bought and no martial arts training took place. Shah seemed more of an “angry
braggart” who described himself as “doggone deadly.” He expressed interest in opening
a martial arts studio, where he could teach people how to use swords, “knives and stars
and stuff like that.” For a year, the FBI worked on Shah, who, as an accomplished jazz
bassist, was busier with exercise, playing music, and nearly booking a show with the
current incarnation of the Platters. Shah eventually pledged his support to Osama bin
Laden, but then turned his attention to the two jazz shows he had back to back. He was
arrested a week later.\textsuperscript{129}

Number 5 conduct involves clearly dangerous conspiracies. Such conspiracies can be
shown to be dangerous by, for example, the commission of the substantive target crime,
the commission of other crimes related to the conspiracy, by the potential danger of the
defendant him or herself, or by an overt act that clearly indicates progress toward
commission of the target crime. The myriad ways that #5 conspiracies can be shown to
be dangerous suggests that if there is a danger, prosecutors will readily be able to prove
it.

Number 3 conduct involves combinations of people that appear to be criminal, but
ultimately are found not to be. In 1967, for example, Dr. Benjamin Spock and three
others were convicted of conspiracy to counsel, aid and abet draftees to avoid military
service.\textsuperscript{130} Their conduct consisted of producing a document, “A Call to Resist
Illegitimate Authority” and a cover letter requesting signatures and support, and speaking
at a press conference in New York City to launch the Call. The men also attended a
demonstration in Washington DC in a failed attempt to present collected draft cards to the
Attorney General.\textsuperscript{131} The First Circuit vacated the convictions of Spock and a second
defendant,\textsuperscript{132} even though their conduct was intertwined with that of the other two men,
for whom the First Circuit ordered new trials. The First Circuit’s vacation was based on
the district court’s failure to abide by the principle of strictissimni juris in the context of
“bifarious” conduct, meaning that it had a protected First Amendment component and an
unprotected conduct component.\textsuperscript{133} It is notable that the First Circuit did not reject the
possible existence of a conspiracy entirely, but did find that Spock was not a part of one.
In so finding, the Court implicitly invoked the often obscure border between #3 conduct
and #4 or #5 conspiracies. The Spock opinion was exceptional for its nuanced analysis of
conspiracy law and how to prove conspirators’ mens rea, something that most other
courts considering such charges rarely evince. A dangerousness requirement would

\textsuperscript{126} Indictment, United States v. Shah, 1:05-cr-00673-LAP (S.D.N.Y. Dec. 6, 2006).
\textsuperscript{128} Alan Fueur, “Tapes Capture Bold Claims of Bronx Man in Terror Plot,” NEW YORK TIMES,
\textsuperscript{129} Id.
\textsuperscript{130} United States v. Spock, 416 F.2d 165, 168 (1st Cir. 1969).
\textsuperscript{131} Id. at 168.
\textsuperscript{132} Id. at 176, 179.
\textsuperscript{133} Id. at 173-74.
provide a more consistent and certain mechanism for dividing #3 conduct from actual conspiracies, whether dangerous or not.

Based on the prevalence and sustained criticism of conspiracy charges, it is likely that a substantial number of charges and ultimate convictions are number 3 and 4 conduct. 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. 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. 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.”

Most recently, in 2003, Professor Katyal suggested that more than 25% of all federal criminal prosecutions and a large number of state cases involved prosecutions for conspiracy.

Many of these conspiracies may not be dangerous, evidenced by the fact that charging decisions have often not been based on a concern for public safety. In 1977, Professor Marcus published the results of a comprehensive survey on conspiracy that he performed of prosecutors, defense counsel, judges, and law professors. Most notable of the prosecutors’ answers were:

- 69% believed that conspiracies were neither per se more or less dangerous, and that their dangerousness depended upon the facts.
- 62.8% brought conspiracy charges where the target offense had been completed or attempted in order to obtain evidentiary advantages.
- 35.3% brought conspiracy charges in order to obtain advantages in connection with plea bargaining.
- 28.4% of prosecutors believed that doing away with conspiracy charges and replacing them with attempt would have little or no effect on convictions.
- 30.3% believed that requiring a “substantial step” toward commission of the substantive crime for purposes of the overt act would have no effect on convictions.

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

138 Katyal, supra note 1, at 1310.


140 Id. at 934.

141 Id. at 942.

142 Id.

143 Id. at 931.

144 Id.
These responses suggest two things. First, altering conspiracy law by either eliminating it or enhancing prosecutors’ burden of proof would not substantially negatively affect the rate of convictions. Second, conspiracies are not per se dangerous\(^\text{145}\) and are often charged for reasons other than prosecutors’ belief that they are dangerous. By requiring a dangerousness showing, therefore, it is possible that innocent groups would be protected from conviction, and criminal conspirators would be convicted at similar (probably high) rates. Such a showing would amount to a regulation that encourages two normatively good results. First, it would ensure that #3 (legal) conspiracies would be separation of #4 (criminal) conspiracies and result in acquittals or dismissed charges for the former. Second, it would encourage a separation of #4 (non-dangerous) conspiracies from #5 (dangerous) conspiracies and a shifting of prosecutorial attention toward the latter. Prosecutorial, defense, and judicial resources would be diverted to dealing primarily with conspiracies that implicate public safety. The cost of obtaining the public safety benefit associated with increased prosecution of #5 conspiracies would be reduced prosecution of non-dangerous #4 conspiracies. In a world of limited resources,\(^\text{146}\) overcriminalization generally,\(^\text{147}\) and the routine application of conspiracy law specifically, this is a result that society can abide.

The reason that so much group conduct—whether innocent combinations or criminal conspiracies—might not be dangerous lies in the Condorcet Jury Theorem, which states that the probability of a group producing the “correct” answer increases toward one hundred percent as the size of the group increases, provided that the majority’s decisions prevail and that each person is more likely than not to be correct.\(^\text{148}\) If the first-best answer in the context of criminal law is to be law-abiding and non-dangerous, the second-best answer is to withdraw from a formed conspiracy and remain non-dangerous, and the third-best answer is to be steadfastly criminal but still non-dangerous (so to avoid detection, a harsher sentence, harm inflicted on oneself by law enforcement, and the internal moral-psychological stress associated with being a source of potential harm), then groups in general should tend toward being law-abiding and non-dangerous.

The Condorcet Jury Theorem depends upon a majority of the group having adequate knowledge to recognize the “correct” answer, and criminals are not known for being rational economic actors who possess adequate knowledge of the “correct” answer.\(^\text{149}\) Nevertheless, they do possess the knowledge and often the intent to mitigate the dangerousness of their crime, for the above-stated reasons. To the extent they want to minimize the danger they present (and therefore the risk of being caught and punished

\(^{145}\) See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 596 n.20 (1986) (competitors suffer no harm from conspiracy to raise prices); see also Nesses v. Shepard, 68 F.3d 1003, 1004 (7th Cir. 1995) (citing Niehus v. Libero, 973 F.2d 526, 531-32 (7th Cir. 1992)); Buckley v. Fitzsimmons, 20 F.3d 789, 796 (7th Cir. 1994)) (if the conspiracy does no harm, there is no tort); Applied Equipment Corp. v. Litton Saudi Arabia Ltd., 7 Cal.4th 503, 511, 28 Cal.Rptr.2d 475, 869 P.2d 454 (1994) (noting that under California law, a conspiracy standing alone does no harm and engenders no tort liability.).


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

The theory of group polarization supports this assertion. The theory states that “members of a deliberating group predictably move toward a more extreme point in the direction indicated by the members' predeliberation tendencies.” 150 Thus, a group of people who tend to believe that honest labor is the best way to earn money will, in a group setting, tend to reinforce this view in each other. A group of people who tend to believe that it is right to take money from someone else if they can get away with it will tend to reinforce each other’s potentially criminal tendency. A group of people who wish to engage in concerted criminal activity but avoid harm will tend to reinforce individuals’ aversion to presenting a danger.

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

A dangerousness requirement would also serve to legitimize conspiracy law. It would police the wide margin between clearly dangerous criminal conspiracies and group combinations that tend toward law-abiding extremes, and so do not come to the attention of law enforcement. Groups in this margin are #3 combinations and #4 conspiracies. They may form around quotidian interests and then drift toward criminality. They may flirt with forming a criminal conspiracy, and they may actually do so. Undercover law enforcement agents may have goaded them into these conspiracies. 151 They may then

think twice, realize they were not serious, or simply forget about their tentative agreement. In such cases, their conspiracy will have been criminal, but it was not dangerous. A required showing of dangerousness would limit broad prosecutorial discretion, which in “close call” conspiracy cases produces either serious outcome unreliability or, just as concerning, public perception of prosecutorial bad faith.

Prosecutions within the number 3 and 4 margin raise trenchant critiques of conspiracy law. Such cases include the Abrams v. United States, Schenck v. United States, and Frohwerk v. United States trilogy after World War I, Dennis v. United States and Yates v. United States in the World War II era, and, more recently, United States v. Al-Hussayen, in which a Muslim man was tried and acquitted of conspiracy to provide material support to Hamas. Government stings of would-be Islamist terrorists also create skepticism about conspiracies’ dangerousness and the legitimacy of these stings.

Conspiracies that have more bluster than criminal intent reside in this margin. These prosecutions also threaten defendants’ constitutional and evidentiary rights. Because conspiracies are seen as a distinct and potent evil, evidentiary rules are relaxed: co-conspirator statements are admissible against a defendant with limitations only a prosecutor could love, agreements can be inferred, overt acts are often not required, First Amendment rights are threatened, as are Sixth Amendment

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154 250 U.S. 616 (1919).


156 249 U.S. 204 (1919).


159 Case No. 3:03-cr-00048-EJL-1, (D. Idaho 2004).

160 Mark C. Niles, Preempting Justice: “Precrime” in Fiction and in Fact, 9 SEATTLE J. FOR SOC. JUST. 275, 276-77 (2010); Peter Margulies, supra note 151, at 526.


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


confrontation rights, and, normatively, acts that produce no harm are criminalized. Not only would a dangerousness requirement improve the rate of accurate and just criminal procedure outcomes, but it would encourage prosecutors to think twice before pursuing cases that in hindsight appear to be politically motivated. This would legitimize the law of conspiracy and contribute to law enforcement efforts by encouraging individuals to report others in their community for suspicious activities. In short, conspiracy prosecutions would become fairer and, just as important, they would be increasingly perceived as fair by the public.

III. Practice

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

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

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

New Jersey’s statute is unique. It reads:

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

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166 See Giles v. California, 554 U.S. 353, 374 n.6 (2008) (noting that admission of co-conspirator hearsay does not usually violate the Confrontation Clause because incriminating statements in furtherance of the conspiracy are rarely testimonial); Adrienne Rose, Forfeiture of Confrontation Rights Post-Giles: Whether a Co-Conspirator’s Misconduct Can Forfeit A Defendant’s Right to Confront Witnesses, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 281, 299-305 (2011); Trachtenberg, supra note 20.

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


170 18 Pa.C.S.A. § 905(b) (2012).
because:

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

(2) The conspiracy, as to the particular defendant charged, is so peripherally related to the main unlawful enterprise.171

All four state statutes and the MPC provide for downgrading or dismissal when both the conspiracy and the conspirators pose no danger. This dual requirement responds to Katyal’s concern that conspiracies themselves are dangerous and that individual participants may, as conspirators, assume new and more dangerous individual identities.172 As the Supreme Court put it, “[C]onspiracy poses a ‘threat to the public’ over and above the threat of the commission of the relevant substantive crime . . . because the ‘[c]ombination in crime makes more likely the commission of [other] crimes’.”173 What the MPC and state laws suggest is that the danger conspiracies pose is not as monolithic as Katyal and the Court believe, and that nuanced limitations to the law’s application are possible without eviscerating its public safety function.

Despite their promise, these four state dangerousness statutes have virtually never been the topic of sustained or formal legal argument. Arkansas has seen one solicitation case in which the court denied a jury instruction on dangerousness174; in Pennsylvania, a defendant moved to dismiss a solicitation charge on dangerousness grounds175; and Colorado has seen no such case. A New Jersey case mentioned its dangerousness statute in combination with the fact that, pursuant to New Jersey code, there can be no guilty verdict on both conspiracy and its substantive offense if the conspiracy has no objective beyond that offense.176 None of these cases offers a sustained discussion of dangerousness in the conspiracy context.

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

One very experienced defense attorney in Arkansas told me that his state simply does not charge conspiracies. He suggested at least two reasons for this. First, state

171 N.J.S.A. 2C:5-4(b) (2012).
172 Katyal, supra note 1, at 1316.
prosecutors are more likely to charge attempt rather than conspiracy if multiple defendants engage in inchoate conduct. This is so, he said, because under Arkansas’ law prohibiting inconsistent verdicts, if one of two defendants is acquitted of conspiracy, the second defendant cannot be convicted. Charging an attempt would mean that the first defendant’s acquittal does not affect the prospect of the second defendant’s conviction. Second, Arkansas’ rule on admission of co-conspirator statements does not require that a conspiracy actually be charged. All that is necessary is that a conspiracy be proved at trial by evidence independent of the statement itself. Accomplices, furthermore, are treated as co-conspirators for purposes of admitting their statements. Both of these rules reduce prosecutors’ need to charge conspiracies to obtain associated evidentiary advantages.

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

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

Conclusion

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

First, and most immediately, defense attorneys in Arkansas, Colorado, New Jersey, and Pennsylvania should use their states’ dangerousness statutes. They can use them to file motions to dismiss, to downgrade charges, and to request jury instructions. They can also use these statutes in pre-trial negotiations with prosecutors. Quite often, prosecutors are actively looking for a way to get rid of unsavory cases. Alleged victims and intra-office dynamics often drive prosecutors to pursue cases unwillingly. A statute that

177 Yedrysak v. State, 293 Ark. 541 (1987); but see A.C.A. § 5-3-103(b)(3) (2012).
suggests a case should be dropped could provide to a prosecutor the leverage and cover she needs.

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

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

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

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181 United States v. Royal, 100 F.3d 1019 (1st Cir. 1996).
182 United States v. Weiner, 3 F.3d 17, 21 (1st Cir. 1993).