“Conspiracy Fundamentals, Problems, and Ways to Challenge the Charge”
2017 Summer Indigent Defense Seminar CLE

June 22, 2017, 1:45-2:45

Presenter:
Steven R. Morrison
Principal, The Morrison Law Practice
Associate Professor of Law, Univ. of North Dakota School of Law
1526 Robertson Ct.
Grand Forks, ND 58201
(617) 749-7817 (Cell)
steven.r.morrison@gmail.com
stevenrmorrisonlaw.com

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I. Introduction (5 min)
   a. Overview of CLE
   b. Brief history of conspiracy
      i. Origin around 1285-1305: Narrow (applied only to abuse of legal process) and
         Consequentialist (crime had to have been committed).
      ii. 1486-1611: Shift from consequentialism to deontology: conspiracies viewed as bad in
         themselves, not only in relation to their potential consequences.
      iii. 1611-17th century: Shift from narrow to general conspiracy (conspiracy to commit any
         crime is now a crime).
      iv. 1717-1832: Shift to moral use of conspiracy law (“wrong” acts, not just “illegal” acts are
         subject to conspiracy liability).
      v. Early 19th century: the Lochnerian Tudor Industrial Code prohibited labor organization,
         favored free trade (not restraint of trade, which unions caused). All unions seen as
         criminal conspiracies, as a distinct evil, because they were viewed as facilitating restraint
         of Lochnerian free trade.
      vi. Into 19th century: rapid economic growth, explosion of industrialization, and
         development of national markets drove worker migration and spurred labor organization.
         Notions of restraint of trade gave way to notions of workers’ freedom to associate.
         Capital pushed back, and, finding no relief in labor-friendly legislatures, went to the
         courts.
      vii. Pre-1842: conspiracy used primarily for anti-labor union prosecution. Unions seen as
         illegal conspiracies per se, as causers of “riotous” behavior.
      viii. 1842: Massachusetts SJC found in Commonwealth v. Hunt that unions are not per se
         conspiracies; first court to do so.
      ix. Post-1842: unions still charged as conspiracies because they might produce riots and
         restraint of trade.
      x. 1867-1869: Passage of Section 88, forerunner to 18 U.S.C. § 371 (first general
         conspiracy statute); advent of hearsay exceptions making a conspiracy charge more
         provable and leading to what would become Fed. R. Evid. 801(d)(2)(E); ratification of
         14th Amendment, which would lead to First Amendment’s application to states in 1925.
xi. 1880s: period of major labor unrest, violence like the Haymarket riot, and national strikes that crippled rail and industries that relied on rail. Calls from some labor groups to use violence. Labor militias existed, labor groups used the language of violent revolution. The distinct evil assumption emerged in this period. A lot of violence surrounding the labor movement (much or most perpetrated by capital and government).

xii. 1887: Connecticut Supreme Court in State v. Glidden affirmed a conspiracy conviction of labor union members for boycotting and distributing flyers, observing of the union members, “The exercise of irresponsible power by men, like the taste of human blood by tigers, creates an unappeasable appetite for more,” and that if boycotts and distribution of flyers were legal, “The end would be anarchy, pure and simple.”

xiii. Turn of 20th century: shift from conspiracy to injunction for labor unions.

xiv. 1905: Industrial Workers of the World (IWW) is founded.

xv. WWI: Red Scare, conspiracy used against socialists and anarchists.

1. Criminal syndicalism at state level, conspiracy at federal level.

xvi. 1919: First Amendment cases Abrams, Schenck, Frohwerk, were also conspiracy cases. Established the clear and present danger test for restricting speech.

xvii. Schoborg v. United States, 264 F. 1 (6th Cir. 1920) (Espionage act conspiracy charges).

xviii. Sykes v. United States, 264 F. 945 (9th Cir. 1920) (church members, conspiracy charges).

xix. 1919-present: scholarly and legal criticism of conspiracy.

1. Sayre, Filvaroff, Krulewitch, Epton, Judge Easterbrook.

2. Why the criticism: conspiracy used for political purposes, evidentiary problems.

xx. WWII: Yates, Dennis, Smith Act prosecutions.


xxii. 1977: Paul Marcus’ study (prosecutors charge conspiracy not because the crime poses public safety danger, but for its evidentiary benefits and to obtain leverage in plea bargaining.

xxiii. post-9/11: continuation of use of conspiracy charges.

1. Mehanna, Hassan, Stone, Shah, others.

c. Brief jurisprudence of conspiracy

i. Conspiracy as general, not crime-specific

ii. Conspiracy as deontological (an evil in itself), not consequentialist (focusing on substantive target crime)

iii. Conspiracy as a moral-political law, not just a traditional, public safety criminal law

II. Elements (25 min)

a. Agreement

i. Knowledge of conspiracy

ii. Voluntarily agreeing to enter conspiracy

iii. Agreement considered the actus reus of the offense

iv. Can also indicate mens rea.

v. Can be inferred with circumstantial evidence. Concert of action toward a common end is sufficient.

1. Tacit understandings may be sufficient

2. Unarticulated working together may be sufficient

b. Mens rea

i. Intent to conspire

ii. Intent to achieve object of conspiracy
iii. At least the same intent (general, specific) as the underlying substantive offense. *United States v. Feola*, 420 U.S. 671, 686 (1975).

iv. Actus reus and mens rea collapse together, because each can be proven by the same evidence.

c. Overt act
   iii. Primary purpose is to show the conspiracy’s operation
   iv. *Locus poenitentiae*
   v. May be a legal, minor act.
   vi. May be used to infer an agreement.

III. The Exercise of Protected Rights as Proof of Conspiracy: First and Second Amendment Problems (15 min)

a. Speech as relevant and probative (or not)
   i. Joe Lipari (NYC comedian, Fight Club quote online against Apple store)
   ii. Tariq Shah (NYC Jazz artist, conspiracy to support Al Qaeda)
   iii. Liberty City Seven (Weird Miami cult, FBI posed as Al Qaeda, they agreed to bomb the Chicago Sears Tower)
   iv. Al-Hussayen (Oregon student, ran innocent websites)
   v. *Elonis v. United States* (online rap lyrics, potential threats)

b. Speech (use as overt act)
   i. Whether overt acts can be comprised of speech is an open question (*Samuels v. Mackell* and *Epton v. NYC*)

c. Speech (use as agreement)
   i. *U.S. v. Spock*

d. Speech (use as evidence of mens rea)
   i. Rap lyrics: *Moore, Foster, Gamory*

e. Speech (use as evidence of all elements)
   i. All Purpose Speech Model: speech as actus reus and evidence of mens rea. Distinction among conspiracy’s elements (agreement, overt act, mens rea, and evidence of these elements) becomes an illusion.

f. Association/assembly (use as evidence of agreement)

h. Association/assembly (use against politically unpopular groups)
   i. Toronto G20 conspirators (around political protest, never protested, never part of any riot)

i. Association/assembly (use to pull individual defendant into a criminal group, even if unassociated with that group)
   i. Terrorist groups as diffuse ideas, not concrete groups
   ii. Unassociated conspiracy: defendants and distant FTOs. Mehanna, Kassir.
   iii. Government’s Sentencing Memorandum, *United States v. Amawi*, 2009 WL 8557096 (N.D.Ohio) (“It would be both a dangerous and erroneous method of analyzing the
appropriate sentence in this case by focusing on whether the defendants are, or were, directly linked to Al Qaeda or some other designated foreign terrorist organization. While there was no evidence introduced at trial that any of these defendants were ‘card-carrying members’ of al Qaeda, the dangerousness of their conduct is by no means lessened given the emerging decentralization of the violent global jihad movement.”).

iv. Malheur National Wildlife Refuge charges and pseudo-journalist Santilli

j. Association/assembly (use of expert witnesses)
   i. United States v. Kassir, No. 04 Cr. 356 (JFK), 2009 WL 2913651, at *3 (S.D.N.Y. Sept. 11, 2009) (Terrorism expert Evan Kohlmann’s testimony on Al Qaeda is wherever you are and whatever you can do).
   ii. 1920s syndicalism cases (see witnesses Coutts, Townsend, Arada, and Dymond, in People v. Wright, 66 Cal.App. 782 (1924); People v. LaRue, 62 Cal.App. 276 (1923), People v. Roe, 58 Cal.App. 690, 700-01 (1922)).
   v. United States v. Locascio, 6 F.3d 924, 936–37 (2d Cir.1993) (organized crime families)
   vii. 1950s communist cases

k. Association/assembly (a priori criminalization of certain groups)
   i. A priori criminalizing certain groups: Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 7-8 (1961); Barenblatt v. United States, 360 U.S. 109, 131-32 (1959) (“The record discloses considerable testimony concerning the foreign domination and revolutionary purposes and efforts of the Communist Party.”). See also labor unions, socialists, IWW, street gangs, FTOs.

l. Association/Assembly (imputing guilt of one onto another)
   i. U.S. v. Dellosantos (using others’ speech against a D)
   ii. Kotteakos v. United States (must ensure individual guilt)
   iii. 2000 RNC Protest charges

m. Exercise of Religion/Rule 610 (using religious belief against a defendant)

n. Exercise of Religion/Rule 610 (prohibiting use of religious belief in favor of a defendant)
   i. Terms: jihad, aman, salafi
   ii. Huq’s article

o. Possession of Firearms (use as evidence of mens rea)

p. Possession of Firearms (use as overt act)

q. Possession of Firearms (use as evidence of agreement)
   i. U.S. v. Stone (D.Mich.): good end for defendants
   ii. U.S. v. Hassan (4th Cir.): gun purchases supportive of conspiracy

IV. Specific Conspiracy Issues (20 min)

a. The Pinkerton doctrine
   ii. Common law theory of criminal liability, contrary to prohibition on federal common law crimes. Ripe for challenge.

b. The Co-conspirator exception (Rule 801(d)(2)(E))
i. Declarant and defendant must be members of conspiracy, and statement must be in furtherance of conspiracy.

ii. Rule 801(d)(2)(E) rests on fiction that co-conspirators are agents of each other.

iii. Lawful joint venture doctrine. United States v. El-Mezain, 664 F.3d 467, 502-03 (5th Cir. 2011), cert. denied, 133 S. Ct. 525 (2012); United States v. Gewin, 471 F.3d 197, 201 (D.C. Cir. 2006) (801(d)(2)(E) applies not only to criminal conspiracies, but to members of a lawful joint venture—as in El-Mezain, where defendants were charged in connection to Hamas but where 801(d)(2)(E) was invoked in light of defendants legal joint ventures).

c. Jury instructions

i. Unlike other elements instructions, conspiracy instructions emphasize what government does not have to prove.

ii. Important to challenge these instructions

iii. Defense instructions: Multiple conspiracies, withdrawal, statute of limitations, venue.

d. Dellosantos/Kotteakos issue: how to separate a defendant from his group, or one conspiracy from another?

e. Conspiracies as a “distinct evil” (See Neal Kumar Katyal, Conspiracy Theory, 112 Yale L.J. 1307, 1315 (2003); Steven R. Morrison, Requiring Proof of Conspiratorial Dangerousness, 88 Tul. L. Rev. 483 (2014)). Challenging this, at least at sentencing.

f. Overcharging (United States v. Reynolds, 919 F.2d 435, 439 (7th Cir. 1990) (“[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.”).

g. Pyramided offenses and the House that Jack Built (conspiracy to agree to oppose the draft, for example). Haywood v. United States, 268 F. 795, 800 (7th Cir. 1920).

h. Piling on evidence (Rule 403 problems)

V. Things lawyers can do now (5 min)

a. Use dangerousness statutes in Arkansas, Colorado, New Jersey, Pennsylvania, and MPC 5.05(2).


c. Where constitutional rights are at issue, argue for substantive application of strictissimi juris.

d. Seek bills of particulars to pin down conspirators, dates, amounts of drugs, overt acts, etc.

e. Seek better jury instructions (draft your own)

VI. Conclusion (5 min)

VII. Q&A (15 min)
Sources for Further Reading

Sources on history of conspiracy:
- Frohwerk v. United States, 249 U.S. 204 (1919).
- Abraham S. Goldstein, Conspiracy to Defraud the United States, 68 YALE L. J. 405 (1959).
- Francis B. Sayre, Criminal Conspiracy, 35 HARV. L. REV. 393 (1922).

Sources on speech problems:
- United States v. Gamory, 635 F.3d 480, 488 (11th Cir. 2011) (use of rap lyrics on a YouTube video to prove conspiracy; appellate court held error b/c D hadn’t authored the lyrics or been in the video).
- United States v. Moore, 639 F.3d 443, 445, 448 (8th Cir. 2011) (use of rap lyrics on a YouTube video to prove conspiracy).
- United States v. Foster, 939 F.2d 445, 456 (7th Cir. 1991) (use of rap lyrics on a YouTube video to prove conspiracy).
- U.S. v. Mehanna, 2011 WL 3959519 (D.Mass.) (Motion to dismiss terrorism charges based on the First Amendment) (government’s opposition at 2011 WL 3511226 states, “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.Supp.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.”).

Sources on Association/Assembly problems:
• United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972).

Sources on First Amendment problems:
• United States v. Spock, 416 F.2d 165, 188 (1st Cir. 1969).

*Sources on Second Amendment Problems*

  • *United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014).

*Sources on Co-Conspirator Exception--Lawful Joint Venture Doctrine*


*Sources on Conspiracy to Defraud the United States*


*Sources on Proposals for Reform*


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

It is important to understand this change because of the contemporary prevalence of conspiracy charges. In 1980, Professor Paul Marcus suggested that severe problems persist in defending conspiracy cases—problems that are made worse because of the large number of conspiracy charges that exist at the federal level. Between 1980 and 1990, conspiracy was in a group of offenses that constituted between thirty-five and sixty-seven percent of the total criminal matters prosecuted in U.S. District Courts. In
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1990, Judge Easterbrook of the Seventh Circuit lamented that conspiracy charges are “inevitable because prosecutors seem to have conspiracy on their word processors as Count I; rare is the case omitting such a charge.”4 Most recently, in 2003, Professor Neal Kumar Katyal suggested that over twenty-five percent of all federal criminal prosecutions, as well as a significant number of state cases, involved conspiracy charges.5

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

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

Next, this Article defines and describes the system of modern criminal conspiracy. It shows that this system’s normative, evidentiary, and *373 constitutional problems ultimately arise from the system’s uniformity. Dynamic systems contain separate components that work at least partially independently to produce just outcomes. Conspiracy, on the other hand, is a uniform system with component parts. These parts include elements, evidence to prove these elements, and the evidentiary and constitutional rules that determine what types of evidence prosecutors can use to prove particular elements. Unfortunately, these parts do not perform truly distinct duties that combine to produce an effective result. Consider the following analogy: a car is a dynamic system because different raw materials—rubber, steel, and cloth and leather—are used for different parts of the car—tires, a chassis, and the interior. If a car were a uniform system, it would be made entirely of one type of raw material, and it would be a very poor-performing system. Conspiracy law is like that poor-performing car. In conspiracy cases, prosecutors can use virtually all types of evidence to prove the elements. Furthermore, proof of one element usually constitutes proof of all other elements, and evidentiary and constitutional rules—referred to in this Article as “gatekeepers”—do not effectively promote defendants’ rights or ensure accurate outcomes. The problems resulting from this system sound in the First Amendment, the Sixth Amendment’s Confrontation Clause, the evidentiary rules dealing with relevance, prejudice, and hearsay, and traditional approaches to proving individual elements of a crime beyond a reasonable doubt, most especially mens rea.

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

This Article also has a national security bent. This is because the Article necessarily discusses law enforcement methods against alleged terrorists, and because counterterrorism activities ultimately cannot be understood without reference to federal criminal law. Domestic criminal law and national security law are two parts of the same system, and it is important for prosecutors in both arenas to know their options. Indeed, as overt war fades, but terrorist threats remain—often in the guise of “homegrown terrorists”—domestic conspiracy law will become more important to national security.9 For example, the D.C. *374 Circuit applies principles of conspiracy law to make detention determinations under the Authorization for Use of Military Force and the National Defense Authorization Act.10 However, in military courts, conspiracy is generally not an available charge.11 Thus, it is an ironic twist that members of Congress who, seeking tough juries, serious charges, and severe sentences, attempt
to restrict Article III courts from trying terrorism suspects, even though conspiracy charges are available and these courts tend to be prosecution friendly.

This Article has seven parts. Part I sets forth conspiracy law's history from 1285 to the nineteenth century. Part II discusses conspiracy law in the nineteenth century, when forces of industrial capital enlisted the courts and conspiracy charges to fight nascent and ultimately powerful labor combinations. Because speech rights, which emerged substantively in 1919, are intertwined with modern conspiracy, Part III sets forth the relevant First Amendment law. Part IV illustrates the maturation of modern conspiracy from the Abrams v. United States, 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, in the context of terrorism and the Internet. Part VI provides a theoretical definition and description of the system of modern criminal conspiracy, which is supported by the preceding history. Finally, Part VII offers practical solutions that respond to the uniform system of conspiracy and its history.

I. CONSPIRACY LAW'S FIRST SIX HUNDRED YEARS

A. Origin: 1285-1304

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

By 1486, courts recognized the potential threat to public safety associated with the consequentialist philosophy of conspiracy law, and began to shift towards a deontological philosophy. In that year, a conspiracy statute provided that “by the law of this land if actual deeds be not had, there is no remedy for such false compassings, imaginations, and confederacies against any Lord ... and so great inconveniences might ensue if such ungodly demeanings should not be straitly punished before that actual deed be done.” Although courts continued to focus substantively on false prosecutions, they began condemning the conspiracy itself, rather than the executed result. This eliminated the need to prove substantive conduct, and therefore brought about uniformity within the system of conspiracy law. The requirement of a substantive crime was a check on the system; without the substantive crime, criminal liability could not attach. This check helped to make conspiracy law a dynamic system over the course of many centuries. By the 1600s, two approaches had emerged. An action of conspiracy could be brought for the deontological wrong of the conspiracy itself. An action upon the case, in turn, could be brought for the executed result, with the conspiracy being an aggravating fact.

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

B. Poulterers’ Case: 1611-1716

During the fourteenth and fifteenth centuries, the English Court of the Star Chamber played a significant role in the development of conspiracy law. In 1611, the Court of the Star Chamber decided the Poulterers’ Case, a watershed conspiracy case, holding that “a bare conspiracy was punishable independently of any act done in execution of it.” The goal was to promote recognition of the conspiracy’s potential harm. Although the Poulterers’ holding is a definitive statement of the deontological thread of conspiracy law that had existed prior to the case, its final authority was established only by subsequent rulings. Its deontological turn has, post hoc, achieved the authority that created and continues to inform the system of modern criminal conspiracy. This is not to say that Poulterers’ eliminated consequentialism entirely. Consequentialism retained currency throughout the seventeenth century in England, and even into the nineteenth century in the United States. However, by furthering the deontological turn, Poulterers’ moved conspiracy law away from targeting clearly dangerous and operative conspiracies and toward enabling the prosecution of merely unpopular thoughts expressed to others. At the same time, Poulterers’ spurred a substantive move away from attaching conspiratorial liability only to combinations to abuse legal processes. This began a move toward a general theory that would prohibit conspiracies to commit any crime whatsoever. As a result, one commentator called deontological and general conspiracy law the “Seventeenth Century Rule in Conspiracy.” This encouraged the development of the system of modern criminal conspiracy by further unmooring conspiracy law from an alleged conspiracy’s factual context. Consequently, prosecutors are able to observe unpopular or suspicious speech or conduct and, from that often-ambiguous evidence, determine the substantive crime that it is supposed to portend. Modern federal criminal law includes over four thousand crimes and thus provides prosecutors a virtually endless menu of substantive crimes to choose from. The system of modern criminal conspiracy, which is deontological and general, lacks an external check that should lie between the crime itself and the facts it addresses and should rely on the norm that criminal liability may only attach to a set of facts that are predetermined to be criminal. The divorce of conspiracy from its factual context also encourages the view that conspiracies are difficult to prove; with no substantive crime, no one can be sure that a defendant in fact conspired. This alleged difficulty drives lowered evidentiary standards and pro-government alterations to evidentiary and constitutional rules. The result is a drift toward a uniform system of conspiracy.

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

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

Courts quickly refuted this moral turn, but the gloss remained as courts began to struggle with the rise of labor movements. For the first time, large combinations of workers could affect significant segments of the economy by engaging in action that would be legal if performed individually. 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 these developments.

II. THE RISE OF LABOR: THE NINETEENTH CENTURY

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

These workers became increasingly vocal about their own discontent and sought rights such as an 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 gave voice to skilled workers by allowing “them to determine to a significant degree both the rate at which surplus value could be produced and the proportions in which it was distributed as wages and profits.” Employers did not accept these workers' push for rights, and pursued their own interests. These employers found no relief in legislatures, which were generally populated in the late nineteenth century by progressive and farmer-labor coalitions. Therefore, employers turned to the courts, which used conspiracy law to regulate labor. In 1842, the Massachusetts Supreme Judicial Court was the first court to declare that labor unions were legal. However, the possibility of “riotous” and therefore illegal and dangerous combinations occupied judges' minds, both before and after the rise of labor unions.

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. Rather, it was a private trespass, for which civil relief was available. In dicta, the court noted that “all misdemeanors whatsoever of a public evil ... may be indicted.” 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 conclusion that the conspiracy may be indicted without an overt act, the court wrote that “combinations against [the] law are always dangerous to the public peace and to private security.” It was in the context of labor movements that courts began to view conspiracies as distinct evils, which would come to justify the system of modern criminal conspiracy and its associated prosecutor-friendly characteristics.
The Massachusetts court had only the first word on the distinct evil question. In 1821, the Maryland Court of Appeals held that an individual may be charged with conspiracy even if the substantive crime was not achieved. However, it so held not because conspiracies are dangerous in themselves, but because “the law punishes the [conspiracy] ... to the end to prevent the unlawful act.” Therefore, there was no consensus among courts that conspiracies were distinct evils. Rather, the consequentialist concern was that a conspiracy could lead to an actual injury. Furthermore, even if some conspiracies were dangerous in themselves, there was no consensus that this was true for all conspiracies. In 1822 an attorney argued, before the Supreme Court of Pennsylvania, that conspiracies “in which the public were concerned” were indictable, but that those producing a “private injury” were not subject to criminal sanction. In 1827, the New York Supreme Court considered this argument in Lambert v. People, in the context of 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.

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

As America moved toward the 1880s, developments in the labor movement reinforced the distinct evil theory. Workers’ attempts to form national trade unions began in the 1850s and resulted in more than thirty such unions by 1873. By 1886, the Knights of Labor had 730,000 members, and sympathy strikes and community-wide boycotts were flourishing. On May 1, 350,000 laborers across the county joined in a coordinated general strike for the eight-hour workday. The International Working People's Association was formed in 1883 and “rejected the political and incremental methods of its socialist predecessors and instead pledged itself to immediate revolutionary change by any means.” Some in the labor movement even proposed “engaging in dramatic acts of violent resistance against state authorities.”

Given the rise of the labor movement and the pushback from capitalists and the courts, violence seemed inevitable. In 1877, the largest strike up to that time in United States history occurred. 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 West Virginia governor deployed the state militia, which killed a locomotive fireman. This casualty earned workers further support from townspeople, farmers, and two companies of the state militia. President Hayes sent in federal troops to quell the strike, which led to the death of between 200 and 400 people.

An even greater strike, the Haymarket Riot, occurred in 1886. On May 1, 1886, a massive general strike for the eight-hour workday began at the McCormick Reaper Works in Chicago. Two days later, police charged toward a group of striking union members, killing two and injuring several others. The next day, labor groups organized a rally at Haymarket Square. As police approached the protesters, someone threw a bomb that killed a policeman and wounded others. The police and protesters exchanged gunfire, and several people died with scores more injured.
The Haymarket bombing, and the 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 an 1886 sentencing hearing accused non-citizen labor agitators of “socialistic crimes” that were “groses breaches of national hospitality.” The Chicago Tribune was blunter, holding “aliens” responsible for the Haymarket deaths and calling on the government to deport the “ungrateful hyenas” and exclude other “foreign savages who might come to America with their dynamite bombs and anarchic purposes.” According to Joseph Medill at the Chicago Tribune, it seemed that the country was in a new civil war against trade unions full of “irresponsible” and “alien” troublemakers.

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

The general rhetoric of judicial opinions reflected this fear. In 1887, the Connecticut Supreme Court in State v. Glidden considered the legality of a conspiracy of workmen to boycott their company and distribute flyers. Affirming the conviction, the court wrote that if boycotts and the distribution of flyers were deemed legal, “[t]he end would be anarchy, pure and simple.” 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. On the other hand, “poor mechanic, driven from his employment, and, as is often the case, deprived of employment elsewhere, is compelled to see his loved ones suffer or depend upon charity.” Therefore, the court explained that conspiracies become “subversive of the rights of others, and the law wisely says [they are] crime[s].”

A series of subsequent cases involving labor and capital echoed the Connecticut Supreme Court's opinion. For example, an Ohio Superior Court, considering a labor boycott, wrote that “it is clear that the terrorizing of a community by threats of exclusive dealing in order to deprive one obnoxious member of means of sustenance will become both dangerous and oppressive.” 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.”

The distinct evil assumption appeared for the first time in a criminal law treatise in 1897. The treatise cited United States v. Cassidy, a conspiracy case against railway employees who participated in the great Pullman strike of 1894. The Pullman strike turned violent when President Cleveland deployed federal troops to restore order and railroad traffic, which had been stopped nationwide due to the strike. Across the country, clashes left forty people dead, and Chicago was described as resembling a war zone. In the strike, President Cleveland saw “proof that conspiracies existed against commerce between the States.” 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 “chameleonlike” hue, meaning that the system of modern criminal conspiracy is adaptable not only 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). 129  This allowed courts to quash entirely peaceful and otherwise lawful labor combinations to boycott, strike, and bargain for better wages and working conditions. 130  Courts did so within the milieu of the Lochner Era. English conspiracy statutes were based on economic theories that “all attempts to alter prices of labour were economically unsound.” 131  American conspiracy sounded more in common law, but courts on this side of the Atlantic were no less willing to engage in Lochnerian reasoning. 132  

The conceptual problem posed by this nineteenth century turn was whether “an act, entirely lawful if done by a single individual, may be unlawful by reason of being done in pursuance of a combination of individuals to do the same act.” 133  Although courts ostensibly abandoned this Hawkinsian moral turn in conspiracy law, specifically as it pertained to labor combinations, the turn left its mark. 134  These early labor conspiracy cases became part of a “unified legal history stretching into the twentieth century.” 135  The Hawkins doctrine continued to influence labor conspiracy prosecutions, 136  and “questionable tactics [used during the Spies Haymarket trial], such as extensively using speeches and publications as evidence, [and] viewing coconspirators as equal to principles ... remain features of the judicial order in the twenty-first century.” 137  Protestors in the 1880s, such as Eugene Debs, kept speaking and agitating into World War I, when patriotic fervor swept the country and the government suppressed all types of protests. 138  Although injunction has generally replaced *386 conspiracy as a means to regulate the labor movement, conspiracy’s successes in this arena eventually led to its use in the twentieth century against socialist and anarchist anti-war protestors and communists. 139  

Entering the twentieth century, conspiracy law at its extremes continued to be general, deontological, and moral. 140  This jurisprudence, coupled with the belief that conspiracies pose serious and existential threats, encouraged early interdiction and justifies the system of modern criminal conspiracy. 141  This jurisprudence has also allowed for conspiracies to be proven by speech alone, which is a relatively unreliable substitute for actual conduct. 142  Prosecutors’ use of alleged co-conspirator's speech at trial, when the co-conspirators are not available for cross-examination, also adds a layer of outcome unreliability and introduces a new Confrontation Clause concern to modern conspiracy. 143  The system of modern conspiracy enables prosecutors to pursue war protestors, 144  civil rights agitators, 145  and alleged terrorist “wann-abe[s],” 146  whether it is clear *387 that they are part of an actual conspiracy or not. Finally, at its most extreme, modern criminal conspiracy enables the discriminatory selection of defendants. “Agreements” that are mere bluster or loose talk, rather than intent to commit crime, or driven primarily by government informants, are now ready subjects of prosecution. 147  

III. 1919: FIRST AMENDMENT AND CONSPIRACY LAW INTEERTWINED

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

*388 Absent such individualist notions, a conflict between speech rights, Confrontation Clause rights, and conspiracy law emerged in the period from 1867 through 1869, and remains unresolved in today’s system of modern criminal conspiracy. Three
THE SYSTEM OF MODERN CRIMINAL CONSPIRACY, 63 Cath. U. L. Rev. 371

events substantiated this conflict. The first was Congress's 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, which led to prosecutor-friendly rules of evidence and the evisceration of “gatekeepers.” The second event was the advent of new hearsay exceptions that made it easier for prosecutors to prove conspiracies. 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 exception virtually removes the Confrontation Clause “gatekeeper” from conspiracy cases. The third was the ratification of the Fourteenth Amendment, which raised the question of whether the Bill of Rights would apply to the states. This permitted the First Amendment's incorporation against the states in 1925.

The Supreme Court did not begin to shape the First Amendment into the highly speech-protective form existing today until 1919. In that year, the Supreme Court introduced the “clear and present danger” test in Abrams v. United States, Schenck v. United States, Frohwerk v. United States, and Debs v. United States. This test permitted the restriction of speech only if “the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” This apparent victory for individual speech rights, however, was blunted by Section 371, the hearsay exceptions, and the readiness of prosecutors to use conspiracy charges to prosecute unpopular groups. Conspiracy enabled end-runs around new speech protections, and, in the process, created additional Confrontation Clause problems.

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 violating the law could be restricted only if it was “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

The Brandenburg test highlights a First Amendment-related conceptual problem with the system of modern conspiracy. If the government suspects that someone is preparing, or has agreed with another, to commit a crime, speech that is purely advocacy will normally be admissible and may be enough to convict. 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, in fact, 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 organizations. Thus far, Brandenburg has not convinced courts to dismiss the charges.

In addition to Brandenburg speech, the Court eventually restricted other categories of speech, including speech that is integral to criminal conduct. 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 achieve a criminal aim, then pure advocacy speech is more likely to be protected than if integral speech is that which is facilitative or related. However, the speech protections that the integral speech jurisprudence delineates are perhaps less certain than speech protected by Brandenburg. This is because speech used as evidence of a crime is not normally subject to First Amendment protection. Therefore, even the purest and most abstract of advocacy speech can be used to prove a
conspiracy. 183  This speech functions as inferential evidence of a conspiracy's agreement and/or overt act. 184  To the extent that individuals express their character through their speech, admission of such speech may also violate Federal Rule of Evidence 404. 185  Because a person's verbalized sympathies do not always reflect his intended actions, unfairly prejudicial and even irrelevant evidence may mistakenly be admitted, invoking Federal Rules of Evidence 401 and 403 problems. 186  Thus, speech can simultaneously be the evidence of conspiracy and the conspiracy itself. 187

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

IV. MODERN CONSPIRACY: 1919-SEPTEMBER 11, 2001

With the exception of Debs, all three of the 1919 cases were as much conspiracy cases as they were First Amendment cases, in which unpopular speech was the target of the prosecution and comprised the evidence thereof. 191  For example, the defendants in Schenck were socialist, anti-war protesters who were convicted of conspiracy to violate the Espionage Act of 1917 by sending leaflets to men who had been drafted into the military. 192  The leaflets proclaimed that the draft violated the Thirteenth Amendment, and that conscription was “in the interest of Wall Street's chosen few.” 193  It asked the inductees to “Assert Your Rights” by refusing to report for duty. 194  The Court ruled that this violated of the Espionage Act, which prohibited individuals from causing or attempting to cause insubordination in the military. 195  Later twentieth century cases indicated that the “clear and present danger” test and, ultimately, the Brandenburg test, would impose no First Amendment “gatekeeper” in conspiracy cases. 196

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

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

Justice Douglas later questioned the extent to which conspiracy charges might violate speech rights. 203  In 1968, the Court denied certiorari in Epton v. New York. 204  Dissenting from the denial, Justice Douglas observed that “whether the overt act required to convict a defendant for conspiracy must be shown to be constitutionally unprotected presents an important question.” 205  His observation has gone unaddressed by the Court.
V. MODERN CONSPIRACY IN THE TWENTY-FIRST CENTURY: TERRORISM AND THE INTERNET

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

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

Despite Justice Black's observations, the terrorist attacks of September 11, 2001, digital-age communicative realities, and the combination of the two in online "recruitment" speech 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 is concerned that the Al Qaeda brand is distributed over the Internet, and is particularly effective in gaining "homegrown" adherents in the United States, which will lead these adherents to perform actual violent acts.

For example, prosecutors are attempting to establish that two or more "homegrown" terrorist "wannabes" in the United States can have as their co-conspirators Al Qaeda leader Ayman al-Zawahiri and, before he was killed, Osama bin Laden, simply because the "wannabes" learned of Al Qaeda's platform and adopted it as their own. No actual connection between the "wannabes" and Al Qaeda needs to 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 these combinations. It is also due to the increasing focus on homegrown terrorists. As the wars in Iraq and Afghanistan wind down, national security is increasingly focused on potential domestic threats. Conspiracy law lies at the heart of the governmental response to combatting terrorism domestically.

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

Prosecutors bring these charges in a series of three steps. First, prosecutors charge the defendants with conspiracy. This permits the government to obtain a conviction based upon speech alone, because in the context of a conspiracy charge, speech can...
serve as both actus reus and evidence of mens rea. Indeed, even the same speech can prove both. Because those charged are often young males who communicate heavily online, prosecutors may have the opportunity to choose the most damning language from a wealth of digitally-preserved and lengthy conversations. Frequently, these defendants talked a “good game,” allowing the government to easily advance a conspiracy charge. Whether those charged actually conspired to commit a substantive crime is doubtful. Dynamic systems of substantive crimes--like capital murder--ensure that doubt leads to acquittals. However, the uniform system of conspiracy law discourages this process. In fact, conspiracy law's very uniformity is based upon prosecution-friendly rules that discount juries' doubt. Thus, juries are permitted to convict on the basis of evidence that may only appear incriminating. For example, prosecutors are not required to prove any substantive act; rather, they need only convince juries that they can and should infer criminal agreement from suspicious words.

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

Second, prosecutors will define key terms in the government's favor within the charging document. For example, prosecutors invariably describe jihad as “‘violent jihad,” which they define as “planning, facilitating, preparing for, and engaging in acts of physical violence, including murder, 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 is both inaccurate and the most prosecution-friendly possible definition. It implies that when a defendant says, “jihad is obligatory,” he simultaneously advances the idea that “terrorism is obligatory.” Although the defense is typically responsible for rebutting this definition, when the government applies its own definition in its charging document, thus arguing that whenever the defendant says “jihad,” he means “‘terrorism,” the government poisons the jury and makes it nearly impossible for the defense to dissociate the defendant from the government's definition.

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

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

The government's broad application of conspiracy charges in the context of terrorism results in important immediate and long-term consequences. Immediately, such terrorism-related indictments produce unreliable outcomes, especially in cases in which the prosecutor only or primarily charges conspiracy. Some high profile cases and twentieth-century conspiracy-speech cases suggest that the government often overreaches and pursues innocent, if unpopular, individuals.
Long-term, broad application of conspiracy charges will transform conspiracy into a broadly discretionary crime of chameleon-like hue. For example, the government's success in using the system of modern criminal conspiracy in the terrorism context means that if a person speaks out against the war on drugs, he could be charged with conspiracy to support a drug cartel, or someone critical of the administration could face charges of conspiracy to assault the President. The risk is that the government will base the decision to prosecute less on whether a person has committed a crime--or, more narrowly, whether there is a public safety danger--and more on whether a person's speech and conduct are unpopular. Good-faith but mistaken prosecutions can result from prosecutorial confirmation bias, meaning systemic checks on prosecutorial bad faith--rather than across the board reductions in discretion--would not necessarily lower this decisional risk.

The case of Sami Omar Al-Hussayen is exemplary. Al-Hussayen was a doctoral student in computer science at the University of Idaho when, in 2004, the government charged him with providing and conspiring to provide material support to Hamas, a designated Foreign Terrorist Organization (FTO). The indictment indicated that between 1994 and 2003, Al-Hussayen provided “expert advice and assistance, communications equipment, currency, monetary instruments, financial services and personnel.” 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.”

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

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

One juror later remarked that based, on the government's opening statement alone, he believed Al-Hussayen was “going to be in jail for life.” At trial, the government's case collapsed. The government argued that Al-Hussayen was closely involved in the creation of the websites that supported violent attacks in the name of jihad. However, the government presented no evidence demonstrating Al-Hussayen's belief in the violent message or of the sites' success in recruiting members. 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 maintained were those of Muslim charities. The government argued that the websites contained hidden messages encouraging violent attacks by terrorist organizations.

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

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

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

Although criticized by First Amendment advocates, on its surface *Humanitarian Law Project* reasserted extant First Amendment rights in a way that could, if the government's concern about terrorism-advocacy speech is well-founded, 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. As the facts of *United States v. Ahmad* and *United States v. Mehanna* reveal, however, prosecutors do not view *Humanitarian Law Project* as protecting free speech for FTOs; they continue to initiate material support charges where pure speech is at issue. Either prosecutors do not take the *Humanitarian Law Project* holding seriously, or two constitutional rights--speaking in favor of an FTO and being a member of that FTO--make one constitutional wrong if exercised together. *Ahmad* stands for the proposition that one cannot legally be a member of an FTO and advocate for it. *Mehanna* suggests that even when one has never communicated with an FTO, pro-jihadi speech may be the subject of indictment. In this regard, the material support statute produces the perverse results seen in *Dennis, Yates*, and the 1919 cases; although the First Amendment protects politically-oriented speech, these protections do not stand in the face of conspiracy charges if the speaker supports an unpopular or outlawed group.

The application of conspiracy law in the war on terror illustrates the concatenation of four individual concerns with the system of modern criminal conspiracy. These concerns include the material support statute's failure to protect unpopular speech, the government's broad definition of "recruitment" speech, the conceptualization of groups like Al Qaeda as ideologies, and the fact that the government portrays the exhortation or advocacy as an agreement to do something illegal. These four issues are compounded by *conspiracy's failure to invoke the Confrontation Clause and Federal Rules of Evidence 401, 403, and 404 safeguards, and give substance to the system of modern criminal conspiracy.*

VI. THE SYSTEM OF MODERN CRIMINAL CONSPIRACY
CONSPIRACY LAW’S THREAT TO FREE SPEECH, 15 U. Pa. J. Const. L. 865

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CONSPIRACY LAW’S THREAT TO FREE SPEECH

Abstract

Conspiracy law has been the consistent subject of controversy, but most commentators do not consider its negative effect on freedom of speech. When they do, their concerns focus only on the use of speech as the crime's actus reus. The use of speech as evidence to prove this actus reus is as important and raises conceptually related issues, so current scholarship tells only half of the story.

This Article addresses the use of speech as the actus reus of conspiracy and evidence thereof. It sets forth what I call the All-Purpose Speech Model. I argue that this Model accurately describes the use of speech in conspiracy cases, and thereby reveals threats to free speech not recognized by past approaches to the subject.

Current scholarship's unipolar approach has led some commentators to conclude that conspiracy law poses no threat to freedom of speech. Contrary to the necessary assumptions underlying this conclusion, the All-Purpose Speech Model discounts the operational distinction among agreement, overt act, mens rea, and evidence thereof. It reveals that these elements and evidence in support of them collapse together, becoming homogenized. The result is that speech used as evidence becomes the crime of conspiracy itself. This raises serious concerns for free speech.

This Article first provides a factual context by discussing conspiracy issues in terrorism, communism, and narcotics cases. It then sets forth the All-Purpose Speech Model by exploring the intersection between conspiracy law and free speech. Next, it uses Kent Greenawalt's tripartite structure of speech and the category of speech integral to criminal conduct to establish a new four-part typology that illustrates the threat to free speech posed by conspiracy law. Finally, it applies this typology to the extant system of speech protection, which includes the familiar concepts of high-value speech, low-value speech, and speech thought to be entirely outside of the First Amendment's protection.

This Article addresses only conspiracy's threat to principles of freedom of speech. A different, and equally important, inquiry concerns its potential violation of the First Amendment. Recognizing the novelty of its argument and the political, evidentiary, and conceptual challenges of placing conspiracy charge-related speech under First Amendment protection, I reserve that inquiry for later work, so that it may be given the attention it deserves. Nonetheless, I conclude with a tentative foray into Brandenburg-related constitutional questions posed by conspiracy law.

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*867  I. Introduction

Since its advent in the thirteenth and fourteenth centuries, criminal conspiracy law has been, at least in hindsight, a subject of great controversy. As American law began its earnest development of First Amendment jurisprudence in the twentieth century, a number of scholars and jurists began to recognize the confluence of these two areas of law. Given the novelty of substantive speech rights, however, this confluence remains underexplored. As a result, most critiques of conspiracy law have little to do with free speech. When they do, the concern always involves the use of speech only as the actus reus of agreement and, sometimes, the overt act.

This approach tells only one side of the story. In conspiracy cases, just as in substantive crime cases, speech is used as evidence of the crime as well as the crime itself. This dual use of speech comprises what I call the “All Purpose Speech Model.” In the pages that follow, I argue that this Model accurately describes the use of speech in conspiracy cases, and thereby reveals threats to free speech not recognized by past approaches to the subject.

Unlike past scholarship, the All-Purpose Speech Model considers speech's multiple uses together because they raise conceptually related concerns. This is so because the functional distinction among agreement, overt act, mens rea, and evidence of these elements is actually an illusion. All of conspiracy's elements and evidence thereof collapse together, becoming homogenized. This means that speech as both crime and evidence thereof are subject to problems of speech's ambiguity and the fact that courts favor the government in conspiracy cases.
The dual uses of speech must be considered together because of the nature of conspiracy's elements and their proof. Conspiratorial agreements can be inferred, and overt acts, if they are required, can be proven by the most minor and legal conduct or speech. Evidence of someone's mens rea and state of mind can amount to evidence of both an agreement and overt act. This allows and encourages proof of a conspiracy by verbosity of speech evidence; prosecutors are rewarded with convictions by inundating *870 juries with mounds of “bad” sounding speech—“bad” speech being that which sounds indicative of criminal activity, but may or may not actually be so. The evidentiary distinction between agreement, overt act, mens rea, and evidence of these elements fades; “bad” speech assumes the appearance of relevance to proving all of these things, and amounts to a normatively unacceptable blunderbuss approach to evidence that implicates free speech concerns. Put another way, in conspiracy trials, speech is the sole necessary building block, which works to prove conspiracy's homogenized set of ostensibly distinct elements.

By accurately describing the use of speech in conspiracy cases, the All-Purpose Speech Model reveals threats to free speech that have not been recognized under the prior unipolar approach. Kent Greenawalt, for example, has dismissed the concern, writing, “no one supposes that the criminal law of conspiracy raises serious First Amendment problems.” This makes sense if speech as the crime of conspiracy and speech as evidence thereof are treated separately: on one hand, there is obvious value to criminalizing certain conspiracies, and on the other, as Greenawalt writes, “freedom to say what one feels and believes and hopes to do does not constitute freedom from use of one's statements as evidence.”

This approach assumes a separation between speech-as-evidence and the crime it is meant to prove. It employs what Thomas I. Emerson called the “expression-action analysis” to the use of speech in criminal cases, which arises when the government either seeks to make speech itself an inchoate crime or when it seeks to use speech as evidence of a “crime of action.” Although Emerson noted that this analysis becomes particularly problematic in the context of conspiracy, he made clear that his expression-action analysis was oriented toward the use of speech either as crime or as evidence of a substantive crime. The expression-action analysis does not address the problems associated with speech being used simultaneously as the crime itself and evidence thereof. In other words, the homogenization of conspiracy's elements and evidence thereof eliminates the distinction between expression-as-evidence and action-as-element. Expression becomes the crime itself, and so conspiracy directly threatens free speech.

In this way, the All-Purpose Speech Model reveals conspiracy's threats to free speech and, possibly, the First Amendment. There is an important difference between the two. Greenawalt distinguishes between “the political principle of freedom of speech” and “the constitutional protection” of speech under the First Amendment. Legislatures, hopefully, look to principles of free speech when crafting law, which may protect more speech than the First Amendment requires. Courts, in turn, provide a First Amendment floor of protection that also may protect speech against occasional legislative encroachments.

This Article argues that conspiracy law threatens free speech, i.e. speech that is valuable in light of recognized rationales for protecting speech, but may not be constitutionally protected. Recognizing the novelty of its argument and the political, evidentiary, and conceptual challenges of placing conspiracy charge-related speech under First Amendment protection, I reserve that inquiry for later work, so that it may be given the attention it deserves.

To make its argument, this Article sets forth a new typology of speech. Current typologies do not respond as well as they might to the use of speech in conspiracy cases. These typologies are Kent Greenawalt's tripartite structure of speech,
which includes situation-altering utterances, weak imperatives, and assertions of fact and value, and the category of speech “integral” to criminal conduct. I combine these two systems to produce a more useful four-part typology of speech, which includes what I call operational and aspirational speech, and speech that is necessary, facilitative, or related to the criminal conduct alleged. I call this the Conspiracy Specific Speech Typology. It illustrates the relevant kinds of speech used in conspiracy cases and reveals when speech is used in normatively acceptable, uncontroversial ways, and when it is used in ways that threaten free speech.

To these ends, this Article proceeds in four main parts. In Part II, I provide a factual context. I discuss two post-9/11 terrorism-related *consspiracy cases, on one of which, United States v. Mehanna, I was a member of the defense team. I also discuss speech related to jihad, communism, and hip-hop music.

In Part III, I present the All-Purpose Speech Model by discussing the intersection of speech and conspiracy. In Part IV, I deconstruct Greenawalt's tripartite structure of speech and the category of speech integral to criminal conduct, and present the Conspiracy Specific Speech Typology.

In Part V, I briefly set forth the familiar three-level structure of speech protection, which includes what most scholars call high-value speech, low-value speech, and speech not believed to be governed by First Amendment considerations. I bring all of the parts of this Article together and use this structure to illustrate further how conspiracy law threatens free speech. In the conclusion, I point to a possible future in which First Amendment requirements bear heavily on conspiracy law. This future, I suggest, is based on the Brandenburg line of cases and a reconceiving of the dangers associated with criminal conspiracies.

II. The Factual Context

A. Sami Omar Al-Hussayen

Sami Omar Al-Hussayen was a doctoral student in computer science at the University of Idaho when, in 2004, he was charged with providing and conspiring to provide material support to a designated foreign terrorist organization.

His indictment indicated that between 1994 and 2003, Al-Hussayen provided “expert advice and assistance, communications equipment, currency, monetary instruments, financial services and personnel.” 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.”

The indictment detailed that Al-Hussayen “helped create, operate and maintain various websites and internet media associated with” certain Islamic organizations that, said the government, had connections to Hamas. These websites and Al-Hussayen's assistance were used to support and justify violent jihad. For example, Al-Hussayen “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 to 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. Materials distributed on the site 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, kidnaping, and destruction of property.

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

At trial, 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.” It emerged, 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 other than Al-Hussayen--that encouraged attacks on the United States and donations to terrorist organizations.

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. The government's case, he said, “was a real stretch.” The entire jury agreed, acquitting Al-Hussayen of all the terrorism charges after only a few hours of deliberation.

B. Tarek Mehanna

Tarek Mehanna was found guilty in December 2011 of providing and conspiring to provide material support to al Qaeda, and conspiracy to kill in a foreign country. These charges were based on two factual allegations. First, Mehanna was charged with conspiracy based on a 2004 trip he took to Yemen, the purpose of which the government alleged was to find and train at a terrorist training camp so that he could proceed to Iraq to fight against United States forces. Second, Mehanna was charged with conspiracy to provide and actually providing material support based on his translation of a publicly available document called 39 Ways to Serve and Participate in Jihad and a “jihadi video” called The Expedition of Umar Hadid, also publicly available. There was no evidence that Mehanna performed these translations at al Qaeda's behest, or that he had any contact at all with al Qaeda.
The government argued that Mehanna's translation work was itself material support, because it encouraged others to fight jihad and otherwise support al Qaeda. This translation work, as well as instant messages between Mehanna and others, jihadi videos, and images of 9/11 and Osama bin Laden, were all “bad” speech that was introduced to show Mehanna's state of mind as well as infer the alleged conspiracy's agreement and overt act.

C. Beyond Terror

The results of these cases were indictments or convictions for activity that may or may not have been actual criminal conspiracies, may or may not have ripened into actual conduct, an expansion of conspiratorial combinations beyond what traditional conspiracy law recognizes, and a fear-driven milieu that sees terrorism as “different” and thus favors the government. These phenomena are not new to the 9/11 era, nor are they restricted to terror-related cases. The First Amendment conspiracy cases emerging in the wake of World War I can be seen as the results of anti-socialist preventive policing, just as the post-World War II cases are now recognized as part of an anti-communist witch hunt. The doctrine of variance, designed to address these prosecutorial missteps, was established in Kotteakos v. United States, a fraud conspiracy case.

Consider also the recent First Circuit opinion in United States v. Dellosantos. In that case, the government charged the defendant with conspiracy to distribute narcotics. The conspiracy allegedly included a total of eighteen people. The defendant was convicted after a trial of conspiracy to distribute cocaine and marijuana. On appeal, the First Circuit determined that two conspiracies operated, one that included distribution of cocaine, and another that included distribution of cocaine and marijuana. The Court found that Dellosantos was a member of the cocaine-only conspiracy, and so vacated his conviction for distributing both drugs.

In proving that Dellosantos conspired to distribute both marijuana and cocaine, the government, under the guise of its single conspiracy theory, subjected the Defendants to voluminous testimony relating to unconnected crimes in which they took no part. This situation created a pervasive risk of “evidentiary spillover,” where the jury might have unfairly transferred to the Defendants the guilt relating to the other sixteen individuals. Specifically, there was a pervasive risk that such transference of guilt might have led the jury to find the Defendants guilty of joining the conspiracy despite the fact that the evidence was insufficient to support such a finding.

In light of this, the Court concluded that “there should be little question that the jury's decision to find the Defendants guilty of joining the conspiracy was influenced by the plethora of evidence implicating the other sixteen indicted co-defendants.”

D. Communism, Hip-Hop, and Jihad
The All-Purpose Speech Model is a problem because of the “bad” and inaccurate meaning given to the speech used. The government can seek to impose such meanings at trial or, where the defendant is charged with a conspiracy related to his association with a suspect group, a priori assumptions of “badness” may be applied to his speech. 89

Justice Black, writing in Yates v. United States, leveled this criticism of the dubiously relevant use of speech in conspiracy trials:

*879 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 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. 90

Communist-related speech in the 1950s carried “bad” speech connotations that may or may not have portended the danger their stigma suggested. 91 Hip-hop lyrics have similarly been used against defendants in drug conspiracy trials. In one case, a twenty-minute video of the defendant rapping with another man about his involvement in the drug trade was used to prove his involvement in a narcotics conspiracy, 92 even though no drugs were actually seized. 93 The defendant testified that rapping was his art and that his lyrics were not true, but were meant to draw a response from the crowd. 94 The Eighth Circuit found that admission of the video did not violate the defendant's rights. 95

In another case, the government introduced a rap video it had found on YouTube during the course of a defendant's drug conspiracy trial. 96 The Eleventh Circuit found error in admission of this video, in part because the defendant was not in it, had not authored the lyrics, and had not adopted the views expressed. 97

*880 The government's definition of jihad in the Al-Hussayen case and other cases also illustrates this a priori assumption of “badness.” 98 In fact, jihad can mean a number of things. It can mean a body of legal doctrine pertaining to legitimate warfare; 99 “disputation and efforts made for the sake of God and in his cause”; 100 “‘internal,’ ‘spiritual’ jihad [(that is) every bit as old as its ‘external,’ ‘fighting’ counterpart”; 101 and preaching the word of Islam. 102

For charges that include a substantive act, the All-Purpose Speech Model is less concerning, both because actual conduct vouches for speech's relevance and because the government has less need to use words like jihad in simplified, exaggerated, and unsupported ways. 103 This is why most observers are not troubled by the Second Circuit's rejection of the defendant's First Amendment claim in United States v. Rahman. 104 Rahman was the Muslim cleric found guilty of seditious conspiracy for plotting to bomb the World Trade Center in 1993 and assassinate Egyptian President Hosni Mubarak. 105 Although Rahman engaged only in speech, it was closely tied to actual conduct, not least of which was
the actual bombing of the World Trade Center. 107 Because there was actual conduct, the government had no need to advance a dubiously reliable definition of jihad. Rahman's own use of jihad, in fact, clearly confirmed his criminality. He exhorted his *881 followers to “do jihad with the sword, with the cannon, with the grenades, with the missile . . . against God's enemies.” 108

Contrast Rahman's definition of jihad with that set forth by one Islamic scholar: “the believer may undertake jihad ‘by his heart; his tongue; his hands; and by the sword’--the foremost of these being the first.” 109 Another scholar notes that some Islamic traditions indicate that the best type of jihad is speaking the truth to an iniquitous ruler or tyrant. 110 The Quran, in turn, states that a Muslim should “[c]ombat the polytheists with your possessions, your selves, and your tongues.” 111

The point is that talk of jihad, like communist tracts and hip-hop, is often a priori assumed to be probative of criminal intent or activity. 112 This is separate from but related to the All-Purpose Speech Model. It is related because the dual uses of speech inherent in the Model raise serious questions of process outcome reliability. 113 When speech is used as evidence and as crime (with the same speech often used for both), confidence in a guilty verdict may be undermined. 114 The a priori assumption is also separate from the All-Purpose Speech Model because the Model would exist whether language were saddled with an a priori “bad” assumption, or it was given a “bad” meaning by the prosecutor at trial. The practical result is qualitatively the same; “bad” speech is admitted that is not as probative as it appears. A priori assumptions simply make the speech much more damning and difficult to counter.

*882 In pursuing inchoate offenses, less actual conduct means that the government must increasingly rely on speech to be simultaneously the agreement, overt act, evidence of these elements, and evidence of mens rea. 115 This encourages prosecutors to stretch the meaning of language. Jihad has come to mean terrorism, and not only in the government's eyes. 116 Groups like al Qaeda also have practically redefined the word to mean abject and raw terrorism. 117

These varied meanings, and the government’s interest in avoiding another 9/11, lead to disturbing linguistic shapeshifting. If a defendant has been critical of the U.S. Government, he is not speaking truth to a tyrant but is evincing criminal intent. If someone claims that he wants to spread the word of Islam, this does not mean that he wants to engage in proselytizing, but that he wants to engage in fighting. If someone argues that Chechen rebels are freedom fighters and that Russian soldiers in that region are war criminals, it means that he believes that the 9/11 hijackers were freedom fighters and the people killed in those attacks got what they deserved. 118 If someone argues that the insurgencies in Iraq and Afghanistan are justified to defend these countries, then that person must intend to kill U.S. service people if given the chance. When someone uses the word jihad, that person must support terrorism and must himself be a criminal. If he has not taken any action, his crime is conspiracy.

The challenge, then, is to embed language into its milieu by deeply understanding it. In a Seventh Circuit drug case, for example, in which a rap lyric was introduced, the defendant argued that this music “‘constitutes a popular musical style that describes urban life’ . . . [and] the reality around its author.” 119 The Seventh Circuit responded that the defendant's “knowledge of this reality . . . was relevant” to the charged crimes. 120

In that case, drugs were found in the defendant's luggage, 121 and so there was little prejudice to introducing the rap lyrics. In light of the All-Purpose Speech Model, however, this case suggests that the government will *883 give defendants' speech “bad” meanings, even when the government, judge, or jury do not understand the speech 122 or the meaning
of the speech is stretched. People who live in crime-ridden neighborhoods—or in communities that are perceived to be crime-ridden—have a greater incentive to censor themselves than people in safe or apparently safe neighborhoods. Put another way, innocent talk of things like jihad, communism, and drug dealing can be misconstrued and result in threats to free speech.

E. World-Wide Communism and the Global Jihad Movement

Conspiracy law has always struggled to define its borders, and so has given rise to doctrines including the Pinkerton rule on vicarious liability, multiplicity, admission of co-conspirators' statements, and rules to exclude those statements. The basic question is who is in a conspiracy and who is not. The answer has always lain in whether someone agreed to join.

The conceptual difficulties with proving agreements notwithstanding, some conspiracy charges stretch the notion of agreement beyond what traditional conspiracy law recognizes. During the anti-communist era, for example, Congress found that:

*884 The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. . . . [I]t seeks converts far and wide by an extensive system of schooling and indoctrination. . . . [Congress must pass] legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

The twenty-first century's “global jihad movement” follows the notion of a world-wide communist conspiracy in form and function. It refers to an alleged international conspiracy to organize and execute Islam-related terror attacks. Whenever someone is accused of such terror activity, the government claims he is part of that conspiracy. This argument, and its conceptual difficulty, is illustrated in the testimony of a government expert in United States v. Kassir:

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

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

Ironically, the United States' success against al Qaeda may contribute to this conceptually problematic approach. As the United States and its allies have been successful in targeting and disrupting al Qaeda, the terrorist organization
has been defeated as a structured organization that traditional conspiracy law recognizes. It has become an idea, and al Qaeda-inspired jihad has retained currency. The United States is now fighting a dangerous idea. This idea, much like that of communism, is the link between domestic conspiracy defendants and their supposed ideological leaders abroad.

A defendant's alleged inclusion in the global jihad movement permits a broad swath of speech to be introduced in evidence. Someone's comment that 9/11 was justified, or that bin Laden is a role model, becomes an agreement to join the international conspiracy. Communication of this comment to another amounts to recruitment and thus an overt act. Finally, support for 9/11 and bin Laden provides evidence of the mens rea to provide material support to terrorism.

*886  F. Law Enforcement Responses

Conspiracy law is a natural response to perceived national crises because, as Justice Jackson wrote, “[c]onspiratorial movements do indeed lie back of the political assassination, the coup d'etat, the putsch, the revolution, and seizures of power in modern times . . . .” Three specific law enforcement responses to such perceived crises increase conspiracy's threat to free speech.

First, the judicial system provides for “exceptions” in the context of terrorism, socialism, communism, and drugs, which create matrices of new legal rules that shift the adversarial balance in criminal cases in favor of the government and away from defendants. These exceptions are often viewed as necessary in light of the country's Wars on Terrorism, Communism, and Drugs, in which the danger is apparently so serious that the government must be given great leeway in the criminal justice process.

Second, the government applies a “prevention paradigm” of law enforcement, which means that inchoate offenses will be charged at ever earlier stages, increasing the risk of prosecutorial error. Because conspiracy is often proved in large part by speech, earlier law enforcement intervention also increases the risk that protected speech will be used to prove nonexistent conspiracies. This is, in part, why Aziz Huq has argued that the use of religious speech in terrorism trials is problematic because it is a poor signal for criminal intent in general, and unjustifiably targets the Muslim community specifically. For example, prior to the use of religious speech as a signal of terrorism, a Muslim may have referred to himself as Salafi, which is a fundamentalist strain of Islam that is not necessarily connected to terrorism. The government has, however, connected Salafism to terrorism, so the Muslim might no longer call himself Salafi. Religious speech, Huq argues, is inaccurately used as a proxy for criminal intent, probably underlies a number of plea bargains, and leads to pretextual charges such as those for false statements and immigration violations.

Third, the government applies an “unaffiliated model” of conspiratorial liability, linking unconnected people in ways which traditional conspiracy law does not recognize.

In the post-9/11 era, these law enforcement responses have resulted in prosecutors employing “an aggressive approach to traditional conspiracy liability, thereby establishing a capacity to prosecute potential terrorists . . . even in the absence
of any specificity as to particular violent acts they might commit.”162 The government does so by linking defendants to the “global jihad movement,”163 even though the defendants may be unconnected to any designated foreign terrorist organization.164

These law enforcement responses carry with them the public safety virtues that traditional conspiracy law and scholars like Robert Chesney,165 Neal Kumar Katyal,166 and Lawrence Rosenthal167 express. The vice, however, is that it worsens the problems associated with the All-Purpose Speech Model by leading to the prosecution of people who may not have actually conspired to commit a crime or who were not serious about it. Some defendants may have plans that are, according to former FBI Deputy Director John Pistole, “more aspirational than operational.”168 Others may not be criminals, but law-abiding dissenters. For those people, the prevention paradigm results in a risk of “prosecuting dissenting thought uncoupled from culpable action.”169 It “might strike the wrong balance between the benefits of preventive action and the risks that defendants will be prosecuted for acts that they might never actually have committed.”170 The All-Purpose Speech Model lies at the heart of this “wrong balance.”

III. The Intersection of Speech and Conspiracy

By now it is clear that speech intersects with conspiracy in intimate and important ways. Questions remain: When is this intersection not a problem? Why do problems arise? What is the structure of the problem? And what is the danger flowing from this problem?

A. When the All-Purpose Speech Model Presents No Problem

The All-Purpose Speech Model observes that speech can be both a crime and evidence thereof. If nothing else is said, this observation does not amount to much. We are normatively satisfied with many categories of speech being crimes (and thus unprotected), just as we are with relevant speech being admissible as evidence of crimes (thus, in my controversial opinion, unprotected). In run-of-the-mill cases, speech and crime intersect in two justifiable ways.

First, consider a defendant who is charged with conspiracy in connection with a planned bank robbery who is caught by law enforcement with a shotgun in the process of executing the robbery. The admission in evidence of the defendant's writings that referred to committing crimes with shotguns is not a problem, even in light of the defendant's First Amendment objection that the writings show only his abstract beliefs. This is so because when actual conduct occurs, the outcome reliability concerns inherent in using speech as evidence of a speech crime are largely absent. In other words, the conduct of possessing the gun lends great relevancy to the speech. When actual conduct takes place, the All-Purpose Speech Model poses no real problem.

Second, a defendant accused of selling drugs might have explicitly discussed with co-conspirators the amount of drugs involved in their crime. Admission of these discussions is also not a concern, even if no drugs are found. This case does not present serious All-Purpose Speech Model concerns because the speech is unambiguously associated with legitimately criminal activity.

The First Circuit's approach in the landmark conspiracy case, United States v. Spock, refers to both of these occasions. Limiting the use of speech to prove mens rea, the Court wrote:
I. The doctrine of *strictissimi juris* applies in cases such as this where group association and First Amendment rights are at issue.

*Strictissimi juris* is the procedural doctrine that supports the substantive prohibition against a defendant being found guilty by association. Steven R. Morrison, *Strictissimi Juris*, 67 Ala. L. Rev. 247, 249–50, 253 (2015). It requires the separate consideration of each individual defendant in a group and the judgment of that defendant’s actions and intent independently. The doctrine specifically applies to situations where an individual is engaged in a substantial amount of First Amendment activity such that discerning a
criminal conspiracy in that activity is difficult. See United States v. Stone, 848 F. Supp. 2d 719, 723 (E.D. Mich. 2012) (It “comes into play for crimes that obviously implicate the First Amendment.”). It is intended to ensure that a verdict rests solely on the conduct and mens rea of the individual. Applied to protester situations, it protects the First Amendment right to speak, assemble, and associate when a defendant is a member of a group that engages in First Amendment conduct but may also engage in crime. The Seventh Circuit applied strictissimi juris to United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), the Chicago Seven case arising out of a protest at the 1968 Democratic National Convention. The court noted that strictissimi juris applies "when the group activity out of which the alleged offense develops can be described as a bifarious undertaking, involving both legal and illegal purposes and conduct, and is within the shadow of the first amendment." Id. at 392.

A. Supreme Court application of the doctrine

“Strictissimi juris” means “of the strictest right.” United States v. Cerilli, 603 F.2d 415, 421 (3d Cir. 1979). Although originating in 1800s surety law, the Supreme Court first applied the doctrine in criminal cases in 1961. In Noto v. United States, 367 U.S. 290 (1961), the defendant had been charged and convicted based on the membership clause of the anti-Communist Smith Act. The defendant was a member of a group that advocated overthrowing the federal government. Much of the government’s evidence came from a witness reading excerpts of communist materials and testimony about the defendant’s group planning to get supporter elected to leadership roles in the United Auto Workers. The Supreme Court announced the modern strictissimi juris rule, holding that this type of crime
must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.

*Noto*, 367 U.S. at 299–300; see also *Hellman v. United States*, 298 F.2d 810, 812 (9th Cir. 1961) (discussed *infra*).

The same day, the Supreme Court decided *Scales v. United States*, 367 U.S. 203 (1961), where it defined the limits on First-Amendment protected group membership and activity, although without discussing the doctrine expressly. Membership could be criminal when the group advocated for violent overthrow and the individual defendant knows of that purpose and specifically intends to further it. While the *Scales* opinion does not specifically mention *strictissimi juris*, it does highlight the need to focus on the individual.

**B. Ninth Circuit application of the doctrine**

In *Hellman v. United States*, 298 F.2d 810, 811 (9th Cir. 1961), the Ninth Circuit waited until the *Scales* and *Noto* opinions were issued before reviewing the case of a Communist Party member who was convicted under the Smith Act’s membership clause. The court, having noted the recent application of *strictissimi juris* by the Supreme Court, focused on whether there was sufficient evidence that the defendant had a “specific intent to bring about violent overthrow of the government as speedily as circumstances would permit.” *Id.* at 812. If that specific intent was not proved, “the conviction cannot stand however strong the proof may be that he was an active and knowledgeable member of an organization which advocated the violent overthrow of the Government.” *Id.*
The court reasoned that because the Communist organization had both legal and illegal goals, a member might not intend the illegal goals. Instead, “an active member with knowledge of both the legal and illegal aims might personally intend to effectuate only the Party’s legal objectives . . . .” Id. Thus, the fact of active membership and knowledge of the organization’s illegal goals do not allow an inference that the member had illegal intent: “Such an inference is not a permissible one especially where, as here, the result of a mistaken finding would be to impair legitimate political expression or association.” Id.

The Ninth Circuit articulated a test of the sufficiency of the evidence: “If Hellman’s activity as a knowledgeable member of the Party was of a kind which is explainable on no other basis than that he personally intended to bring about the overthrow of the Government as speedily as circumstances would permit, personal illegal intent could properly be inferred.” Hellman, 298 F.2d at 813. The court listed examples of activity that would meet this test: The “collection of weapons and ammunition in substantial quantities, or the conducting of field surveys to ascertain ways and means of sabotage[e] . . . .” Id. Without such personal advocacy on Hellman’s part, the only other way that his illegal intent could be proved was through evidence he urged and encouraged contemporary legal or illegal action that could only have been motivated by an intent to accomplish violent overthrow of the Government. Id. at 813–14.

The court acknowledged that the government proved he was an “exceedingly active” member, organizer, recruiter, and promoter of the group.¹ However, although Hellman had discussed force and violence, he did so in his role as a teacher of his party’s beliefs, not in

¹ Hellman “served as an organizer for the states of Montana and Idaho. He regularly
his personal advocacy. *Id.* at 814. Hellman urged Party members “to immediately undertake action.” *Id.* Among other things, he encouraged students to take leadership positions and taught that they must advance the conditions necessary “to produce the crisis which the Communists need to succeed.”

He asked students to participate in elections to expose that change could not be achieved through elections. *Hellman*, 298 F.2d at 814. He proposed that the State Board organize an educational program which would stress ‘the development of mass agitation and propaganda of all types.’ He prepared a plan to accomplish the infiltration of the Farmer's Union in an attempt to dominate it.” *Id.*

Even taken together, the Ninth Circuit did not feel that these calls to action supported a finding that Hellman had the requisite intent. Without his personally advocating violent overthrow of the Government, all of his actions were only equivocal. Applying its test, the court found that “[c]onsidering these facts alone, or in conjunction with his knowledge of the Party’s illegal advocacy, the activity portrayed is explainable on the basis that he intended to bring about the Party’s ultimate goals through peaceable means.” *Id.* Accordingly, the court reversed Hellman’s conviction.

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II.  The *strictissimi juris* doctrine at trial

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2 The Ninth Circuit found this call to action to be “[t]he most damaging action attributed to Hellman . . . .” *Id.* at 814. However, it appeared that Hellman was using one of the Communist Party “classics” and was doing no more than outlining the Party program. *Id.*
While the doctrine is an overarching rule to be considered throughout pretrial motions and trial, it particularly applies to evidentiary rulings, Rule 29 motions, and jury instructions.

C. Evidentiary rulings

Relevance. In addition to the standards set out in Federal Rules of Evidence 401 and 402, the court should evaluate the relevance of offered evidence with a mind toward the doctrine. This entails being skeptical of how relevant evidence is to any defendant not directly linked to it and giving an appropriate limiting instruction. It further entails protecting the First Amendment rights of defendants by excluding or limiting the evidence even if it may carry some relevance. When making a Rule 403 evaluation of whether relevant evidence is unduly prejudicial, confusing, or misleading, strictissimi juris works hand-in-hand with Rule 403 because both protect the right to not be guilty by association. To protect the right to be judged only on one’s own actions and intent, the doctrine “was meant to address the unreliability of circumstantial evidence, the misuse of attenuated inference . . . [and] impose a preference for direct evidence, circumstantial evidence supported by direct evidence, and ambiguous First Amendment-protected evidence supported by direct or circumstantial evidence . . . .” Morrison, Strictissimi Juris at 252.

Co-conspirator hearsay. The court should consider and rule on the admissibility of co-conspirator hearsay under Rule 801(d)(2)(E) as soon as possible, since the government is likely to try and show the speech of one defendant is probative as to the intent of others. If jurors hear co-conspirator evidence improperly, they are likely to impute that speaker’s beliefs onto other defendants. This is exactly the guilt-by-association concern that strictissimi juris is designed to prevent. In United States v. Spock, 416 F.2d 165, 173 (1st
Cir. 1969), the court criticized the use of statements by third parties alleged to be co-conspirators, noting that the trial court had “fail[ed] to recognize” that “[t]he metastatic rules of ordinary conspiracy are at direct variance with the principle of strictissimi juris.” Id. (footnote omitted).

D. Request to Reconsider Co-conspirator Statements

Defendants respectfully ask the Court to reconsider the admissibility of co-conspirator statements, otherwise admissible pursuant to Federal Rule of Evidence 801(d)(2)(E), under First Amendment of the United States Constitution and pursuant to the rule of strictissimi juris.

When an defendant is charged as a member of a conspiracy, Rule 801(d)(2)(E) allows the admission of co-conspirator statements and acts as evidence against the defendant where: (1) the conspiracy alleged was in existence at the time the statement was made; (2) that the person who made the statement (the declarant) and the defendant were participants in the conspiracy, and (3) the statement was made by the declarant during and in furtherance of the conspiracy. FRE 801(d)(2)(E). This rule, allowing the imputation of guilt via the statements and acts of third-parties, is generally applied to individuals of a group defined solely by a criminal purpose. But when a conspiracy charge stems from an individual’s involvement in a group having both legal and illegal purposes, and which engages in both legal and illegal means of achieving those purposes, the applicability of Rule 801(d)(2)(E) requires further analysis under the First Amendment.

The United States Supreme Court has applied the rule of strictissimi juris when reviewing convictions under the anti-Communist Smith Act of individuals based on their membership in an organization advocating for the violent overthrow of the government.
Finding that the First Amendment protections applied to defendants prosecuted for membership in an organization having both lawful and unlawful purposes, the Court determined that the defendant’s intent “must be judged Strictissimi juris, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.” Noto v. United States, 367 U.S. 290, 299 (1961); see also Scales v. United States, 367 U.S. 203 (1961).

The Supreme Court’s reasoning also applies in certain conspiracy cases. For example, in United States v. Spock, 416 F.2d 165 (1st Cir. 1969), the First Circuit reviewed the conspiracy convictions of three anti-war activist defendants for counseling and aiding others to avoid the draft. The First Circuit recognized that the crime of conspiracy implicates an individual’s First Amendment rights to freedom of association and speech when it involves “a bifarious undertaking, involving both legal and illegal conduct,” and that when such rights are implicated, it is improper to apply “the panoply of rules applicable to a conspiracy having purely illegal purposes * * *,” as “[t]he metastatic rules of ordinary conspiracy are at direct variance with the principle of strictissimi juris.” Id. at 172-74. To address these constitutional concerns, the First Circuit held:

“When the alleged agreement is both bifarious and political within the shadow of the First Amendment, we hold that an individual's specific intent to adhere to the illegal portions may be shown in one of three ways: by the individual defendant's prior or subsequent unambiguous statements; by the individual defendant's subsequent commission of the very illegal act contemplated by the agreement; or by the individual defendant's subsequent legal act if that act is “clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated.””

Applying this standard, the First Circuit specifically noted the error of allowing the government to introduce co-conspirator statements as evidence of a defendant’s specific intent because the “specific intent of one defendant in a case such as this is not ascertained by reference to the conduct or statements of another even though he has knowledge thereof.” *Id.*

When the criminal activities of a group implicate the rights protected by the First Amendment, a higher level of scrutiny and proof should be applied, and the guilt of an individual conspirator should not rest on the circumstantial and attenuated evidence permitted under Rule 801(d)(2)(E). Otherwise, the crime of conspiracy becomes a vehicle by which the government can pursue all members of an organization or movement shown to have some illegal aim or be engaged in illegal means without clear proof that a particular member specifically intended to pursue that illegal aim or engage in illegal activity.

For example, in *United States v. Dellinger* 472 F.2d 340 (7th Cir. 1972), the Seventh Circuit found that the First Amendment was implicated in a case involving protestors convicted of violating the Anti-riot Act, noting:

A realistic approach compels application of a first amendment test to a statute which punishes activity leading up to and furthering a riot, for at least two reasons. One is that rioting, in history and by nature, almost invariably occurs as an expression of political, social, or economic reactions, if not ideas. The rioting assemblage is usually protesting the policies of a government, an employer, or some other institution, or the social fabric in general, as was probably the case in the riots of 1967 and 1968 which are the backdrop for this legislation. A second reason is that a riot may well erupt out of an originally peaceful demonstration which many participants intended to maintain as such. Each participant is entitled to a careful distinction between responsibility for the lawful and constitutionally protected demonstration and responsibility for the activity for which the legislative body validly prescribes a penalty.

*Id.* at 359.

The underlying assemblage here, protesting the policies of the federal government, necessarily implicates the protections of the First Amendment. As such, the Court is
required to make sure that the application of the conspiracy statute and its attendant rules do not infringe upon the defendants’ rights of speech and assembly.

Defendant therefore request that the Court reconsider the admissibility of co-conspirator statements under the First Amendment.

*Experts.* Should the government offer expert testimony under Rule 702, the court should apply *strictissimi juris* to ensure that any expert does not remotely imply that an individual defendant is a part of a group, encourage the jury to find the defendants guilty as a group, or otherwise misuse their status as an expert to conflate individual defendants.

**E. Rule 29 Motions**

“*Strictissimi* is, at its base, a sufficiency-of-the-evidence rule.” *Morrison, Strictissimi Juris* at 263. The Ninth Circuit in *Hellman* articulated “the negate-all-alternatives, “clear proof,” and direct evidence” approaches. *Id.* In applying the doctrine while determining the sufficiency of the evidence, the Eighth Circuit has explained that “[b]ecause the parties contemplated aims protected by the First Amendment, it is this Court’s duty to carefully examine the specific intent of each party so that the illegal aims of one or several defendants are not mistakenly imputed to an innocent party.” *United States v. Casper*, 541 F.2d 1275, 1280 (8th Cir. 1976). The Seventh Circuit described the application of *strictissimi juris* as

necessary to avoid punishing one who participates in such an undertaking and is in sympathy with its legitimate aims, but does not intend to accomplish them by unlawful means. *Specially meticulous inquiry into the sufficiency of proof is justified and required* because of the real possibility in considering group activity, characteristic of political or social movements, of an unfair imputation of the intent or acts of some participants to all others.
United States v. Dellinger, 472 F.2d 340, 392 (7th Cir. 1972) (emphasis added).

“[S]trictissimi juris affects the sufficiency of the evidence to convict. It imposes a duty on the Court, in the case of defendants accused of membership in an organization with both lawful and unlawful aims, to consider evidence against each defendant ‘according to the strictest law’ so as to avoid conviction of members who used the organization for legitimate purposes.” United States v. Stone, 848 F. Supp. 2d 719, 724 (E.D. Mich. 2012) (quoting N.A.A.C.P. v. Claiborne Hardware, 458 U.S. 886, 920, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982)). The doctrine’s application to sufficiency of the evidence has also been described as “requir[ing] a court to determine if there is sufficient direct or circumstantial evidence of the defendant’s own advocacy of and participation in the illegal goals of the conspiracy and the court may not impute the illegal intent of alleged co-conspirators to the actions of the defendant.” United States v. Markiewicz, 978 F.2d 786, 813 (2d Cir. 1992) (internal citations and alterations omitted).

F. Jury Instructions

“The strictissimi juris doctrine emphasizes the need for care in analyzing the evidence against a particular defendant in a case of this type, both by the jury in its fact-finding process and by the court in determining whether the evidence is capable of convincing beyond a reasonable doubt.” United States v. Dellinger, 472 F.2d 340, 393 (7th Cir. 1972). The jury instructions must tell the jury that evidence of First Amendment speech requires a heightened level of scrutiny, and they must also emphasize that they cannot assign guilt to any individual based on the actions of the group or other group members.
As applied to the conspiracy charge in Count One, *strictissimi juris* requires a heightened standard for the *mens rea* element to safeguard against an individual being convicted based on their association with the group. The Supreme Court has held that the government’s evidence of a defendant’s “specific intent” should be judged strictly – or *strictissimi juris*. *Noto v. United States*, 367 U.S. 290, 299 (1961)

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

*Noto* at 299-300,

In *Scales v. United States*, 367 U.S. 203 (1961) the Court stated that “protection for the innocent could be adequately accomplished by requiring that the defendants' specific illegal intent be proved to the degree demanded in *Noto v. United States*.” *Id.* at 234. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Supreme Court repeated this rule and held that it applied to civil liability also. “For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.” *Id.* at 920. “The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims.” *Healy v. James*, 408 U.S. 169, 185-86 (1972).

With specific reference to the factor of intent, it is said in *Scales*, at page 229, that there must be 'clear proof.' Citing to *Scales*, in *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969), the First Circuit developed a test for determining a defendant’s specific intent.
When the alleged agreement is both bifarious and political within the shadow of the First Amendment, we hold that an individual's specific intent to adhere to the illegal portions may be shown in one of three ways: by the individual defendant's prior or subsequent unambiguous statements; by the individual defendant's subsequent commission of the very illegal act contemplated by the agreement; or by the individual defendant's subsequent legal act if that act is "clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated." *Scales v. United States*, 367 U.S. at 234.


In this case, the Court’s jury instructions should require a heightened level and standard of proof to make sure the jury is making its determination based on credible, direct evidence of a defendant’s specific intent to join in the illegal objective of the alleged conspiracy. The Spock test does this.

In addition to a higher, stricter *mens rea* standard, *strictissimi juris* requires a similarly heightened standard for the jury’s findings. The First Amendment protection of "core political speech" is "at its zenith.” *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988) (describing "). To provide this protection, *Noto* informs us that the evidence of an individual’s participation in a conspiracy that involves a significant First Amendment component must be clear. *Noto v. United States*, 367 U.S. 290 (1961) (Requiring “clear proof that a defendant ’specifically intend(s) to accomplish (the aims of the organization) by resort to violence.” Id. at 299.)

In general, “instructions should restate the strictissimi-informed evidentiary rulings made before and during trial, inform the jury that it must consider the evidence under a heightened level of scrutiny, remind them that they cannot impute guilt from the group to the individual, and remind them that they play a role not only in determining guilt, but also in protecting defendants’ First Amendment rights. *Morrison*, *Strictissimi Juris* at 280.
III. Conclusion

As recognized by the Supreme Court, multiple circuit courts and trial courts, 
strictissimi juris plays an important role in conspiracy trials that implicate the First 
Amendment. The doctrine works to protect the rights of individual defendants to free 
speech, to free association, and to being judged based on their actions and intent alone. 
For these reasons, it must be considered in the case at bar, which so clearly implicates the 
doctrine.

Dated this 29th day of August 2016.

Thomas K. Coan
Thomas K. Coan, OSB 89173
Attorney for Defendant Santilli
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMMON BUNDY, RYAN BUNDY,
SHAWNA COX, PETER SANTILLI,
DAVID LEE FRY, JEFF WAYNE
BANTA, KENNETH MEDENBACH, and
NEIL WAMPLER,

Defendants.

BROWN, Judge.

This Order Re: Final Pretrial Conference includes the Court’s definitive rulings on disputed issues raised or argued during the Final Pretrial Conference on August 23, 24, and 25, 2016, and as otherwise brought to the Court’s attention to date. To the extent that the rulings stated herein differ in any respect from the Court’s statements during the Final Pretrial Conference or from prior Orders, this Order controls. To the
a continuing objection, and, therefore, Defendants need not re-
raise this issue in order to preserve it for appeal. 5

**DEFENDANTS’ STRICTISSIMI JURIS ARGUMENTS**

Defendants filed a Memorandum (#1145) Regarding Application
of *Strictissimi Juris* and Request to Reconsider Admissibility of
Co-Conspirator Statements in which they contend the doctrine of
*strictissimi juris* will affect these proceedings in several
respects. In particular, Defendants contend *strictissimi juris*
in this case operates to narrow the scope of relevant evidence
that the government can produce to only that evidence that is
directly linked to the illegal object of the alleged conspiracy,
to exclude statements that would otherwise be admissible as co-
conspirator statements under Federal Rule of Evidence
801(d)(2)(E), to provide a basis to scrutinize any motions for
judgment of acquittal to ensure there is sufficient evidence that
each Defendant had the requisite specific intent to help
accomplish the illegal object of the alleged conspiracy, and to
limit jury instructions because “evidence of First Amendment
speech requires a heightened level of scrutiny” and the jury may
not “assign guilt to any individual based on the actions of the

5 The Court notes the parties’ Joint Notice (#1123) as to
the Preliminary Jury Instructions addresses these issues and
memorializes the parties’ previous positions that they submitted
informally.
In *Hellman v. United States*, 298 F.2d 810 (9th Cir. 1961), the defendant was charged with violating the Smith Act, 18 U.S.C. § 2385. The defendant was indicted under the “membership clause” of the Smith Act, which required proof of two elements:

1. that a society, group, or assembly of persons (here the Communist Party) advocated the violent overthrow of the Government, in the sense of present advocacy to action to accomplish that end as soon as circumstances were propitious; and
2. that defendant was an active member of that society, group or assembly of persons (and not merely a nominal, passive, inactive or purely technical member) with knowledge of the organization’s illegal advocacy and a specific intent to bring about violent overthrow of the Government as speedily as circumstances would permit.

*Hellman*, 298 F.2d at 811-12 (citing *Scales v. United States*, 367 U.S. 203, 220-21 (1961)). Relying on *Scales* and *Noto v. United States*, 367 U.S. 290, 296 (1961), the Ninth Circuit noted “Smith Act offenses require strict standards of proof,” which meant “‘this element of the membership crime, like its others must be judged *strictissimi juris* for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes . . . which he does not necessarily share.’” *Hellman*, 298 F.2d at 812 (quoting *Noto v. United States*, 367 U.S. at 299-300) (omissions in original).

Because the political party at issue in *Hellman* had “legal aims
as well as the assumed illegal aims,” an “active member with
knowledge of both the legal and illegal aims might personally
intend to effectuate only the Party’s legal objectives.”
Hellman, 298 F.2d at 812.

The Ninth Circuit summarized the factual record as follows:

Hellman was an exceedingly active member of the Party. He served
as an organizer for the states of Montana and Idaho. He regularly
attended state and regional meetings. He taught extensively in Party
schools, recruited members into the Party, organized youth camps,
participated in the Party underground and distributed Party
literature. The evidence shows that Hellman also sold subscriptions
to Party publications, solicited contributions for the Party, requested
persons to attend Party meetings, and concealed his own
membership in the Party by signing a non-Communist affidavit.

Id. at 813. Applying a standard that required the illegal intent
to be demonstrated by “clear proof,” the Ninth Circuit found
“however sufficient these facts may have been to prove that
Hellman was an active member of the Party, . . . they do not give
rise to a reasonable inference that he specifically intended to
overthrow the Government by force and violence at the first
propitious moment.” Id.

Although the concerns that underpin strictissimi juris have
general application to the First Amendment issues in this case,
those concerns are largely already addressed by the narrow focus
of the conspiracy charged in Count One and the legal
ramifications that flow from the narrow focus of the charged
conspiracy. The Court intends to give Preliminary Jury
Instructions, for example, that provide “[t]he government must also prove beyond a reasonable doubt that a particular Defendant became a member of such conspiracy knowing of its illegal object and specifically intending to help accomplish that illegal object regardless whether the particular Defendant or other individuals may have also had other, lawful reasons for their conduct.” The Court notes Defendants have requested the Court remove the following language from the Preliminary Jury Instructions:

Defendants’ political beliefs are not on trial. Defendants cannot be convicted based on unpopular beliefs. Although speech and assembly are generally protected by the First Amendment, that protection is not absolute, and it is not a defense to the conspiracy charged in Count One.

For example, “threats” and “intimidation,” as defined in these instructions, are not protected by the First Amendment.

On the other hand, a defendant’s speech that merely encourages others to commit a crime is protected by the First Amendment unless that defendant intended the speech to incite an imminent lawless action that was likely to occur.

Thus, you may consider the purpose of a Defendant’s speech and expressive conduct in deciding whether the government proved beyond a reasonable doubt that any Defendant agreed with another to impede officer of the United States Fish and Wildlife Service and/or Bureau of Land Management by force, intimidation, or threats.

The Court is still considering whether to include this subject in the Preliminary Jury Instructions.
merely by knowing that a conspiracy exists.”

The Court’s expected jury instructions, therefore, sufficiently guide the jury and preclude any finding that any Defendant joined the charged conspiracy based solely on lawful, protected conduct, intent, or association. Similarly, in the event any Defendant makes a motion for a judgment of acquittal at the end of the government’s case-in-chief, the Court will scrutinize the record to determine whether sufficient evidence exists from which the jury could find the particular Defendant joined the conspiracy knowing of its illegal object (i.e., to impede officers of the United States by force, intimidation, or threats as defined in the Preliminary Jury Instructions) and specifically intended to help to accomplish that object.

In any event, so tailored, strictissimi juris does not change the standard that the Court has been applying to relevant evidence or the admission of statements under Rule 801(d)(2)(E). Evidence remains relevant only to the extent that it has bearing on whether a Defendant joined (or did not join) the charged conspiracy with the requisite intent. Similarly, the jury may only consider statements of a co-conspirator to the extent that the jury finds the alleged conspiracy existed and the particular Defendant against whom the statement is offered joined the charged conspiracy knowing of its illegal object and intending to help to accomplish it. As noted, that charged conspiracy relates
only to the alleged conspiracy to “impede officers of the United States by force, intimidation, or threat.” To the extent that a co-conspirator statement does not have any direct or circumstantial bearing on the charged conspiracy, therefore, that statement cannot be admitted under Rule 801(d)(2)(E).

The Court underscores, however, this is precisely the same standard that the Court applied to the evidence discussed previously in this Order, and it is the same standard that the Court will apply in the event of additional objections at trial. The Court, therefore, concludes strictissimi juris does not mandate reconsideration of the Court’s evidentiary rulings because the Court has been applying the necessary standard of admissibility, relevance, and sufficiency to date and will continue to do so.

IT IS SO ORDERED.

DATED this 1st day of September, 2016.

[Signature]

ANNA J. BROWN
United States District Judge
I. Introduction

The defendant, Tarek Mehanna, moves that this Court dismiss those portions of counts one through three of the Second Superseding Indictment that are based on speech that is protected by the First Amendment.

II. Facts

The Second Superseding Indictment (hereafter “indictment”) in this case was returned on June 17, 2010. It alleged, inter alia, that the defendant and his co-defendant, Ahmad Abousamra (“Abousamra”), conspired to provide material support or resources to Al-Qaeda, in violation of 18 U.S.C. § 2339B (Count One); conspired to provide material support to terrorists, in
violation of 18 U.S.C. § 2339A (Count Two); and provided and attempted to provide material support to terrorists, in violation of 18 U.S.C. § 2339A (Count Three).

The United States has made it clear through its presentations at the bail arguments that the government considers the defendant’s speech itself is a violation of these statutes. The government also views this speech to be overt acts in furtherance of the other conspiracy counts. For example, the government alleges that the defendant provided “expert advice and assistance” to a terrorist organization, when his only skill was his knowledge of both the English and Arabic languages. His translation of a document written by someone else and readily available on the internet is an act protected by the First Amendment, and cannot be the basis for a criminal prosecution.

A. Count One

The government has charged the defendant with conspiracy to provide material support or resources to Al-Qaeda, in violation of 18 U.S.C. § 2339B. The government alleges acts that are protected speech under the First Amendment. They include:

1 The government also alleges overt acts that the defendant does not argue are protected speech. They include:

• In 2002, Abousamra traveled to Pakistan, made a phone call, and called two phone companies to facilitate his entry into a terrorist training camp (Indictment, Count One, ¶¶ 1-3);
The defendant watched “jihadi videos” with friends (Indictment, Count One, ¶ 4);

He lent compact discs to people in the Boston area to "create like-minded youth" (Indictment, Count One, ¶ 5);

He discussed with friends their view of suicide bombings, the killing of civilians, and dying on the battlefield for Allah (Indictment, Count One, ¶ 6);

He translated texts that were and remain freely available on the Internet (Indictment, Count One, ¶¶ 16-18, 21-22, 25);

He looked for information online about the nineteen 9/11 hijackers (Indictment, Count One, ¶ 19);

In 2003, Abousamra traveled to California for advice on how to receive terrorist training (Indictment, Count One, ¶ 8);

In 2003, Abousamra gave $5,000 to someone (Indictment, Count One, ¶ 9);

In 2004, Abousamra entered Iraq to fight against U.S. forces (Indictment, Count One, ¶ 15);

In 2004, Abousamra and the defendant traveled to Yemen to attend a terrorist training camp (Indictment, Count One, ¶¶ 7, 11-14);

The defendant gave false information to agents of the FBI (Indictment, Count One, ¶ 27).

The defendant does not now move to dismiss the charges based on these overt acts. He moves to dismiss the charges only to the extent they are based on the defendant’s protected speech. He reserves the right, however, to move for dismissal of the charges based on these overt acts, and to make any other legal challenges available to him.
• He asked a friend for information on how to transfer files from one computer to another (Indictment, Count One, ¶ 20);
• He asked Abousamra how to shield his identity from the metadata on media that he was translating (Indictment, Count One, ¶ 23).

B. **Count Two**

The government has charged the defendant with conspiracy to provide material support or resources to terrorists, in violation of 18 U.S.C. § 2339A. The overt acts alleged in this count are identical to Count One in most pertinent ways. For Count Two, the government made the additional allegations that the defendant agreed to (but never did) translate a video about an insurgent leader in Iraq (Indictment, Count Two, ¶ 18), and the defendant gave someone a DVD of footage from Afghanistan and Chechnya. (Indictment, Count Two, ¶ 28).

C. **Count Three**

The government has charged the defendant with providing or attempting to provide material support to terrorists, in violation of 18 U.S.C. § 2339A. The government’s allegations merely mirror the language of the statute. It is evident, therefore, that the allegations made under Counts One and Two also will be used to support Count Three.

**III. Discussion**
“Congress shall make no law [abridging] the freedom of speech.” U.S. CONST. AM. 1. Despite Justice Hugo Black’s opinion that these words are clear and absolute, Hugo Black, The Bill of Rights, 35 N.Y.U. L. REV. 865, 874, 879 (1960), some speech certainly can be prohibited. In contrast, however, none of the defendant’s speech outlined above can be constitutionally prohibited under the First Amendment.

Speech that can be prohibited includes that which is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). It includes speech that furthers a conspiracy to commit a crime. Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 243-44 (4th Cir. 1997); U.S. v. Mubayyid, 476 F.Supp.2d 46, 55 (D. Mass. 2007). It includes speech that is a threat to injure someone or destroy property. Watts v. United States, 394 U.S. 705 (1969); Planned Parenthood v. Am. Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002). Although there are categories in which speech can be restricted, the First Amendment remains a bulwark against prohibiting speech that is unpopular, particularly on government policies. Snyder v. Phelps, 131 S.Ct. 1207, 1215 (2011) (“The First Amendment reflects ‘a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-
open.’") (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

In the context of a charge of providing material support to terrorists, the defendant is free to “say anything [he] wish[es] on any topic.” Holder v. Humanitarian Law Project (“HLP”), 561 U.S. ----, 130 S.Ct. 2705, 2722-23 (2010). The Supreme Court in Holder explicitly stated that independent advocacy, even of a terrorist organization, is protected by the First Amendment. Id. at 2723, 2728.2

The First Amendment protects the defendant from being tried or convicted based on the speech alleged in the indictment. Holder v. HLP speaks directly to this tenet. Furthermore, the defendant’s speech was not incitement under Brandenburg; it did not further the substantive conspiracies that the government alleges, and it did not constitute any threat.

A. The defendant’s speech is “core” speech for First Amendment purposes

The government alleges that the defendant (1) watched videos; (2) lent a compact disc to someone; (3) discussed issues with others; (4) translated texts that were available on the Internet and sent the translations to others; (5) accessed

2 18 U.S.C. § 2339B also does not punish membership in or association with terrorist organizations. Holder v. Humanitarian Law Project, 561 U.S. ----, 130 S.Ct. 2705, 2723, 2730 (2010). The defendant was never a member or associate of Al-Qaeda or any other terrorist organization, and the government does not allege that he was a member or associate.
information online; (6) asked someone how to transfer files; and (7) asked someone how to keep his name off of a computer file of a translation he was doing. The government’s allegations indicate the defendant did all of these things in order to exchange ideas and generate discussion of publicly accessible texts and videos.3


3 For purposes of this motion, the defendant is not challenging the factual basis of the government’s allegations. This does not mean he admits to any of them.
Indeed, the speech at issue in this case is political speech that lies at the heart of speech protected by the First Amendment. Hill v. Colorado, 530 U.S. 703, 787 (2000) (Kennedy, J., dissenting) ("Laws punishing speech which protests the lawfulness or morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against"); Elrod v. Burns, 427 U.S. 347, 356 (1976) ("political belief and association constitute the core of those activities protected by the First Amendment"); Texas v. Johnson, 491 U.S. 397, 411 (1989) ("expression of dissatisfaction with the policies of this country, [is] expression situated at the core of our First Amendment values").

The recent Supreme Court case Snyder v. Phelps suggests the type of speech that is regarded as a "matter of public concern" and that therefore lies "at the heart of the First Amendment’s protection." 131 S.Ct. 1207, 1215 (2011). In Snyder, the Court considered the speech of religious protestors at the funeral of a fallen U.S. soldier. This speech consisted of protestors carrying signs saying "God Hates the USA/Thank God for 9/11," "Thank God for IEDs," and "Thank God for Dead Soldiers." Id. at 1213.

The Court found that this speech involved a matter of public concern and was therefore entitled to "special protection" under the First Amendment. Id. at 1219. "Such speech
cannot be restricted simply because it is upsetting or arouses contempt.” Id.

If the signs in Snyder involved a matter of public concern, then the defendant’s speech certainly does as well. He had exchanges through the internet and in person with others about controversial topics involving global politics and religion, and he exchanged videos of events occurring in the wars in Iraq and Afghanistan. He put forward the religious beliefs he held as well as his political views on the Middle East. That these exchanges or the beliefs expressed were offensive or disagreeable does not matter. Id. (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”) (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

In wartime, in fact, courts must be especially careful to preserve free speech. The Supreme Court wrote that

[the] greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.

The Court’s recent opinion in Holder v. Humanitarian Law Project further illustrates why the First Amendment protects the defendant’s speech.

B. **Holder v. Humanitarian Law Project**

Humanitarian Law Project is a United States-based, United Nations-recognized human rights organization. 561 U.S. ---, 130 S.Ct. 2705, 2713 (2010). It wanted to train two terrorist organizations to use humanitarian principles and international law to peacefully resolve their disputes, engage in political advocacy on the groups’ behalf, and teach organization members how to petition bodies like the United Nations for relief. Id. at 2716. It petitioned the Supreme Court for a declaration that this activity does not constitute material support for terrorists, pursuant to 18 U.S.C. § 2339B. Id. at 2731-32.

The Court held that the First Amendment left unprotected only the “narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.” Id. at 2723. “Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups.” Id. at 2728.

This narrow prohibition leaves most speech protected. “Under the material-support statute, [the defendant] may say
anything [he] wish[es] on any topic.” Id. at 2722-23. The government acknowledged that § 2339B “does not prohibit independent advocacy or expression of any kind.” Id. at 2723. To be guilty of providing material support to terrorists, one must work under the organization’s “direction and control.” Id. at 2721. In other words, there must be a solid “connection between the service and the foreign group.” Id. at 2722.

Because Humanitarian Law Project proposed to work in connection with terrorist organizations, the Court found that their proposed efforts would constitute material support. Given its narrow prohibition, however, the Court noted that it was not addressing “the resolution of more difficult cases that may arise under the statute in the future.” Id. at 2712.

The case at bar is one of those future cases, but it is not a difficult one. The defendant engaged in speech and did so independently. He did not do so under the direction or control or in coordination with Al-Qaeda or any other designated terrorist organization. The indictment reflects the fact that the defendant never had any such connection.

The government highlights its inability to establish this connection by arguing in its Opposition to Defendant’s Renewed Motion for Release on Bail that the defendant was “tasked (directly or indirectly)” by “individuals with direct or indirect connection to” Al-Qaeda to perform translations of
publicly available texts. (Gov’t Opp. 15, 19 n. 18). Despite the government’s use of the word “tasking,” there is no evidence that the defendant acted under the control or direction of Al-Qaeda. Furthermore, even if the government’s tenuous and multiple degrees of separation⁴ between the defendant and Al-Qaeda were real, it shows that the defendant’s correspondents with whom he shared his translations were not members of Al-Qaeda. Even if they had some connection to Al-Qaeda, the government has not produced and will not produce any evidence establishing the defendant’s awareness.

The government also argued in its Opposition to Defendant’s Renewed Motion for Release on Bail that they did not need to prove that the defendant’s speech was under the direction or control or in coordination with a terrorist organization. The government believes that if the defendant provided translations that he believed Al-Qaeda “could use” or that advanced their objective, he is guilty of conspiracy to provide material support. This directly contradicts the explicit language in Holder. Under the direction or control or in coordination with means active mutual participation between a defendant and a terrorist organization. The plaintiffs in Holder would be guilty

of material support because they intended to work directly with terrorist organizations, regardless of the peaceful nature of the work that was proposed.\(^5\)

Under the First Amendment and HLP, the defendant was free to say anything he wished on any topic. He did so, and the government has indicted him based on this speech. This indictment violates the defendant’s First Amendment rights and must be dismissed.

C. **The defendant’s speech is not incitement**

Speech may be prohibited if it constitutes “advocacy of the use of force or law violation” and if that advocacy “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). “[T]he mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence” may not be prohibited. *Id.* at 448.

Consistent with *Brandenburg*, the defendant’s speech is clearly protected. The defendant’s speech is not even advocacy, much less advocacy that was intended and likely to lead to imminent lawless action. Rather, the defendant’s speech consists of watching videos describing insurgent fighters in Iraq and

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\(^5\) The Court in *Holder*, specifically noted that it could not determine the degree or coordination or direction needed to violate the material support law because it did not have specific activities before it.
depicting military operations against U.S. forces. It consists of conversations the defendant had with others about controversial topics. It consists of translations of readily available texts.

The government has repeatedly referred to the defendant’s translation of the “39 Ways to Serve and Participate in Jihad” as evidence of his support of foreign terrorist groups. He translated it and Tibyan Publications, a web site, placed it on their site. The government alleges that the defendant hoped his work would convince others of his view of things, (Indictment, Count One, ¶ 5), “lead to action,” (Indictment, Count One, ¶ 16), and “make an impact.” (Indictment, Count One, ¶ 22). The very purpose of speech is to persuade. Hill v. Colorado, 530 U.S. 703, 716 (2000) (“The right to free speech, of course, includes the right to attempt to persuade others to change their views”); Lee v. Weisman, 505 U.S. 577, 591 (1992) (“[T]he very object of some of our most important speech is to persuade... .”); Eisenstadt v. Baird, 405 U.S. 438, 459 (1972) (“The First Amendment protects the opportunity to persuade to action... .”); Thomas v. Collins, 323 U.S. 516, 537 (1945) (“'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts.”). The question is whether the defendant intended to advocate the use of force or violation of law. He did not, and the indictment does not indicate that he
did. The 39 Ways provides many suggestions as to how a Muslim may participate in defending his faith without joining a fighting force.

Even if the translation suggested the use of force or lawless action under certain situations, the evidence does not indicate that the defendant intended that his speech lead to imminent lawless action or was likely to do so. The defendant watched movies, translated texts, and talked with a few people about controversial topics inherent in the wars in Iraq and Afghanistan. This is not the kind of speech that would lead listeners to immediately engage in violence or lawless action. The indictment attests to the fact that the defendant’s speech led to absolutely nothing. Of all the speech by which the defendant is accused, the government is able to point to only a single effect: on one occasion, one of the defendant’s correspondents said, “[t]hings are clearer now.” (Indictment, Count One, ¶ 5).

D. The defendant’s speech did not further any conspiracy

In order to establish a conspiracy, the government must prove, in part, that an illegal objective is coupled with one or more overt acts in furtherance of the objective. U.S. v. Dahlstrom, 713 F.2d 1423, 1429 (9th Cir. 1983); see Direct Sales Co. v. U.S., 319 U.S. 703 (1943); U.S. v. Falcone, 311 U.S. 205
The government has charged the defendant with, *inter alia*, conspiracy to provide material support to Al-Qaeda (Count One) and conspiracy to provide material support to terrorists (Count Two). The indictment does not explicitly state what conduct the government considers to be material support.

Despite the lack of specificity, the defendant is able to determine that the material support envisioned in counts one and two is comprised of one or more of the following allegations:

1. Abousamra’s 2002 trip to Pakistan (Indictment, Count One, ¶¶ 1-3; Count Two, ¶¶ 1-5);
2. the defendant’s and Abousamra’s 2004 trip to Yemen (Indictment, Count One, ¶¶ 7-8, 10-15; Count Two, ¶¶ 8-9, 11-16); or
3. the defendant’s speech as described in this memorandum (Indictment, Count One, ¶¶ 4-6, 16-25; Count Two, ¶¶ 6-7, 17-24, 28).

The government has indicated that the defendant’s speech itself constitutes material support. It has also indicated that this speech is used as overt acts to support other material support. The government cannot do so without violating the First Amendment.

As noted above, “overt acts” for the purpose of establishing a conspiracy are acts done to further a conspiracy. See *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglas, J.)


Speech that is integral to a crime consists of, for example, a conversation about where to make a drug deal or how to build a bomb. This is quite different from translating a document or video that supports a point of view or suggests a course of conduct. Id. Indeed, the First Amendment “leaves the way wide open for people to favor, discuss, advocate or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.” Cole v. Richardson, 405 U.S. 676, 688-89 (1972).

In the instant case, the speech that the government alleges is an overt act is not an overt act in furtherance of either Abousamra’s alleged 2002 trip to Pakistan or Abousamra and the defendant’s alleged 2004 trip to Yemen. The vast majority of this speech took place in 2006, well after the two trips. Furthermore, the content of the speech is completely irrelevant to the success of either trip. Translating videos, discussing controversial topics, and trading CDs with friends were not
integral to these trips abroad. This speech was independent of these trips, and therefore cannot be used as overt acts in support of material support charges based on those trips.

“'Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it.'” Garrison v. State of La., 379 U.S. 64, 82 (1994) (Douglas, J., concurring). “Unless speech is so brigaded with overt acts of that kind there is nothing that may be punished.” Id.

E. The defendant’s speech is not a threat

The First Amendment permits the government to ban “true threats.” Virginia v. Black, 538 U.S. 343, 359 (2003). Such threats “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” Id.

Political hyperbole is not a true threat, and cannot be banned under the Court’s true threat doctrine. Watts v. U.S., 394 U.S. 705, 708 (1969). For example, an opponent of the draft who receives orders to report for military service may say, “I am not going. If they ever make me carry a rifle the first man I want to get in my sights is” the president. Id. at 706. Similarly, merely emotional speech that may appear to be threatening is protected. During a boycott, for example,
boycott leader’s statement, “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck,” is protected. N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 902 (1982).

In Claiborne Hardware, the Supreme Court found that the speech was protected, writing, “Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.” Id. at 910. The First Amendment’s “‘[f]ree trade in ideas’ means free trade in the opportunity to persuade to action, not merely to describe facts.” Id.

In the instant case, the defendant’s speech did not constitute a threat. His speech contained no threat of violence. The defendant communicated his speech to friends or correspondents, not as an actual threat to a potential victim. See Demers ex rel. Demers v. Leominster School Dept., 263 F.Supp.2d 195, 201 (D. Mass. 2003) (no First Amendment protection if the speaker “should have foreseen that her words would be seen as a threat to the” potential victim) (citing Lovell By and Through Lovell v. Poway Unified School Dist., 90 F.3d 367, 373 (9th Cir. 1996)). To find that the defendant’s speech constituted a threat would be tantamount to someone “threatening” his brother by expressing his anger only to his own wife in the privacy of the marital home.
The defendant’s speech was, at worst, political hyperbole concerning the United States’ actions in Iraq and Afghanistan. His speech concerned an issue of no less public importance than those in Watts and Claiborne Hardware, and his speech was much less “threatening” than in those two cases. In fact, it was not threatening at all.

IV. Conclusion

The defendant is being accused of providing, attempting to provide, and conspiracy to provide material support to terrorists. These charges are based primarily on the defendant’s speech, which is protected by the First Amendment. For the above reasons, the defendant requests that this court dismiss Counts One through Three of the Second Superseding Indictment to the extent they are based on the defendant’s protected speech.

TAREK MEHANNA
By his attorneys,

CARNEY & BASSIL

J. W. Carney, Jr.
J. W. Carney, Jr.
B.B.O. # 074760

Janice Bassil
Janice Bassil
B.B.O. # 033100

Sejal H. Patel
B.B.O. # 662259
Steven R. Morrison
B.B.O. # 669533
John E. Oh
B.B.O. # 675916
Carney & Bassil
20 Park Plaza, Suite 1405
Boston, MA 02116
617-338-5566

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J. W. Carney, Jr.
J. W. Carney, Jr.
CRIMINAL CONSPIRACY: POSITION PAPER AND PROPOSALS FOR REFORM

Ellen C. Brotman, John Cline, Matt Kaiser, Lisa Mathewson, Caleigh Milton, Steven R. Morrison

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Criminal Conspiracy: Position Paper and Proposals for Reform

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INTRODUCTION

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

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

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

Justice Learned Hand called conspiracy the “darling of the modern prosecutor’s nursery.”⁷ Judge Coffin, in the First Circuit’s landmark United States v. Spock case, commented, “[T]he absence of clear definitions of the elements of conspiracy creates a serious risk . . . . [Conspiracy] is . . . not well-defined and experience teaches that even its traditional limitations tend to disappear.”⁸ More recently, Seventh Circuit Judge Frank
H. Easterbrook lamented that “prosecutors seem to have conspiracy on their word processors as Count I; rare is the case omitting such a charge.”

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

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

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

Part I introduces the basic doctrine of criminal conspiracy. This includes the general conspiracy statute, found at 18 U.S.C. § 371; specific statutory conspiracy provisions, such as Title 21 drug conspiracies, conspiracies to provide material support to foreign terrorist organizations, under 18 U.S.C. §2339B, and conspiracies to commit money laundering, under 18 U.S.C. § 1956; and specialized conspiracy provisions, such as those provided by the Racketeer-Influenced and Corrupt Organizations Act (RICO), at
18 U.S.C. § 1962, and charges involving a continuing criminal enterprise (CCE) under 21 U.S.C. § 848. Part I is purely descriptive; we describe conspiracy law as it is, not as we believe it should be.

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

Part III presents NACDL’s proposals for reforming conspiracy law. These proposals include the following: requiring an overt act for every form of conspiracy, requiring that the overt act be a “real and substantive step toward accomplishment of the conspiratorial objective,” and requiring that overt acts be actual conduct and not speech, and conduct that is not protected by the Constitution; requiring that the overt act be accompanied by the specific intent to achieve the conspiratorial objective (already required in some jurisdictions, while in others it is required but not always given the
attention it deserves); requiring hearings to determine conspiracy membership — and
thus admissibility of members’ statements under Fed. R. Evid. 801(d)(2)(E) — before
trial and not during trial after the alleged co-conspirator statement has been conditionally
admitted; limiting the conduct of co-conspirators that is attributable to defendants;
requiring new jury instructions on conspiracy; replacing Pinkerton liability with liability
set forth in 18 U.S.C. § 2; advocating for the application of the doctrine strictissimi juris;
and legislatively abrogating the Supreme Court’s 1981 opinion Albernaz v. United States
by providing that multiple conspiracy charges merge where there is only one agreement-
in-fact.

PART I: THE BASIC DOCTRINE OF CRIMINAL CONSPIRACY

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


a. Section 371 Conspiracy

At common law, conspiracy entailed merely an agreement to commit a crime or
an agreement to do something legal, but in an illegal way.\textsuperscript{16} Conspiracy was codified in
1867 and ultimately resulted in 18 U.S.C. § 371, the “catch-all” federal conspiracy statute\textsuperscript{17} that added the overt act requirement to the common law.\textsuperscript{18} Section 371 reads:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

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

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

None of conspiracy’s elements must be proven by direct evidence; they all can be inferred from circumstantial evidence.\textsuperscript{23} This evidence includes use of statements of an alleged co-conspirator, which are admissible for their truth pursuant to the hearsay exception at Fed. R. Evid. 801(d)(2)(E).\textsuperscript{24} Agreements, furthermore, need not be explicit; they can be inferred from tacit statements and actions.\textsuperscript{25} Agreements must, however,
consist of a meeting of two or more minds; a conspiracy usually cannot be committed alone.\textsuperscript{26}

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

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

\textit{b. Other Statutory Conspiracy Provisions}

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

Narcotics conspiracy under 21 U.S.C. § 846 criminalizes “conspir[ing] to commit any offense” under the Controlled Substances Act.\textsuperscript{35} This statute, in effect, provides for a multitude of statutory drug conspiracies including conspiracy to distribute, conspiracy to
manufacture, conspiracy to possess, and conspiracy to possess with the intent to manufacture, distribute or dispense.\(^{36}\)

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

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

With regard to the knowledge element, the government must prove that the defendant “knowingly and voluntarily” joined the conspiracy.\(^{43}\) As with the agreement element, knowing and voluntary participation need not be proved by direct evidence.\(^{44}\) The government is also not required to prove that the defendant knew the type of the drug involved in the conspiracy.\(^{45}\) It is sufficient for the government to prove knowledge by showing that the defendant knew the substance in question was “some type of controlled substance.”\(^{46}\)
As will be discussed later, unlike under 18 U.S.C. § 371, proof of conspiracy under 21 U.S.C. § 846 does not require an overt act. Actual possession is also, of course, not an essential element.

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

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

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

Al Qaeda is not just an organization. Al Qaeda also views itself as an ideology. It hopes to encourage people around the world who are unable to travel to places like Afghanistan or Somalia or wherever else, it hopes to encourage those people to do what they can at home. Particularly after 9/11, there was a tremendous emphasis on the training camps are closed [sic]. You can't just come to Afghanistan now to get training and go home. Now the battle is in your own backyard. The battle is what you yourself are able to do with your own abilities, so you should do whatever you can. It is an individual duty upon you to participate in the struggle. It is not about Usama Bin Laden and it's not about al Qaeda. It is about the methodology and the ideology behind them. If you follow the same methodology and the same ideology, then you too can be al Qaeda.

The point is that any two people, anywhere in the world, can “conspire” to support Al Qaeda or any other FTO, even if the likelihood of ever helping the organization is remote or even non-existent. In one case, United States v. Mehanna, the government argued that the defendant’s translation of pro-jihad religious texts, publicly available online, from Arabic to English was part of his conspiracy to support Al Qaeda,
and constituted the substantive offense of providing *actual* material support — even though the defendant never knew or spoke with any member of Al Qaeda.  

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

Whereas material support conspiracy charges can be absurd, conspiracy to commit money laundering shows how routine conspiracy charges can become. 18 U.S.C. § 1956 sets forth a broad range of conduct that can satisfy the elements of money laundering. Very broadly speaking, moving money that is the proceeds of an illegal activity to hide it is money laundering, as is transferring money from a clean source so that it can be used to assist in the commission of a crime. In addition, § 1956(h) provides that conspiracy liability is punished as though the substantive object of the conspiracy were completed.
In *Whitfield v. United States*, the Supreme Court held that no overt act is required to violate the conspiracy subsection of § 1956. As a result, a person has completed the crime of conspiracy to commit money laundering merely by agreeing to do something that constitutes money laundering with someone else, but without taking any action to actually do any money laundering.

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

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

c. *Specialized Conspiracy Provisions*

In addition to the above statutory conspiracies, there are specialized conspiracy provisions, which include most prominently criminal provisions under the Racketeer-Influenced and Corrupt Organizations Act (RICO), at 18 U.S.C. § 1962, and Continuing Criminal Enterprise (CCE), at 21 U.S.C. § 848.
RICO prohibits conspiracy to perform a number of actions connected to racketeering. RICO permits law enforcement to cast a wider net than traditional conspiracy by replacing “wheel” and “chain” rationales for conspiracy with the new statutory concept of “enterprise.”\textsuperscript{65} This allows law enforcement to infer a common objective from “the commission of highly diverse crimes by apparently unrelated individuals”; RICO ties together these diverse parties and crimes.\textsuperscript{66}

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

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

\textbf{PART II: CONSPIRACY’S PROBLEMS}

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

a. The Overt Act Requirement

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

Under current law, an overt act is any act performed by any conspirator for the purpose of accomplishing the objectives of the conspiracy. The overt act does not have to be unlawful; “it can be any act, innocent or illegal, as long as it is done in furtherance of the object or purpose of the conspiracy.” An overt act of one conspirator is imputed to all without any new agreement specifically directed to that act. Finally, the overt act
requirement can be used to establish venue “in any district where an overt act in
furtherance of the conspiracy was performed.”

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

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

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

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

b. Use of Circumstantial Evidence and Inference

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

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

As the Seventh Circuit has held, “[W]hile mere association with an individual involved in a criminal enterprise is not sufficient, ‘presence or a single act will suffice if circumstances show that the act was intended to advance the ends of the conspiracy.’” Under current law, therefore, being present with someone doing something that is a substantive crime — giving a bribe, for example — can be sufficient for a conspiracy conviction. The Eighth Circuit has elaborated, “Although not sufficient by itself, association or acquaintance among the defendants supports an inference of conspiracy.” While guilt by association is nominally condemned by all, it is alive and well in the conspiracy context.
Moreover, courts have held that membership in a conspiracy does not require that a person know everything else going on in a conspiracy. It does not defeat a conspiracy conviction to be able to prove, for example, that you do not know or had no contact with the people who are running the conspiracy or planning it. As the Fourth Circuit has explained, “[W]hile many conspiracies are executed with precision, the fact that a conspiracy is loosely-knit, haphazard, or ill-conceived does not render it any less a conspiracy — or any less unlawful.” Or, put another way, “[A] defendant properly may be convicted of conspiracy without full knowledge of all of [the conspiracy's] details, but if he joins the conspiracy with an understanding of the unlawful nature thereof and willfully joins in the plan on one occasion, it is sufficient to convict him of conspiracy, even though he had not participated before and even though he played only a minor part.”

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

This standard can lead to a conviction for conspiracy on a thin reed. For example, the Fifth Circuit affirmed the conviction of a woman who used an alias to buy a plane ticket for her husband, who she knew was part of a drug conspiracy. The Seventh
Circuit has affirmed the conviction of a man who drove to a drug dealer’s house in a truck with two other people and a toolbox that was later found to contain drugs, touched the lid of the tool box, and, as he parked in the driveway backed into his driveway instead of driving in head first. The Eighth Circuit affirmed a conspiracy conviction based solely on the fact that two men rode in a car together to a place where one of them was dealing drugs, and the other man warned him that police were arriving. Finally, in United States v. Njoku, a woman was convicted of health care fraud because she performed health assessments on patients, knew her bosses were submitting some false Medicare claims, drove the woman primarily responsible for falsifying claims to home visits, and knew that the woman had submitted claims for some patients whom she had not been driven to visit.

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

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

The quantum of evidence required to prove the existence of the conspiracy and other prerequisites has varied from “substantial” to “slight.” Furthermore, it is not necessary that the conspiracy be charged, or that the defendant be a member of the
conspiracy at the time the statements were made. Some courts have held that it is not even necessary for the government to identify the declarant. Finally, as discussed above, the corroborating evidence required may be completely circumstantial.

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

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

d. First Amendment and Conspiracy

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

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

This all allows and encourages proof of a conspiracy by verbosity of speech evidence, and prosecutors are rewarded with convictions by inundating juries with mounds of “bad” sounding speech116 — “bad” speech being that which sounds indicative of criminal activity, but may or may not actually be so.117 The evidentiary distinction between agreement, overt act, *mens rea*, and evidence of these elements fades; “bad” speech assumes the appearance of relevance to proving all of these things, and amounts to a normatively unacceptable blunderbuss approach118 to evidence that implicates free speech concerns.119 Put another way, in conspiracy trials, speech is the sole necessary building block, which works to prove conspiracy’s homogenized set of ostensibly distinct
elements.

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

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

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

In the war on terror, the government’s definition of “jihad” illustrates the a priori assumption of speech’s “badness.” In fact, jihad can mean a number of things. It can mean a body of legal doctrine pertaining to legitimate warfare; “disputation and efforts made for the sake of God and in his cause”; “internal, ‘spiritual’ jihad [that is] every bit as old as its ‘external,’ ‘fighting’ counterpart”; and preaching the word of Islam.
In pursuing inchoate offenses like conspiracy, less actual conduct means that the government must increasingly rely on speech to be simultaneously the agreement, overt act, evidence of these elements, and evidence of *mens rea*. This encourages prosecutors to stretch the meaning of language to suit their purposes, but not First Amendment principles.

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

e. The Pinkerton Doctrine

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

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

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

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

(a) Whoever commits an offense against the United States or aids, abets,
counsels, commands, induces or procures its commission, is punishable as
a principal.

(b) Whoever willfully causes an act to be done which if directly performed
by him or another would be an offense against the United States, is
punishable as a principal.

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

Third, the Pinkerton doctrine violates the principle of individual criminal liability,
especially in the context of conspiracies, whose proof is often notoriously uncertain. Put
another way, convictions for conspiracies themselves often rest on dubious evidence.
Proving that conduct committed by one person was related to the alleged conspiracy and
was reasonably foreseeable to the other person often rests on even more dubious evidence. *Pinkerton* thus further undermines the already questionable legitimacy of conspiracy law.

\[ f. \] **Expansion of Conspiracy to Defraud the United States**

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

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

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

Although widely known as a “Klein conspiracy,” named after a Second Circuit case applying it (and discussed below), this theory of liability originated with two Supreme Court cases. The first, *Haas v. Henkel*, held sufficient to charge an offense
the allegation that the defendants had bribed a Department of Agriculture employee to leak to them advance information about official crop reports. Acknowledging that the leak was not intended to cause pecuniary harm to the United States, and in fact caused none, the Court nonetheless held that “it is not essential that such a conspiracy shall contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government.”

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

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

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

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

Interestingly, the *Klein* court never considered the fact that a conspiracy to defeat the government’s collection of revenue is intended to deprive the government of money
or property — and thus fits neatly within the traditional definition of a conspiracy to
defraud. Nor did the court acknowledge that the false statements that it cited to uphold
the conviction violated separate federal statutes, and thus would have supported a
conviction under the offense clause of § 371. Nevertheless, until recently *Klein’s*
authoritative status has been unquestioned among the circuits.

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

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

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

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

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

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

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

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

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

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

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

The instruction continues in a way that can be confusing:

Evidence which shows that [the person charged] only knew about the conspiracy, or only kept “bad company” by associating with members of the conspiracy, or was only present when it was discussed or when a crime was committed, is not sufficient to prove that [the person] was a member of the conspiracy even if [the person] approved of what was happening or did not object to it. Likewise, evidence showing that [the person] may have done something that happened to help a conspiracy does not
necessarily prove that [she] joined the conspiracy. You may, however, consider this evidence, with all the other evidence, in deciding whether the government proved beyond a reasonable doubt that [the person] joined the conspiracy.  

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

h. Strictissimi Juris

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

When this group conduct involves substantial amounts of First Amendment activity, an individual defendant’s guilt is supposed to be determined “strictissimi juris,” or “of the strictest right or law.”  Strictissimi juris is supposed to separate the individual from the group by attending to the evidentiary problems associated with circumstantial evidence; attenuated inferences; and improper imputation of guilt from the group to the individual. It is also meant to impose a preference for direct
evidence, circumstantial evidence supported by direct evidence, and ambiguous First Amendment-protected evidence supported by direct or circumstantial evidence\textsuperscript{178} (so-called “independent evidence” rules\textsuperscript{179}).

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

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

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

This was meant to avoid improper imputation of the group’s criminal *mens rea* or conduct to the individual.\textsuperscript{183} *Strictissimi juris* is not, however, limited to Smith Act prosecutions.

In *United States v. Spock*, a 1969 case, the First Circuit considered a charge of conspiracy among anti-war activists to counsel and aid others to avoid the draft.\textsuperscript{184} The Court ostensibly applied *strictissimi juris* because the alleged agreement was legal but the means to accomplish that end might be both legal and illegal.\textsuperscript{185} Thus applied, *strictissimi juris* for the First Circuit required an individual defendant’s specific intent to
adhere to the illegal portions of the undertaking to be proven with one of three types of
direct evidence:

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

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

In United States v. Dellinger, the Seventh Circuit considered the convictions of
the Chicago Eight for conspiracy to riot during the 1968 Democratic National
Convention.188 All of the defendants had participated in legal protests, during which
some crime and violence occurred.189 The government claimed the defendants shared the
common aim of producing violence,190 and the defendants claimed that they merely
wanted to protest and organize peacefully.191 The court held that evidence of an
individual defendant’s participation in a group engaged in crime could not, standing
alone, be probative of the defendant’s unlawful intent.192 That said, it is unclear what
role strictissimi juris played in the court’s analysis193; indeed, the court took steps to
declare what strictissimi juris did not require.194

Finally, in Castro v. Superior Court of California, prosecutors charged protestors
with conspiracy during a school protest.195 Reversing the convictions, the court rejected
the state’s “slavish adherence to” the use of circumstantial evidence, which chilled the
exercise of free speech, and its attempt to circumvent the First Amendment by charging
conspiracy. The state, said the court, could not use conspiracy as a First Amendment work-around. The state’s dependence on circumstantial evidence, said the court, violated the principle of strictissimi juris.

i. The Albernaz Problem

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

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

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

PART III: PROPOSALS FOR REFORM

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

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

Some forms of conspiracy require no overt act. All forms should require such an element. Furthermore, under current law overt acts can be comprised of the most minor of conduct, mere speech, constitutionally protected acts, and even constitutionally protected speech. To be a meaningful element, the overt act — like the “substantive step” element of attempt — should consist of a “real and substantial step toward accomplishment of the conspiratorial objective.” In addition, while recognizing that speech and other constitutionally protected conduct can be, in some cases, relevant, it should not be permitted to comprise a very element of the crime of conspiracy. The ease with which the government can prove an overt act should, *a fortiori*, require it find some...
overt act that is an actual, unprotected act. Finally, prosecutors and courts should be reminded that this overt act must be accompanied by specific intent to commit the conspiratorial objective. This element is all too often discounted or even ignored.

\( b. \text{Require hearings to determine conspiracy membership prior to trial} \)

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

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

\( c. \text{Limit the conduct of co-conspirators that is attributable to defendants} \)

Under Pinkerton, a defendant can be convicted of reasonably foreseeable substantive crimes committed by a co-conspirator during the course and in furtherance of a conspiracy.\(^{205}\) The Supreme Court should discard this impermissible common law
theory of criminal liability, or Congress should overrule it legislatively. Accomplice liability should be determined solely by the standards set forth in 18 U.S.C. § 2.

d. Require new jury instructions on conspiracy

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

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

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

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

f. Albernaz should be legislatively overruled

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

CONCLUSION

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

4 Katyal, supra note 1.
7 Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).
8 416 F.2d 165, 188 (1st Cir. 1969) (Coffin, J., dissenting).
9 United States v. Reynolds, 919 F.2d 435, 439 (7th Cir. 1990).
10 Criminal Conspiracy, 35 HARV. L. REV. 393, 393 (1922).
11 David B. Filvaroff, Conspiracy and the First Amendment, 121 U. PA. L. REV. 189 (1972); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 481 (2004) (“[T]he crime of conspiracy has routinely been used by prosecutors to ‘get’ union organizers, political dissenters, radicals, and other ‘dangerous’ individuals who could not otherwise be convicted of an offense.”); Note, Conspiracy and the First Amendment, 79 YALE L.J. 872, 872 (1970) (explaining that cases involving the use of conspiracy law to prevent individuals from joining controversial groups have attained notoriety).
13 See Pinkerton v. United States, 328 U.S. 640, 647-48 (1946) (establishing that a defendant is responsible for substantive crimes committed by a co-conspirator that are performed in furtherance of the conspiracy and are reasonably foreseeable).
14 Especially after Hammerschmidt v. United States, 265 U.S. 182 (1924).
16 Deacon v. United States, 124 F.2d 352 (1st Cir. 1941).
18 Deacon, 124 F.2d 352.