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The Movement Toward Statute-Based Conspiracy Law in the United Kingdom and the United States

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Abstract

A single criminal charge of conspiracy, because it simultaneously involves an inchoate as well as a substantive offense, is characterized by a duality that for years has created confusion and uncertainty as to the proper prosecution and punishment for the crime. The author of this Note places responsibility for this confusion primarily on the judges whose rulings have produced a highly incoherent body of common law and secondarily on the complacent legislatures that have allowed judicial interpretation to shape conspiracy law in a haphazard manner.

The Note compares the approaches to conspiracy law taken by the United Kingdom and the United States. After discussing the historical origins of conspiracy law and analyzing its various justifications, this Note then describes recent statutory efforts to reform conspiracy law—efforts that have been slow and cumbersome. Next, this Note addresses the most controversial issues surrounding the current prosecution and punishment schemes, including accessorial liability, the merger rule, and cumulative sentencing. Finally, this Note predicts the likely direction of conspiracy law reform. The author concludes that in order for conspiracy law to survive as a useful component of the United States criminal justice system, Congress must follow the lead of its British counterpart by abrogating the inchoate common law and codifying conspiracy law in the most coherent and explicit manner possible.

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I. INTRODUCTION

Conspiracy law occupies a unique position in criminal law. Conspiracy is an inchoate offense, preceding the commission of a target crime or crimes. In addition, conspiracy itself constitutes a crime separate from the underlying offense: an agreement plus the intention to carry it forth. Because of its hybrid character, conspiracy law lacks the clarity of many other criminal law doctrines. The duality of conspiracy law also creates uncertainty in the prosecution and punishment of a conspiracy and any substantive offenses associated with it.[1] What is clear is that conspiracy law allows for the prosecution and conviction of individuals who might otherwise remain outside the criminal justice system.[2]

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1. *See* GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 420 (2d ed. 1983) ("Conspiracy, the most complex of the inchoate offenses at common law, may seem somewhat arbitrary.").

2. *See Development in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 922 (1959) [hereinafter *Developments*]. Some critics argue that conspiracy law allows individuals to become legally associated with a crime without a determination of individual guilt. These critics suggest that other legal doctrines may accomplish the policy goals of conspiracy without the potential of guilt by association. *See* Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1140 (1973). *But see* Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back From an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 5 (1992) (discussing the changes in conspiracy law since the Johnson article).

Two other factors contribute to the uncertainty of conspiracy law. First, because conspiracies involve groups, each member of a conspiracy adds another potential defendant and additional counts to the indictment, thereby increasing the length and complexity of a trial. Second, conspiracy law is a product of courts rather than of legislatures. While civil-law states generally have codified narrowly tailored conspiracy statutes, common-law states generally have codified broad statutes and relied on courts for their interpretation.[3] In the past, many judges and prosecutors relied upon the wide latitude of the conspiracy charge to carry out their political agendas.[4] More recently, courts and legislatures have recognized the potential abuses of conspiracy law.[5] Reform has been slow and difficult, and certain procedural advantages for the prosecutor, such as liberal joinder of defendants and offenses and the co-conspirator hearsay exception, remain firmly entrenched in conspiracy law.[6]

Although subject to frequent criticism, conspiracy law remains an important part of criminal law in common-law states. Over the past century, the United Kingdom and the United States have been at the forefront of the development of conspiracy law.[7] Because conspiracy law in

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3. *See generally* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (1978). Common-law states rely more on conspiracy law than do civil-law states, the latter employing other legal devices to achieve the same goals. *Id.* at 647; *see* Krulewitch v. United States, 336 U.S. 440, 450 n.15 (1949) (Jackson, J., concurring). Court opinions are frequently the source of philosophical discussions of conspiracy as judges attempt simultaneously to justify and criticize the doctrine. *See, e.g.*, Regina v. Withers, 1975 App. Cas. 842 (appeal taken from Eng.); Regina v. Griffiths, 1 Q.B. 589 (Crim. App. 1966); Pinkerton v. United States, 328 U.S. 640 (1946).

4. *See infra* notes 20-24 and accompanying text.

5. *See infra* notes 25-49 and accompanying text.

6. This Note will not focus on the prosecutorial advantages of conspiracy because these are more a consequence of, and not a justification for, conspiracy law. *See* MODEL PENAL CODE § 5.03 cmt. at 389 (1985). For a discussion of the procedural advantages of conspiracy law, see WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 536-40 (2d ed. 1986).

7. Other common-law nations including Australia, Canada, and New Zealand generally rely on British conspiracy law and frequently refer to cases adjudicated in the United States. *See generally* L. J. Jackson, Case Law, *Redirecting the Common Law:* The Queen v. Darby, 10 SYDNEY L. REV. 430 (1984) (Austl.); Gerald Orchard, *The Mental Element of Conspiracy*, 2 CANTERBURY L. REV. 353 (1985) (N.Z.); Harvey Groberman, *The Multiple Conspiracies Problem in Canada*, 40 U. TORONTO FAC. L. REV. 1 (1982) (Can.); Wes Wilson, *The Political Use of Criminal Conspiracy*, 42 U. TORONTO FAC. L. REV. 60 (1984) (Can.).

This Note is limited to a comparison between the laws of the United Kingdom and the United States at the national level, where conspiracy charges are more likely. *See* Elliot L. Weinreb, Note, *The Threat of Unfairness in Conspiracy Prosecutions: A Proposal*

the United Kingdom and the United States is largely a product of judges, not legislators, case outcomes often hinge on specific facts rather than on legal precedent.[8] As a result, the development of British and United States conspiracy law has lacked coherence. This Note will examine the similarities and differences between conspiracy law in the United Kingdom and the United States to illuminate an area of the law that exists not in spite of its ambiguities, but because of them.

Part II discusses the early development of conspiracy law, its elements, and recent efforts at statutory reform. Part III sets forth the various justifications for conspiracy law and how they interrelate. Part IV analyzes the current charging and punishment scheme as it relates to the law's justifications. Finally, Part V projects a scenario for the future development of conspiracy law.

II. BACKGROUND

A. *Common-Law Developments*

Perhaps contrary to popular opinion, the law of conspiracy has existed for hundreds of years.[9] The early common law of conspiracy, however, applied only to conspiracies to obstruct justice[10] and usually involved false accusations.[11] Furthermore, a state could prosecute a conspiracy only if the falsely accused was indicted, and then acquitted of the substantive charge.[12]

The first revolution in conspiracy law came about in the early seven-

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for Procedural Reform, 2 N.Y.U. REV. L. & SOC. CHANGE 1, 1 (1972). Some states within the United States have more restrictive conspiracy laws than those found at the federal level, but the specifics of state conspiracy laws are beyond the scope of this Note. For a discussion of various state conspiracy statutes, see Peter Buscemi, Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122 (1975).

8. *See generally* FLETCHER, *supra* note 3.

9. In Regina v. Parnell, 14 Cox 508, 516 (Q.B.D. 1881), Judge Fitzgerald stated that "[t]his law of conspiracy is not an invention of modern times. It is part of our common law; it has existed from time immemorial." For a short historical review, see Regina v. Kamara, 1974 App. Cas. 104, 121 (appeal taken from Eng.). For a more extensive review of the history of conspiracy law, see J. W. CECIL TURNER, RUSSELL ON CRIME 1469-94 (12th ed. 1964), Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922), and PERCY H. WINFIELD, THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE (Fred B. Rothman & Co. 1982) (1921).

10. Early criminal procedure left many opportunities for abuse of the judicial system. For examples of this abuse, see Sayre, *supra* note 9, at 394-96.

11. *See* LAFAVE & SCOTT, *supra* note 6, at 525. *See generally, Developments, supra* note 2; WINFIELD, *supra* note 9.

12. *See* LAFAVE & SCOTT, *supra* note 6, at 525.

teenth century in *Poulterers' Case*.[13] The Court of Star Chamber held in *Poulterers' Case* that a conspiracy need not be wholly successful to obtain a conviction because the agreement that the conspirators forged was separate from the substantive criminal act.[14] That is, the crime of conspiracy lay in the unlawful agreement itself rather than in its execution.[15] This development signaled the beginning of courts' view of conspiracy as a separate crime punishable even if the planned act was not completed. Consequently, prosecutions and convictions of the crime of conspiracy increased significantly.[16]

After *Poulterers' Case*, the English judiciary made greater expansions in the law of conspiracy.[17] In 1716, the influential Judge William Hawkins stated that "there can be no doubt, but all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law."[18] One hundred years later, a well-respected English judge interpreted Hawkins' statement to mean that an indictment for conspiracy must "charge a conspiracy to do an unlawful act, or a lawful act by unlawful means."[19]

Judges in England and the United States recognized as early as the beginning of the nineteenth century that an agreement to commit an unlawful act constituted a conspiracy even when they did not interpret unlawful as criminal.[20] Judges used this broad definition of unlawfulness to

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13. 77 Eng. Rep. 813 (1611).

14. *Id.* at 813-14. The defendants had falsely accused an individual of robbery, but because it was clearly evident from the facts that the accused was innocent, the grand jury did not indict the alleged thief. *Id.* at 813.

15. *Id.*

16. *See* LAFAVE & SCOTT, *supra* note 6, at 525.

17. *See id.*

18. *Id.* (quoting 1 W. HAWKINS, PLEAS OF THE CROWN 348 (6th ed. 1787)). This statement has been the subject of great criticism. *See* Regina v. Kamara, 1974 App. Cas. 104, 121-22.

19. Lord Denman made this statement in Regina v. Jones, 110 Eng. Rep. 485, 487 (1832). Courts in the United States still quote Lord Denman's statement, although as a practical matter it is of historical significance only. *See* Pettibone v. United States, 148 U.S. 197 (1893); United States v. Caplan, 633 F.2d 534 (9th Cir. 1980). In the United Kingdom, the scope of the conspiracy definition remained uncertain until the 1970s. *See* J.C. SMITH & BRIAN HOGAN, CRIMINAL LAW 256 (1988); Regina v. Withers, 1975 App. Cas. 842 (appeal taken from Eng.).

The most important aspect of "lawful act by unlawful means" has been its use in statutory conspiracies. For example, antitrust statutes are based on the premise that it is legal for one merchant to raise the price of goods; however, it is not legal for several merchants to collude and to raise their prices simultaneously. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951).

20. *See Developments*, *supra* note 2, at 923.

impose their view of law and morality in cases that involved questionable criminal charges, and legislators acquiesced.[21] In this way, courts could achieve what they considered to be just results by serving as quasi-legislators.[22]

Prosecutors also took advantage of the broad nature of conspiracy law to further their governmental agendas. At the end of the eighteenth century, British prosecutors used the conspiracy charge to stifle critics of the government and to prevent demonstrations calling for religious, social, and economic reform.[23] By the beginning of the twentieth century, the British and United States governments were using conspiracy charges to thwart the unionization movement.[24]

Despite the recognition by British and United States courts that governments could easily abuse conspiracy law, neither nation's courts have advocated abolishing the crime.[25] United States Supreme Court Justice Jackson stated in his famous *Krulewitch v. United States*[26] concurrence that there is a place for conspiracy prosecutions in the United States

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21. *Id.*

22. Sayre, *supra* note 9, at 408.

23. *See* Regina v. Greenfield, 1 W.L.R. 1151 (Crim. App. 1973); *see also* A. H. Hermann, *Conspiracy to Cloud the Issues*, FIN. TIMES (LONDON), Nov. 30, 1988, at 14.

24. *See* Sayre, *supra* note 9, at 413-20.

25. Many commentators have criticized the hesitancy of the courts to limit the conspiracy doctrine. In 1922 one commentator warned:

> 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. That this uncertain doctrine should be seized upon, perhaps because of its very vagueness, as one of the principal legal weapons with which lawyers press their attack in labor controversies and in which judges find an easy and frequent support for their decisions is nothing short of a misfortune. It would seem, therefore, of transcendent importance that judges and legal scholars should go to the heart of this matter, and, with eyes resolutely fixed upon justice, should reach some common and definite understanding of the true nature and precise limits of the elusive law of criminal conspiracy.

Id. at 393-94 (footnote omitted). More recent commentators have been more direct: "What conspiracy adds to the law is simply confusion, and the confusion is inherent in the nature of the doctrine." Johnson, *supra* note 2, at 1139.

Interestingly, some judges have used the ambiguities associated with conspiracy law to limit its application. *See* Patrick A. Broderick, Note, *Conditional Objectives of Conspiracies*, 94 YALE L.J. 895, 902 (1985). Similarly, the United Kingdom has experienced difficulty in extraditing defendants accused of conspiracy from other states. Furthermore, the United Kingdom has on occasion refused to comply with other states' extradition requests on the ground that the conspiracy charge can be abused. Hermann, *supra* note 23, at 14.

26. 336 U.S. 440 (1949).

legal system[27] in spite of the fact that they are "elastic, sprawling, and pervasive . . . . [and a] loose practice" that poses a "serious threat to the fairness in our administration of justice."[28] In *Regina v. Parnell*,[29] a British court asserted that conspiracy law was unique within the legal system; although criminal law in general had a necessary degree of certainty, conspiracy was vague and uncertain.[30] However, the uncertainty of conspiracy prosecutions was nonetheless allowable if the state took great care in its administration.[31]

The conspiracy charge continues to be a powerful weapon favored by prosecutors.[32] Because of the change's ambiguities, procedural advantages, and potential for prosecutorial abuse, courts in both nations have attempted to limit the impact of abusive conspiracy prosecutions.

B. *Attempts at Statutory Reform*

British and United States legislatures have attempted, through codification, to eliminate the confusion surrounding conspiracy law.[33] In the 1970s, the British set out to define the parameters of conspiracy law. The creation of a Working Paper,[34] followed by a Law Commission,[35]

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27. *Id.* at 445-46. Justice Jackson continued: "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 offense is on which it may be overlaid." *Id.* at 446-47.

Judge Learned Hand described conspiracy as the "darling of the modern prosecutor's nursery." Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).

28. *Krulewitch*, 336 U.S. at 445-46.

29. 14 Cox 508 (Q.B.D. 1881).

30. *Id.* at 519.

31. *Id.*

32. *See* Weinreb, *supra* note 7, at 7; Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276, 284 (1948) [hereinafter *Conspiracy Dilemma*]. It may also be a burden for prosecutors for the same reasons it is a benefit. Conspiracy trials can be long and complicated. If the prosecutor cannot understand the case because of its complexities, then the jury might not be able to completely understand the case either. Out of confusion, the jury may decide not to convict. *See* Johnson, *supra* note 2, at 1140; Marcus, *supra* note 2, at 38.

33. The legislatures in civil-law states have been far more active in defining, by statute, the bounds of conspiracy. Civil-law states, in general, have taken a much narrower view of conspiracy. *See* FLETCHER, *supra* note 3, at 647; *Developments, supra* note 2, at 923.

34. *Inchoate Offences: Conspiracy Attempt and Indictment*, 6 Law Commission Working Paper No. 50 (June 5, 1973) [hereinafter Working Paper].

35. *Criminal Law: Report on Conspiracy and Criminal Law Reform*, 7 Law Commission Report No. 76 (Mar. 14, 1976) [hereinafter Law Commission Report]. *See generally* Ian H. Dennis, *The Rationale of Criminal Conspiracy*, 93 LAW Q. REV. 39

was the result of an attempt to establish uniformity and clarity regarding conspiracy law. The work of these two bodies culminated in Part I of the Criminal Law Act of 1977 (the Act).[36] The House of Lords, the highest British appellate court, described the law as "a radical amendment of the law of criminal conspiracy."[37] The law was considered radical because it eliminated most common-law conspiracies and replaced them with a statutory scheme.[38] Only a few common-law conspiracies, such as conspiracy to defraud and conspiracies to corrupt public morals or outrage public decency, survived codification under the Act.[39]

Although the Act may have appeared radical by classifying all conspiracies under four categories,[40] it effected few substantive changes in the law of conspiracy.[41] Conspiracy now has a statutory basis, but the

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(1977).

36. Criminal Law Act of 1977, ch. 45 (Eng.). Only Part I of the Act enacts the revisions to conspiracy law. All subsequent citations are to Part I of the Act.

37. Regina v. Ayres, 1984 App. Cas. 447, 453-54 (appeal taken from Eng.).

38. Section 1(1) of the Criminal Law Act of 1977 states:

> Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions, he is guilty of conspiracy to commit the offence or offences in question.

Section 5(2) of the Criminal Attempts Act of 1981 amended section 1(1) of the Criminal Law Act of 1977 to include conspiracies where commission of the substantive offense is impossible, thereby eliminating the defense of impossibility.

39. Conspiracy to defraud remained a common-law conspiracy because the drafters were concerned about leaving a gap in the criminal law that the Act would not catch. This distinction between statutory conspiracies and conspiracies to defraud greatly troubled the courts in the late 1970s and 1980s. *See* Regina v. Ayres, 1984 App. Cas. 447; Regina v. Holmes, 2 All E.R. 458 (Crim. Ct. App. 1985); Regina v. Tonner, 1 All E.R. 807 (Crim. Ct. App. 1985); Regina v. Duncalf, 2 All E.R. 1116 (Crim. Ct. App. 1979). *See generally* A. T. H. Smith, *Conspiracy to Defraud: The Law Commission's Working Paper No. 104*, 10 CRIM. L. REV. 508 (1988).

The Criminal Justice Act of 1987 abolished common-law conspiracy. SMITH & HOGAN, *supra* note 19, at 258. However, Parliament has yet to fully address the common-law conspiracies to corrupt public morals or outrage public decency.

40. The four categories are (1) statutory conspiracies under section 1(1), (2) conspiracies under a statute that provides for a conspiracy offense, (3) all conspiracies to defraud, (4) all conspiracies to corrupt public morals or outrage public decency. *See* Regina v. Ayres, 1984 App. Cas. at 454.

41. *See* SMITH & HOGAN, supra note 19, at 257; J.C. Smith, *Conspiracy under the Criminal Law Act 1977(1)*, 1977 CRIM. L. REV. 598. It is unclear whether the Act still allows the possibility of punishment even when the completed act is not a crime. *See* SMITH & HOGAN, *supra* note 19, at 287.

vague language of section 1(1) and subsequent sections, has left the Parliament with the task of defining the statute's parameters to the courts.

Although the Act fails to provide the degree of certainty characteristic of other criminal statutes, it does provide some reform, and, perhaps more significantly, demonstrates Parliament's interest in codifying conspiracy law. Moreover, the Act has served as a basis for other statutes that fill some of the gaps the Act left open. For example, the Criminal Attempts Act of 1981 expanded statutory conspiracy to include conspiracies to do the impossible.[42] Most recently, the Criminal Justice Act of 1987 converted conspiracy to defraud from a common-law offense to a statutory offense, thereby correcting one of the major shortcomings of the Act.[43]

In the United States, congressional efforts to clarify conspiracy law through federal statutes generally have been unsuccessful, and Congress has been content with allowing the courts considerable latitude in the development of the doctrine.[44] Congress enacted the most recent general conspiracy statute[45] in 1948 as part of a revision of Title 18, Crimes and Criminal Procedure.[46] It is a broadly tailored statute that codifies the punishment but not the elements of the offense.[47] One substantive change is the new requirement that the government prove an overt act in addition to the agreement itself as evidence of the conspiracy.[48] However, this requirement has not been a significant obstacle to prosecution of conspiracies.[49]

In addition to this general conspiracy statute, certain substantive-of-

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42. *See supra* note 38.

43. *See supra* note 39.

44. The great majority of conspiracy law in the United States has been developed by the judiciary. *See* MODEL PENAL CODE, *supra* note 6, § 5.03 cmt. at 386 (1985).

45. 18 U.S.C. § 371 (1988).

46. 1948 U.S.C.C.S. 645 (special pamphlet on Title 18).

47. *See* James Ball, Comment, *Criminal Conspiracy: A Balance Between the Protection of Society and the Rights of the Individual*, 16 ST. LOUIS U. L.J. 254, 273 (1971). Section 371 states, in part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States . . . 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 not more than $10,000 or imprisoned not more than 5 years, or both.

Statutes that include conspiracy as one of the offenses generally have a separate sentencing provision that may provide for a higher sentence than Section 371.

48. *Id.* This requirement did not exist at common law. *See* LAFAVE & SCOTT, *supra* note 6, at 547.

49. *See Developments*, *supra* note 2, at 946.

fense statutes include provisions that criminalize conspiracies to commit the substantive offense.[50] For analytical purposes, it is immaterial whether a defendant is charged with violating the general conspiracy statute or a conspiracy provision in a separate criminal statute.[51]

A blueprint for revision of the general federal conspiracy law appears in the Model Penal Code.[52] The Model Penal Code continues to treat conspiracy as an offense,[53] but it proposes a statutory scheme whose ultimate goal is to add more certainty and coherence to the law.[54] Congress has not adopted the Model Penal Code into federal law.[55]

C. *Basic Requirements*

As with other crimes, proving a conspiracy requires proof of the actus reus and the mens rea.[56] The actus reus is the agreement itself, and it forms the basis of the conspiracy.[57] The agreement may be oral, and surrounding circumstances alone may prove its existence.[58] Once the agreement exists, all other acts are merely acts in furtherance of the conspiracy and do not constitute the conspiracy itself.[59]

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50. *See, e.g.*, 18 U.S.C. §§ 372, 794(c), 894(a), 904 (1988).

51. *See* Broderick, *supra* note 25, at 904 n.50.

52. *See generally* Buscemi, *supra* note 7.

53. The crime of conspiracy is defined in the MODEL PENAL CODE, *supra* note 6, § 5.03:

> (1) *Definition of Conspiracy.* A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
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> (a) agrees with such person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

54. The proposed reforms to conspiracy law are found in several Model Penal Code provisions. Each provision is discussed *infra*.

55. Although not adopted at the federal level, several states have adopted significant portions of the Model Penal Code. *See generally* Buscemi, *supra* note 77.

56. The distinction between the actus reus and the mens rea is often hazy in conspiracy, which accounts for some of the confusion. *See* SMITH & HOGAN, *supra* note 19, at 258; LAFAVE & SCOTT, *supra* note 6, at 531, 535.

57. Agreement implies that there must be two or more parties. In general, two parties are necessary, although it may be possible in some circumstances to convict a defendant who conspires with a government agent. *See* SMITH & HOGAN, *supra* note 19, at 281-84; LAFAVE & SCOTT, *supra* note 6, at 560-63.

58. *See* Regina v. Duffield, 5 Cox 404 (1851); Direct Sales Co. v. United States, 319 U.S. 703 (1943); *see also* Regina v. Cooper, 32 Crim. App. 102 (1947).

59. *See generally Developments, supra* note 2, at 925-33.

The mens rea is the intent to carry out the agreement, not the intent to agree.[60] The mens rea for conspiracy is, at a minimum, the mens rea required for the substantive offense.[61] Furthermore, those who agree must have a common intention.[62] Intention without the agreement does not constitute conspiracy.[63]

III. The Rationale of Conspiracy Law

Perhaps in response to criticism that the crime of conspiracy is too uncertain to prosecute and punish, the courts have set forth a series of interrelated rationales for it. These court-fashioned explanations are themselves frequently unclear, and even the more coherent ones have encountered vocal critics. Nonetheless, exploring the justifications underlying the conspiracy doctrine helps explain why the crime exists as a punishable offense.[64]

A. *United Kingdom*

1. Early Intervention

The Law Commission stated that "the most important reason for retaining conspiracy as a crime was that it enabled the criminal law to intervene at an early stage before a contemplated crime had actually

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60. Lafave & Scott, *supra* note 6, at 535-36. Like the agreement itself, circumstantial evidence may prove intent. *Id.* at 537-38.

61. *Id.* at 536. Intent, not mere knowledge, is generally required. *See* Regina v. Anderson, 3 W.L.R. 268 (H.L. 1985); United States v. Falcone, 311 U.S. 205 (1940).

62. *Developments*, *supra* note 2, at 926. The requisite intent for a conspiracy indictment has been a controversial issue in Britain. In *Regina v. Anderson*, 81 Crim. App. 253 (1985), the defendant was charged and convicted of conspiracy to assist in the escape of a prisoner. On appeal the defendant argued (1) that he was not agreeing to assist in the escape but was merely agreeing to provide the necessary equipment, and (2) that the defendant could not have conspired because he did not believe that escape was possible.

The House of Lords rejected the defendant's arguments and dismissed the appeal. Lord Bridge of Harwich stated that the court must consider the diversity of roles that co-conspirators play and that if full intention of all conspirators was required, then conspiracy law would have no effect. *Id.* at 258-59. Conspirators become involved for many reasons and, once they achieve their objectives, they do not care if the ultimate goal of the conspiracy is reached. *Id.*

For a criticism of *Anderson*, see P. W. Ferguson, *Intention, Agreement and Statutory Conspiracy*, 102 Law Q. Rev. 26 (1986). For a more recent discussion of the issue, see David Cowley, *Conspiracy—The Mental Element*, 54 J. Crim. L. 312 (1990) (reviewing Regina v. Siracusa, 90 Crim. App. 340 (1990)); Rosemary Tobin, *Conspiracy and Intention*, 1991 N.Z.L.J. 430-31.

63. *See* Mulcahy v. Regina, 3 L.R.-E. & I. App. 306, 317 (1868).

64. *See* Dennis, *supra* note 35, at 40.

been committed . . . ."[65] Moreover, the law of conspiracy allows intervention at an earlier stage than does the law of attempt.[66] British attempt law focuses on actions that are "more than merely preparatory."[67] British conspiracy law focuses on the agreement. Therefore, an agreement to commit a crime may not constitute a violation of attempt law but will constitute violation of conspiracy law. The Law Commission refused to combine all inchoate crimes into one general attempt crime, arguing that the distinction between conspiracy and other inchoate crimes was necessary to avoid punishing an individual for conspiracy when the intent existed without the actus reus.[68]

Not surprisingly, the Law Commission placed particular emphasis on the agreement as the primary factor distinguishing conspiracy from attempt. This may be because the agreement is both the actus reus and a manifestation of the mens rea.[69] The agreement itself holds great significant because it is a step toward the completion of the crime.[70] Moreover, the thinking has been that there is "something inherently wicked" about the conduct of a group, something that is absent when one acts alone.[71]

2. Inherent Danger of Group Conduct

Neither the Working Party Paper nor the Law Commission Report addressed the concern about criminal conduct of groups.[72] This concern instead emerges in cases in which the facts lend themselves to a group-danger rationale for punishment rather than an early-intervention rationale.

British courts in the nineteenth and early twentieth centuries relied on

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65. Law Commission Report, *supra* note 35, para. 1.5. This statement was taken from the Working Paper, *supra* note 34, para. 12.

66. *See* SMITH & HOGAN, *supra* note 19, at 286. Early intervention, however, may be a misnomer because it implies that such intervention may not be justified under attempt law. This issue has been subject to great debate over whether conspiracy should be treated like other inchoate offenses, that is, as preparation for a substantive offense, or whether conspiracy itself should be treated as a substantive offense. *See generally* Working Paper, *supra* note 34.

67. The Criminal Attempts Act of 1981 at Section 1(1) defines attempt to be: "If, with the intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence." Criminal Attempts Act of 1981, ch. 47 (Eng.). *See generally* Ian Dennis, *The Criminal Attempts Act 1981*, 1982 CRIM. L. REV. 5.

68. See Working Paper, *supra* note 34, para. 3.

69. The Commission was not so explicit. *See* Dennis, *supra* note 35, at 41.

70. SMITH & HOGAN, *supra* note 19, at 286.

71. *See id.* at 287.

72. *See* Dennis, *supra* note 35, at 41.

commercial law as a basis for the development of modern criminal conspiracy law. In *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.*,[73] a shipowner sued an association of shipowners that offered merchants a discounted price for transporting their goods but did not allow the plaintiff to join the association.[74] The court noted that there is a "general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several."[75] It is, however, the damage the conspirators cause, not the agreement to cause harm, "that is the gist of actions on the case for conspiracy."[76] Lord Bowen went on to state that this was not a case of legally sanctionable group conduct because "the combination of capital for purposes of trade and competition is a very different thing from such combination of several persons against one, with a view to harm . . . ."[77] In other words, the conspiracy's purpose must be to harm a particular target; the harm is not an element of a conspiracy if it is a mere consequence of the group's actions.[78]

In *Quinn v. Leathem*,[79] the House of Lords applied the *Mogul* analysis and affirmed the judgment against the defendant[80] for conspiracy to commit wrongful interference with contracts between the plaintiff and his employees and customers.[81] The defendant's employment association had pressured the plaintiff to employ only union members.[82] The court characterized this case as one involving "the outcome of a malicious but successful conspiracy to harm the plaintiff in his trade."[83] This court distinguished the case from *Mogul* because it involved acts directed at a specific individual.[84]

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73. 23 Q.B.D. 598 (Crim. App. 1889).

74. *Id.*

75. *Id.* at 616 (opinion of Lord Bowen).

76. *Id.*

77. *Id.* at 617.

78. *Id.* In a concurring opinion, Lord Fry noted that the defendants' actions were merely an effort to make money and that the plaintiff simply was not a good businessman. *Id.* at 625-26.

79. 1901 App. Cas. 495 (P.C. appeal taken from Ir.).

80. Only one of the five co-conspirators appealed the judgment. *Id.* at 496.

81. *Id.* at 518-19. In this civil action, the plaintiff, Leathem, was a butcher. The defendant was a member of an association that had an unregistered rule that the association would not work with nonunion members. *Id.* at 517.

82. *Id.* at 517-18. The association threatened to blacklist plaintiff Leathem. In addition, the controversy between the plaintiff and the association had been bad for the plaintiff's business, causing at least one vendor to refuse to deal with the plaintiff. *Id.*

83. *Id.* at 528.

84. *Id.* at 527. The court warned of the threat of coercion on specific individuals. *Id.*

Although *Quinn* was a civil case and the court required a showing of actual damage for a judgment against the defendant,[85] the court stated that the role of conspiracy was the same in civil and criminal cases.[86] The court cited the criminal conspiracy case of *Mulcahy v. Regina* which held that "[t]he number and the compact give weight and cause to danger."[87] The *Quinn* court added that innocent acts performed alone "become dangerous and alarming [when performed in a conspiracy], just as a grain of gunpowder is harmless but a pound may be highly destructive."[88]

British courts historically have focused their concern on the potential harm that groups may cause by virtue of being groups. Although civil remedies may be sufficient in some circumstances, they argued other cases require the remedies of a criminal prosecution. In *Regina v. Parnell*,[89] the court stated that because the potential for damage increased as the number of defendants increased, the criminal conspiracy charge was the only effective relief for the victim.[90] The government's interest, Judge Fitzgerald pointed out, was to combat the "powers of combination."[91]

Over time, as the conspiracy charge became a popular prosecutorial choice, courts began to reexamine the doctrine and attack the assumption that groups are more dangerous than individuals.[92] In *Regina v. Kamara*,[93] the House of Lords surveyed the history of conspiracy law and concluded that the focus in the doctrine's development in the seven-

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at 528.

85. *Id.* at 529. Although actual damage is required in a tort action for conspiracy, there is no damage requirement in a criminal action. *See* Martin-Norwich Products, Inc. v. Intercen Limited, High Court of Justice, Chancery Division, F.S.P. 513 (1976), *available in* LEXIS, Nexis, Enggen File.

86. *Quinn*, 1901 App. Cas. at 529.

87. *Id.* (citation omitted).

88. *Id.* at 530.

89. 14 Cox 508 (Q.B.D. 1881). The defendants were convicted of conspiracy to prevent tenants from paying their rents. *Id.* at 508-09.

90. *Id.* at 521. Judge Barry provided an example: If one person libels V, then V's recourse is a civil action. If a group libels V, however, V's civil remedy is inadequate because the weight of the statements against V is much more difficult to counter. Therefore, V needs to invoke the power of the state. *Id.*

91. *Id.* at 514.

92. Many commentators have also been highly critical at this assumption, pointing out that although a group often may be more dangerous, one determined individual on occasion may be more dangerous than a group. *See* Dennis, *supra* note 35, at 46; SMITH & HOGAN, *supra* note 19, at 257.

93. 1974 App. Cas. 104 (appeal taken from Eng.).

teenth and eighteenth century was misguided.[94] Instead of focusing on the collaboration of the conspirators, the emphasis should be on the damage the conspiracy caused.[95] Thus the court reverted to the civil notion of conspiracy in order to limit its application in criminal cases.

The following year, the House of Lords further eroded the group conduct theory in *Regina v. Withers*.[96] The court held that conspiracy law should apply only to a situation involving "intimidation or overbearing by superior numbers," not in the more general context.[97] Lord Glaisdale criticized the group conduct theory as follows:

> But the vagueness of the offence when charged against an individual, to which he objected, is not altered by its being charged as the subject matter of an agreement. And although some conduct which causes or tends to cause extreme injury to the public may be more heinous and more damaging when committed by numbers, not all such conduct will be so; nor may some such conduct when committed by numbers be necessarily more heinous and damaging than other such conduct when committed by an individual.[98]

Until *Withers*, conspiracy law had employed a presumption in favor of the prosecution. *Withers* shows the courts' new willingness to decide cases based on their unique facts and resistance to assume that groups present more of a danger than do individuals operating alone.

3. Current View

The decision in *Withers* may explain why the Law Commission stated that the most important reason for prosecuting conspiracy is early intervention rather than protecting the public from the danger of group criminal conduct. In doing so, however, the Working Party and Law Com-

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94. *Id.* The court reiterated the position that Judge Hawkins's statement had been given too much importance. *Id.*

95. *Id.* at 123. The court did not require proof of harm, but merely that the potential for harm exist if the conspirators achieved their goal. The facts of this case lend themselves to the damage approach. The defendants were students who conspired to occupy the London building of the High Commission of Sierra Leone to voice their grievances. *Id.* at 106-07.

96. 1975 App. Cas. 842 (appeal taken from Eng.). As in *Kamara*, the court reversed the conviction in *Withers*. Defendants had been convicted of conspiracy to effect a public mischief. They worked in an investigation agency and made reports for clients about the status and financial standing of third parties. The defendants had made several phone calls to banks and government agencies. *Id.*

97. *Id.* at 874. Contrast this statement with the statements made in *Mogul*. *See supra* notes 73-78 and accompanying text.

98. *Withers*, 1975 App. Cas. at 870.

mission have failed to explain adequately why attempt law cannot satisfy these goals. The Working Party and Law Commission merely asserted that agreements are clear manifestations of an intent to commit a crime; this approach removes much of the uncertainty that characterizes attempt law, but does not explain the distinction between a group's attempt and a conspiracy.[99]

The Commission noted that, in addition to early intervention, conspiracy law is a valuable tool for striking at the heart of unlawful activities, namely, the organizers who direct their agents to commit the substantive acts.[100] Although the Commission admits that it is possible to prosecute the organizers as accessories to the substantive crime, the Commission believes that a jury will understand more easily a prosecution for conspiracy.[101]

Since the enactment of the first general British conspiracy statute in 1977, British courts have resisted making any statement about the proper role of conspiracy law in the English legal system. The issues that have arisen since the Act's passage have been ones of statutory interpretation and have not required the courts to justify the existence of conspiracy law.[102] Today, the courts' justification for conspiracy law is that there is a conspiracy statute.

The real issue of justifying conspiracy law appears to lie with the legislature. The question is not whether there should be a conspiracy law, but whether the law should distinguish the crime of conspiracy from the crime of attempt. Unwilling to integrate the two, the British legal system continues to struggle for an adequate justification for keeping them separate.[103]

B. *United States*

1. Early Intervention

The courts in the United States have relied periodically, though infrequently, on early intervention as a rationale for conspiracy law. The

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99. For a discussion of the current law of attempt in the United Kingdom, see SMITH & HOGAN, *supra* note 19, at 287-300.

100. Law Commission Report, *supra* note 35, para. 1.6; *see* Dennis, *supra* note 35, at 42.

101. Law Commission Report, *supra* note 35, para. 1.6.

102. *See, e.g.* Regina v. Kamara, 1974 App. Cas. 104.

103. Interestingly, the amendments to statutory conspiracy established in the Criminal Law Act of 1977 are found in the Criminal Attempts Act of 1981. This suggests that Parliament still believes that there is some connection, elusive as it may seem, between the law of conspiracy and the law of attempt.

Supreme Court's explanation for this rationale has not been clear. For example, in *United States v. Rabinowich*,[104] the Court indicated that because conspiracies are difficult to detect, there is a need for additional time to discover the conspiracy.[105] In *United States v. Feola*,[106] the Court, citing only a law review article,[107] stated that the likelihood that the agreed upon criminal act will in fact occur is great enough to justify intervention and prosecution.[108] The Court stated: "Criminal intent has crystallized, and the likelihood of actual, fulfilled commission warrants preventative action."[109]

The early-intervention rationale finds some support in the connection between conspiracy and attempt. The crime of attempt requires an act that is a "substantial step in the commission of the underlying offense."[110] A conspiracy's agreement may be a substantial step toward committing a crime. Like conspiracy law, one goal of attempt law is to prevent crime by apprehending and prosecuting the perpetrators before they complete the criminal act.[111] Nonetheless, case law simply does not support the proposition that early intervention alone is an adequate basis upon which to justify the law of conspiracy even though that basis may be enough to justify attempt law.

2. Group Conduct and Potential Future Harm

United States courts have focused on the group conduct aspect and agreement to commit a crime. The United States Supreme Court, however, has extended the agreement analysis to implicate broader concerns.

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104. 238 U.S. 78 (1915).

105. *Id.* at 88.

106. 420 U.S. 671 (1975).

107. The article the court referred to was *Developments*, *supra* note 2. The reliance on material other than prior judicial decisions is not surprising. Courts in the United Kingdom and the United States have had difficulty grappling with conspiracy; the result is a case law history that is ambiguous and inconclusive. Whether the courts have agreed or disagreed with the academic critics of conspiracy, the latter have at the very least provided the former with a set of issues to discuss in their opinions.

108. *Feola*, 420 U.S. at 694. The relevant section of the article stated: "When the defendant has chosen to act in concert with others, rather than to act alone, the point of justifiable intervention is reached. . . . The agreement itself, in theory at least, provides a substantially unambiguous manifestation of intent." *Developments*, *supra* note 2, at 924.

109. *Feola*, 420 U.S. at 694.

110. MODEL PENAL CODE, *supra* note 6, § 5.01. The substantial step demonstrates a "firmness of purpose." *See* United States v. Joyce, 693 F.2d 838, 841-43 (8th Cir. 1982); Snell v. United States, 627 F.2d 186 (9th Cir. 1980), *cert. denied* 450 U.S. 957 (1980).

111. *See* LAFAVE & SCOTT, *supra* note 6, at 498.

In *United States v. Kissel,*[112] Justice Holmes described a conspiracy as "a partnership in criminal purposes."[113] Although the agreement which the conspirators made was similar to a contract, Justice Holmes emphasized that a conspiracy whose object was the restraint of trade was "different from and more than" a contract that restrained trade.[114] The Court attributed to the conspiracy certain acts which followed the conspirators' agreement and did not regard them as separate from it.[115]

In *United States v. Rabinowich,*[116] the Court explained why group criminal behavior is particularly heinous: "For two or more to confederate and combine together to commit or cause to be committed a breach of criminal laws is an offense of the gravest character sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime."[117] Even in Justice Jackson's sharp criticism of the law of conspiracy in *Krulewitch v. United States,*[118] he conceded that "the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer."[119] In a subsequent case, Justice Jackson agreed that it was proper for Congress to use conspiracy law to criminalize acts which would not be criminal if committed by one actor.[120]

According to the more recent case of *United States v. Feola,* conspiracy law "seeks to protect society from the dangers of concerted criminal activity"[121] and the "threat to social order."[122] Collective action toward antisocial ends is more threatening to the community than is individual action.[123] This is due in part to the fact that a conspiracy can achieve

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112. 218 U.S. 601 (1910).

113. *Id.* at 608. As in *Mogul* and *Quinn,* the defendant was charged with conspiring to eliminate free competition. *Id.* at 605-06.

114. *Id.*

115. *Id.* at 607. Furthermore, a conspiracy, unlike a contract, may not terminate at a specified time. *Id.* at 608.

116. 238 U.S. 78 (1915).

117. *Id.* at 88.

118. 336 U.S. 440 (1949).

119. *Id.* at 448-49.

120. Dennis v. United States, 341 U.S. 494, 573 (1951) (Jackson, J., concurring). Justice Jackson provided two examples of proper application of conspiracy law: antitrust prosecutions and labor disputes. In an antitrust scenario, a single business could raise its prices; however, a group could not get together and agree to do so. In the area of a labor disputes one worker could quit a job, although it is criminal for workers to conspire to quit together. *Id.* at 573.

121. *Feola,* 420 U.S. at 693.

122. *Id.* at 694.

123. *Developments, supra* note 2, at 923-24.

more complex goals than can individual action.[124] Furthermore, the likelihood of success increases while the probability that one or all of the conspirators will abandon the object of the crime decreases.[125]

United States courts have also viewed the potential of future harm unrelated to the particulars of the agreement as significant enough to warrant the application of conspiracy law. The Court described the conspiracy in *Kissel* as a partnership, implying that the conspiracy's goals were ongoing rather than limited to a single venture.[126] Later cases developed this concept further. In *Rabinowich*, for example, the Court expressed concern not only with the group's plotting, but also with the "educating and preparing [of] the conspirators for further and habitual criminal practices."[127] The group serves as a "continuing focal point for further crimes."[128] In *Callanan v. United States*, Justice Frankfurter stated:

> Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.[129]

The Court's suggestion that conspiracies are dangerous entities with respect to both present and future crimes may derive from a second rationale for the law of attempt. That is, attempt law not only seeks to intervene at a point before the perpetrator completes the crime, but also serves a corrective and rehabilitative function.[130] One who attempts and does not succeed may be more dangerous than one who completes the act because the former remains a continuing threat.[131] It is this continuing threat aspect of group criminal activity that the Court seeks to eliminate through the use of conspiracy law.

The Model Penal Code accepts the two justifications for conspiracy law stated above—early intervention and group danger.[132] The Model

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124. *See* Callanan v. United States, 364 U.S. 587, 593 (1961).

125. *See id.*; *see also Developments*, *supra* note 2, at 924 ("[T]he encouragement and moral support of the group strengthens the perseverance of each member.").

126. *See supra* notes 112-15 and accompanying text.

127. 238 U.S. 78, 88 (1985).

128. *See Developments*, *supra* note 2, at 924.

129. 364 U.S. 587, 593-94 (1961) (emphasis added); *see also* Iannelli v. United States, 420 U.S. 770, 778 (1975).

130. *See* LAFAVE & SCOTT, *supra* note 6, at 499.

131. *See id.* at 495, 499.

132. MODEL PENAL CODE, *supra* note 6, § 5.03 cmt. at 387.

Penal Code, however, treats each rationale as a separate proposition that implicates entirely different concerns. Regarding early intervention, the Code drafters stated that because conspiracy is an inchoate offense, the law (1) intervenes at the time the agreement becomes concrete and unambiguous, (2) parallels the use of complicity law, and (3) combats group fortitude.[133] Regarding group danger, the Code rejects in part the justification that groups pose more danger than does a single individual. "The measure of . . . danger is the risk of such a culmination."[134] Therefore, according to the Model Penal Code, only a conspiracy that involves a continuing enterprise implicates group danger concerns.[135]

IV. SENTENCING

A. *The Merger Doctrine*

At common law, all conspiracies except conspiracy to commit treason were punishable as misdemeanors.[136] If the target crime was a felony and the perpetrators completed it, then the misdemeanor conspiracy charge would merge into the target crime.[137] The law required this merger because of the procedural differences which gave the defendant certain advantages in a trial for a misdemeanor that were not available in a felony trial.[138] Therefore, the state could convict and punish a co-conspirator only for the completed felony.[139]

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133. *Id.* at 388.

134. *Id.* at 390.

135. *Id.* at 390-91. *See generally Conspiracy Dilemma, supra* note 32.

136. LAFAVE & SCOTT, supra note 6, at 567.

137. *See* Commonwealth v. Kingsbury, 5 Mass. 106, 108 (1809).

138. In a misdemeanor trial, the defendant was entitled to counsel and a copy of the indictment, neither of which was available to a defendant in a felony trial. *See* Callanan v. United States, 364 U.S. 587, 589 (1961).

139. Proof of the felony barred conviction for the conspiracy. LAFAVE & SCOTT, *supra* note 6, at 567. However, only when the target crime was a felony was there merger. If the target crime was a misdemeanor or if a statute specifically made conspiracy a felony, then there was no merger. *Id.*

One remaining bar to a prosecution for both the conspiracy and the completed offense is Wharton's Rule. One cannot be charged with conspiracy to do a criminal act when that act by definition requires two persons. *See* CHARLES E. TORCIA, 4 WHARTON'S CRIMINAL LAW § 731 (1981). For a discussion of its application, see Iannelli v. United States, 420 U.S. 770 (1975).

B. *United Kingdom*

1. Rejection of the Merger Doctrine

Historically, British courts rejected the merger rule as it applied to conspiracy law. In *Regina v. O'Connell*,[140] Lord Campbell stated: "Where they have actually done what they intended to do, it may be more proper to prosecute them for their illegal acts; but, in point of law, they remain liable for the offence of entering into the conspiracy."[141] The conspiracy is separate from the act; the state therefore may prosecute the defendant even if the defendant did nothing to further it.[142]

Four years later, the Court of Queen's Bench in *Regina v. Button*[143] reaffirmed the abolition of the merger doctrine. The defendants were convicted in *Button* of conspiracy to defraud their employer.[144] The defendants argued on appeal that because there was evidence of the substantive crime, the misdemeanor conspiracy charge allowed no conviction because it merged with the felony of fraud.[145] The Queen's Bench rejected the defendants' argument and held that the conviction for misdemeanor conspiracy could be upheld even though there was evidence to convict on the completed substantive offense.[146] The court dismissed the defendants' concern that they might be punished twice for the same offense, stating that "the two offences [are] different in the eye of the law."[147]

Although it may seem more logical to pursue a conviction on the substantive count when there is ample evidence to do so, the prosecutor may opt to charge a defendant only with conspiracy as occurred in *Button*.

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140. 8 Eng. Rep. 1061 (H.L. 1844).

141. *Id.* at 1154.

142. *Id.*

143. 11 Q.B. 929 (1848).

144. *Id.* The defendants had used their employer's vats and dyers for their own profit. *Id.*

145. The defendants were not charged with the substantive offense of fraud. *Id.* at 929.

146. *Id.* at 948.

147. *Id.* at 947. The court indicated that adopting the defendants' argument could lead to perverse results through sleight of hand:

> The felony may be pretended to extinguish the misdemeanor, and then may be shewn to be but a false pretense: and entire impunity has sometimes been obtained by varying the description of the offence according to the prisoner's interests: he has been liberated on both charges, solely because he was guilty upon both.

Id. at 948. However, the court did note that if the defendants were later convicted for the substantive offense, then it was "the duty of the Court to apportion the sentence for the felony with reference to such former conviction." *Id.*

British courts have, however, discouraged this prosecutorial tactic. In *Regina v. Boulton,*[148] for example, the Court of Queen's Bench reversed the defendants' convictions and warned against charging conspiracy when there is evidence of the completed crime. Chief Judge Cockburn stated:

> I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it; for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences' which, if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others, and deprive defendants of the advantage of calling their co-defendants as witnesses.[149]

Similarly, the Court of Criminal Appeal in *Regina v. West*[150] reversed the defendants' convictions[151] and stated that charging for the conspiracy when there is evidence of the completed act "is not to be encouraged."[152] The court expressed its concern that the judge and jury would be needlessly confused because the prosecutor had sufficient evidence to pursue a case on the completed offense.[153] More important, the defendants had the right to know the precise charges against them so they could prepare and offer reasonable defenses; the vagueness of the conspiracy charge made that more difficult.[154] Moreover, the court considered conspiracy a much more difficult concept to comprehend than a conviction on the completed crime.[155]

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148. 12 Cox c.c. 87 (1871).

149. *Id.* at 93. The indictment against the two defendants contained fourteen different counts of conspiracy related to the commission of a "felonious and unnatural crime." *Id.* at 88. Two male defendants were charged with cross-dressing because they wore women's clothing while walking in the street or attending the theater. *Id.* at 89.

150. 32 Crim. App. 152 (1948).

151. The four defendants were associated with a company dealing with toilet preparation goods and were charged with violating a quota established by the Board of Trade. *Id.* at 156.

152. *Id.* at 163. The court reaffirmed *Boulton* which was "in danger of being overlooked." *Id.* at 163-64.

153. *Id.*

154. *Id.*

155. *Id.* The position that conspiracy is a difficult concept to grasp has been a common criticism from the courts, reflecting their own difficulty with the crime. However, some have forcefully argued that it is the fact that conspiracies by their very nature involve groups which makes them difficult to understand, not the additional conspiracy count. This issue becomes more prominent when there is a charge of both conspiracy and

Despite early criticism of the practice, section 3(3) of the Criminal Law Act of 1977, as the British courts have interpreted it, allows the state to prosecute the conspiracy even when there is evidence of the substantive act.[156] Intensified judicial scrutiny has made this practice less attractive,[157] but the prosecutor still may opt for the conspiracy charge because of its procedural advantages at trial.[158]

2. Sentencing on the Conspiracy Conviction

Once convicted of conspiracy, the defendant could receive any one of a wide range of possible sentences under common law.[159] Because conspiracy was a crime apart from the completed act, its punishment was not in any way dependent on the punishment for the completed crime. Therefore, the issue arose as to whether a conspirator could receive a longer sentence for conspiracy than the sentence available for the substantive offense. British courts have determined that a longer sentence may be appropriate in two situations: when the conspiracy involves continuing criminal activity and when the conspiracy involves single crimes that offer "exceptional" circumstances.

In *Rex v. Morris*,[160] the Court of Criminal Appeal formulated the first reason for a longer sentence for a conspiracy conviction, that is, because the agreement involved criminal activity on a large and continuing scale.[161] The defendant argued that his four-year prison sentence for the misdemeanor offense of conspiracy to evade duties of customs was historically disproportionate.[162] The court denied the defendant's request for a reduction in sentence, holding that a longer sentence is appropriate when the conspiracy involves more than one distinct activity.[163] The court classified the defendant's activity of importing over 10,000 watches

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the completed crime. *See infra* section (IV)(B)(3).

156. *See* Glanville Williams, *The Added Conspiracy Count*, 128 NEW L.J. 24 (1978).

157. *Id.*

158. *See supra* note 6.

159. *See* SMITH & HOGAN, *supra* note 19, at 285.

160. 1 K.B. 394 (Crim. App. 1951)

161. *Id.* at 398.

162. *Id.* at 395. The defendant argued that there was no record of any defendant receiving more than two years imprisonment for a common-law misdemeanor in the past one hundred years. The court dismissed this contention on several grounds, including the fact that in the past a two year sentence was considered severe because of the poor conditions accompanying imprisonment. The court stated that these conditions no longer existed. *Id.* at 396.

163. *Id.* at 398.

as "wholesale smuggling" that had taken place over many months.[164] The court regarded conspiracy itself as much more significant than any individual goal of the conspiracy.[165]

Judicial discretion, the second justification for allowing a longer sentence for conspiracy, appears in *Verrier v. Director of Public Prosecutions*.[166] In *Verrier*, the House of Lords responded to the one issue left open in *Morris*: whether a defendant could receive a longer sentence on a conspiracy count when the object of the conspiracy was only one substantive offense. The defendant in *Verrier* had received a seven-year sentence for conspiracy to defraud when the maximum sentence for the crime of fraud was five years.[167] The House of Lords upheld the lengthier sentence, holding that a judge may have grounds for treating the conspiracy as "an offence different from and more serious than the substantive offence."[168] The House of Lords placed three limitations on its holding. First, it would apply only to "exceptional" cases.[169] Second, if the prosecutor charges the substantive offense, the court should disapprove a subsequent charge of conspiracy.[170] Third, the House of Lords holding distinguished conspiracy law from attempt law, noting that a longer sentence would not apply to violations of attempt law.[171]

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164. *Id.* at 398-99.

165. *See also* Regina v. Blamires Transport Services, Ltd., 1 Q.B. 278 (Crim. App. 1964)

166. 2 App. Cas. 195 (1967) (appeal taken from Eng.).

167. *Id.* at 197. The conspiracy involved life insurance fraud. The appellant, Verrier, and his co-conspirator Anderson, conspired to fake the death of Anderson to collect on Anderson's life insurance. Anderson himself was sentenced to only two years. *Id.* at 196.

168. *Id.* at 223. The House of Lords relied on R. S. WRIGHT, LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS 81-82 (1873) and quoted the following passage:

> There may be cases in which the agreement or concurrence of several persons in the execution of a criminal design is a proper ground for aggravation of their punishment beyond what would be proper in the case of a sole defendant. Such would be cases in which the co-operation of several persons at different places is likely to facilitate the execution or the concealment of a crime, or in which the presence of several persons together is intended to increase the means of force or to create terror, or cases of fraud in which suspicion and ordinary caution are likely to be disarmed by the increased credibility of a representation made by several persons.

2 App. Cas. at 223 (1967).

169. *Id.* at 224. The court provided no definition of "exceptional." Critics charged that this was a loophole that gave an unfair advantage to the prosecution. *See* Dennis, *supra* note 35, at 60.

170. *Id.*

171. *Id.* The maximum for attempt was the maximum for the substantive offense.

In its report, the Law Commission expressed its dissatisfaction with the *Morris* and *Verrier* decisions.[172] In addressing *Morris*, the Commission argued that the state could punish a large or continuing conspiracy by convicting conspirators for criminal acts they commit as part of the conspiracy.[173] Once convicted for a series of substantive offenses, the conspirator could receive consecutive sentences.[174] If the defendant is charged and convicted of conspiracy alone, the maximum sentence for one count of the substantive offense would be sufficient.[175]

Regarding the *Verrier* decision, the Commission argued that the sentence for conspiracy should not be longer than the sentence for the substantive offense because, in enacting the penalty for committing the substantive act, Parliament "must be taken to have envisaged the worst possible case of the actual commission of the offence."[176]

Parliament agreed with the Law Commission, and the Commission's recommendation became section 3(3) of the Criminal Law Act of 1977. Under section 3(3), a person convicted of statutory conspiracy may receive a sentence not exceeding the maximum for the substantive offense.[177]

3. The Double Charge, Cumulative Sentencing, and its Limits

Historically, British appellate courts have not been willing to take the "no merger doctrine" to its extreme and allow a charge of both conspiracy and the substantive act. Moreover, as the *Boulton* and *West* opinions indicate, the courts are uncomfortable with charging conspiracy at all when strong evidence of the substantive act exists.[178] As early as 1848, just four years after the *O'Connell* case first abolished the merger

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Once again, the House of Lords made clear that conspiracy and attempt were two different doctrines.

172. Law Commission Report, *supra* note 35, para. 1.97.

173. *Id.* para. 1.100.

174. *Id.*

175. *Id.* The Law Commission argued that the conspiracy to commit the substantive act could be no more serious than the act itself; therefore, the state should not punish the conspiracy any more severely. *Id.*

176. *Id.* para. 1.97.

177. Criminal Law Act of 1977, § 3(3). When a defendant is convicted of one conspiracy to do many substantive acts, then the maximum sentence for the conspiracy conviction is set at the maximum for the longest substantive act. *Id.*

The Criminal Law Act does not address the issue of fines and it remains possible to receive a large fine for conspiracy, even larger than one would receive for the substantive offense. *See* Williams, *supra* note 156, at 24.

178. *See supra* notes 148-55 and accompanying text.

rule,[179] the Queen's Bench stated that conviction on both the conspiracy and substantive counts did not necessarily amount to consecutive sentencing.[180]

The courts' reluctance to permit both a conspiracy charge and a charge for the substantive act lies in part in their concern about confusing judges and juries. In *Regina v. Dawson,*[181] the state charged and convicted six defendants on one count of conspiracy and fourteen counts of fraud.[182] The Court of Criminal Appeal quashed the convictions and pointed to several negative effects the conspiracy charge had on the trial.[183] First, the substantive counts were provable, so the conspiracy charge complicated the trial without adding anything beneficial.[184] Second, the conspiracy count allowed admission of otherwise inadmissible evidence.[185] Third, the additional conspiracy count added to the length of the trial and was "a quite intolerable strain both on the court and on the jury."[186]

Nonetheless, the *Dawson* court did not prohibit double charging. Instead, the court fashioned a new analytical approach to the problem. Under the traditional approach, the jury looked at the conspiracy charge first and then at the substantive crime.[187] The *Dawson* court's approach was to evaluate the substantive charge first and then determine the viability of a conspiracy count.[188] The benefit of this approach, the court stated, would be that the state could bring many smaller, more manageable conspiracies before the court rather than a single large, complicated conspiracy.[189]

Related to the concern about confusing judges and juries is that of the

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179. *See supra* notes 140-42 and accompanying text.

180. Regina v. Button, 11 Q.B. 929 (1848).

181. 44 Crim. App. 87 (1960).

182. *Id.* at 89.

183. *Id.* at 93. The court also pointed to its previous encounters with conspiracy and its dangers. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* Recently, the assumption that the conspiracy count actually leads to more confusion was challenged:

> The supposed procedural unfairness cannot lie in any extra complication introduced by the conspiracy count. A charge of joint crime normally implies that the defendants have acted in concert, so that the addition of a conspiracy count does not, on its face, increase the issues that the jury have to try.

Williams, *supra* note 156, at 24.

187. *Dawson*, 44 Crim. App. at 94.

188. *Id.*

189. *Id.* at 172.

unmanageability of a trial involving double charging.[190] In *Regina v. Griffiths*, the state charged nine defendants with one count of conspiracy to defraud the government and twenty-four counts of the substantive offense of false pretenses.[191] During the trial, 60 witnesses appeared for the prosecution, 35 witnesses for the defense, and the defense and prosecution offered a total of 263 exhibits.[192] The court held that the prosecution had failed to prove that there was a single comprehensive conspiracy among all 9 defendants.[193] In reversing all of the convictions, the court stated that there were two types of confusion that the court could not adequately control. First, there was "general confusion" that led jurors to complain during the trial "at their having to try the case with all its details and ramifications."[194] Second, there was "procedural confusion" related to the admissibility of evidence; the judge needed to instruct the jury that it could not consider certain evidence admissible to prove the conspiracy in determining guilt or innocence on the substantive offense.[195] The court expressed its frustration:

> The practice of adding what may be called a rolled-up conspiracy charge to a number of counts of substantive offences has become common. We express the very strong hope that this practice will now cease and that the courts will never again have to struggle with this type of case. . . .[196]

Despite *Dawson* and *Griffiths*, British courts have continued to allow convictions for both conspiracy and the completed offense. The courts have allowed a double conviction to stand if the defendant does not directly attack it on appeal. For example, in *Director of Public Prosecutions v. Doot*,[197] the defendants were convicted of importing cannabis into the United Kingdom without a license and conspiracy to import dangerous drugs.[198] Defendant Doot received consecutive sentences.[199]

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190. 1 Q.B. 589 (Crim. App. 1966).

191. *Id.* at 593-94. The indictment alleged that the defendants had committed fraud in obtaining subsidies from the government. *Id.* at 591.

192. *Id.* at 593. The trial lasted 10 weeks and the jury was required to return 78 verdicts. *Id.* at 592-93.

193. *Id.* at 597. The court stated that the evidence pointed to several smaller conspiracies. *Id.* at 599.

194. *Id.* at 594. The confusion associated with the added conspiracy count is generally seen as an advantage to the prosecution. *See* Dennis, *supra* note 35, at 58; SMITH & HOGAN, *supra* note 19, at 280-81.

195. 1 Q.B. at 594.

196. *Id.*

197. 1973 App. Cas. 807 (appeal taken from Eng.).

198. *Id.* at 819.

199. *Id.* at 820.

Lord Dilhorne noted that the defendants on appeal did not raise the issue of sentencing but indicated that the House of Lords probably would have rejected the argument if it had been raised because the court accords deference to the trial court's determinations.[200] Indeed, Lord Salmon opined that the sentence that the trial court imposed may have been too lenient.[201]

The courts' deference to prosecutorial discretion is a means by which they allow the conspiracy and substantive counts to stand.[202] The courts have been unwilling to establish a rule that might unduly constrain the prosecutor, such as in the situation in which the prosecutor charges both crimes because of the uncertainty of securing a conspiracy conviction.[203] Instead, judges have preferred to deal with the problem of double charging on a case-by-case basis.[204]

The Law Commission recognized not only the problems facing those defendants which *Griffiths* and *Dawson* exemplified, but also the procedural needs of prosecutors.[205] Ultimately, the Law Commission recommended a rule of practice requiring the prosecutor to justify the joinder of the conspiracy and substantive counts.[206] If the prosecutor failed to justify the joinder adequately, the prosecutor would have to choose to pursue either the conspiracy count or the substantive count.[207] The Queen's Bench Division adopted the Law Commission's recommendation in 1977 virtually verbatim and issued a Practice Note.[208] The Prac-

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200. *See id.* at 821.

201. *Id.* at 831.

202. The reluctance of the courts to infringe on prosecutorial decisions is exemplified in *Regina v. McDonnell*, 3 W.L.R. 1138, 1144 (Bristol Assizes 1965), where Judge Nield stated:

> I respectfully agree with [the observations in *West* and *Dawson*]; but it is plain, I think, that the court cannot direct the prosecution as to the course to be adopted . . . . On the other hand, of course, sometimes an expression of judicial opinion will affect the prosecution with the conduct of their case. In this particular case I do not feel that I ought to express a view.

On this ground, Judge Nield allowed the conspiracy count to remain in the indictment but later in his anticipatory ruling dismissed the conspiracy count on a different, unrelated ground. *Id.* at 1149.

203. *See* Williams, *supra* note 156, at 24.

204. *See, e.g.*, John McKinsie Jones, 59 Crim. App. 120, 124 (1974).

205. *See* Law Commission Report, *supra* note 35, paras. 1.67, 1.69.

206. *Id.*

207. *Id.* para. 1.71. The joinder decision therefore was ultimately left to the judge. *Id.*

208. 2 All E.R. 540 (1977). The Practice Note reads in part:

> 1. In any case where an indictment contains substantive counts and a related conspiracy count, the judge should require the prosecution to justify the joinder,

tice Note concluded with the statement that "[a] joinder is justified . . . if the judge considers that the interests of justice demands it."

The meaning of the "interests of justice" appears in *John McKinsie Jones,*[209] a case which preceded the Practice Note:

> It is not desirable to include a charge of conspiracy which adds nothing to an effective charge of a substantive offence. But where charges of substantive offences do not adequately represent the overall criminality, it may be appropriate and right to include a charge of conspiracy.
>
> The indictment ought to include those charges which make for simplification of the issues and which avoid complexity and the need for multiplicity of counts. In some cases a conspiracy count may involve complexity which counts for substantive offences would avoid; in other cases a charge of conspiracy may be the simpler way of presenting the case to the jury because the alternative would be to proceed on a substantial number of changes of substantive offenses. . . . A count for conspiracy should not be included with counts charging substantive offenses if the inclusion will result in unfairness to the defence.[210]

Because it is still possible to charge both conspiracy and the substantive offense, it is also possible that a jury will convict on both counts. Some commentators suggest that proper jury instructions from the judge should prevent this occurrence.[211]

The Practice Note seemingly has reduced the number of prosecutions for both conspiracy and the substantive offense.[212] When there is a double conviction, the appellate courts are likely to prevent a trial court from imposing double punishment. In *D.P.P. v. Stewart,*[213] for example, the defendant was indicted for conspiracy under the Customs Act and for the substantive offense of failing to offer foreign currency to an authorized dealer.[214] The judge convicted the defendant and sentenced him to £30,000 or 6 months imprisonment for each offense.[215] On appeal, the

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or, failing justification, to elect whether to proceed on the substantive or on the conspiracy counts.

Id.

209. 59 Crim. App. 120 (1974).

210. *Id.* at 124.

211. *See* Williams, *supra* note 156, at 24-25. The judge should evaluate the evidence twice before the jury is instructed: 1) at the hearing before trial where the judge will apply the test set forth in the Practice Note and 2) after hearing and evaluating all the evidence at trial to determine the sufficiency of the evidence to support either count. *Id.*

212. *See id.*

213. 3 W.L.R. 884 (P.C. 1982).

214. *Id.* at 890.

215. *Id.*

court reduced the sentence for the conspiracy offense to a nominal fine of £100 because the two offenses arose out of the same facts and imposing substantial penalties for each of them would have been excessive.[216]

4. Accessorial Liability and the Substantive Offense

The rejection of the merger rule permitted the possible prosecution of the substantive crime even if the conspirator played no direct role in its commission. As a result, prosecutors could charge minor conspirators as if they actually carried out the target crime. *Director of Public Prosecutions v. Doot* sets forth this analysis.[217] In *Doot*, Lord Pearson analogized the conspirators' agreement to a contract entered into by two or more parties.[218] Therefore, each conspirator is a party to the agreement and benefits from each of the acts of the co-conspirators.[219]

However, *Doot* remains a unique case in British criminal law.[220] Few British cases impute accessorial liability for a substantive offense through the conspiracy mechanism. Accessorial liability has remained the province of agency law.[221] A conspirator who does not participate directly in the pursuit of the substantive offense is but a secondary party, not principally liable for the object of the conspiracy.[222]

C. *United States*

1. Rejection of the Merger Doctrine

Although the British courts abolished the merger doctrine as early as 1844, courts in the United States were more hesitant to formally reject it until much later. Instead, the Supreme Court recognized the doctrine until the middle of the twentieth century, yet consistently found it inapplicable to the case before the Court.

For example, in *United States v. Britton*[223] and *Clune v. United States,*[224] the Court held that there was no merger of the conspiracy and substantive offense because the record contained no evidence that would

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216. *Id.*

217. *See* 1973 App. Cas. 807 (appeal taken from Eng.).

218. *See id.* at 827.

219. *Id.* at 830. In a separate opinion, Lord Salmon, conceptualized the conspiracy as a continuing enterprise. *Id.* at 835.

220. Later court opinions do not cite *Doot* for the principle of accessorial liability being derived from the conspiracy.

221. SMITH & HOGAN, *supra* note 19, at 132.

222. *Id.* at 150.

223. 108 U.S. 199 (1883).

224. 159 U.S. 590 (1895).

conclusively prove the substantive offense. Therefore, in each case, the conspiracy count stood alone. In *Heike v. United States*,[225] the Court went one step further and stated that even if there was evidence of the completed substantive offense, an indictment for conspiracy alone was permissible because "the liability for conspiracy is not taken away by its success."[226] The Court's decision in *Heike* made clear that prosecutors could charge a conspiracy even when the substantive offense was in fact completed; it implied, however, that prosecutors could not charge both the conspiracy and the substantive offense that was the object of the conspiracy.[227]

Finally, in *Pinkerton v. United States*,[228] the Court abolished the merger doctrine.[229] Walter Pinkerton and his brother Daniel were each charged and convicted of one count of conspiracy as well as several substantive counts of tax fraud.[230] Because Walter was the party who carried out the plan, Daniel argued on appeal he could not be held responsible for Walter's substantive acts.[231] The Court rejected Daniel's

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225. 227 U.S. 131 (1912).

226. *Id.* at 144. Interestingly, the Court cited *Regina v. Button*, one of the early English cases that abolished the merger doctrine. Nevertheless, the Court did not abolish the merger doctrine in *Heike*. *See also* Arnstein v. United States, 246 F. 946 (4th Cir. 1924) (applying the holding in *Heike*).

227. 227 U.S. at 144. Some lower federal courts were uncomfortable with this position because conspiracies could result in more punishment than the substantive offense. The Supreme Court's narrow application of the merger rule did not serve as a safeguard against excessive punishment for a conspiracy. *See, e.g.*, Weiss v. United States, 103 F.2d 759 (3d Cir. 1939) (intent of statute was that punishment for substantive offense would be the maximum punishment for conspiracy to commit that offense).

The merger rule formed the basis for Wharton's Rule; one can not be liable for conspiracy to commit an act that requires more than one individual for its commission. With the subsequent abdication of the merger doctrine, Wharton's Rule has had extremely limited application. *See* United States v. Bevite, 648 F.2d 73 (1st Cir. 1981).

Wharton's Rule basically applies today when the defendant can prove the conspiracy is limited to the one substantive offense, the agreement of the participants is necessary for the completion of the substantive offense, and the conspiracy and substantive offense are inseparable. United States v. Bobo, 477 F.2d 974, 987 (4th Cir. 1973); *see also* United States v. Cerone, 830 F.2d 938 (8th Cir. 1987).

228. 328 U.S. 640 (1946).

229. Even before *Pinkerton*, the original justification for the merger doctrine was seemingly gone as the procedural differences in the trial of a misdemeanor and a felony were no longer substantially different. *See* LAFAVE & SCOTT, *supra* note 6, at 567.

230. *Pinkerton*, 328 U.S. at 641. Walter was convicted of nine substantive counts and Daniel was convicted of six. *Id.*

231. *Id.* at 645. There was evidence of the conspiracy but no evidence that Daniel had directly committed the offense. Daniel was in jail at the time of some of the substantive acts. *Id.* at 645, 648.

argument and upheld the convictions for the conspiracy and substantive counts on two grounds. First, the Court referred to its language in previous cases stating that a conspiracy "has ingredients, as well as implications, distinct from the completion of the unlawful project."[232] Second, the Court directly addressed the merger doctrine[233] and stated that as long as co-conspirators have not withdrawn from the conspiracy, they are aiding in the carrying out of the substantive offense.[234] Moreoever, the Court emphasized that a conspiracy was similar to a partnership; therefore, the lower court was correct in extending agency law to conspiracies.[235] Justice Douglas, writing for the majority, stated:

> Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle.[236]

The *Pinkerton* Court placed three limitations on its decision. First, it noted that "[t]he addition of a conspiracy count may at times be abusive and unjust."[237] Second, it stated that the substantive act for which a co-conspirator was to be held liable must be done in furtherance of the conspiracy and be reasonably foreseeable "as a necessary or natural consequence of the unlawful agreement."[238] Third, the Court stated that defendants could escape liability for the substantive act if they could

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232. *Id.* at 644. Defendant could not raise double jeopardy as a defense to cumulative sentencing. *Id.*

233. *Id.* at 643. The Court noted that the merger doctrine had little vitality. *Id.*

234. *Id.* at 646. Supporters of the *Pinkerton* doctrine have argued that an individual should not be able to escape liability just because he is not the one who pulls the trigger. *See* Jon May, Pinkerton v. United States *Revisited: A Defense of Accomplice Liability*, 8 NOVA L.J. 21, 42 (1983) (a co-conspirator should not be allowed "to hide behind his associates and escape liability.").

235. *See Pinkerton*, 328 U.S. at 646. One article states:

> What was revolutionary in *Pinkerton* . . . was not the introduction of agency concepts into the law of criminal conspiracy; agency jargon and agency concepts had been a routine feature of conspiracy opinions for decades prior to *Pinkerton*. What was revolutionary was *Pinkerton's* use of agency relationship as a means for establishing guilt.

James M. Shellow et al., Pinkerton v. United States *and Vicarious Criminal Liability*, 36 MERCER L. REV. 1079, 1084 (1985) (citations omitted).

236. *Pinkerton*, 328 U.S. at 647.

237. *Id.* at 644-45 n.4.

238. *Id.* at 647-48. This limitation is derivative of the underpinnings of imputed liability. Shellow, *supra* note 235, at 1087.

demonstrate they had withdrawn from the conspiracy.[239]

Justice Rutledge wrote a strong dissent that critics of *Pinkerton* frequently cite.[240] According to Justice Rutledge, the majority created constitutional problems in its expansion of conspiracy law, particularly in the use of evidence in trials[241] and in the area of double jeopardy.[242] Furthermore, Justice Rutledge emphasized that the *Pinkerton* decision represented an extension of vicarious liability from commercial and tort law to the area of criminal law.[243] This extension was dangerous because criminal law, unlike other areas of the law, places a premium on individual guilt, not guilt by association.[244]

2. Sentencing on the Conspiracy Conviction

The Supreme Court in 1895 addressed the issue of imposing a shorter sentence for the conspiracy than the conspirator would have received for the substantive crime; that was more than sixty years before the English courts did so in *Verrier*.[245] In *Clune v. United States*,[246] the Court held that a defendant could receive a longer sentence for conspiracy than for the substantive offense.[247] The defendants were convicted of conspiracy to obstruct the United States mails and were sentenced to eighteen months in jail.[248] The maximum penalty for the completed crime was a $100 fine.[249] The Court rejected the defendants' argument that the punishment for conspiracy could not be more severe than the penalty for the substance offense, stating that because a conspiracy is separate from the substantive act, it is punishable separately.[250] The Court stated that the

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239. *Pinkerton*, 328 U.S. at 646. However, the individual would remain guilty of the conspiracy. *Id.* at 647.

240. *Id.* at 649.

241. *Id.* at 651. As to Daniel, the evidence only pointed to guilt for the conspiracy and not to guilt for the substantive crime. *Id.*

242. *Id.* at 649-50. *See infra* notes 266-69 and accompanying text.

243. *Id.* Some argued that the "importation" of vicarious liability into criminal conspiracy law was "repugnant to the basic precepts of Anglo-American law." Shellow, *supra* note 235, at 1080 (citations omitted).

244. *Pinkerton*, 328 U.S. at 651. This criticism is generally known as the attack on guilt by association. *See* Shellow, *supra* note 235, at 1085 (describing guilt by association as the "sinister purpose" behind the *Pinkerton* decision).

245. 1967 App. Cas. 195 (appeal taken from Eng.).

246. 159 U.S. 590 (1895).

247. *Id.* at 595.

248. *Id.* at 591. The penalty for the conspiracy under the applicable statute could be as high as two years. *Id.* at 595.

249. *Id.* at 594.

250. It could be punished even if the substantive act was not completed. *Id.* at 595;

legislature could prescribe a punishment for conspiracy that it is more severe than the punishment for the completed offense.[251]

The holding in *Clune* remains good law, and the sentence for conspiracy is limited only by the five year maximum established in the general conspiracy statute[252] or the maximum established in a conspiracy provision of a specific criminal statute. In *United States v. Cattle King Packing Co.*,[253] a defendant was convicted on a single count of conspiracy and six counts of separate substantive crimes associated with the conspiracy. For conspiracy, the defendant was sentenced to four years imprisonment, despite the fact that the maximum sentence the defendant could receive for any of the substantive offenses was three years. The Court of Appeals for the Fifth Circuit upheld the sentence, citing *Clune* for the proposition that the congressional intent in 18 U.S.C. § 371 supported the imposition of a higher sentence.[254] Similarly, the Court of Appeals for the Ninth Circuit upheld a five-year sentence for conspiracy relating to defrauding a savings and loan, although the maximum for any of the fifteen substantive counts was only two years.[255]

3. Cumulative Sentencing

United States v. Pinkerton not only abolished the merger rule in the United States, it also laid the foundation for debate on two specific issues: first, whether there were any limitations on sentencing a defendant found guilty of both conspiracy and the substantive act, and second, to

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see also United States v. Rabinowich, 238 U.S. 78, 86 (1915). The *Clune* Court stated that there was no issue of merger in the case because there was not sufficient evidence on the record to find actual obstruction of the mails. *Clune*, 159 U.S. at 595.

251. *Clune*, 159 U.S. at 595. In the absence of a particular statutory offense and accompanying punishment, 18 U.S.C. § 371 applies in which the maximum penalty for conspiracy is a $10,000 fine, five years imprisonment, or both. 18 U.S.C. § 371 (1988). The Model Penal Code rejected *Clune*. *See* MODEL PENAL CODE, *supra* note 6, § 5.05(1); *see also id.* § 5.03 cmt. at 391.

252. The punishment established in 18 U.S.C. § 371 continues to reflect a congressional intent that existed at the time of *Clune*. The statute specifically states that only when the object of the conspiracy is a misdemeanor shall the punishment "not exceed the maximum punishment provided for such misdemeanor."

253. 793 F.2d 232 (10th Cir. 1986).

254. *Id.* at 242.

255. United States v. Smith, 891 F.2d 703, 714 (9th Cir. 1990) ("Congress may rightly consider conspiracy more dangerous than the substantive offense itself."). The broad reading of the intent of Congress has been criticized by some courts even as early as 1925 when Judge Learned Hand stated that the "maximum sentence prescribed by Congress is intended to cover the whole substantive offense in its extremist degree." Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).

what extent conspirators who play minor roles should be held responsible for the substantive acts of co-conspirators.

The Supreme Court addressed this issue of cumulative sentencing in *Callanan v. United States*.[256] The defendant was convicted of two crimes—one conspiratorial and one substantive—under the Hobbs Anti-Racketeering Act.[257] The Court, reaffirming *Pinkerton*, held that the defendant could be sentenced separately for each conviction.[258] Citing *Carter v. McClaughry*,[259] the Court concluded that cumulative sentencing did not amount to cumulative punishment.[260] The Court would allow cumulative sentencing unless Congress expressed a clear intent that the conspiracy and the substantive offense not both be punished.[261] The Court's justification for separate sentencing stems from its sense that the danger inherent in conspiracy extends beyond the target crime because a conspiracy has the potential to produce additional harm in the future.[262] In addition, the Court found that cumulative punishment is not double punishment because Congress has created two separate offenses composed of separate elements.[263] Although the Court acknowledged that cumulative sentencing may be harsh punishment, it decided to leave that issue for the legislature to resolve.[264]

Defendants have also argued that cumulative sentencing violates the

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256. 364 U.S. 587 (1961). For an excellent general discussion of multiple punishment as well as a specific analysis of *Callanan*, see George C. Thomas, *A Unified Theory of Multiple Punishment*, 47 U. PITT. L. REV. 1, 49-50 (1985).

257. *See* 18 U.S.C. § 1951(3) (1988), for conspiracy to obstruct interstate commerce and 18 U.S.C. § 1951(2) (1988) for the substantive act of obstructing interstate commerce.

258. *Callanan*, 364 U.S. at 597. The defendants had not argued that they could be charged with both violations but only argued that they could not be sentenced consecutively for both. *Id.* at 590.

259. 183 U.S. 365 (1902). In *Carter*, the Supreme Court upheld the defendant's conviction for both conspiracy to defraud and the substantive offense of making false and fraudulent claims. *Id.* at 394. After stating the rule that "cumulative sentences are not cumulative punishment," the Court noted that "[t]he fact that both charges related to and grew out of one transaction made no difference." *Id.* at 593-94.

260. *Callanan*, 364 U.S. at 593. In *United States v. Feola*, 420 U.S. 671, 693 (1975) the Court stated that conspiracy is separate from and complementary to the substantive offense; therefore, consecutive sentencing was rational.

261. *Callanan*, 364 U.S. at 594.

262. *Id.* at 593; *see also* Iannelli v. United States, 420 U.S. 770, 777-78 (1975).

263. *Callanan*, 364 U.S. at 597; *see also* United States v. Kearney, 560 F.2d 1358 (9th Cir. 1977) ("evidence showing agreement is quite different from evidence showing that the plan was carried out").

264. *Callanan*, 364 U.S. at 597.

constitutional protection against double jeopardy.[265] In *Pereira v. United States*,[266] the Supreme Court held that cumulative sentencing does not raise double jeopardy problems because the legal requirements and evidence necessary to prove conspiracy differ from those needed to prove the completed substantive act.[267] The Court also found no double jeopardy issue when the government uses overt acts to prove a conspiracy and then uses those same overt acts as part of its prosecution for the substantive offense.[268] Consequently, prosecutions for conspiracy need not even occur at the same time as prosecutions for the substantive offense. The government, therefore, remains free to prosecute both crimes provided it has evidence of both.

The Model Penal Code approach would overrule *Callanan* and not allow a conviction for both the conspiracy and the substantive act when the completed offense is the only objective of the conspiracy.[269] The rationale is that the state punishes conspiracy because it is an inchoate offense that will likely result in the commission of a substantive offense. Therefore, simultaneous punishment of the conspiracy and the underlying offense amounts to punishment of the same action twice.[270]

The Code provides a single exception to its ban on cumulative sentencing—when conspiracies involve continuing enterprises of organized crime or professional criminals.[271] The Code recognizes this activity as true group danger,[272] and these co-conspirators can be sentenced to extended terms of imprisonment.[273]

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265. *See* U.S. CONST. amend. V.

266. 347 U.S. 1 (1954)

267. *Id.* at 11. The Supreme Court has also held in *Albernaz v. United States*, 450 U.S. 333 (1981), that conviction and sentencing on two separate counts of conspiracy is constitutionally permissible if based on two separate conspiracy statutes.

268. United States v. Felix, 112 S. Ct. 1377, 1380 (1992).

269. MODEL PENAL CODE, *supra* note 6, § 1.07 cmt. at 110; *see also id.* §§ 1.07(1)(b), 7.06 at 19, 268-70.

270. *Id.* § 1.07 cmt. at 109.

271. *See* Buscemi, *supra* note 7, at 1180.

272. *See supra* notes 134-35 and accompanying text.

273. *See* MODEL PENAL CODE, *supra* note 6, § 7.03, According to the MPC's "Criteria for Sentence of Extended Term of Imprisonment; Felonies,"

> The Court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this Section . . . .
>
> (2) The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public.
>
> The Court shall not make such a finding unless the defendant is twenty-one years of age and:
>
> (a) the circumstances of the crime show that the defendant has knowingly de-

4. Accessorial Liability

The *Pinkerton* opinion did not consider accessorial liability. Instead, it viewed conspiracy as a unique area of criminal law and defined co-conspirator.[274] Nevertheless, *Pinkerton* did form the basis for many subsequent court decisions that significantly expanded the notion of accessorial liability. It was only three years after *Pinkerton* that Justice Jackson wrote his concurring opinion in *Krulewitch*,[275] in which he noted his unease with the *Pinkerton* decision and his concern that prosecutors may use conspiratorial liability for the substantive acts of others to incriminate people who were minor participants in the conspiracy; such people would not be guilty of an accessorial crime such as aiding and abetting.[276]

United States v. Alvarez tested the extent to which *Pinkerton* would apply to conspirators who did not play a major role in a conspiracy.[277] Three defendants challenged their convictions for second degree murder of an undercover government agent during a drug buy. Although none of the defendants played a direct role in the shooting, the Court of Appeals for the Eleventh Circuit deemed them part of the conspiracy to sell drugs.[278] The government conceded that none of the three defendants had intended that the agent be shot, but argued that they could be held liable for the murder under *Pinkerton* for the substantive act committed by a fourth co-conspirator.[279]

The defendants argued that the murder of the agent was not reasonably foreseeable and that they were simply minor players in the conspiracy.[280] The court rejected the defendants' arguments and upheld the murder convictions for two reasons:[281] First, it found that the murder

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voted himself to criminal activity as a major source of livelihood. . . .
Id.

274. FLETCHER, *supra* note 3, at 647. All participation in the conspiracy made one a co-conspirator, not an accessory. *Id.* at 660.

275. 336 U.S. 440, 445 (1949).

276. Krulewitch v. United States, 336 U.S. 440, 450 (1949). It was even possible under *Pinkerton* that co-conspirators could be held liable when their actions did not matter at all. *See* SANFORD H. KADISH, BLAME AND PUNISHMENT 165 (1987).

277. 755 F.2d 830 (11th Cir. 1985).

278. *Id.* at 851. One defendant was a lookout who allegedly was armed. Another had introduced the agents to Alvarez, the alleged leader of the conspiracy. The third was the manager of the hotel and was alleged to have allowed drug transactions to take place and to have acted as a translator during the drug negotiations. *Id.*

279. *Id.* at 839-40, 847.

280. *Id.* at 848.

281. *Id.*

was a reasonably foreseeable consequence of the drug conspiracy.[282] The drug sale involved a large amount of cocaine,[283] a fact which enabled the jury to infer that some conspirators would be armed and would use deadly force if necessary.[284] Second, the court found that the three defendants played more than a minor role.[285] Their actions were an integral part of the conspiracy.[286] The court did limit liability under this holding, however, to those co-conspirators who played "more than a minor role in the conspiracy, or who had actual knowledge of at least some of the circumstances and events culminating in the reasonably foreseeable but originally unintended substantive crime."[287]

Courts have also used *Pinkerton* to hold organizers of crime liable for the substantive crimes that they plan but do not personally effectuate. In *United States v. Michel,*[288] defendant Belmares challenged his conviction of the crime of importation of marijuana.[289] Belmares argued that there was no evidence linking him to the flights that actually imported the marijuana.[290] The Court of Appeals for the Fifth Circuit rejected Belmares argument, stating:

Well settled is the principle that a party to a continuing conspiracy may

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282. *Id.*

283. The transaction that led to the murder involved the sale of 1 kilogram of cocaine for $49,000. The total value of the drugs discussed in the negotiations was $147,000. *Id.*

284. *Id.* at 849. Weapons were "tools of the [drug] trade." *Id.*

285. *Id.* at 850.

286. *See supra* note 278. The Ninth Circuit has held conspirators liable for the substantive act when the conspirators' activities in the conspiracy were "early, fundamental, and substantial." United States v. Kearney, 560 F.2d 1358 (9th Cir. 1977).

287. *Alvarez*, 755 F.2d at 850 n.27. The court stated that in a typical *Pinkerton* case, the court need not inquire into individual culpability; however, this case was not typical because the murder of the agent was not within the originally intended scope of the conspiracy. The court was concerned with holding a conspirator responsible for a substantive act regardless of the individual culpability and the due process implications involved in the relationship between the conspirator and the substantive act. *Id.* at 850. However, not all courts have limited their holdings as the Eleventh Circuit did in *Alvarez.* Others courts have held that there is a strong presumption of guilt for the substantive acts once a defendant is proven to be a member of the conspiracy. *See* United States v. Rodriguez Cortes, 949 F.2d 532, 539 (1st Cir. 1991) (defendants convicted of conspiracy are held liable for the acts of co-conspirators committed in furtherance of the conspiracy); United States v. Jewel, 947 F.2d 224, 231 (7th Cir. 1991) (once government proves one conspirator committed the act, then other conspirators are also liable).

288. 588 F.2d 986 (5th Cir. 1979).

289. *Id.* at 996. Belmares was also convicted of conspiracy to import. The court upheld this conviction on other grounds. *Id.* at 994-96.

290. *Id.* at 994.

> be responsible for a substantive offense committed by a co-conspirator in furtherance of the conspiracy, even though that party does not participate in the substantive offense or have any knowledge of it. . . . It (the principle of *Pinkerton* liability) should be no less strictly applied to hold the organizer or supervisor of a criminal enterprise responsible for the acts of his co-conspirators done in furtherance of the operation he manages. The *Pinkerton* vicarious-liability rationale is based upon an agreement or common purpose shared by co-conspirators; they are partners in crime and the act of one in furtherance of the unlawful plan is the act of all.[291]

The Model Penal Code has rejected *Pinkerton*. Instead of using the conspiracy to charge the co-conspirator with a substantive act, the Code favors the use of complicity to hold conspirators liable for their substantive acts. Under section 2.06(a)(ii), a person is deemed an accomplice if, "with the purpose of promoting or facilitating the commission of an offense, he . . . aids or agrees or attempts to aid such other person in planning or committing it." Implementation of section 2.06 would force prosecutors to ask more specific questions about the behavior of each individual.[292] The goal of this formulation was to limit the liability of co-conspirators and to prevent an individual from being held accountable "for thousands of additional offenses of which he was completely unaware and which he did not influence at all."[293]

V. CONCLUSION

Despite its important place in the criminal law, conspiracy law remains an elusive subject. Court opinions and statutes have struggled to clarify the definition, scope, and purpose of the law. As the doctrine becomes more refined, however, it begins to look like other criminal law doctrines, and the need for a separate conspiracy law disappears. Conspiracy law reform, therefore, is inherently limited.

During the past three decades, British courts have favored the early-intervention rationale while strongly criticizing the group-conduct rationale. The drafters of the Criminal Law Act of 1977 subsequently codified the courts' early-intervention rationale. By statute, a conspiracy cannot be punished more severely than the substantive offense. There is, however, a court-established presumption against the charging of both the conspiracy and the substantive offense which was its object. Even if there is a double charge followed by conviction on both, it is unlikely

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291. *Id.* at 999.

292. MODEL PENAL CODE, *supra* note 6, § 2.06 cmt. at 307.

293. *Id. See* Broderick, *supra* note 25, at 905 (protecting civil liberties of defendants by limiting liability to the expectations of individuals).

that cumulative sentencing will withstand appellate review.

United States courts have favored the group-danger rationale. Unlike the United Kingdom, the United States has failed to enact a conspiracy statute with many specifics. Judges in the United States therefore continue to apply conspiracy law based on their perception of the common-law approach as it has developed during the past five centuries. The lack of statutory standards has resulted in the United States courts consistently viewing conspiracy as a separate and more grave offense than the underlying substantive offense alone because a conspiracy necessarily involves a group of criminals. Conspiracies, therefore, are in many cases punished more severely than substantive offenses. Finally, courts allow prosecutors to use conspiracy as a form of accessorial liability for substantive offenses, a device that the British generally reject except in the most extreme cases.

The use of conspiracy law as accessorial liability highlights how conspiracy law in the United States, when left unchecked by the courts and legislatures, can expand to encompass more individuals and more offenses based on an incoherent and ever-changing notion of conspiracy. The recent British approach to conspiracy law has begun the process of defining the doctrine in a way that does not collapse conspiracy into other inchoate offenses. Congress should follow the British move and codify conspiracy law so that the doctrine will survive and serve the criminal justice system not because of its ambiguities but rather because of its clarity.

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