THE THREAT OF UNFAIRNESS IN CONSPIRACY PROSECUTIONS: A PROPOSAL FOR PROCEDURAL REFORM

I. INTRODUCTION

Writing about the law of criminal conspiracy in 1941, Professor Albert Harno declared that the crime of conspiracy presents "serious potential dangers of abuse."[1] His statement is no less true today. Extraordinary dangers face defendants in conspiracy prosecutions. Arising from the substantive law of conspiracy and the court practices that have developed around it, they fall into three categories. First, there are problems associated with proof at trial. Second, there is a substantial risk of guilt by association. Third, there appears to be a tendency for prosecutors to abuse their discretion in their use of the charge of conspiracy.

The situation is grave, for the law surrounding the crime of conspiracy allows serious abuses of defendants' rights. This Note will examine these abuses. It will then enumerate the protections provided by present law to prevent abuse and explain why these protections are ineffective. Because conspiracy law has been developed mainly in the federal courts,[2] the discussion here focuses upon conspiracy prosecutions on the federal level. Therefore, unless otherwise noted, the law of conspiracy referred to in this Note is the law of the federal courts.

To remedy the potential for unfairness at conspiracy trials, this Note proposes three procedural reforms, to be incorporated into the Federal Rules of Criminal Procedure. Since the law of conspiracy differs little from one jurisdiction to another,[3] it should be noted that although the focus is here upon the federal courts, the proposed reforms might apply with equal validity to state conspiracy law.

The procedural reform proposed in this note will be compared with other approaches to the problem of remedying abuses in conspiracy prosecutions. The reforms proposed here would not change the substance of the law of conspiracy; nor would they directly change the procedures at trial. To do either to the extent necessary to correct abuses would be to make the crime of conspiracy ineffective against groups organized for criminal purposes. The proposed reforms would simply require the government to meet certain prerequisites before it can prosecute on a charge of conspiracy. The effect of these reforms would be to restrict the application of conspiracy law to cases in which it properly attacks groups organized for criminal purposes, without involving innocent persons in a web of guilt spun out by procedures peculiar to conspiracy prosecutions.

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1 Harno, Intent in Criminal Conspiracy, 89 U. Pa. L. Rev. 624, 635 (1941).

2 The reason for federal dominance is that federal crimes, such as narcotics traffic or mail frauds, are more likely to be committed by groups of people than are crimes in violation of the laws of the states. O'Dougherty, Prosecution and Defense Under Conspiracy Indictments, 9 Bklyn L. Rev. 263 (1940).

3 Conspiracy statutes in most jurisdictions do little more than outline the unlawful objects for which a conspiracy can be punished. "[T]here has been only fragmentary legislative treatment of the scope and components of the crime." Wechsler, Jones & Korn, The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute, 61 Colum. L. Rev. 957 (1961). Compare, for example, 18 U.S.C. § 371 (1948); Conn. Gen. Stat. Rev. § 54-197 (1958); Mont. Rev. Codes Ann. § 94-1101 (1947); Wis. Stat. Ann. § 939.31 (1958).

II. WHAT THE GOVERNMENT MUST PROVE IN A CONSPIRACY PROSECUTION

Endorsed by the Supreme Court in 1893 and still followed today, the classic definition of conspiracy is: "a combination of two or more persons, by some concerted action, to accomplish some criminal purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means."[4] In practice, however, the crime of conspiracy cannot be confined within the boundaries of this definition.[5] The acts which constitute a conspiracy change with each substantive crime that is claimed to be the object of the conspiracy.[6]

Moreover, the nature of a conspiracy makes it difficult to prove. The difficulty arises because secrecy is inherent in the crime itself. Conspirators usually take precautions against revealing their plans.[7] In addition, the agreement to combine to achieve an unlawful goal may not be in writing. In fact, there may not be an explicit agreement at all.

To compensate for the difficulty of proving a crime that is "devious, hidden, secret and clandestine,"[8] the government is not required to provide direct evidence of the criminal act,[9] which in prosecutions for conspiracy is the agreement to commit or contribute to the substantive crime.[10] A conspiracy can be successfully proven merely by evidence of motive and circumstances.[11] Proof of formal agreement is unnecessary.[12] However, the general faderal conspiracy statute[13] requires proof of an overt act in furtherance of a conspiracy.[14] The purpose of this requirement is to assure that

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[4] Commonwealth v. Hunt, 45 Mass. (4 Met.) 111, 123 (1842). See also National Commission on Reform of Federal Criminal Laws, Working Papers 387 (1970). The definition in *Hunt* was adopted fifty-one years later by the Supreme Court in Pettibone v. United States, 148 U.S. 197, 203 (1893).

[5] Harno, supra note 1, at 624.

[6] To illustrate, the general federal conspiracy statute, 18 U.S.C. § 371 (1970), is directed against "[t]wo or more persons [who] conspire . . . to commit any offense against the United States." Thus, the act of carrying heroin into the country in violation of a federal narcotics statute could be an act in furtherance of a conspiracy; and the act of passing money to an official at a sporting contest, in violation of 18 U.S.C. § 224 (1970) (bribery in sporting contests), might similarly be an act in furtherance of a conspiracy.

[7] See e.g., Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring); Marrash v. United States, 168 Fed. 225, 229 (2d Cir. 1909). See generally O'Dougherty, supra note 2, at 271; Note, Conspiracy and the First Amendment, 79 Yale L. J. 872, 877-78 (1970); Note, The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276, 278 (1948).

[8] Marrash v. United States, 168 Fed. 225, 229 (2d Cir. 1909).

[9] Powell v. Texas, 392 U.S. 514, 543 (1968) (Black, J., concurring); G. Williams, Criminal Law, The General Part 1 (2d ed. 1961).

[10] See e.g., People v. Fedele, 366 Ill. 618, 10 N.E. 2d 346 (1937); State v. Carbone, 10 N.J. 329, 336-37, 91 A.2d 571, 574 (1952). "The term, 'conspiracy,' merely means an agreement of a certain kind." Williams, supra note 9, at 663.

[11] See United States v. Morado, 454 F.2d 167 (5th Cir. 1972). In United States v. Anderson, 101 F.2d 325 (7th Cir.), cert. denied, 307 U.S. 625 (1939), the court upheld a conviction for conspiracy to interfere with the mails, in spite of the absence of direct evidence that such a conspiracy existed, on the grounds that interference with the mails was a natural consequence of other acts by the appellants, and that "appellants will be presumed to have intended the natural consequences of their acts." Id. at 330-31.

[12] Glasser v. United States, 315 U.S. 60, 80 (1942); Madsen v. United States, 165 F.2d 507, 511 (10th Cir. 1947).

[13] 18 U.S.C. § 371 (1970), which makes criminal a conspiracy to "commit any offense against the United States, or to defraud the United States." In addition, there are several particularized federal conspiracy statutes, among them: 18 U.S.C. § 224 (1970) (bribery in sporting contests); 18 U.S.C. § 241 (1970) (conspiracy against rights of citizens); 18 U.S.C. § 956 (1970) (conspiracy to injure property of a foreign government).

[14] Several of the specific conspiracy statutes do not have an overt act requirement; e.g., 18 U.S.C. § 241 (1970) (conspiracy against rights of citizens); 18 U.S.C. § 1951 (1970) (conspiracy to interfere with interstate commerce).

proof of the agreement does not become so distantly related to the substantive crime that a supposed conspiracy would be only a "project still resting solely in the minds of the conspirators."[15] Proof is also required that each individual defendant specifically intended the common design.[16]

III. THE RISK OF UNFAIRNESS

A. The Overt Act Requirement

In theory, the requirement that the government prove overt acts in furtherance of a conspiracy would protect defendants against incrimination that is based on unfulfilled plans and acts not yet carried out. Yet, insignificant and noncriminal acts, such as attendance at a meeting or the making of a telephone call, have been held to satisfy the overt act requirement.[17] Hence, in practice, the overt act requirement does not add to the difficulty of proving the conspiracy.[18]

Moreover, the overt act requirement can add to the defendant's difficulties, especially with regard to the question of venue, since the prosecution can obtain venue anywhere an overt act has been committed.[19] Since, in effect, almost any act committed during the pendency of the conspiracy can satisfy the overt act requirement, the prosecution can choose from among several jurisdictions in deciding where to bring the trial. For example, in *United States v. Spock*,[20] a prosecution for conspiracy to counsel men to evade the Selective Service laws, almost all of the acts in the alleged conspiracy took place in New York and Washington. However, the government found it expedient to bring the prosecution in Boston. It was able to do so by alleging in the indictment a single overt act which had taken place in Boston, but which was only a minor part of the alleged conspiracy and in which only two of the five defendants had taken part.[21]

Hence, the prosecution's initial disadvantage in proving a conspiracy is more than overcome by the above enumerated rules. The prosecution starts from a disadvantageous position, for it must prove the existence of a criminal act, the conspiratorial agreement, which is inherently secret and concealed. For this reason, it is not compelled to prove the act by direct evidence. However, to prevent the law from stretching too far in favor of the prosecution, proof of an overt act may in some cases be required. Yet, because acts which are innocent in themselves can, taken together, show the existence of an unlawful conspiracy, acts both trivial and lawful are allowed to be proved to satisfy the overt act requirement. In the end, it is the defense upon which a heavy burden rests. The accused may find himself caught in a conspiracy prosecution by virtue of the relationship of his own acts to acts of others whose significance he could not have appreciated at the time.[22]

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15 Yates v. United States, 354 U.S. 298, 334 (1957).

16 See notes 54-57 infra and accompanying text for a discussion of the specific intent requirement.

17 Yates v. United States, 354 U.S. 298, 33-34 (1957) (attendance at a meeting); Smith v. United States, 92 F.2d 460 (9th Cir. 1937) (telephone call).

18 There is a rationale for relaxing the overt act requirement. A conspiracy may be carried out by a number of acts innocent in themselves. For example, in a conspiracy to build a still and sell illegal liquor, acts in furtherance might be buying sugar, renting a building and obtaining a sufficient water supply. These are innocent acts in themselves; yet at trial they could be put together by the prosecution to paint a picture of an unlawful conspiracy. O'Dougherty, supra note 2, at 269-70.

19 Hyde v. United States, 225 U.S. 347, 357-67 (1912). See Justice Holmes' famous criticism of the conspiracy venue rule, in his dissent in *Hyde*. Id. at 384.

20 416 F.2d 165 (1969).

21 Mitford, The Trial of Dr. Spock 66 (1969).

22 Von Moltke v. Gillies, 332 U.S. 708, 727-28 (1948) (Frankfurter, J., concurring opinion).

B. Peculiar Rules of Evidence

The rules of evidence in conspiracy trials offer the greatest possiblities for prejudice against defendants.[23] Three kinds of evidence are usually introduced to prove the existence of a conspiracy: 1) circumstantial evidence, 2) testimony of coconspirators and 3) out of court statements of coconspirators or of the defendant himself.[24]

First, since a conspiracy can be proven without direct proof of an agreement, most conspiracy convictions rest on inferences from circumstantial evidence.[25] The criteria by which the relevance of the evidence is measured may be very broadly applied.[26] In practice, there is no clear standard to help the trial judge decide what evidence is admissible as proof of a conspiratorial agreement. Professor Abraham Goldstein concluded that the courts allow "considerable latitude" to the prosecution in presenting evidence of a conspiracy and that, although the allegations of the indictment are supposed to delimit this latitutde, "the limitation is illusory."[27]

Secondly, the conspiratorial exception to the hearsay rule provides that "any act or declaration by one coconspirator, committed in furtherance of the conspiracy, and during its pendency, is admissible against each coconspirator provided that a foundation for its admission is laid by independent proof of the conspiracy.[28] This exception is important in many conspiracy trials; frequently a codefendant will offer a plea to one or more counts of the indictment, at which point the prosecutor may use him as a witness. In addition, in many cases alleged coconspirators are not indicted and are instead called as witnesses by the prosecution.[29]

The main difficulty with applying the exception is the condition that before a statement made by a coconspirator can be admissible against a defendant there must be independent proof of the conspiracy.[30] In presenting its case, the prosecution may want to introduce hearsay statements *before* introducing other independent proof of the conspiracy. The courts have been generally flexible on this point, recognizing that exclusion of the hearsay might seriously upset the prosecution's effort at painting a picture of the conspiracy before the jury. For example, in *United States v. Falcone*,[31] appellants challenged the admission against them at trial of evidence of illegal liquor stills, because there had been no prior proof of appellants' connection with the stills. The Second Circuit upheld the convictions, stating that

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23 Krulewitch v. United States, 336 U.S. 440, 446 n.2 (1949) (Jackson, J., concurring).

24 Note, Developments in the Law: Criminal Conspiracy, 72 Harv. L. Rev. 920, 983-84 (1959) [hereinafter: Developments: Conspiracy].

25 Id.

26 Courts allow the crime to be charged with no greater specificity than the language in the statute, which is clearly quite broad in the case of the general federal conspiracy statute, 18 U.S.C. § 371 (1970), punishing conspiracy to "commit any offense against the United States, or to defraud the United States." Courts also admit evidence of acts other than those set forth in the indictment, to prove the conspiracy. See Rivera v. United States, 57 F.2d 816, 819 (1st Cir. 1932); United States v. Negro, 164 F.2d 168, 173 (2d Cir. 1947). "[T]he criterion of relevance applied by the judge [may be] as broad or as narrow as the statutory definition of the crime." Goldstein, Conspiracy to Defraud the United States, 68 Yale L. J. 405, 412 (1959).

27 Goldstein, supra note 26, at 412.

28 Developments: Conspiracy, at 984-85. See also United States v. United States Gypsum Co., 333 U.S. 364 (1948). The hearsay exception is based on an agency principle. That is, where a group of men assumes the attribute of an individuality, whether for business purposes or for the commission of a crime, the "association should be bound by the acts of each of its members in carrying out its design." O'Dougherty, supra note 2, at 276. There is some conflict in the law concerning whether the exception applies to acts as well as declarations. See generally Goldstein, The Krulewitch Warning: Guilt by Association, 54 Geo. L. J. 133, 139 (1965); O'Dougherty, supra note 2, at 275.

29 O'Dougherty, supra note 2, at 273-74.

30 Developments: Conspiracy, at 987.

31 109 F.2d 579 (2d Cir. 1940), aff'd, 311 U.S. 205 (1940).

32 Id. at 582.

although admission of the evidence might "predispose the jury to assume that all the accused were connected with it, ... [admitting the evidence] was unavoidable if the prosecution was to be allowed to prove the scheme as alleged.[32]

Moreover, at each point at which hearsay is offered as evidence, either the judge or the jury must "perform the intellectual feat of assessing the independent evidence free from the color shed upon it by the hearsay."[33] In the Second Circuit, the trial judge decides whether the hearsay evidence should be admitted.[34] This practice is in accord with the traditional duty of the trial judge to decide issues of fact which determine the applicability of a technical exclusionary rule.[35]

However, in most jurisdictions hearsay acts and statements by coconspirators are allowed in as evidence against all defendants, and the jury is cautioned to consider the evidence as against a particular defendant only if it is satisfied that there has been prior independent proof of his part in the conspiracy.[36] The value of such an instruction to the jury is highly doubtful.[37] In *Bruton v. United States*,[38] the Supreme Court quoted approvingly from a dissenting opinion of Justice Frankfurter, in which he had stated:

> The fact of the matter is that too often [the judge's] admonition against misuse is intrinsically ineffective in that the effect of ... a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.[39]

In *Krulewitch v. United States*, Justice Jackson summed up the position of the defendant in a conspiracy trial who is faced with the loose criterion of evidentiary relevance and the ineffective independent proof restriction on hearsay:

> As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy.[40]

C. Guilt by Association

The use of conspiracy as a dragnet, for indiscriminate indictments of numerous defendants, is as great a threat to the rights of the accused in conspiracy prosecutions as the rules of proof. A conspiracy indictment will not fail merely because of a lack of proof against certain of the alleged coconspirators.[41] Hence, prosecutors have been able to "sweep within the net of conspiracy all those who have been associated in any degree whatever with the main offenders,"[42] without risking loss of the entire case should some defendants be proven innocent. The "opportunities of great oppres-

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33 United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969).

34 See United States v. Nuccio, 373 F.2d 168, 173 (2d Cir. 1967); United States v. Dennis, 183 F.2d 201, 231 (2d Cir. 1950).

35 Carbo v. United States, 314 F.2d 718, 737 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964).

36 See the discussion of the merits of allowing the jury to decide whether or not to consider the evidence in United States v. Dennis, 183 F.2d 201, 230-31 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951). See also Parente v. United States 249 F.2d 752, 754 (9th Cir. 1957).

37 Model Penal Code § 5.03 (Criminal Conspiracy), Comments (Tent. Draft No. 10, 1960), at 136 [hereinafter: Model Penal Code, Comments].

38 391 U.S. 123 (1968).

39 Id. at 129; quoting from Delli Paoli v. United States, 352 U.S. 232, 247 (1957) (Frankfurter, J., dissenting).

40 Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

41 United States v. Silverman, 248 F.2d 671, 675 (2d Cir. 1957).

42 United States v. Falcone, 109 F.2d 579, 581 (2d Cir. 1940).

sion"[43] in this practice have been sharply condemned by the courts. In *United States v. Bufalino*,[44] the appellate court found "not a shred of evidence"[45] against two alleged coconspirators, one of whom was convicted at the trial. The court noted with disapproval that the indictment rested on the bare assumption that everyone associated with a meeting central to the alleged conspiracy must have been taking part in some sort of illegal activity.[46]

The danger of guilt by association arises because conspiracy trials are normally multiple defendant proceedings.[47] Appellate Courts have refused to reverse convictions in mass conspiracy trials simply because of prejudice arising out of the large number of defendants.[48] The reason is that a group trial is often the only type of proceeding in which it is possible for the prosecution to present a picture of the workings of a conspiracy, especially a large and intricate one. Moreover, the group picture presented may help the jury grasp the role in a conspiracy of individuals whom otherwise might be overlooked.[49] However, such prosecutions hold an inherent risk of unfairness to the defendants, because once a common scheme is shown only "slight evidence" is needed to connect a particular defendant with the conspiracy, and all evidence relating to the scheme involving all participants is admissible.[50]

Furthermore, the possibility of jury prejudice against individual defendants looms large in a multiple defendant conspiracy trial. Incriminating evidence introduced against only some of the defendants may influence the jury in its consideration of the guilt of the others as well. The fate of each defendant may depend not on the merits of his own case but, rather, on his success in dissociating himself from the others, in the minds of the jurors.[51] That defendants in a conspiracy trial require protection against the danger of guilt by association was recognized by the Supreme Court in *Kotteakos v. United States*.[52] The Court noted that, "[w]hen many conspire they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass."[53]

The substantive law of conspiracy seeks to protect an individual defendant against guilt by association by requiring the government to prove that each defendant

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[43] Id. See also Krulewitch v. United States, 336 U.S. 440, 445-46 (1949) (Jackson, J., concurring); United States v. Bufalino, 285 F.2d 408, 418 (2d Cir. 1960); O'Brien, Loyalty Tests and Guilt by Association, 61 Harv. L. Rev. 592, 599 (1948).

[44] 285 F.2d 408 (2d Cir. 1960).

[45] Id. at 417-18.

[46] Id.

[47] There are two other disadvantages to the accused in multiple defendant proceedings. First, group trials increase the possibility of ineffective assistance of counsel. Second, financial hardship is inherent in a long trial. Developments: Conspiracy, at 976. See O'Dougherty, supra note 2, for a discussion not only of the hardships of the multiple defendant conspiracy trial but also of the ways in which defense counsel should attempt to cope with them.

[48] Note, The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276, 282 n.42 (1948). See, e.g., Allen v. United States, 4 F.2d 688 (7th Cir. 1925) (75 defendants); United States v. Bruno, 105 F.2d 921 (2d Cir. 1939) (88 defendants).

[49] Model Penal Code, Comments, at 98.

[50] United States v. DeCavalcante, 440 F.2d 1264 (3d Cir. 1971); United States v. Henderson, 446 F.2d 960 (8th Cir. 1971).

[51] For expressions of the danger of jury prejudice in conspiracy trials, see Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Jackson, J., concurring); United States v. Bufalino, 285 F.2d 408, 417 (2d Cir., 1960). See also Model Penal Code, Comments, at 135-36. An added danger from guilt by association accompanies the so-called Pinkerton Doctrine, according to which membership in a conspiracy may make a defendant liable for substantive offenses committed by coconspirators in furtherance of the conspiracy. Pinkerton v. United States, 328 U.S. 640 (1946).

[52] 328 U.S. 750 (1946).

[53] Id., at 773. For other expressions of the same opinion, see Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Jackson, J., concurring); United States v. Central Supply Association, 6 F.R.D. 526 (N.D.Ohio 1947); and O'Brien, supra note 43, at 599-600.

specifically intended the common design and knew it was unlawful.[54] However, the specific intent requirement, in practice, is not an adequate protection against guilt by association. Because direct evidence of a defendant's specific intent is rarely available, it may be proven by circumstantial evidence.[55] Dissenting in *United States v. Spock*,[56] Judge Coffin observed that although proof of criminal intent must usually meet a high standard in our criminal law, the broadly defined and loosely interpreted rules governing conspiracy prosecutions allow that standard to be broken.[57]

D. Abuse of the Prosecutor's Discretion

Appeals have been made to the discretion of the prosecutor in efforts to find a solution to abuses at conspiracy trials.[58] If prosecutors would exercise particular caution before seeking indictments for conspiracy, there would be less chance that an innocent defendant would find himself entangled in the incriminating web of a conspiracy that is presented at trial. The Supreme Court has noted the weight which jurors give to the discretion and good judgment of the prosecutor.[59] In conspiracy trials, because of their complexity and difficulty, the responsibility of the prosecutor is especially great.[60] Yet, prosecutors have shown an increasing tendency to seek indictments for conspiracy in preference or in addition to indictments for substantive crimes.[61] It was this practice that led Judge Learned Hand to call conspiracy "that darling of the prosecutor's nursery."[62]

In an indictment, conspiracy appears more frequently together with counts charging substantive crimes than it does alone. The usual practice is to include one conspiracy count and several substantive counts, since a conspiracy count can allege a conspiracy to commit one or more crimes, but each substantive count must allege commission of a single offense.[63] It has been held that evidence introduced to prove the conspiracy may also help prove the substantive crimes alleged in the indictment.[64] This result is unavoidable because of the problems involving order of proof in presentation of the prosecution's case at trial.[65] When presenting its case, the prosecution is rarely able to separate proof of the conspiracy from proof of the substantive crimes alleged to be the object of the conspiracy.

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54 Caywood v. United States, 232 F.2d 220, 225 (9th Cir.), cert. denied, 351 U.S. 983 (1956); United States v. Mack, 112 F.2d 290, 292 (2d Cir. 1940); Landen v. United States, 299 Fed. 75 (6th Cir. 1924). See generally Yawn, Conspiracy, 51 Mil. L. Rev. 211, 218-19 (1971); Developments: Conspiracy, at 935-36. According to Professor Harno the government must prove that there was a common intent flowing from the conspiratorial agreement and that this intent was specifically directed towards a particular act and was criminal. Harno, supra note 1, at 635.

55 Goldstein, supra note 28, at 150.

56 416 F.2d 165 (1st Cir. 1969).

57 Id. at 172-73.

58 See, e.g., Krulewitch v. United States, 336 U.S. 440, 452 (1949). See also Goldstein, supra note 28, at 155.

59 Berger v. United States, 295 U.S. 78. 85 (1935).

60 O'Brien, supra note 43, at 599.

61 See, e.g., Krulewitch v. United States, 336 U.S. 440, 445-46 (1949) (Jackson, J., concurring).

62 Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925). Judge Hand wrote many of the leading conspiracy opinions, among them United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951); United States v. Compagna, 146 F.2d 524 (2d Cir. 1944), cert. denied, 324 U.S. 867 (1945); United States v. Crimmins, 123 F.2d 271 (2d Cir. 1941); United States v. Falcone, 109 F.2d 579 (2d Cir.), aff'd, 311 U.S. 205 (1940); United States v. Peoni, 100 F.2d 401 (2d Cir. 1938).

63 O'Dougherty, supra note 2, at 268-69. The author speaks, in part, from his experience as a prosecutor in conspiracy trials.

64 Dahl v. United States, 234 Fed. 618 (9th Cir. 1916). See also O'Dougherty, supra note 2, at 273.

65 Cf. the discussion on hearsay and the problem of order of proof in presentation of the prosecution's case. Text accompanying nn. 30-32 supra.

This characteristic of the conspiracy trial has led to a practice by prosecutors of adding a conspiracy count solely to facilitate proof of the substantive crime,[66] seeking "surer and more frequent convictions."[67] This practice is followed particularly in the federal courts, because federal crimes are more likely to involve group criminality.[68]

The verdict in *United States v. Dellinger*[69] illustrates this injustice. All the defendants in that trial were acquitted of conspiracy, while five of the defendants were convicted of the substantive crime of traveling in interstate commerce with intent to incite a riot.[70] However, notwithstanding acquittal of conspiracy, evidence was allowed at trial that was admissible only according to the lowered standards of relevance to prove a conspiracy[71] and the conspiracy exception to the hearsay rule.[72]

A second way in which prosecutors may abuse their discretion in their use of conspiracy is by including a conspiracy count in order to join together in one dragnet indictment charges against several defendants who could not otherwise be tried together. In *Schaffer v. United States*, decided by the Supreme Court in 1960, appellants had been tried on a conspiracy count and three substantive counts. The Court held that there was no prejudice when the conspiracy count was dismissed and the jury found appellants guilty on different substantive counts. The *Schaffer* rule permits the prosecutor to frame a "baseless conspiracy count in order that several defendants, accused of similar but unrelated offenses, may be tried together."[74] This is what seems to have been done in *Dellinger*.[75]

A third way in which prosecutors have abused their discretion is by seeking unfounded and frivolous indictments for conspiracy. In several cases[76] appellate courts recognized that defendants had been indicted for conspiracy, instead of the substantive crime that was the object of the alleged conspiracy, to enable the government to make

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66 An attorney who served both as prosecutor and defense attorney in conspiracy trials explained the practice of adding a needless conspiracy count as follows: "The rules of evidence applicable to [conspiracy] cases offer the most cogent reason for the modern prosecutor to seek this particular count in the indictment. Where proof would normally be rejected under a substantive count, the more encompassing privileges under the conspiracy count permit its introduction where, otherwise, it could not be introduced." O'Dougherty, supra note 2, at 271.

67 O'Dougherty, supra note 2, at 263.

68 See note 2 supra.

69 No. 69 CR-180 (N.D. Ill., February, 1970). One former prosecutor states that he knows of cases where defendants were acquitted of conspiracy but convicted of substantive crimes, in trials in which the government's evidence had been introduced according to the rules of proof for conspiracy prosecutions; but he does not name these cases. O'Dougherty, supra note 2, at 286.

70 This was in violation of the 1968 federal Anti-Riot Act, 18 U.S.C. § 2101 (1970).

71 The Conspiracy Trial: The Extended Edited Transcript of the Trial of the Chicago Eight (J. Clavir & J. Spitzer eds. 1970). Two examples from the transcript are: 1) Over objection, the government was permitted to introduce evidence of an incident during the convention week disorders without having shown prior connection between any of the defendants and the incident. Id. at 53. 2) Again over objection, the government was permitted to introduce evidence of a speech given by defendant Dellinger in California the month before the Democratic Convention, the subject of which did not relate to the crimes the defendants were alleged to have committed. Id. at 108.

72 For example, the government was permitted to introduce hearsay evidence against three of the defendants without having shown, by independent proof, their participation in the alleged conspiracy. Id. at 96.

73 362 U.S. 511 (1960).

74 Note, Joinder of Defendants in Criminal Prosecutions, 42 N.Y.U. L. Rev. 513, 518 (1967).

75 The defendants represented two distinct groups: a) political protesters; and b) "Yippies," each with their own plans and goals for the Convention Week. See Clavir & Spitzer, supra note 71, at 18.

76 E.g., United States v. Spock, 416 F.2d 165 (1st Cir. 1969); United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960); Terry v. United States, 7 F.2d 28 (9th Cir. 1925); Vannata v. United States, 289 Fed. 424 (2d Cir. 1923).

use of the advantages it enjoys in a conspiracy trial. These courts recognized that convictions for conspiracy should never have been obtained in such cases.[77]

In *United States v. Bufalino*,[78] the Second Circuit reversed the convictions of twenty codefendants for conspiracy to obstruct justice and to commit perjury by giving false and evasive grand jury testimony concerning a meeting held at the home of a reputed mobster, Joseph Barbara, Sr. The appellants had all been sentenced to prison terms and fines. Normally, the testimony of two witnesses or, at least, evidence "stronger than the mere word of one man against another" is required to convict a defendant of perjury.[79] At trial, the government was able to circumvent this requirement by charging the defendants with conspiracy to commit perjury, rather than with the substantive crime. Part of the evidence on which the conviction rested was statements which the defendants had made to the police on the day of the meeting at Barbara's home. These statements had not been made under oath, and so could not have formed the basis of a conviction for perjury. Furthermore, the government did not prove at trial, "by the traditional perjury standard," that any single defendant had lied before the grand jury as to any material matter.[80]

In *Bufalino*, the government would not have succeeded if it had charged the defendants with the substantive crime. Instead, the defendants were charged with conspiracy in order to obtain the advantages that accrue to the prosecution in conspiracy trials. The appellate court recognized this, and held that "conviction for a crime which the government could not prove, on inferences no more valid than others equally supported by reason and experience, and on evidence which a jury could not properly assess, cannot be permitted to stand."[81]

United States v. Spock,[82] a prosecution for "public conspiracy in the speech-opinion field,"[83] demonstrates how far-reaching and threatening can be the abuse of prosecutorial discretion with regard to conspiracy. *Spock* was the trial of Dr. Benjamin Spock and four codefendants for conspiracy to counsel, aid and abet Selective Service registrants to avoid the draft. All of the defendants except one had been convicted at trial. On appeal, the First Circuit reversed the convictions of two of the defendants on the ground that neither had shown the requisite specific intent for complicity in a conspiracy; and it ordered a new trial for the other two defendants who had been convicted, because of an error in the judge's charge to the jury. In a strong dissent, Judge Coffin argued that the appellate court erred in not finding wholesale misuse of the conspiracy prosecution in this case. Not only was there no precedent, stated Coffin, but indeed there was no justification for applying the conspiracy theory to a public, ill-defined and shifting agreement as existed here.[84]

The authors of the Model Penal Code estimated that in many cases in which conviction of conspiracy was obtained, the result might have been different if the issue at trial had been, instead of conspiracy, liability for the substantive crimes committed in furtherance of the alleged conspiracy.[85] In *Krulewitch*, Justice Jackson stated what

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77 In Vannata v. United States, 289 Fed. 424 (2d Cir. 1923), the Second Circuit affirmed a conviction for conspiracy, but nonetheless conceded that, "[t]he indictment was a great stretch on the part of the prosecutor of the quasi-judicial power lodged in him." Id. at 429.

78 285 F.2d 408 (2d Cir. 1960).

79 Id. at 418.

80 Id.

81 Id. at 419.

82 416 F.2d 165 (1st Cir. 1969).

83 Id. at 184.

84 Id. at 186-87 (Coffin, J., dissenting in part). For a persuasive argument that indictments for conspiracy should be restricted in the area of public expression, see Note, Conspiracy and the First Amendment, 79 Yale L.J. 872 (1970).

85 Model Penal Code, Comments, at 119.

is obvious: the fact that the prosecutor can abuse his discretion by inserting a baseless conspiracy count into an indictment "constitutes a serious threat to fairness in our administration of justice."[86]

IV. IS THERE A WAY TO DEAL WITH THE PROBLEMS?

To summarize, a defendant who faces trial for criminal conspiracy is at a disadvantage in several respects. First, he is subject to rules of proof at trial which allow the criminal act (the agreement) to be proven by indirect, circumstantial and sometimes only remotely relevant evidence, and which provide inadequate barriers against inadmissible hearsay. Secondly, he risks guilt by association; the merits of his own case become lost in the general picture of conspiracy that is painted at trial. Third, he may find himself indicted for conspiracy rather than for a substantive crime, in order for the prosecutor to take advantage of his favored position at trial. Finally, if he has been accused of a crime that has been completed, the task of defending his innocence at trial may be made much more difficult by the insertion of a conspiracy count into the indictment for the purpose of easing the way to conviction for the substantive crime.

Protections in the present law against unfairness to defendants at trial, the overt act requirement, the rule of independent proof of the conspiracy before admission of hearsay, and the specific intent requirement, are ineffective. Those who have criticized conspiracy trials have offered the caution of the prosecutor,[87] the careful scrutiny of the trial judge[88] and the availability of appellate review[89] as remedies for abuses. Experience has shown that these are not enough. The tendency has been for prosecutors not to exercise caution in seeking indictments for conspiracy, but, instead, to use the conspiracy charge whenever possible to enhance the position of the prosecution at trial. Appellate review has corrected only the most obvious cases of abuse and, even then, only after the fact. Hence, the greatest possibility for protection of defendants against unfairness may lie with the power of the trial judge. Yet, within the framework of present law, even the power of the trial judge to dismiss or to rule on the admissibility of evidence has not been an effective check on abuses at trial. Under present law, the defendant in a conspiracy prosecution is, indeed, "in an uneasy seat."[90]

The problems of abuses in indictments and at trial are procedural ones. Neither of the two leading proposals for reform of the criminal law have suggested remedies expressly directed at these problems. The National Commission on Reform of Federal Criminal Laws chose not to deal with procedural problems in its model federal conspiracy statute,[91] although the Report of the Consultant to the Commission recognized that the "main reforms in this area must be in criminal procedure."[92] The Report further stated that clarification of the substantive law, by means of a conspiracy statute that more explicitly states the character of the crime, might

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86 336 U.S. at 445-46.

87 Krulewitch v. United States, 336 U.S. 440, 452 (1949) (Jackson, J., concurring); Goldstein, supra note 28, at 155.

88 See United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied sub nom Lynch v. United States, 397 U.S. 1028 (1970); Carbo v. United States, 314 F.2d 718 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964).

89 Goldstein, supra note 28, at 155.

90 Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Jackson, J., concurring).

91 National Commission on Reform of Federal Criminal Laws, supra note 4, at 381-82.

92 Id. at 381.

"provide a useful cue to the judiciary" to deal with procedural problems.[93] The Consultant's proposed conspiracy statute went further, by setting out the criteria for admission of hearsay declarations at trial and by including a provision governing venue.[94]

Similarly, the Model Penal Code made a partial attempt to deal with abuses in conspiracy prosecutions by including in its model statute a provision on joinder.[95] This provision would not change present procedures; it would add clauses to conspiracy statutes declaring that a) the liability of a defendant and admissibility of evidence against him shall not be enlarged by joinder to the trial of codefendants; and b) on motion of a defendant, the court shall order severance, "if it deems it necessary or appropriate to promote the fair determination of his guilt."[96] The authors of the Model Penal Code believed it was important to include explicit reference to the effect of joinder on defendants' rights because, although it is a procedural issue, "[i]t undoubtedly operates covertly as an influence on the substantive law of conspiracy."[97]

Thus, the authors of the Model Penal Code and members of the Commission on Reform of Federal Criminal Laws did not propose changes to remedy the procedural abuses that lead to unfairness in conspiracy prosecutions. Nonetheless, their proposals are significant for a study of how to avert abuses. First, they recognized the importance and the magnitude of the problems. Secondly, they correctly saw the problems as procedural ones, which cannot be dealt with by changes in the substantive law of conspiracy. Thirdly, they recognized the intimate connection that exists between the substantive law of conspiracy and these procedural problems.

> [T]here is a close interrelationship between the functional operation of the various rules, procedural and substantive, that have developed in the conspiracy area. ... Procedural concerns relating to the law of conspiracy have caused as much concern and confusion as the substantive definitions.[98]

Abuses at conspiracy trials originate in the fact that the government is presumed to face a heavy burden in trying to investigate and prove at trial the existence of a secret agreement with criminal objects. For this reason, to remedy the abuses one might consider changing the substantive law by redefining the crime in such a way as to make proof easier for the government. The crime of conspiracy might be redefined so that to prove a conspiracy the government would not have to reach as far back into the planning stages of a substantive crime as it must with conspiracy the way it is presently defined. For example, conspiracy might be redefined as a species of group attempt, requiring a substantial step toward completion of a substantive crime. Or it might be redefined as a type of group aiding and abetting.

However, modification of the substantive law of conspiracy to correct abuses in conspiracy prosecutions finds little support. There is widespread agreement that the crime of conspiracy, as presently defined, is needed to inhibit the formation of clandestine combinations with criminal objectives.[99] In 1915, the Supreme Court noted the importance of conspiracy laws, characterizing conspiracy as "an offense of

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93 Id. at 381-82.

94 Id. at 386.

95 Model Penal Code, Proposed Official Draft § 5.03(4) (July 30, 1962).

96 Id.

97 Model Penal Code, Comments, at 135.

98 National Commission on Reform of Federal Criminal Laws, supra note 4, at 395.

99 See, e.g., Callanan v. United States, 364 U.S. 587 (1961); Pinkerton v. United States, 328 U.S. 640 (1946); Goldman v. United States, 245 U.S. 474 (1918); United States v. Rabinovich, 238 U.S. 78 (1915); Banghart v. United States, 148 F.2d 521 (4th Cir.), cert. denied, 325 U.S. 887 (1945). See also Goldstein, supra note 28, at 154-55.

the gravest character."[100] It reaffirmed that view in 1946.[101] In fact, the crime of conspiracy seems to be a peculiarly good weapon to fight organized crime.[102]

Alternatively, the rules that govern trial before a jury might be modified to offer more adequate protections to the accused. The overt act requirement might be strengthened by requiring the government to prove an overt act on the level of an attempt; or it might be required that specific intent be proven directly and not by inference; or the conspiracy exception the the hearsay rule might be abolished. However, if changes such as these were made, the government might find it impossible to prove the conspiracy at trial, in a proper case. The government does, in fact, face a difficult task in uncovering and proving a conspiracy; and, given the need for such a crime in our law, the rules that have been developed to enable its prosecution may be unavoidable.[103] A feeling that this is so may be the reason why sharp criticism of conspiracy trial practices appears frequently in the judicial opinions and in legal commentary, while, at the same time, proposals to significantly improve the situation are lacking. "Wholesale application of ... measures to protect the defendant is impossible in view of the function served by the conspiracy concept and the reasons for its peculiar vitality."[104] Further, in a proper case the rules work, as intended, to uncover the clandestine agreement without unfair prejudice to the defendants.[105]

V. PROPOSAL TO CORRECT THE ABUSES

To avert the abuses and consequent threat of unfairness in conspiracy prosecutions, a unique solution is required. Special procedures to govern conspiracy prosecutions must be implemented. The following three part proposal is suggested to remedy the threat to fairness in conspiracy prosecutions while, at the same time, maintaining conspiracy as a weapon to attack groups organized for criminal objectives. The proposal focuses upon federal prosecutions; it envisions incorporating special rules for conspiracy into the Federal Rules of Criminal Procedure. However, it might be adopted with equal utility by the procedural codes of the states.

PART A

Under a provision incorporated into the Federal Rules of Criminal Procedure, the government will be required to make a prima facie showing of a conspiratorial agreement, at an in camera *pre-trial review before the court. At this pre-trial review, the government will also be required to inform the court of the kinds of evidence which it intends to use to prove*

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100 United States v. Rabinowich, 238 U.S. 78, 88 (1915).

101 Pinkerton v. United States, 328 U.S. 640, 644 (1946).

102 Note, The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276, 283-84 (1948).

103 The authors of the Model Penal Code and the members of the National Commission on Reform of Federal Criminal Laws recognized the need for the present rules. Although the elements of the crime are codified in much greater detail in the Model Penal Code and in the conspiracy statute prepared by the National Commission than in most existing statutes, the definition of the crime and the procedures governing trial before the jury remain largely unchanged from existing law. Model Penal Code, Proposed Official Draft § 5.03 (July 30, 1962); Hearings Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, United States Senate, 92nd Congress, 1st Session, pt. I: Report of the National Commission on Reform of Federal Criminal Laws, 223-24 (1971) (proposed criminal conspiracy statute).

104 Note, The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276, 284-85.

105 See United States v. Manton, 107 F.2d 834 (2d Cir. 1938), cert. denied, 309 U.S. 664 (1940).

its case at trial, in order for the court to make a preliminary determination as to whether the admissible evidence in the possession of the government is sufficient to prove a conspiracy. Thus, in order to go forward with proof before the jury, the government must meet two burdens before the court: a) prima facie showing of a conspiratorial agreement; and b) sufficiency of admissible evidence for proof at trial.

The government would not be required to parade its evidence before the trial judge at this pre-trial review beyond that necessary for a prima facie showing of an agreement. The government would be required only to inform the trial judge as to the nature of the evidence it will later introduce at trial to prove its case. Nor would the government be prohibited from presenting new evidence at trial.

This proposal does not seek to rigidify conspiracy trial procedures but, rather, to provide a hurdle of review for the government to meet before it goes before the jury. At trial, when ruling on motions to dismiss or on the admissibility of evidence, the judge could consider any variance that exists between the case presented to him by the government at the *in camera* pre-trial review and the case which the government is presenting before the jury. Such variance would not, of course, require dismissal of the case, and it would not bar admission of evidence. The judge would use his discretion when ruling on such motions, as he presently does.

Of course, pre-trial review of the government's case represents an unusual burden, not only on the government, but also on the court. As such, it must be justified in the face of opposition to imposing extra work on our overburdened courts. It must also be justified in view of the fact that our judicial system provides the preliminary hearing and the grand jury to test the sufficiency of the government's case for trial.

Three cogent reasons exist for imposing additional pre-trial review in conspiracy prosecutions. First, there is much evidence to suggest that the preliminary hearing and the grand jury do not effectively protect defendants against abuse of prosecutorial discretion.

The effectiveness of the preliminary hearing in performing its traditional function of preventing "hasty, malicious, improvident, and oppressive prosecutions"[106] is doubtful.[107] The preliminary hearing is often avoided. Defense counsel may choose to waive the hearing in order to avoid strengthening the government's case.[108] Alternatively, the preliminary hearing may, in effect, be mooted by an intervening grand jury indictment, a common occurrence in those federal districts where the grand jury sits continuously.[109] Federal courts (as well as state courts) have held that the return of an indictment eliminates the need for a preliminary hearing.[110]

Similarly, the grand jury affords little protection against abuses in conspiracy prosecutions. In most cases, the grand jury does not restrain the prosecutor. To the contrary, it has been severely criticized as being the prosecutor's "rubber stamp," simply approving, "often uncritically, the wishes of the prosecuting attorney."[111]

Moreover, the Supreme Court has held, in *Costello v. United States*,[112] that incompetent or inadequate evidence before a grand jury provides no constitutional

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106 Thies v. State, 178 Wis. 98, 103, 189 N.W. 539, 541 (1922).

107 L. Hall, Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 850 (3d ed. 1969).

108 United States ex rel. Wheeler v. Flood, 269 F. Supp. 194 (E.D.N.Y. 1967). See also Fed. R. Crim. P. 5(c).

109 Hall, supra note 107, at 842.

110 E.g., Sciortino v. Zampano, 385 F.2d 132 (2d Cir. 1967), cert. denied, 390 U.S. 906 (1968); Martinez v. State, 423 P.2d 700 (Alaska 1967); People v. Petruso, 35 Ill.2d 578, 221 N.E.2d 276 (1966).

111 Morse, A Survey of the Grand Jury Systems, 10 Ore. L. Rev. 101, 295 (1931). See also National Commission on Law Observance and Enforcement, Report on Prosecution 124 (1931).

112 350 U.S. 359 (1956).

basis for quashing an indictment. In fact, the Court expressly refused to lay down a rule for the federal courts that would quash indictments obtained on the basis of such evidence, noting that it is only at trial that defendants "are entitled to a strict observance of all the rules designed to bring about a fair verdict."[113]

In short, it seems clear that neither the grand jury nor the preliminary hearing can be relied upon to provide additional protections for defendants in conspiracy prosecutions.

A second reason for reform is that a "desperate need" for more effective use of pre-trial review in the federal courts has already been recognized.[114] The Federal Rules of Criminal Procedure allow the court to hold a pre-trial conference "to consider such matters as will promote a fair and expeditious trial."[115] Even without this Rule, federal courts have, in the past, used pre-trial conferences;[116] and their use has been urged in "big" criminal cases, including conspiracy.[117] *In camera* proceedings are now explicitly authorized for joint trials by the Federal Rules.[118] Thus, a framework for *in camera* pre-trial review in conspiracy prosecutions already exists.

The third and most compelling reason for *in camera* pre-trial review by the court is the special need to protect defendants in conspiracy prosecutions, in view of the special problems of proof at trial, the inherent risk of guilt by association, and the lack of caution and restraint by prosecutors in indicting for conspiracy. The extreme importance that has been attached to the role of the trial judge in a conspiracy case suggests that the burden of providing this protection should fall upon the trial court. This view was emphasized by the Second Circuit in *Bufalino*,[119] and by Judge Friendly, when he commented, in *United States v. Geaney*,[120] on the Second Circuit rule which requires the trial judge to decide on the admission of hearsay evidence: "When the matter is viewed from the standpoint of the trial judge, it may be hard to say more than that he must satisfy himself of the defendant's participation in a conspiracy on the basis of the non-hearsay evidence."[121]

Of course, the trial judge in a criminal case may exercize his discretion to dismiss a conspiracy charge during the trial, on motion by the defendant. However, the demand for more effective pre-trial review in the criminal courts in general, and, more importantly, the abuses that can and have occurred in conspiracy prosecutions demonstrate that this power does not suffice to protect the defendants in a conspiracy trial.

The California case of *Davis v. Superior Court*[122] demonstrates how review of the government's case by the trial court might protect defendants from unfairness at trial and from frivolous prosecution for conspiracy. In California, a defendant may move to set aside an indictment on the ground that he "has been indicted without reasonable or probable cause."[123] If this motion is denied, he may then file a petition for a writ of prohibition in the proper appellate court.[124] In *Davis*, defendants were

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113 Id. at 364.

114 Goldstein, supra note 28, at 150, 153. The author is a state court judge in California. See also State v. Parks, 437 P.2d 642, 645 (Alaska 1968) (Rabinowitz, J., concurring).

115 Fed. R. Crim. P. 17.1.

116 Note, Joinder of Defendants in Criminal Prosecutions, 42 N.Y.U.L. Rev. 513, 534.

117 Judicial Conference of the United States, Report on Recommended Procedures in Criminal Pretrials, 37 F.R.D. 95, 98 (1965).

118 The Federal Rules of Criminal Procedure authorize the court, in ruling on a motion for severance, to conduct an *in camera* inspection of statements or confessions made by the defendants which the government intends to introduce as evidence at trial. Fed. R. Crim. P. 14.

119 285 F.2d 408, 417-18 (2d Cir. 1960).

120 417 F.2d 1116, (2d Cir. 1969).

121 Id. at 1120.

122 175 Cal. App.2d 8, 345 P.2d 513 (1st Dist. Ct. App. 1959).

123 Cal. Ann. Pen. Code § 995 (West 1970).

124 Id. at § 999a.

indicted by a grand jury for conspiring to smuggle the manuscript of Caryl Chessman's book, *The Face of Justice*, from prison in order to have it published. The defendants' motion to set aside the indictment was denied, and they filed for a writ of prohibition. In granting the writ, the appellate court found that none of the evidence presented to the grand jury would support a conviction for conspiracy.[125]

Thus, Davis and his alleged coconspirators were saved from the hardship of going to trial. More significantly, they were saved from the possibility of conviction at a trial in which they might have been incriminated by technically inadmissible evidence or by a process of guilt by association. Analogously, a case such as *Bufalino*, which exemplifies the unfounded prosecution for conspiracy, might not have gone to trial if the government's case had been forced to undergo review by the trial judge to determine whether prima facie existence of a conspiracy had been established.

Thus, in substance, three reasons compel the institution of mandatory pre-trial *in camera* review of the government's case by the trial court at which a) the government must make a prima facie showing of a conspiratorial agreement, and b) the trial judge determines the sufficiency of admissible evidence for proof at trial. The first reason is the considerable evidence that the grand jury and preliminary hearing do not sufficiently protect defendants from abuse of prosecutorial discretion. Secondly, there is a demand for more effective pre-trial review by the trial court in criminal cases in general. Finally, there is a demonstrated need for special protections for defendants both before and during conspiracy trials, beyond those which present law provides.

PART B

The second part of the proposal presented in this Note is aimed at effectively protecting individual defendants in conspiracy trials against the danger of guilt by association.

> *Under a provision incorporated into the Federal Rules of Criminal Procedure, upon pre-trial review of the government's case as provided in Part A, the court will determine the sufficiency of the evidence against each defendant or distinguishable group of defendants. The court will then direct a special verdict or order a severance as to any defendant(s) against whom the evidence appears substantially less than or different from the evidence against the other defendants.*

The Federal Rules provide for severance on the initiative of the court, as well as on the motion of either party.[126] However, the protection is "more theoretical than real," since trial courts rarely grant severance.[127] The reluctance of trial courts to sever before trial is due largely to the trial judge's lack of knowledge, at that point, of what is likely to prejudice the defendant at trial.[128] However, it has been suggested that the "pre-trial conference . . . provides the trial judge with an excellent opportunity to acquaint himself with the possibilities of prejudice, so that he may rule more intelligently on a motion for severance."[129] Given this opportunity, trial judges might view severance as a practicable option in a conspiracy trial.[130] Moreover, even if it

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125 Cal. App.2d at 22-26, 345 P.2d at 522-25.

126 "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." Fed. R. Crim. P. 14.

127 Note, Joinder of Defendants in Criminal Prosecutions, 42 N.Y.U.L. Rev. 513, 519.

128 Id. at 520.

129 Id. at 534-35.

130 The importance of an explicit provision for severance in conspiracy trials is underscored by the fact that the authors of the Model Penal Code include a paragraph on severance in their model conspiracy statute. Model Penal Code, Proposed Official Draft § 5.03(4)(iii) (July 30, 1962). See also Model Penal Code, Comments, at 135-38.

does not lead to severance, mandatory review of the sufficiency of the evidence against each defendant at pre-trial review would direct the court's attention to the danger of guilt by association at trial.

PART C

As has been discussed above, it is common for prosecutors to add a conspiracy count to an indictment for substantive crimes with the object of easing the way to conviction. To overcome this injustice, the third part of the present proposal would eliminate combined trials for conspiracy and substantive crimes, as follows.

> *Under a provision incorporated into the Federal Rules of Criminal Procedure, when there has been a completed crime involving group criminality, the government must choose between prosecution for conspiracy and prosecution for the substantive crime. Choice of either alternative bars later prosecution for the other. If the government prosecutes for the substantive crime and obtains a conviction, the government may request a further proceeding before the court to prove conspiracy. The outcome of this proceeding must be considered by the court upon sentencing.*

This provision would place an extra burden on the government in the case of group criminality and a completed crime, for it must choose between two theories of criminality – conspiracy or commission of a substantive crime – before going to trial. The threat to fairness posed by the added conspiracy count justifies such a burden. It is also proposed that choice of one alternative should bar later prosecution for the other, the reason being to prevent defendants from having to face the possibility of defending at two separate trials which deal with the same criminal transaction or series of events. Even with this requirement, the government is not materially restricted in punishing criminality, since it retains its present option of charging defendants with either the substantive crime, or conspiracy, or both (conspiracy, upon conviction for the substantive crime). Yet, at the same time, this provision prevents the government from obtaining a conviction for the substantive crime by taking advantage of the rules provided for conspiracy trials, which ease the government's way to conviction.

Dissenting in *Spock*, Judge Coffin argued that the government should have looked for an alternative that is less restrictive of defendants' rights than conspiracy, when it prosecuted that case.[131] Although *Spock* was unusual in that it raised first amendment issues, Judge Coffin's reasoning applies with equal force to use of the conspiracy indictment in general. Once the criminal act has been completed, the government can prosecute for substantive crimes, and for aiding and abetting, "without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges."[132]

Prosecution for the substantive crime alone would avoid many hazards. However, there is a widely accepted view that independent reasons exist to punish conspiracy to commit crime. According to this view, accepted even among those who have warned of the dangers of conspiracy prosecutions, the existence of criminal combinations is in itself threatening; for it gives rise to the possibility of broader criminal objectives with a greater possibility of success, and it creates an uneasiness in the society, stemming from the knowledge that such combinations exist.[133]

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131 United States v. Spock, 416 F.2d 165, 189 (1969).

132 Krulewitch v. United States, 336 U.S. 440, 457 (1949) (Jackson, J., concurring).

133 See Callanan v. United States, 364 U.S. 587, 594 (1961); Krulewitch v. United States, 336 U.S. 440, 448 (1949) (Jackson, J., concurring). See also Developments: Conspiracy, at 924-25; Goldstein, supra note 28, at 154-55; Model Penal Code, Comments, at 96-98.

. Therefore, it is proposed here that proof of conspiracy be permitted in a proceeding before the court after conviction of a substantive crime to affect the degree of sentencing. Such a scheme compares with the procedure contemplated by the National Commission on Reform of Federal Criminal Laws for imposing "organized crime penalties."[134] According to that proposal, following conviction of a substantive crime the judge could impose a stiffer sentence than that available for the substantive crime alone, if he finds in a sentence proceeding that the "defendant's crime was related in a significant way to organized crime."[135] Analogously, the judge might impose a stiffer sentence upon a finding of participation in a conspiracy. For example, if the range of sentences for the substantive crime is five to fifteen years, the judge might be confined to a range of ten to fifteen years, when a conspiracy has been found.[136]

In this way, the government's interest in punishing combination for criminal purposes, apart from commission of substantive crimes, would be served. Indeed, the bifurcated proceeding envisioned here would better serve the interest in punishing conspiracy than the present system, in which conviction for conspiracy and for substantive crimes at the same trial usually results in concurrent sentences. At the same time, this procedure would save innocent defendants from the possibility of a conviction resulting from the hazards of conspiracy trials, in which "all the procedural safeguards surrounding the individual are let down."[137]

VI. CONCLUSION

The proposal presented in this Note has not followed the approach of suggesting changes in the substantive law of conspiracy or the character of the crime. Nor has this proposal suggested that changes be made in the way in which a conspiracy is proven before the jury at trial. To do either would be to hamstring the law in attacking groups organized for criminal objectives. Instead, the approach has been to create hurdles of review for the government to overcome before it can confront the defendants with a charge of conspiracy, either before a jury at trial, or before the judge in a sentencing proceeding. On a proper charge, the hurdles should prove no obstacle. Thus, the effect of this approach would be to restrict application of conspiracy law to the proper, narrower range of cases in which it attacks the evil which justifies its place in our criminal law. This way of dealing with the problem is suggested not only by comments on the way in which conspiracy works in the American criminal justice system,[138] but also by comparison with the function of conspiracy doctrine in Western European countries, where it is applied only "in situations involving a very great danger to society."[139]

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134 National Commission on Reform of Federal Criminal Laws, supra note 4, at 384.

135 National Commission on Reform of Federal Criminal Laws, supra note 4, at 384.

136 Confining the judge to a limited range of sentences within the maximum available for the substantive offense is what the National Commission proposes for a "professional or persistent offender." National Commission on Reform of Federal Criminal Laws, supra note 4, at 384.

137 Affeldt, Group Sanctions and Sections 8(b)(7) and 8(b)(4): An Integrated Approach to Labor Law, 54 Geo. L.J. 55, 75 (1965).

138 One commentator has expressed concern that broadening of the conspiracy concept in the American criminal justice system has led to complacent acceptance of guilt by association, which is antithetical to our notion of justice. O'Brien, supra note 43, at 599-602.

139 Developments: Conspiracy, at 923. Justice Jackson's criticisms of American conspiracy law, in *Krulewitch* have been cited here and elsewhere. See, e.g., Goldstein, supra note 28. Justice Jackson became intimately acquainted with the law of conspiracy of the United States and other countries while serving as Chief Justice of the Nuremburg War Crimes Tribunal. While serving in that capacity, he encountered problems in convincing lawyers of other countries that the "sweep of the [American] conspiracy concept could be so broad." O'Brien, supra note 43, at 600.

Once before the jury on a charge of conspiracy, it seems unavoidable that a defendant will undergo exceptional hazards, because of the difficulties faced by the government in trying to prove the existence of a secret agreement to commit an unlawful act. However, the reforms proposed here would force a more restrictive and more demanding application of the law of conspiracy. In this way, they would go far to protect innocent persons from an entangling web of guilt that can be spun out in a prosecution for conspiracy.

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