Articles

Conspiracy Theory

Neal Kumar Katyal[†]

CONTENTS

I. TWO VIEWS OF CONSPIRACY 1314
A. *The Dangers to Society from Group Behavior* 1315
1. *Psychological Analysis of Social Identity* 1316
a. *Polarization and Risk-Taking* 1318
b. *Acting Against Self-Interest* 1319
c. *Dissuasion* 1321
d. *Success in Tasks* 1323
2. *Economic Analysis of Specialization of Labor and Economies of Scale* 1325
B. *The Benefits to Society from Group Behavior* 1328
1. *Information Extraction* 1328
2. *Physical Evidence and Perpetration Cost* 1333

† Professor of Law, Georgetown University Law Center. For many helpful insights, I am grateful to Bruce Ackerman, George Akerlof, Allie Alperovich, Ian Ayres, Rachel Barkow, Sara Beale, Margaret Blair, Nola Breglio, Dan Capra, John Donahue, George Fletcher, Jeffrey Gordon, Mitu Gulati, Aaron Haas, Henry Hansmann, Eric Holder, Christine Jolls, Jenia Iontcheva, Dan Kahan, Sonia Katyal, Mark Kelman, John Langbein, Don Langevoort, David Luban, Anup Malani, John Manning, Tracey Meares, Daniel Meltzer, Carrie Menkel-Meadow, Monika Moore, Julie O'Sullivan, Larry Ribstein, Daniel Richman, Roberta Romano, Jeffrey Rosen, Joanna Rosen, Steve Salop, Mike Seidman, Nikhil Shanbhag, Steven Shavell, Carol Steiker, Kate Stith, Lynn Stout, Bill Stuntz, Cass Sunstein, Robert Weisberg, and participants at workshops at Fordham Law School, Georgetown Law Center, Harvard Law School, Northwestern Law School, Stanford Law School, and University of Virginia Law School. A special debt is owed to Warren Schwartz for many stimulating conversations on the subject.

Imaged with the Permission of Yale Law Journal

II. THE THEORY OF CONSPIRACY 1333
A. *Price Discrimination* 1336
B. *Reversing Contract Law Principles To Increase Transaction Costs and Uncertainty* 1341
C. *Norms and Trust: Undermining Group Efficiencies* 1346
1. *Fracturing Trust* 1346
a. *Encouraging Costly Monitoring* 1350
b. *Compartmentalizing Information and Chilling Effects* 1353
2. *Destabilizing Group Identity* 1355
3. *Exacerbating Team-Production Problems* 1359
4. *Targeting Stakeholders* 1361
5. *Promoting Cost Deterrence and Attacking Leadership* 1363
6. *Reversing Intellectual Property Law* 1367

III. THE DOCTRINE OF CONSPIRACY 1369
A. *Traditional Features* 1370
1. *Extra Punishment for Group Activity* 1370
2. Pinkerton 1372
3. *Inchoate Liability* 1375
4. *Impossibility* 1376
5. *Withdrawal* 1378
B. *Further Aligning Theory and Doctrine* 1380
1. *Sentencing Reforms* 1380
2. *Exculpatory Flipping* 1385
3. *Nonsentencing Rewards* 1386
4. *Publicity* 1390
5. *Prosecutorial Reforms* 1392

CONCLUSION 1397

Imaged with the Permission of Yale Law Journal

Consider how a law school textbook might introduce the elements of traditional conspiracy law: Imagine that Joe and Sandra agree to rob a bank. From the moment of agreement, they can be found guilty of conspiracy even if they never commit the robbery (it's called "inchoate liability"). Even if the bank goes out of business, they can still be liable for the conspiracy ("impossibility" is not a defense). Joe can be liable for other crimes that Sandra commits to further the conspiracy's objective, like hot-wiring a getaway car (it's called "*Pinkerton*" liability, after a 1946 Supreme Court case involving tax offenses). He can't evade liability by staying home on the day of the robbery (a conspirator has to take an affirmative step to "withdraw"). And if the bank heist takes place, both Joe and Sandra can be charged with bank robbery and with the separate crime of conspiracy, each of which carries its own punishment (the crime of conspiracy doesn't "merge" with the underlying crime).

Why should conspiracy liability begin at the moment of "agreement," before any crime is committed? Why can a conspirator be charged with both the inchoate offense of conspiracy *and* the robbery? Why should the law punish conspirators even if it's impossible for them to commit the crime they planned? Why is withdrawal from a conspiracy so difficult? And what about that oddball *Pinkerton* doctrine?

For more than 50 years, these questions have prompted a series of critiques of conspiracy law. The major scholarly articles have alleged the doctrine "unnecessary"[1] and stated that the "assumed dangers from conspiracy . . . have never been verified empirically."[2] And such views have successfully permeated the criminal law. The Model Penal Code, a blueprint for state law first written by a commission of experts in the early 1950s, rejected many of the traditional features of conspiracy law. Over the past fifteen years, the Federal Sentencing Commission similarly eliminated many of the traditional features of conspiracy doctrine, so that, for example, it is not generally possible to punish someone for conspiring to commit a crime and for committing it.

These cutbacks are likely to be a mistake. For some years now, I have been arguing that realistic models of crime control must incorporate, and sometimes reconcile, economic and psychological reactions to penalties.[3] This is particularly the case with the offense of conspiracy. Psychologists have made many advances in understanding the ways in which people in

1. Philip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1140 (1973) (calling for abolition of the doctrine).

2. Abraham S. Goldstein, *Conspiracy To Defraud the United States*, 68 YALE L.J. 405, 414 (1959).

3. Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1043, 1063-64, 1072-73, 1086-89 (2002) [hereinafter Katyal, *Architecture*]; Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2441-45, 2458-70 (1997) [hereinafter Katyal, *Deterrence's Difficulty*].

Imaged with the Permission of Yale Law Journal

groups act differently than they do as individuals. So, too, economists have developed sophisticated explanations for why firms promote efficiency, leading to new theories in corporate law. These insights can be "reverse-engineered" to make conspiracies operate less efficiently. In reverse engineering corporate law principles and introducing lessons from psychology, a rich account of how government should approach conspiracy begins to unfold.

This is a central issue in criminal law, since more than one-quarter of all federal criminal prosecutions and a large number of state cases involve prosecutions for conspiracy.[4] Virtually every state recognizes the crime.[5] Yet criticisms of the doctrine are pervasive, and generally take two forms. First, the rationale for the offense of conspiracy is questioned. Why should group behavior receive additional punishment, and why should any punishment at all attach at the moment of agreement?[6] In the second critique, conspiracy law is excoriated for giving prosecutors too much power.[7] This Article concerns itself with answering the first of these

4. Beth Allison Davis & Josh Vitullo, *Federal Criminal Conspiracy*, 38 AM. CRIM. L. REV. 777, 778 n.9 (2001) (finding that 20,132 of 70,114 defendants charged in federal court in 1997 were charged with conspiracy under one of three provisions of the U.S. Code); United States v. Reynolds, 919 F.2d 435, 439 (7th Cir. 1990) (Easterbrook, J.) ("[P]rosecutors seem to have conspiracy on their word processors as Count I; rare is the case omitting such a charge."); Paul Marcus, *Criminal Conspiracy Law: Time To Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 9 (1992) ("[C]hange in the growing number of conspiracy prosecutions can be seen in large cities and small cities, in regions throughout the country, in the federal courts and in the state courts."). Almost every headline-grabbing prosecution has involved a conspiracy charge. For example, conspiracy charges were brought in the Oklahoma City bombing trial, the 1993 bombing of the World Trade Center, and the narcotics-trafficking trial of former Panamanian leader Manuel Noriega. *See* Jo Thomas, *Swift, Hard Attack in Bombing Trial*, N.Y. TIMES, May 12, 1997, at A12 (noting that conspiracy charges were brought in the Oklahoma City bombing case); Blaine Harden, *2 Guilty in Trade Center Blast*, WASH. POST, Nov. 13, 1997, at A1; Simon Tisdall, *Jury Convicts Noriega on Drug Charges*, GUARDIAN (London), Apr. 10, 1992, at 24; *cf.* WILLIAM SHAKESPEARE, JULIUS CAESAR act 2, sc. 1, ll. 78-79 (William Rosen & Barbara Rosen eds., New Am. Library 1963) ("O conspiracy, Sham'st thou to show thy dang'rous brow by night, When evils are most free?").

5. WAYNE R. LAFAVE, CRIMINAL LAW 573 & n.66 (3d ed. 2000) (stating that the crime of conspiracy "exists in virtually all jurisdictions" and that "[o]f the modern recodifications, only Alaska's is without a crime of conspiracy").

6. Ian H. Dennis, *The Rationale of Criminal Conspiracy*, 93 LAW Q. REV. 39, 41 (1977) ("The question then is, *why* should this form of conduct be criminal? Why should an agreement between two people to commit a crime itself be a crime?"); Goldstein, *supra* note 2, at 413-14 (questioning the group harms of conspiracy); Johnson, *supra* note 1, at 1140 (calling for abolition of the doctrine); Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 393 (1922) ("[C]riminal conspiracy lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought."); *see also* Hyde v. United States, 225 U.S. 347, 387 (1911) (Holmes, J., dissenting) (arguing that because whenever "two or more have united for the commission of a crime there is a conspiracy, the opening to oppression thus made is very wide indeed. It is even wider if success should be held not to merge the conspiracy in the crime intended and achieved.").

7. *See, e.g.*, Susan W. Brenner, *RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?*, 2 WM. & MARY BILL RTS. J. 239, 303 (1993) (providing such a criticism of conspiracy law); Albert J. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 624 (1941) ("In the long category of crimes there is none, not excepting criminal attempt,

Imaged with the Permission of Yale Law Journal

criticisms by offering a functional justification for punishing conspiracy. The debate about the best way, if any, to implement conspiracy law must naturally take place, but it should occur only after a sober assessment of the underpinnings of the doctrine itself. These underpinnings are not understood, which is not surprising since the last major articles on conspiracy were written in 1959 and 1973,[8] and because the dominant motif in criminal law scholarship has veered too far toward retributivist analysis.[9]

This Article outlines a case for traditional federal conspiracy doctrine by returning to fundamental points about group behavior. By looking at groups, the Article holistically addresses both the necessity of the offense of conspiracy, as well as the doctrinal questions about *Pinkerton* liability, impossibility, and the offense's other traditional features. This view of conspiracy is part of a larger trend emerging in legal scholarship, one that trains its eye on groups instead of on individuals. In corporate law, Eric Talley, Lynn Stout, and Margaret Blair have drawn much attention to the team-production problem;[10] in torts and business organizations, Lewis Kornhauser, Reinier Kraakman, Alan Sykes, and others have usefully analyzed vicarious liability and gatekeepers,[11] and Donald Langevoort has similarly studied employer monitoring;[12] and in civil law, David Schkade, Cass Sunstein, and Daniel Kahneman have developed an understanding of the jury system based on group dynamics.[13] Most law professors, used to

---

more difficult to confine within the boundaries of definitive statement than conspiracy."); Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III and IV*, 87 COLUM. L. REV. 920, 948 (1987) ("[T]he procedural and evidentiary consequences directly or indirectly associated with a conspiracy charge . . . create possibilities of abuse."); Milton C. Lorenz Jr., Comment, *Conspiracy in the Proposed Federal Criminal Code: Too Little Reform*, 47 TUL. L. REV. 1017, 1037 (1973) ("Indiscriminate or reflexive use of the conspiracy charge by government prosecutors may be equated to a wide dragnet . . . . Even this overkill might be tolerable were it not for the costly drain upon judicial and law enforcement resources . . . ."); Note, *Vicarious Liability for Criminal Offenses of Co-Conspirators*, 56 YALE L.J. 371, 378 (1947) ("In the final analysis the *Pinkerton* decision extends the wide limits of the conspiracy doctrine to the breaking-point and opens the door to possible new abuses by overzealous public prosecutors.").

8. Goldstein, *supra* note 2; Johnson, *supra* note 1.

9. *Compare, e.g.*, Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232 (1985) (using an economic approach), *with* George P. Fletcher, *Criminal Theory in the Twentieth Century*, 2 THEORETICAL INQUIRIES L. 265 (2001) (adopting a philosophical approach).

10. Eric Talley, *Taking the "I" out of Team: Intra-Firm Monitoring and the Content of Fiduciary Duties*, 24 J. CORP. L. 1001 (1999); Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundation of Corporate Law*, 149 U. PA. L. REV. 1735 (2001).

11. Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CAL. L. REV. 1345 (1982); Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984).

12. Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 1 COLUM. BUS. L. REV. 71 (2002).

13. *See* David Schkade, Cass R. Sunstein & Daniel Kahneman, *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000); *see also* Cass R. Sunstein, *Deliberative Trouble?: Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000).

Imaged with the Permission of Yale Law Journal

writing articles on their own, think about crime as a solo enterprise—a tendency reinforced by the individualist prism of microeconomics and the case-driven method of studying specific parties. The damage here, and elsewhere, in legal education is apparent.[14]

Part I outlines two reasons why conspiracies are harmful: the specialization of labor/economies of scale and the development of a pernicious group identity. The former is easily understood by thinking about how difficult it is for an individual to rob a bank alone. Several individuals are needed to carry weapons and provide firepower (economies of scale), someone needs to be the "brains behind the operation" (a form of specialization of labor), and another should serve as a lookout (specialization again). Conspiracy creates obvious efficiencies, efficiencies predicted by Ronald Coase in his path-breaking article about why firms develop.[15]

What are somewhat less obvious, but at least as important, are psychological accounts of the dangers of group activity. Advances in psychology over the past thirty years have demonstrated that groups cultivate a special social identity. This identity often encourages risky behavior, leads individuals to behave against their self-interest, solidifies loyalty, and facilitates harm against nonmembers. The psychological and economic accounts explain why law treats conspiracy in a distinctive way. The law focuses on "agreement" because that decision has drastic consequences. The law seeks to attach a broad and potentially uncognizable set of penalties at this early stage to deter many from becoming conspirators.

The second half of Part I discusses the converse: When *A* conspires with *B*, *B* can turn around and *flip*—implicate—*A* to the authorities in exchange for a lighter sentence. In the eyes of law enforcement, therefore, criminal conspiracy is not always harmful. The more conspirators, the more witnesses there are to flip and the more ominous the prisoners' dilemma for a conspirator. Teachers of criminal law today already consider economics, psychology, and flipping to some extent. What this Article tries to do is systematically review the interdisciplinary literature to detail its implications for the doctrines surrounding conspiracy. Part I therefore sets the stage on which the tough drama about conspiracy is played out, and will move quickly because the play is more exciting than the stage itself.

Part II explains how conspiracy law resolves the tension of group behavior through a method of price discrimination. The law strives to prevent conspiracies from forming with high up-front penalties for those

14. *See* Neal Kumar Katyal, *Beyond the Law of One: The Real World Works in Groups, but Law Schools Don't Teach That Way*, LEGAL TIMES, Sept. 9, 2002, at 27 (arguing that law schools fundamentally fail to prepare students to work in group settings).

15. *See generally* Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

Imaged with the Permission of Yale Law Journal

who join, but also uses mechanisms to obtain information from those who have joined and decide to cooperate with the government. Federal law itself has come to recognize such a tension, although scholars have not, and this can explain the function of doctrines such as *Pinkerton* liability and the exclusion from merger. These doctrines not only further information extraction, they also make conspiracies more difficult to create and maintain by forcing them to adopt inefficient practices. The possibility of defection forces the syndicate to use expensive monitoring of its employees for evidence of possible collusion with the government. Mechanisms for defection also erode trust within the group and lead members to think that others are acting out of self-interest. This analysis will suggest that other doctrines in criminal law—apart from conspiracy—have information-extraction advantages; today, however, conspiracy law is a primary vehicle equipped for the task.

The argument in Part II, and in the Article more generally, should not be confused with one advocating the imposition of more punishment. Indeed, with a vibrant conspiracy doctrine, sentences may very well be lower as a result of increased cooperation agreements. And with giving prosecutors more tools for leverage over conspirators comes the possibility of cultivating greater compartmentalization and other inefficiencies within the criminal firm, thereby preventing some crime before it happens, not simply because of standard deterrence, but also because the financial rewards from crime are reduced. Today, perhaps as a result of the weakening of conspiracy doctrine, Congress has required high mandatory minimum sentences for a variety of crimes (involving guns, drugs, violence, etc.). But ratcheting up sentences in this smattering of substantive laws can overpunish lone actors; the single doctrine of conspiracy is more closely calibrated to the harms of group conduct.

Part II therefore attempts to develop a theory of conspiracy, centered on economic and psychological accounts of group behavior, that incorporates its complexities. As such, the claims are not only descriptive, by detailing unnoticed features of contemporary conspiracy law, but normative as well. Part III furthers these normative claims by offering additional mechanisms that cause defection and extract information. It suggests, for example, that sentencing rewards should not only be confined to those who provide inculpatory information, but should also be given to those who turn over material that sets innocent people free. In addition, Part III offers other ways to promote defection of conspirators and suggests the reversal of several recent changes to conspiracy law that were imposed by the Federal Sentencing Commission—changes that quietly nullified many advantages the doctrine accreted in the past fifty years.

This Article contemplates, as its paradigm case, a criminal enterprise characterized by repeat players, where the psychological and economic

Imaged with the Permission of Yale Law Journal

effects of group behavior are at their height. The general prohibition on conspiracy, however, reaches more than those cases. In addition to suggesting that the offense of conspiracy should be broken apart into first- and second-degree variants, Part III will also suggest some of the advantages of statutes that target enterprises, such as the modern prohibitions on drug enterprises and racketeering.[16]

Accordingly, this Article does not aspire to defend every aspect of federal conspiracy law. Rather, it contends that the criticism of some of the doctrine's various features (such as its inchoate nature, *Pinkerton* liability, the exclusion from merger, and its extension to agreements whose successes are "factually impossible") has not appreciated their functional benefits. Nevertheless, in many places, divergences between doctrine and theory will exist. Particularly striking in this regard are state law treatments of conspiracy: A significant number of states, induced by the Model Penal Code, have ignored many of the unique harms that conspiracies pose and have given short shrift to the justifications for conspiracy doctrine. In the course of outlining these justifications and the accompanying divergences, naturally many different causalities will arise. My goal is to start a debate on how best to prioritize these causalities rather than to resolve precisely where the contours of conspiracy law must lie.

I. TWO VIEWS OF CONSPIRACY

Treatments of conspiracy law consider group crime to pose special dangers (the more common view) or special benefits (the rarer view).[17] A

16. *Compare, e.g.*, 18 U.S.C. § 371 (2000) (providing that if at least two or more "persons conspire either to commit any offense against the United States, or to defraud the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both"), *with id.* § 1962(c) (providing that it is "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt"), *and* 21 U.S.C. § 848(a) (2000) ("Any person who engages in a continuing criminal enterprise [to violate felony narcotics prohibitions] shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment . . . ."). On the variety of approaches to conspiracy, see generally LAFAVE, *supra* note 5, at 567-614. The claims in this Article are limited, moreover, to an analysis of conspiracy law's impact on purely illegal enterprises, where a principal goal is to destroy the efficiency of such enterprises. It does not discuss the role of conspiracy law in prosecuting crimes by otherwise legal firms. For an introduction to such issues, see Barry D. Baysinger, *Organization Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 341 (1991); and V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996).

17. *Compare, e.g.*, BRITISH LAW COMM'N, CRIMINAL LAW: REPORT ON CONSPIRACY AND CRIMINAL LAW REFORM 7 (1976) (discussing the harm of group activity), *with* Goldstein, *supra* note 2, at 413-14 (observing how conspirators might leak information). For an excellent brief attempt to consider the psychological and economic dangers of groups, see United States v. Townsend, 924 F.2d 1385, 1394 (7th Cir. 1991) ("[W]hat makes the joint action of a group of *n*

Imaged with the Permission of Yale Law Journal

thorough study of the costs and benefits of conspiracies to criminals and of conspiracy law to prosecutors has not been undertaken; the dominant motif in the scholarship has been harsh philosophical criticism without a full appreciation of the doctrine's functional benefits. Folding these benefits back into the legal discourse will generate a new understanding of conspiracy law.

Before we begin, definitions of a few concepts may help readers. *Deterrence* is a function of the severity of a criminal sanction discounted by the probability that it will actually be enforced. *Marginal deterrence* refers to the need for greater sanctions to prevent greater harm; as George Stigler poignantly puts it, "If the thief has his hand cut off for taking five dollars, he had just as well take $5,000."[18] The *substitution effect* refers to a common reaction to a price increase of a good: switching to an alternative product. If the price of your latte goes up to $10 (a not unrealistic hypothetical where I live), you might consume more tea. Similarly, if the law massively punishes crack cocaine, then dealers may sell more heroin.[19] Finally, *cost deterrence* refers to strategies that prevent criminal acts by increasing their monetary price.[20]

A. *The Dangers to Society from Group Behavior*

Just three months ago, the U.S. Supreme Court held that a criminal agreement is "'a distinct evil,' which 'may exist and be punished whether or not the substantive crime ensues.'"[21] In reaching this conclusion, the Justices drew upon their holding in a 1961 case, explaining that a conspiracy

> poses "a threat to the public" over and above the threat of the commission of the relevant substantive crime—both because the "[c]ombination in crime makes more likely the commission of [other] crimes" and because it "decreases the probability that the individuals involved will depart from their path of criminality."[22]

---

persons more fearsome than the individual actions of those *n* persons is the division of labor and the mutual psychological support that collaboration affords. Both the conspiracy and the market transaction are agreements, but only conspiracy poses the added danger of group action." (internal quotation marks and citations omitted)).

18. George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 527 (1970).

19. *See* Katyal, *Deterrence's Difficulty*, *supra* note 3, at 2402-08 (suggesting this possibility).

20. Katyal, *Architecture*, *supra* note 3, at 1089-90 (outlining the theory of perpetration-cost deterrence); Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1006, 1039-41 (2001) (same).

21. United States v. Recio, 123 S. Ct. 819, 822 (2003) (quoting Salinas v. United States, 522 U.S. 52, 65 (1997)).

22. *Id.* (quoting Callanan v. United States, 364 U.S. 587, 593-94 (1961)) (alterations in original); *see also* United States v. Rabinowich, 238 U.S. 78, 88 (1915) ("For two or more to

Imaged with the Permission of Yale Law Journal

Yet, despite the centrality of these propositions to conspiracy law, and despite the fact that Professor Abraham Goldstein prominently challenged them over forty years ago,[23] there has been virtually no attention to examining whether these core assertions are correct. This Section draws on psychological and economic research to show where the Court was right.

1. *Psychological Analysis of Social Identity*

A wide body of psychological research over the last century reveals that people tend to act differently in groups than they do as individuals.[24] Some of the work is tentative, thereby precluding robust results. Nevertheless, it is generally accepted that groups are more likely to polarize toward extremes, to take courses of action that advance the interests of the group even in the face of personal doubts, and to act with greater loyalty to each other.[25] Much of the most influential research focuses on how group membership changes an individual's personal identity to produce a new *social identity*. In this process, a person's self-esteem becomes linked to the group's

---

confederate . . . is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices.").

Similarly, the Model Penal Code drafters observed that conspiracy "is a means of striking against the special danger incident to group activity." MODEL PENAL CODE § 5.03 cmt. (1985). But the drafters did not examine this claim outside of stringing together some slogans:

> [T]he act of combining with another is significant both psychologically and practically, the former because it crosses a clear threshold in arousing expectations, the latter because it increases the likelihood that the offense will be committed. Sharing lends fortitude to purpose. The actor knows, moreover, that the future is no longer governed by his will alone; others may complete what he has had a hand in starting, even if he has a change of heart.

Id. § 5.03.

23. Goldstein, *supra* note 2, at 413-14.

24. John C. Turner, *Foreword* to S. ALEXANDER HASLAM, PSYCHOLOGY IN ORGANIZATIONS: THE SOCIAL IDENTITY APPROACH, at x, xii (2001) ("Moving from the 'I' to the 'we' psychologically transforms people and brings into play new processes that could not otherwise exist. Indeed it is to this creative capacity that most organizations owe their success."); *see also id.* at 26 ("[G]roups *change* individuals and this in turn makes groups and organizations more than mere aggregations of their individual inputs."); Margaret Wetherell, *Group Conflict and the Social Psychology of Racism*, *in* IDENTITIES, GROUPS, AND SOCIAL ISSUES 175, 203 (Margaret Wetherell ed., 1996) ("[G]roup membership *in itself* has profound effects upon the psychology of the individual, regardless of personality and individual differences.").

25. The research responsible for these conclusions spans the range of traditions in psychology. For example, Sigmund Freud extensively discussed Gustave Le Bon's claim that "the fact that [individuals] have been transformed into a group puts them in possession of a sort of collective mind which makes them feel, think, and act in a manner quite different from that in which each individual of them would feel, think, and act were he in a state of isolation." SIGMUND FREUD, *Group Psychology and the Analysis of the Ego*, *in* 18 COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 65, 72-73 (James Strachey ed. & trans., 1955). According to Le Bon, human groups behave "exactly as the cells which constitute a living body form by their reunion a new being which displays characteristics very different from those possessed by each of the cells singly." *Id.* at 73.

Imaged with the Permission of Yale Law Journal

successes and failures. Group members thus tend to refer more to each other than they do to outsiders, listen more to each other, and reward each other more often.[26]

The work on social identity began with studies of group conformity. Muzafer Sherif's 1936 experiments showed that people estimating how far a pinpoint of light moved in a dark room tended to conform to what others in the room said. Even a wildly off-base group member influenced the results. Follow-up studies confirmed that individuals internalized the views of others and adhered to them even a year later.[27] Furthermore, when individuals left a group and were replaced by others, the group views remained constant over "generations" of subjects—so much so that an entirely new group of subjects at the end of an experiment had the same views as the initial group of subjects.[28]

Finding somewhat similar results, early studies by Solomon Asch asked individuals in groups which of three "comparison" lines placed at a distance matched a "standard" line. Each group was staffed largely with Asch's confederates; when they voiced clearly wrong answers, the naive subjects would conform over one-third of the time to these obviously incorrect answers (compared to a one percent error rate when confederates voiced correct answers).[29] When even one confederate broke ranks with the off-base match, however, the subject was very unlikely to support the wrong answer—even when seven other people voiced support for it.[30] The lesson here is not that individuals blindly follow groups; rather, it is that groups suppress dissent and induce conformity when they are visibly unanimous.

---

26. When one joins a group a person is likely to "self-stereotype" herself to mold her identity to that of the group. Hedy Brown, *Themes in Experimental Research on Groups from the 1930s to the 1990s*, *in* IDENTITIES, GROUPS, AND SOCIAL ISSUES, *supra* note 24, at 9, 34-35. This leads to a "self-fulfilling process in the formation of identity: since being a group member implies behaviour stereotypical of the group, the stereotype will tend to be inferred and created from that behavior." JOHN C. TURNER ET AL., REDISCOVERING THE SOCIAL GROUP 182 (1987).

27. LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION 28-31 (1991).

28. Robert C. Jacobs & Donald T. Campbell, *The Perpetuation of an Arbitrary Tradition Through Several Generations of a Laboratory Microculture*, 62 J. ABNORMAL & SOC. PSYCHOL. 649 (1961).

29. S.E. ASCH, SOCIAL PSYCHOLOGY 450-74 (1952). For recent work on conformity, see Dominic Abrams et al., *Knowing What To Think by Knowing Who You Are: Self-Categorization and the Nature of Norm Formation, Conformity and Group Polarization*, 29 BRIT. J. SOC. PYSCHOL. 97, 99-100 (1990) (discussing studies that show that groups converge in their judgments and take frames of reference from each other, and that these judgments persist "even when the original group members are no longer present"); and Kenneth L. Bettenhausen, *Five Years of Groups Research: What We Have Learned and What Needs To Be Addressed*, 17 J. MGMT. 345, 350-51 (1991) (similar).

30. ROSS & NISBETT, *supra* note 27, at 31; *see also* Brown, *supra* note 26, at 9, 19 (noting that "Asch's studies were widely replicated" and "the results were fairly consistent and in accord with the original findings"); Stanley Milgram, *Nationality and Conformity*, SCI. AM., Dec. 1961, at 45 (providing similar results from subjects who believed they were testing a signaling system for airplanes).

Imaged with the Permission of Yale Law Journal

Rules that provide incentives to break ranks, such as conspiracy's withdrawal doctrine, may therefore unravel conformist dynamics.

More generally, the psychological research will underscore why conspiracy law cannot be understood as a device that merely deters individuals. Rather, the doctrine functions on a group level, for in groups a variety of psychological processes come into play, such as the relationship between leaders and followers, the emergence of a social identity, and polarization. By thinking about the individual, as the dominant mode of legal scholarship has sought to do, these processes are slighted—yet they explain why conspiracy should be treated in a distinctive way.[31]

We will examine several problems that emerge from social identity. After outlining each problem, I will offer a few morsels about conspiracy law, but the main course will be served up alongside the drama of Part II.

a. *Polarization and Risk-Taking*

Groups are more likely to have extreme attitudes and behavior. This research began with findings showing "risky shifts"—predictability in the conformity result in that people take greater risks in groups.[32] Subsequent work found that the phenomenon was not limited to shifts in risk, and that groups polarize in the direction their members were already tending.[33] For

31. Naturally, caution is necessary in applying these psychological studies to the problem of conspiracy. In some studies, the members of the group know each other; in others, they do not. In some, the group is held together by a common ideology; in others, the membership in the group is more notional. Nevertheless, the findings presented in this Subsection have appeared in a variety of contexts, and they square with the (unfortunately limited) empirical research of criminal group behavior. *See infra* notes 37-38. As such, the claim here is not that every criminal group follows the tendencies shown by psychologists—rather it is that many may do so. *See also infra* Subsection III.B.1 (discussing the advantages of creating a first-degree conspiracy offense for repeat players).

32. J.A. Stoner, A Comparison of Individual and Group Dimensions Involving Risk (1961) (unpublished M.A. thesis, Massachusetts Institute of Technology) (on file with the Hofstra University Library); ROGER BROWN, SOCIAL PSYCHOLOGY 204 (2d ed. 1986) ("[O]ne decade after Stoner wrote his thesis, the effects he obtained . . . had been replicated so many times that people had stopped counting."). For further descriptions, readers should consult HASLAM, *supra* note 24, at 153-73; Bettenhausen, *supra* note 29, at 356-59; Noah E. Friedkin, *Choice Shift and Group Polarization*, 64 AM. SOC. REV. 856, 856-60 (1999); David G. Myers & Helmut Lamm, *The Group Polarization Phenomenon*, 83 PSYCHOL. BULL. 602, 606-10 (1976); and Charles Pavitt, *Another View of Group Polarizing: The "Reasons for" One-Sided Oral Argumentation*, 21 COMM. RES. 625, 625-29 (1994). For a brief mention of polarization's relationship to conspiracy, see Sunstein, *supra* note 13, at 99 (arguing that "if the act of conspiring leads people moderately disposed toward criminal behavior to be more than moderately disposed, precisely because they are conspiring together, it makes sense, on grounds of deterrence, to impose additional penalties").

33. *See* TURNER ET AL., *supra* note 26, at 142 ("[L]ike polarized molecules, group members become even more aligned in the direction they were already tending."); Markus Brauer et al., *The Effects of Repeated Expressions on Attitude Polarization During Group Discussions*, 68 J. PERSONALITY & SOC. PSYCHOL. 1014, 1015 (1995) (describing polarization); Myers & Lamm, *supra* note 32, at 603 (providing a similar account). Polarization therefore runs against the finding by cognitive psychologists that individuals avoid extreme positions. *See* Katyal, *Deterrence's Difficulty*, *supra* note 3, at 2463-64 (discussing the studies).

Imaged with the Permission of Yale Law Journal

example, French students who already liked de Gaulle liked him even more after discussing him in a group, and those who did not like Americans liked them even less after discussing Americans in a group.[34] Once the problem is conceptualized as polarization, it becomes possible to understand why some groups behave with extreme caution.[35]

From one perspective, criminal risk-taking might be good because lawbreakers may commit acts with a high probability of detection. While more empirical research is necessary, there are reasons to doubt that polarization will occur along this dimension. Polarization arises because individuals exaggerate their conformity to perceived traits of a group's social identity.[36] It is therefore possible to have a group of criminals acting more cautiously with respect to what targets to attack, and more riskily with respect to the number of crimes that they commit. A study of active burglars provides some support for this dual shift, for it found that burglars working in groups committed more burglaries *and* that they were more cautious about which targets to burgle.[37] The study also found that burglars in groups are more likely to be aroused, raising the possibility that group crimes lead to unplanned violence.[38]

b. *Acting Against Self-Interest*

Groups encourage individuals to submerge their self-interest to that of the group. Some of the most interesting work on this point is being done by

34. BROWN, *supra* note 32, at 223-24 (explaining the French studies); Serge Moscovici & Marisa Zavalloni, *The Group as a Polarizer of Attitudes*, 12 J. PERSONALITY & SOC. PSYCHOL. 125 (1969).

35. BROWN, *supra* note 32, at 207-13 (detailing the studies); Colin Fraser et al., *Risky Shifts, Cautious Shifts, and Group Polarization*, 1 EUR. J. SOC. PSYCHOL. 7, 8-29 (1971) (same); Stephen Worchel, *A Developmental View of the Search for Group Identity*, *in* SOCIAL IDENTITY: INTERNATIONAL PERSPECTIVES 53 (Stephen Worchel et al. eds., 1998). For studies of why polarization occurs, see *infra* note 184.

36. *See* Abrams et al., *supra* note 29, at 110 ("Influence in polarization studies, as elsewhere, may depend on shared identity, even if this identity is minimal . . . ."); TURNER ET AL., *supra* note 26, at 154-56 (similar).

37. Paul Cromwell interviewed thirty burglars and asked them to reconstruct burglaries they had previously committed and to evaluate sites that had been burgled by other burglars participating in the study. The burglars were interviewed alone and in the presence of their usual accomplices. He found that the number of burglaries would increase in a group, Paul F. Cromwell et al., *Group Effects on Decision-Making by Burglars*, 69 PSYCHOL. REP. 579, 586 (1991) [hereinafter Cromwell et al., *Group Effects*], and that burglars in groups were more careful about selecting targets, *id.* at 584-85. While Cromwell claims that the cautious shift did not decrease apprehension rates, *id.* at 586-87, no evidence was provided for this claim, and it appears to be a claim based on a different sample. *Cf.* Paul Cromwell et al., *Modeling Decisions by Residential Burglars*, *in* STUDIES ON CRIME AND CRIME PREVENTION 113, 119-20 (1993) (suggesting that caution led some burglars to substitute less risky burglaries for risky ones).

38. *See* Cromwell et al., *Group Effects*, *supra* note 37, at 586 (finding that burglars "pscyh[ed] each other up"); *see also* Charles F. Bond & Linda J. Titus, *Social Facilitation: A Meta-Analysis of 241 Studies*, 94 PSYCHOL. BULL. 265 (1983) (providing a literature review that found that the presence of others increases arousal only when individuals perform complex tasks).

Imaged with the Permission of Yale Law Journal

two economists, Nobel laureate George Akerlof and his colleague Rachel Kranton. Their model puts forth a theory for why individuals act against their own interests in order to preserve or augment their group identity. Flouting the perceived ideals of the group generates personal anxiety over self-image.[39] Standard economic theory, Akerlof and Kranton underscore, does not take these considerations into account, and therefore has a difficult time explaining activities that are against individual self-interest, such as self-mutilation through tattoos or piercing.[40]

Akerlof and Kranton's work follows from a number of psychological studies about behavior in groups. In a series of famous experiments, Sherif studied group dynamics in a boys' summer camp. Upon arrival, the boys were free to form spontaneous friendships, but after a few days they were split into two groups. Under isolation, the groups "developed a cohesive structure and they came to strongly prefer the members of their own group." When the groups were brought together for a tournament, "overt group hostility . . . [and] minor acts of discrimination and aggression" were found, and "in-group loyalty, solidarity and cooperation" were at their height.[41]

A second series of experiments, dubbed the "minimal group" ones, found that even arbitrary formation of groups with no previous history between the members produces similar results. Henri Tajfel's initial studies divided schoolchildren into two groups by showing them some abstract paintings and asking which ones they liked best. The students were told that they were assigned to their groups on the basis of their answers (in actuality they were randomly assigned, and in later experiments, they were not even shown paintings, but assigned by a coin toss or by being told they were in a red or blue group). The subjects were not told who else was in the group and were placed in individual cubicles. They were then asked to award money between the two groups, and Tajfel found that there was significant discrimination in favor of one's own group.[42] Indeed, individuals favored

39. *See* George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 Q.J. ECON. 715, 728 (2000) [hereinafter Akerlof & Kranton, *Economics and Identity*] ("Modern scholars . . . agree on the importance of *anxiety* that a person experiences when she violates her internalized rules."); George A. Akerlof & Rachel E. Kranton, Identity and Schooling: Some Lessons for the Economics of Education 3 (Apr. 13, 2002) (unpublished manuscript, on file with author) (stating that individuals "gain or lose utility insofar as they belong to social categories with high or low social status and their attributes and behavior match the ideal of their category").

40. Akerlof & Kranton, *Economics and Identity*, *supra* note 39, at 721.

41. Wetherell, *supra* note 24, at 205 (describing the experiments); *see also id.* at 207 ("Experimental research since the Summer Camp Experiments has supported Sherif and Sherif's conclusions.").

42. Henri Tajfel et al., *Social Categorization and Intergroup Behaviour*, 1 EUR. J. SOC. PSYCHOL. 149, 171 (1972) (describing the experiments); *see also* Henri Tajfel, *The Achievement of Group Differentiation*, *in* DIFFERENTIATION BETWEEN SOCIAL GROUPS: STUDIES IN THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 77 (Henri Tajfel ed., 1978); Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*, *in* THE SOCIAL PSYCHOLOGY OF

Imaged with the Permission of Yale Law Journal

their group even when it was against their absolute self-interest: They gave their group the largest relative gains instead of giving their group and the other group greater absolute gains.[43] This research suggests that the initial decision to agree to conspire is an important pivot point. Once an individual has made such an agreement, group identity can take hold and lead her to submerge self-interest to the group's interest.[44]

c. *Dissuasion*

Contracts scholars have spoken of a moral obligation to fulfill contracts—an obligation that increases the probability of performance.[45] When *A* agrees to engage in a crime with *B*, the agreement thus makes the crime more likely.[46] What is now understood about groups is that, apart from this obligation, groups are far more difficult to dissuade than are individuals because they develop self-serving inferences.[47] Such inferences permit members of groups to justify their conduct as furthering either social or group goals.

One common inference is for group members to believe that other members are more likely to be correct and that nonmembers are more likely to be wrong.[48] Another inference is that group members are fairer than

---

INTERGROUP RELATIONS 33, 39 (William G. Austin & Stephen Worchel eds., 1979); Wetherell, *supra* note 24, at 211-12 (noting that the "results suggest that people will discriminate against the out-group even when group membership is anonymous, no contact is made between group members and there is no obvious self-interest involved. . . . The first effect of a group division . . . is to provide a new cognitive scheme with which to view the world.").

43. So too, real-world studies of aircraft engine workers who are asked about how wage increases should be structured will answer the questions primarily in ways that "preserve wage *differentials* . . . rather than to increase their own absolute earnings." HASLAM, *supra* note 24, at 29.

44. For example, Felix Padilla has noted that the "business success" of one Chicago gang he intensely studied "is heavily dependent upon its capacity to engender a feeling of collectivism among members. A major responsibility of the gang is to encourage this behavior, and it has employed several methods to guarantee that its members' thinking and work practices proceed within a collectivist context." FELIX M. PADILLA, THE GANG AS AN AMERICAN ENTERPRISE 109 (1992).

45. *E.g.*, CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 1 (1981) ("The promise principle . . . is the moral basis of contract law . . . by which persons may impose on themselves obligations where none existed before.").

46. As the Model Penal Code puts it, "[T]he act of combining with another is significant . . . because it increases the likelihood that the offense will be committed." MODEL PENAL CODE § 5.03 cmt. (1985); *see also supra* note 22 (quoting the Code).

47. *See* Daniel Batson et al., *In a Very Different Voice: Unmasking Moral Hypocrisy*, 72 J. PERSONALITY & SOC. PSYCHOL. 1335 (1997); George Loewenstein, *Behavioral Decision Theory and Business Ethics: Skewed Trade-Offs Between Self and Other*, *in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 214 (David M. Messick & Ann E. Trenbrunsel eds., 1996).

48. Abrams et al., *supra* note 29, at 109. Many of us have experienced similar feelings when watching sports: Mistakes by our team are considered bad luck or caused by a foul, and players on the other team who "score" are considered to have benefited from lucky breaks. Indeed, so pronounced is this tendency that I will catch myself doing all of this while watching televised

Imaged with the Permission of Yale Law Journal

nonmembers.[49] As a result of these and other group biases, members of a group will listen to one another far more than they will listen to other people.[50] Consequently, people in groups are more likely to escalate their commitments to failing courses of action and more likely to continue with these failing courses of action.[51] Chip Heath, in a related finding, discovered that people are far more likely to experience doubts about their performance and disillusionment when they act as individuals compared to when they act in groups.[52]

Dissuasion and disillusionment are critical ways for the government to fight conspiracy. When criminal groups develop self-serving inferences, it reinforces their tendencies toward crime. Members may feel more justified in pursuing criminal activity to help other members and may develop rationalizations (some drug dealers, for example, believe they perform the positive work of pharmacists and steer customers away from violent dealers). Such rationalizations can also thwart cooperation with law enforcement. Consider the recent startling results of two psychologists who found that prisoners' dilemma players induced to feel empathy for the other party cooperate almost fifty percent of the time even when they know that the other party has already defected.[53] Game theory predicts constant defection, and yet cooperation is manifested repeatedly.[54] Such research

---

games in which I have no affiliation or knowledge whatsoever about the teams playing—such as during the NCAA basketball tournaments. Within minutes, I will find a team for which to root, and begin attributing successes and failures disproportionately—and I don't even like sports.

49. HASLAM, *supra* note 24, at 221 ("Even when little is known about the groups in question, the groups to which we belong are typically seen as fair, just, honest and decent in comparison to outgroups that are unfair, unjust, dishonest and treacherous."); *see also id.* at 31 (providing research showing that people randomly assigned to a group are more likely to describe its members as "more flexible, kind and fair than members of outgroups").

50. *See* TURNER ET AL., *supra* note 26, at 160 (describing such research).

51. Scott E. Seibert & Sonia M. Goltz, *Comparison of Allocations by Individuals and Interacting Groups in an Escalation of Commitment Situation*, 31 J. APPLIED SOC. PSYCHOL. 134, 134-36, 146 (2001). This study also found that interaction between the group members magnified the commitment to the failing course of action. *Id.* at 147. Accordingly, conspiracy law, which reduces interaction between members of the group, may blunt this tendency.

52. *See* Chip Heath & Forest J. Jourden, *Illusion, Disillusion, and the Buffering Effect of Groups*, 69 ORG. BEHAV. & HUM. DECISION PROCESSES 103, 104 (1997) (describing their empirical study, which found that "[w]hile 59% of group members thought that their group performed *above* the median of group performance, 64% of individuals thought that they performed *below* the median of individual performance"); *id.* at 106 (providing studies finding that "[g]roup activity increases positive emotions, and social support, in general, decreases negative emotions by protecting people from emotional distress"). The study found that a significant reason for buffering was group discussion. *Id.* at 114.

53. C. Daniel Batson & Nadia Ahmad, *Empathy-Induced Altruism in a Prisoner's Dilemma II: What if the Target of Empathy Has Defected?*, 31 EUR. J. SOC. PSYCHOL. 25 (2001). The participants were all told that the other party had defected, and a random assortment received a note from the other party stating that she had just broken up with her boyfriend and hoped something good would happen to her to cheer her up. Without that inducement of empathy, only five percent cooperated. *Id.* at 28-30.

54. C. Daniel Batson and Nadia Ahmad also noted:

Imaged with the Permission of Yale Law Journal

explains why many do not defect from conspiracies. The group encourages a feeling of solidarity and cultivates the view that each member needs the cooperation of the others.[55] It is harder to get people to defect—to flip—when they share an identity.

d. *Success in Tasks*

Studies of group performance appear to be in some tension with each other. On the one hand, some studies show that people perform less well in groups than they do as individuals. For example, German experiments in the nineteenth century found that when the size of a group asked to pull a rope was increased, the total pull exerted would increase, but the amount each participant pulled would drop. Dyads pulled at 93%, trios at 85%, and groups of eight at only 49% of their individual performance levels.[56] Taylorism, a management theory dominant in the early part of the twentieth century, was based on such notions of group inefficiency.[57] More recent work has argued that groups suppress dissent and stifle creativity, an idea captured by Irving Janis's term "groupthink."[58]

On the other hand, a number of studies find that groups enhance performance. Early work showed that when word puzzles were provided to

---

> Our research participants never saw the other participant. They did not anticipate meeting her. They did not even know her name. Yet imagining her feelings about the break-up of a romantic relationship was enough to lead many to have sufficient concern for her welfare that they gave up all chance at winning a $30 gift certificate themselves in order to improve her chances of winning.
>
> From the perspective of classic game theory and the theory of rational choice, the behavior of our empathically aroused participants makes absolutely no sense.

Id. at 35.

55. These features of group membership are evident in the Mafia Code, which includes the following general tenets:

> (1) To put the organization above wife, children, country, or religion. (2) To follow orders of the captain without question, even to include murder. (3) To furnish no information or help to a law enforcement agency. (4) To disclose nothing about the organization to outsiders. (5) To respect all members, despite personal feelings; to pay debts owed other members; never to injure, steal from, or make disparaging remarks about other members.

NORMAN W. PHILCOX, AN INTRODUCTION TO ORGANIZED CRIME 20 (1978).

56. Later experiments corroborated these findings even when subjects were blindfolded and simply told how many people were pulling on the rope with them. Bettenhausen, *supra* note 29, at 360; *see also* HASLAM, *supra* note 24, at 244 (discussing the studies).

57. FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT 72 (1913) ("A careful analysis . . . demonstrated the fact that when workmen are herded together in gangs, each man in the gang becomes far less efficient than when his personal ambition is stimulated . . . .").

58. Janis found that "members of any small cohesive group tend to maintain esprit de corps by unconsciously developing a number of shared illusions and related norms that interfere with critical thinking and reality testing." IRVING L. JANIS, GROUPTHINK 35 (2d ed. 1982). Some suggest that groupthink may help organizations. *E.g.*, Donald C. Langevoort, *Taking Myths Seriously: An Essay for Lawyers*, 74 CHI.-KENT L. REV. 1569, 1578 (2000) ("The stress reduction leads to better focus, concentration and persistence.").

Imaged with the Permission of Yale Law Journal

individuals and groups, groups performed better.[59] Other research has found that groups tend to have more solutions to problems, to generate them faster, and to find more creative solutions than do individuals.[60] Indeed, a psychological literature review found a "general consensus . . . that, on average, groups outperform individuals" on tasks ranging from intellectual problems to decisionmaking ones.[61]

The findings from these studies are reconcilable in two ways. First, the rope-pulling and other such experiments were beset with what we will later call "team-production" problems—circumstances in which an individual's input to the team product was not visible and shirking therefore more likely. So, for example, individuals asked to cheer will not do so as loudly in a group as they will on their own, but will cheer as loudly in a group setting if they are told that a computer can discern their individual level of cheering.[62] As we will soon see, team-production analysis will generate many useful insights for conspiracy law by suggesting doctrines that reward shirking. Second, the group-inefficiency studies often slighted social identity. With a shared identity, performance increases markedly.[63] One literature review found that "loyalty, rule-following and extra-role behaviour increase when employees define themselves in terms of a relevant team or organizational identity"[64] so that when groups are given tasks that "encourage participants to define themselves in terms of a shared sense of self, group productivity can match that of isolated individuals and may also exceed it."[65] Conspiracies, which often cultivate such an identity, therefore can be more productive (and impose greater harm) than isolated individuals.

---

59. Marjorie E. Shaw, *A Comparison of Individuals and Small Groups in the Rational Solution of Complex Problems*, 44 AM. J. PSYCHOL. 491 (1932).

60. James H. Davis, *Some Compelling Intuitions About Group Consensus Decisions, Theoretical and Empirical Research, and Interpersonal Aggregation Phenomena: Selected Examples, 1950-1990*, 52 ORG. BEHAV. & HUM. DECISION PROCESSES 3, 7-8 (1992) (discussing group decisionmaking studies).

61. Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687, 691 (1996).

62. Kipling Williams et al., *Identifiability as a Deterrent to Social Loafing: Two Cheering Experiments*, 40 J. PERSONALITY & SOC. PSYCHOL. 303 (1981).

63. HASLAM, *supra* note 24, at 254-56; *see also* Stephen G. Harkins & Kate Szymanski, *Social Loafing and Group Evaluation*, 56 J. PERSONALITY & SOC. PSYCHOL. 934, 941 (1989) (criticizing low-performance studies because "there is little that is 'groupy'" and "little in the procedure itself to make participants feel that they are part of a group").

64. HASLAM, *supra* note 24, at 304-05.

65. *Id.* at 243; *see also id.* at 259 ("Rather than being a source of weakness, it is, then, precisely because groups have the potential [to] be more productive than the sum of their parts that they play such a key role in organization life." (emphasis omitted)); Jaap W. Ouwerkerk et al., *When the Going Gets Tough, the Tough Get Going: Social Identification and Individual Effort in Intergroup Competition*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1550, 1552 (2000) (describing studies that found that individuals are more likely to perform well when subtle cues of group identity are present—for example, students better perform tasks in the presence of their school's colors, and teams that wear uniforms perform better than those without them).

Imaged with the Permission of Yale Law Journal

2. *Economic Analysis of Specialization of Labor and Economies of Scale*

Businesses take advantage of their size in two ways: They permit their employees to specialize (and thereby increase production and/or quality), and they use their purchasing power to obtain larger advantages in the marketplace.[66] Much early twentieth-century work in economics was preoccupied with understanding these phenomena.[67] Coase argued that the benefit from merger arises because the manager of one firm will have control over the other and will not need to price incentives for additional output. A preexisting firm will economize on the search costs involved in finding labor for each new activity, and on the costs incurred in setting a wage structure from scratch.[68] The firm develops because it is cheaper to avoid marketplace contracts.

A conspiracy, too, can exploit these benefits—the criminal firm creates a framework of trust to reduce the transaction costs involved in forming new contracts with each other.[69] A criminal enterprise can hire specialists and use its size to obtain benefits that uncoordinated individuals cannot.[70] Conspiracies also create efficiencies for criminal enterprises because they minimize competition among members. Competing against each other imposes costs (such as the resources spent fighting) and reduces profits (due to a greater number of suppliers).

---

66. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 8 (1991) ("People can organize as teams with the functions of each member identified, so that each member's specialization makes the team as a whole more productive than it would otherwise be."); Harold Demsetz, *The Theory of the Firm Revisited*, *in* THE NATURE OF THE FIRM: ORIGINS, EVOLUTION, AND DEVELOPMENT 159, 169 (Oliver E. Williamson & Sidney G. Winter eds., 1991) (describing the specialization advantages of firms).

67. *See* Coase, *supra* note 15, at 388 (discussing the views of Marshall, Knight, J.B. Clark, and D.H. Robertson).

68. *Id.* at 390-91 ("The most obvious cost of 'organising' production through the price mechanism is that of discovering what the relevant prices are. This cost may be reduced but it will not be eliminated by the emergence of specialists who will sell this information . . . . It is true that contracts are not eliminated when there is a firm but they are greatly reduced." (footnote omitted)); *see also* Alan Schwartz, *Legal Contract Theories and Incomplete Contracts*, *in* CONTRACT ECONOMICS 76 (Lars Werin & Hans Wijkander eds., 1992) (discussing the transaction-cost theory of the firm); Oliver D. Hart, *Incomplete Contracts and the Theory of the Firm*, 4 J.L. ECON. & ORG. 119 (1988) (similar).

69. Werner J. Einstadter, *The Social Organization of Armed Robbery*, 17 SOC. PROBS. 64, 74 (1969) (detailing the specialization of armed robbers); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1219 (1985) (noting that conspiracies are dangerous because they "take advantage of the division of labor"). Indeed, the fact that criminals work in groups for more complex crimes suggests that their behavior conforms, at least to some extent, to the rational actor premise.

70. In a later Section, we will come to understand how flipping directly confronts these advantages by requiring people to recontract with each other at every turn in order to reestablish trust because membership in the organization alone is not sufficient. *See infra* Subsections II.C.1.a-b.

Imaged with the Permission of Yale Law Journal

Economies of scale also have another set of advantages: They can reduce the probability of detection. Although larger entities may be more visible, they are also better bribers.[71] The laws against bribery, which punish a small bribe with a large penalty, create marginal deterrence problems in that police and prosecutors only take large bribes since small ones are not worth the risk; individuals can rarely afford to pay these bribes. Conspiracies can also reduce the probability of detection in two other ways: by committing numerous crimes within a short time period in a jurisdiction and overpowering limited resources for investigation,[72] and by assigning people as "lookouts" to avoid committing crimes in the presence of witnesses or law enforcement.[73]

Specialization also permits *crimes of diffusion*, where the responsibility for a single crime is spread over many persons. These strategies help members evade punishment because of the difficulty involved in proving a person's actus reus and mens rea. The former is obscured by the number of other actors who committed parts of the crime; the latter because the individual might only have intended to carry out a minor role and because proof of a more culpable mental state is difficult to prove for those performing discrete tasks. In general, those insulated will be leaders, who orchestrate actions to maintain plausible deniability.[74] (I first became painfully aware of this phenomenon while investigating war-crimes cases; imputing wrongdoing is exceptionally difficult because leaders hide their actions behind layers of middlepersons.)[75] Conspiracy liability partially

71. *See* Andrew Dick, *Organized Crime*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS & THE LAW 719 (Peter Newman ed., 1998) (making such an argument). In addition to bribery, there is also the fear that conspiracies are more likely to interfere with law enforcement operations. Indeed, at common law, it was homicide if death was caused, even unintentionally, when there existed "an intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison." JAMES FITZJAMES STEPHEN, A DIGEST OF THE CRIMINAL LAW (CRIMES AND PUNISHMENTS) art. 223 (photo. reprint 1991) (St. Louis, F.H. Thomas & Co. 1878). This rule protected law enforcement from the reaches of a conspiracy by attaching additional sanctions when co-conspirators tried to prevent officers from arresting or imprisoning one of the members of a group.

72. *See* Scott Freeman et al., *The Spatial Concentration of Crime*, 40 J. URB. ECON. 216 (1996); Joel Schrag & Suzanne Scotchmer, *The Self-Reinforcing Nature of Crime*, 17 INT'L REV. L. & ECON. 325 (1997).

73. *See* PADILLA, *supra* note 44, at 147 ("Youngsters carry out their work in crews . . . which serve as protection against police invasions and assaults. . . . When a police car approaches a call is made which acts as a warning to dealers to take cover or be extra cautious.").

74. *See* GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 201 (1998) ("[S]ometimes it might be the case that one person possesses the relevant information, another makes the decision to act, and still another carries out the action."); PHILCOX, *supra* note 55, at 78 ("It is difficult to obtain proof of organized crime violations insofar as the top command is concerned. If and when they are identified it is often impossible to obtain documentary evidence which can be used in court.").

75. *See generally* David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957 (1999) (describing the problem).

Imaged with the Permission of Yale Law Journal

compensates for diffusion by punishing those who hide behind the veneer of the group.

Diffusion can also remove internal restraints to crime. Like the prison warden who flips a switch to carry out a death sentence, a person who drives a person from Point *A* to Point *B* may not feel that he is doing something gravely immoral, even when he is driving away from the scene of a crime. A person who "bags" cocaine for individual consumption may not consider herself responsible for the cocaine dependence of buyers. The forces of morality and social norms are thus subverted through strategies that disaggregate human behavior, playing on the idea that little bad acts are excusable. This makes crime easier and cheaper to carry out.[76]

The above economic insights therefore help explain punishments for group behavior. Nineteenth-century claims about the dangers of conspiracy recognized the dangers of specialization,[77] as have more recent jurists.[78]

---

76. Of course, economies of scale do not yield only advantages. As an organization gets larger, specialization must be accompanied by institutional processes to coordinate discrete entities. *See* HENRY MINTZBERG, MINTZBERG ON MANAGEMENT 100-02 (1989); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 788-89 (1972). And sometimes specialization may make a group particularly vulnerable because the loss of a key member—whether to law enforcement or a rival firm—may hurt the group. *See* V.S. CLARK, HISTORY OF MANUFACTURES IN THE UNITED STATES 152 (1949) ("'Manufactures, where they are in perfection, are carried on by a multiplicity of hands, each of which is expert only in his own part, no one of them a master of the whole; and if by any means spirited away to a foreign country, he is lost without his fellows.'" (quoting Benjamin Franklin)).

77. *E.g.*, United States v. Lancaster, 44 F. 896, 899 (W.D. Ga. 1891) ("[T]he act of unlawful combination is more dangerous and disturbing to the peace of society than would be the crime which is the object of the combination, when accomplished by a single individual . . . . A conspiracy will become powerful and effective in the accomplishment of its illegal purpose in proportion to the numbers, power, and strength of the combination to effect it."); Commonwealth v. Judd, 2 Mass. 329, 337 (1807) ("A solitary offender may be easily detected and punished; but combinations against law are always dangerous to the public peace and to private security."); Commonwealth *ex rel.* Chew v. Carlisle, Brightly 36, 40 (Pa. Ct. Nisi Prius 1821) (similar). English cases of the time voiced similar arguments. *See, e.g.*, Quinn v. Leathem, 1901 A.C. 495, 530 (appeal taken from Ir.). Lord Brampton noted:

> [A] number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may, with conspiracy, become dangerous and alarming, just as a grain of gunpowder is harmless but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine but administered frequently and in larger quantities with a view to harm may be fatal as a poison.

Id.; *see also* Regina v. Parnell, 14 Cox 508, 514 (Q.B. 1881) (referring to the "powers of combination"); Mulcahy v. The Queen, 3 L.R.-E. & I. App. 306, 317 (H.L. 1868) (appeal taken from Ir.) ("The number and the compact give weight and cause danger, and this is more especially the case in a conspiracy like those charged in this indictment.").

78. *See* Krulewitch v. United States, 336 U.S. 440, 448-49 (1949) (Jackson, J., concurring) ("[T]he basic conspiracy principle has some place in modern criminal law, because to unitc . . . the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer."); People v. Welch, 264 P. 324, 325 (Cal. Ct. App. 1928) ("[A] group of evil minds planning and giving support to the commission of crime is more likely to be a menace to society than where one individual alone sets out to violate the law.").

Imaged with the Permission of Yale Law Journal

And yet, these claims have not been considered alongside the benefits from group behavior.

B. *The Benefits to Society from Group Behavior*

1. *Information Extraction*

The chief benefit conspirators provide is information. In the Oklahoma City bombing prosecution, for example, Michael Fortier's testimony was indispensable because it "connected the government's 'bricks of evidence' by providing the only direct evidence of the plan, motivation, and preparation" of Timothy McVeigh and Terry Nichols.[79] Because many conspiracies operate in a shadowy netherworld without complaining "victims," conspirators are valuable sources, and many prosecutions would not be possible without them.[80]

The primary way that a conspirator can be induced to provide information is by threatening penalties against that individual.[81] A 1998 study found that flipping helped the government obtain guilty pleas of co-defendants, prosecution of new defendants, additional convictions and arrests, recovery of assets, cooperation of known and new co-defendants, and deportations.[82] Indeed, flipping is so common that when the Tenth Circuit briefly decided to shut down the practice, the Justice Department complained that its ruling made "a criminal out of nearly every federal prosecutor" and that the government "relies on witnesses who testify in

79. Nolan Clay, *Fortier Appeals*, DAILY OKLAHOMAN, Jan. 6, 1999, at 3.

80. *See* United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1950) (Hand, J.) ("Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly."); Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 4 (1974) ("Enforcement is generally more effective against violations with victims because victims have a stake in apprehending violators . . . ."); Ann C. Rowland, *Effective Use of Informants and Accomplice Witnesses*, 50 S.C. L. REV. 679, 697 (1999) ("It is a rare federal criminal trial that does not require the use of criminal witnesses . . . .").

81. Several statutes recognize the practice. *See, e.g.*, 18 U.S.C. § 3553(e) (2000) (permitting a court to impose a sentence below the Sentencing Guidelines range in order to "reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense"); 28 U.S.C. § 994(n) (2000) (directing the Sentencing Commission to set guidelines that "reflect the general appropriateness of imposing a lower sentence . . . to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense"); *see also* 18 U.S.C. § 3521(b)(1) (providing housing and payment for living expenses for witnesses under government protection).

82. *See* LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, U.S. SENTENCING COMM'N, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 29 (1998).

Imaged with the Permission of Yale Law Journal

return for leniency in literally thousands of cases each year, including major cases."[83]

The classic co-conspirator exception to hearsay at trial, which permits a prosecutor to introduce all sorts of evidence about the parties without the actual speakers themselves in the courtroom, facilitates information extraction.[84] The conspirator must "bear the risk of what his agents say as well as the risk of what they do."[85] As such, it is a powerful tool to harvest information from a cooperator because it increases the range of statements to which she can testify.[86] The permissiveness of joinder in conspiracy cases similarly furthers information extraction.[87] Joinder induces each defendant to testify and lay responsibility for the crimes at the feet of the other defendants.[88] Other features of conspiracy law have moved toward

83. Supplemental Brief of the United States at 2, 15, United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998) (No. 97-3178); *see also id.* at 15 (stating that without such cooperation the government "could not enforce the drug laws [and] could not prosecute organized crime figures"); United States v. Avellino, 136 F.3d 249, 251-53 (2d Cir. 1998) (reporting that the conviction of Carmine Avellino of the Luchese crime family was partly based on evidence from a co-conspirator). In a survey, between ninety-eight and one hundred percent of federal prosecutors stated that defendants who participate in the investigation of another offender or who testify at another offender's trial should receive a lower sentence. MAXFIELD & KRAMER, *supra* note 82, at 8.

84. The Federal Rules of Evidence provide that a statement is not hearsay if made by a co-conspirator of a party "during the course and in furtherance of the conspiracy." FED. R. EVID. 801(d)(2)(E) (internal quotation marks omitted).

85. Johnson, *supra* note 1, at 1183. It is sometimes remarked that the hearsay exception is founded on concepts of agency law, due in part to Justice Story's early remarks that conspirators are partners in crime, and that each is the agent of the others. *See* United States v. Gooding, 25 U.S. (12 Wheat.) 460, 469 (1827); *see also* Anderson v. United States, 417 U.S. 211, 218 n.6 (1974) (adopting an agency/partnership rationale for the hearsay exception); United States v. Trowery, 542 F.2d 623, 626 (3d Cir. 1976) ("The co-conspirator exception to the hearsay rule . . . is merely a rule of evidence founded, to some extent, on concepts of agency law."). *But see Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 988-89 (1959) (arguing that agency concepts do not fully explain the hearsay exception). As such, it is not clear whether information extraction is a cause or an effect of the co-conspirator exception.

86. Paul Marcus's survey of hundreds of prosecutors and defense attorneys found an overwhelming belief that doing away with the hearsay exception for co-conspirators would lead to a "[s]ignificant reduction in convictions." Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO L.J. 925, 940 (1977) (reporting that 61.7% of prosecutors and 72.1% of defense attorneys so believed).

87. Federal Rule of Criminal Procedure 8(b) permits joinder when there are multiple defendants. In general, defendants who are jointly indicted should be jointly tried, "and this rule applies with particular force to conspiracy cases." United States v. Walker, 720 F.2d 1527, 1533 (11th Cir. 1983); *see also* Note, *Application of Conspiracy Statute to Prosecution for Sale of Counterfeit Money*, 48 YALE L.J. 1447, 1450 (1939) ("Only by prosecuting all the members together and by culling the sum total of their knowledge is it possible to obtain a detailed mosaic of the whole undertaking.").

88. Justice Jackson noted:

> A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other.

Imaged with the Permission of Yale Law Journal

facilitating information extraction, such as the diminishment of the rule of consistency.[89]

The information-extraction benefits of conspirators have been known for some time. As early as the year 1130, medieval law recognized the practice of approvement, whereby an indicted person could plead guilty but offer to cooperate with the prosecution. The accuser had to implicate accomplices before the jury deliberations began, and the accuser was not simply to reveal "the whole truth" of the particular crime, but also all felonies to which the person had knowledge.[90] If the accomplices were convicted, he would be pardoned, but if his accomplices were not, then the accuser was sentenced to death.[91] Because this was not often a sufficient inducement for information, England developed the crown-witness system. Rather than receive a right to a postconfessional pardon from the King via an approvement, the crown witness would be granted *pretrial* immunity from local magistrates: a promise from the authorities not to prosecute him.[92] (The witness was not necessarily pardoned, contrary to what some, including the Supreme Court, have claimed.)[93] Further, so long as the crown witness made a good faith effort to assist the prosecution he would go free. Under these dynamics, a race to become a crown witness often ensued.[94] Some criminals even kept journals of their offenses to bolster

---

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

89. The rule of consistency prevents one conspirator from being convicted when his compatriots have been acquitted. *See* United States v. Sachs, 801 F.2d 839, 845 (6th Cir. 1986) (describing the rule); JOSEPH F. MCSORLEY, A PORTABLE GUIDE TO FEDERAL CONSPIRACY LAW 128 (1996) (describing the rule's application). So, too, a new Federal Rule of Evidence 804(b)(6), which governs forfeiture of confrontation clause rights by wrongdoing, has been interpreted to permit hearsay evidence when one conspirator murders a cooperating witness. *See* United States v. Cherry, 217 F.3d 811, 820 (10th Cir. 2000) (holding that "a co-conspirator may be deemed to have 'acquiesced in' the wrongful procurement of a witness's unavailability . . . when the government can satisfy the requirements of *Pinkerton*").

90. The King v. Rudd, 98 Eng. Rep. 1114, 1116 (K.B. 1775); *see also* 2 MATTHEW HALE, THE HISTORY OF PLEAS OF THE CROWN 228, 280 (George Wilson ed., Dublin, E. Lynch 1778) (1736).

91. Frederick C. Hamil, *The King's Approvers: A Chapter in the History of English Criminal Law*, 11 SPECULUM 238, 238 (1936); John Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 91 (1983). Conviction rates for those accused by approvers were low and some approvers were hanged despite the convictions of all their accomplices, so "the approvers were the losers and victims of the entire system." A.J. Musson, *Turning King's Evidence: The Prosecution of Crime in Late Medieval England*, 19 OXFORD J. LEGAL STUD. 467, 479 (1999).

92. *See* Langbein, *supra* note 91, at 91-96.

93. *See* Whiskey Cases, 99 U.S. 594, 600 (1878) (describing the crown witness system as giving "a kind of hope to the accomplice that if he behaves fairly and discloses the whole truth, he may, by a recommendation to mercy, save himself from punishment and secure a pardon").

94. JOHN LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (forthcoming 2003) (manuscript at 107-09, on file with author); *see also* Langbein, *supra* note 91, at 88-90 (describing the race).

Imaged with the Permission of Yale Law Journal

reliability of their evidence.[95] This system became crucial to English law enforcement.[96]

Given the English success, it is not surprising that early American law employed similar practices and that the United States Supreme Court blessed them.[97] As Americans backed away from the draconian punishments of old England (typically, death), however, new inducements for cooperation were needed. Conspiracy law, as we shall see, became one such inducement. Not only has this proven to be an exceptionally effective way of controlling crime, flipping has also reduced the monetary costs of law enforcement, bypassing expensive informants and detectives.

I will be discussing the details surrounding the American practice of flipping, and its recognition in the current law and the Sentencing Guidelines, in a moment. For now, all that is necessary is the basic point that a conspiracy can sometimes aid law enforcement. The criminal who robs a house by himself may be less likely to get caught than the duo who robs two houses. Working in a group can expose a criminal to additional law enforcement risks because his partners can implicate him. Prosecutors can also obtain information about entirely unrelated crimes of which a conspirator learns from dealings with other members of a criminal syndicate.

Research on multiplayer prisoners' dilemmas illuminates methods to induce defection. When the game is played only once, game theorists have surmised that everyone will defect unless coercion can be used to secure cooperation.[98] The law of contracts, as we shall see, rightly refuses to

95. *See infra* note 316.

96. LANGBEIN, *supra* note 94 (manuscript at 110) ("For most of the eighteenth century the crown witness system was practically the only resort of the London-area authorities in dealing with gang crimes."); *see also* J.M. BEATTIE, CRIME AND THE COURTS OF ENGLAND: 1660-1800, at 366 (1986) (stating that crown witness "evidence was very common in trials at the Surrey assizes from the late seventeenth century").

97. *See Whiskey Cases*, 99 U.S. at 604 (stating that when a defendant "testifies fully and fairly as to his own acts in the case, and those of his associates . . . he is equitably entitled to a pardon, and the prosecutor, and the court if need be, when fully informed of the facts, will join in such a recommendation"); *Ex parte* Wells, 59 U.S. (18 How.) 307, 312-13 (1855) ("[A]ccomplices, though admitted according to the usual phrase to be 'king's evidence,' have no absolute claim or legal right to a pardon. But they have an equitable claim to pardon, if upon the trial a full and fair disclosure of the joint guilt of one of them and his associates is made."); United States v. Ware, 161 F.3d 414, 419 (6th Cir. 1998) ("The prosecutorial prerogative to recommend leniency in exchange for testimony dates back to the common law in England and has been recognized and approved by Congress, the courts, and the Sentencing Commission of the United States."); Commonwealth v. Knapp, 27 Mass. 477, 494 (1830) ("[W]here the king's witness makes a fair and full discovery to the satisfaction of the judge, he is to be recommended to mercy . . . ."); Ingram v. Prescott, 149 So. 369, 369 (Fla. 1933) ("From the earliest times, it has been found necessary, for the detection and punishment of crime, for the state to resort to the criminals themselves for testimony with which to convict their confederates . . . . [T]herefore . . . a state may contract with a criminal for his exemption from prosecution if he shall honestly and fairly make a full disclosure of the crime, whether the party testified against is convicted or not.").

98. DUNCAN LUCE & HOWARD RAIFFA, GAMES AND DECISIONS 169-71 (1957); Henry Hamburger, *N-Person Prisoner's Dilemma*, 3 J. MATHEMATICAL SOC. 27, 30 (1973).

Imaged with the Permission of Yale Law Journal

enforce agreements that prevent conspirators from defecting. So, too, the witness protection program reduces the ability of the group to exert coercion. Strategies to reduce coercion further will take the form of measures that increase the anonymity of defecting players.[99]

When the multiplayer dilemma is iterated over multiple stages, the number of players makes collusion to prevent defection very difficult. Theory would predict defection even in early stages,[100] although individuals often will not defect when they have stakes in forming reputations. In these reputational scenarios, defection is less likely when it can be detected by the group, and more likely when the group believes that its activities are coming to a close.[101] Members on the precipice of leaving a group have an incentive to cheat, and this fact may stimulate defection by others. Viewed this way, criminal law should encourage renunciation and withdrawal, not only because a person's renunciation or withdrawal removes *that person* from the organization, but because it may also increase the defection of *other* members of the group.[102]

Two other findings from game theory deserve quick mention. First, Robert Axelrod found that hierarchy and organization concentrate interactions between individuals and promote cooperation.[103] As we shall see, conspiracy law targets organizers and leaders with special penalties, thereby incapacitating them and deterring the formation of hierarchy. Second, cooperation is significantly promoted by group identity.[104] Conspiracy law, by reducing the number of groups and fracturing the identity within those that do exist, minimizes such harms.

---

99. *See* CRISTINA BICCHIERI, RATIONALITY AND COORDINATION 225 (1993) (stating that anonymity or the inability to punish defection in future rounds increases defection).

100. In a finitely repeated game, every player knows when the game ends and, as such, has an incentive to defect at the very last stage in order to capture defection profits. If every player knows that every other player is rational, then all players will know that the others will defect in the last stage and, as such, will defect in the second-to-last stage because they have no mutual cooperation to gain by cooperating. Inducting backward in this fashion gives the result that all players will defect at every stage of the game. Barry Nalebuff, *Prisoners' Dilemma*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, *supra* note 71, at 89, 91 ("The idea of resolving the prisoners' dilemma through repeated interaction is appealing, but there is a logical time bomb hidden in the argument. To sustain any cooperation requires that there be no final period to the game, no matter how distant.").

101. Defection is more likely to occur in small groups when it is known that the group will soon dissolve or when a member plans to leave soon. *See* BICCHIERI, *supra* note 99, at 240.

102. *See infra* Subsection III.A.5.

103. ROBERT AXELROD, THE EVOLUTION OF COOPERATION 130-32 (1984).

104. Henry Hamburger et al., *Group Size and Cooperation*, 19 J. CONFLICT RESOL. 503, 520 (1975). The psychology literature on social dilemmas finds that "the decisive condition" for cooperation is "the extent to which players come to see themselves as a collective or joint unit, to feel a sense of 'we-ness,' of being together in the same situation facing the same problems." TURNER ET AL., *supra* note 26, at 34. For example, when people are divided into short-lived groups and asked to play prisoners' dilemmas against members of their own team as well as against members of other teams, cooperation occurs sixty percent of the time when playing their own team, twice as much as for intergroup competition. *Id.* at 35.

Imaged with the Permission of Yale Law Journal

2. *Physical Evidence and Perpetration Cost*

Working in a group often results in physical evidence that increases the probability of being caught and sentenced. Because conspirators need to communicate with each other, their messages can be intercepted. E-mails can be captured, phone conversations tapped, mail read, and discussions in public places overheard.[105] The lone criminal does not face these risks.

The Title III wiretap statute therefore permits the government to take advantage of these benefits of group activity. By creating mechanisms to intercept communications between conspirators, law enforcement can prevent some criminal acts, further ongoing investigations, and generate evidence that may be introduced into court proceedings. (A similar point is true for newfangled interception techniques, such as the FBI's e-mail-interception system called "Carnivore.")[106] Ex ante, such rules also make communication among members of the firm more difficult, thereby combating its ability to coordinate tasks and engage in specialization.

In addition, conspiracy may be financially costly. A leader who runs a conspiracy has to devote time to management: making sure that employees are happy, the books are working, the suppliers are paid, and so on. Profits need to be split among many different actors. At some point, a conspiracy gets large enough that it does not generate enough profits for each participant. This is particularly the case when changes to architecture, such as better locks and more powerful lighting, require criminals to work in larger groups or to expend money on better equipment. These costs, by reducing gains to the criminal, can diminish incentives to commit crime.

II. THE THEORY OF CONSPIRACY

This Part outlines three somewhat hidden features of conspiracy law that, taken together, generate a new theory of the crime. Conspiracy law employs price discrimination to change the valence of conspirators from negative to positive, introduces additional uncertainty to make criminal contracts more difficult to strike, and forces criminal enterprises to adopt bundles of inefficient practices that ultimately destabilize trust and cue defection.

Two caveats are appropriate at this juncture. *First*, in some cases, the argument will depend on the assumption that criminals know the contours of conspiracy law. For example, if *Pinkerton* liability is to deter additional

105. *See* Katyal, *supra* note 20, at 1042-44.

106. The wiretap statute is Title III of the Omnibus Crime Control and Safe Streets Act. 18 U.S.C.A. §§ 2510-2522 (2000 & Supp. 2002); *see also* John Schwartz, *Wiretapping System Works on Internet, Review Finds*, N.Y. TIMES, Nov. 22, 2000, at A19 (describing Carnivore).

Imaged with the Permission of Yale Law Journal

criminal acts, in general, conspirators must understand the doctrine.[107] Yet, even in these settings, there will be marginal offenders, such as leaders, who know the doctrine and can be deterred through legal sanctions. And, if ignorance of the law is widespread, it suggests all the more why governments must publicize the meaning of conspiracy law to communities.[108] There will also be other occasions for law enforcement to educate individual criminals about particular sanctions, such as in the cooperation and sentencing processes, in order to influence their behavior and facilitate flipping. Nevertheless, even when many participants lack knowledge about it, conspiracy law can deter criminal activity. Conspiracy law encourages organizations to adopt practices, such as employee monitoring, that generate inefficiencies, stymie group identity, and sow distrust within the group.[109] In so doing, it helps make criminal enterprises unattractive places in which to work, regardless of the members' understandings of their personal legal risks.

Second, conspiracy law extends liability in a range of circumstances beyond the criminal enterprise, such as to individuals who "agree" to commit a single crime. Much of the analysis in this Article views criminal groups as enterprises, and the positive effects of conspiracy law will be most robust in these settings. The Supreme Court has claimed that the economic and psychological harms of groups are applicable to the panoply of situations that constitute a "conspiracy,"[110] but, single-shot agreements do not pose precisely the same dangers as repeat ones. Because of their closer calibration to enterprises, it might be thought that modern "conspiracy-plus" statutes such as the Racketeer Influenced and Corrupt Organizations Act (RICO) and Continuing Criminal Enterprise Statute (CCE) may have advantages over the traditional conspiracy offense. It is not altogether clear, however, that RICO is so limited since some courts have interpreted it to reach single-shot agreements.[111] This Article,

107. Knowledge of the doctrine will not always be necessary for deterrence, for *Pinkerton* may help generate social norms against joining conspiracies. These norms can deter crime even when individuals lack information about their source. *See* Katyal, *Deterrence's Difficulty*, *supra* note 3, at 2449-50 (discussing the role of lore as a solution to informational problems in deterrence).

108. *See infra* Subsection III.B.4 (discussing the publicizing of conspiracy law).

109. A similar point concerns decisional simplification. Psychologists have shown that individuals tend to simplify their decisionmaking processes, so changing technical details of conspiracy law and the rules of evidence may not provide much direct deterrence. *See* Charles R. Schwenk, *Cognitive Simplification Processes in Strategic Decision-Making*, 5 STRATEGIC MGMT. J. 111, 112-22 (1984) (discussing simplification processes). However, the pronounced effects of conspiracy law on flipping, monitoring, and cuing internal distrust will loom large (perhaps even larger) in the minds of potential conspirators under conditions of decisional simplification. *See infra* text accompanying notes 164-184.

110. *See supra* text accompanying note 22.

111. *See* United States v. Gonzalez, 921 F.2d 1530 (11th Cir. 1991) (upholding a RICO charge from a single narcotics importation because "a pattern" arose from violation of two statutes that prohibit possession of cocaine and travel across state lines to facilitate criminal activity,

Imaged with the Permission of Yale Law Journal

therefore, serves as a template to help understand the function of such statutes and to outline the many advantages that accrue from retooling them to target repeat players.[112]

Statutes like RICO and CCE, moreover, often have significant limitations that preclude them from supplanting the function of the conspiracy offense. Both have been limited to reach only particular types of offenses and particular types of illegal enterprise.[113] Because even single agreements have the potential to cascade into repeat ones, some sanction on criminal agreement is appropriate to further deterrence at an early stage, before group identity has taken root. Relatively minor sanctions in that phase can have greater crime-prevention benefits than will larger sanctions once a conspiracy has blossomed into an enterprise. And even at these early points, specialization of labor and economies of scale can make the concerted action more dangerous. So, too, might the mind-set produced by the agreement, for the psychology literature suggests that even "minimal groups" can form a group identity that leads them down a path of escalation. This may explain why some courts have put pressure on RICO to reach single-shot agreements, but the traditional offense of conspiracy can easily fulfill this role by attaching liability at an early stage.

The traditional offense of conspiracy will also be necessary when law enforcement is unable to discover the existence of criminal enterprises without leverage against those known to have made a criminal agreement. The only way for prosecutors to learn of a RICO violation (both in terms of the triggering offenses and their repetition), for example, may be to flip someone they know who made a single agreement. For information-extraction reasons, the offense of conspiracy should attach liability earlier in time—at the moment of agreement—though it will often be appropriate

---

respectively); United States v. Licavoli, 725 F.2d 1040 (6th Cir. 1984) (finding that a conspiracy to commit murder and the object crime of murder are separate crimes that fulfill the two predicate crimes for a RICO violation). *See generally* NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW 488-91 (3d ed. 2000).

112. This is particularly so for RICO, since one of the more common ways to use RICO is to charge a conspiracy to commit a RICO violation under 18 U.S.C. § 1962(d) (2000). An understanding of conspiracy law may illuminate RICO's operation because similar principles apply to § 1962(d). *See, e.g.*, Salinas v. United States, 522 U.S. 52, 63-64 (1997) (relying on interpretations of the general federal conspiracy statute, in particular *Pinkerton*, to determine the scope of RICO's § 1962(d)).

113. For example, the Continuing Criminal Enterprise Statute, 21 U.S.C. § 848 (2000), is limited to narcotics felonies. And under RICO, an "'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." United States v. Turkette, 452 U.S. 576, 583 (1981) (quoting 18 U.S.C. § 1962(c)). This means that purely illegal enterprises may escape the reach of RICO. *See* Handeen v. Lemaire, 112 F.3d 1339, 1352 (8th Cir. 1997) (suggesting this possibility). RICO is also limited because one of its major provisions, § 1962(c), which punishes participation in an enterprise through a pattern of racketeering activity, applies only to those involved in the management or operation of the enterprise. *See* Reeves v. Ernst & Young, 507 U.S. 170, 177-85 (1993).

Imaged with the Permission of Yale Law Journal

to lower the punishment or, in some cases, decline to prosecute altogether, after investigation determines that the conspiracy was a single-shot one.[114]

A. *Price Discrimination*

Conspiracy law has subtly become a vehicle for a practice akin to price discrimination. Price discrimination refers to the ability to charge different prices for the same good, such as selling a box of widgets to *A* for $1000 and to *B* for $2000. Price discrimination is often tough to implement because of arbitrage—*A* can buy the widgets for $1000 and sell them to *B* for a profit. But, when the price is set by a monopoly, then arbitrage ceases to be a constraint.[115] The government distinguishes among offenders by charging high prices to some conspirators and low prices to others—depending on whether they provide useful information. Learned Hand once famously called conspiracy the "darling of the modern prosecutor's nursery,"[116] and while his words referred to the procedural advantages conspiracy gave to prosecutors, they also describe well a series of other "darlings"—flipped witnesses.

Conspiracy law imposes an up-front and early penalty on criminal agreements.[117] That penalty is a combination of the statutory sentence for conspiracy and the liability for acts committed by other members (*Pinkerton* liability). The high price is necessary to deter people from entering conspiracies in the first place. As such, it reflects the view that fewer people should be in conspiracies. Additional people can create the possibility of polarization, or economies of scale and specialization of labor. Once someone has joined a conspiracy, however, the matrix changes and the law attempts to provide a conspirator with incentives to turn evidence over to the government, thereby creating price discrimination. Accordingly, prosecutors need the ability to make credible threats of large penalties and credible promises of low ones.[118] This is a point about

114. *See infra* Subsection III.B.1 (advocating higher penalties for repeat players in an enterprise).

115. *See* Katyal, *Deterrence's Difficulty*, *supra* note 3, at 2439-41 (outlining these features of price discrimination).

116. Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).

117. Iannelli v. United States, 420 U.S. 770, 777 n.10 (1975) (noting that "agreement remains the essential element of the crime"); Hyde v. United States, 225 U.S. 347, 359 (1912) (stating that "the combination of minds in an unlawful purpose was the foundation of the offense"). An overt act, required in some jurisdictions, is discussed *infra* text accompanying notes 182-183.

118. *See* Rowland, *supra* note 80, at 680 ("Before approaching a co-conspirator or an accomplice, the Government must have sufficient leverage to induce cooperation . . . ."). Because flipping is so important, attempts by Congress to cut back on the leniency prosecutors give some defendants in conspiracy cases by requiring mandatory minimums risk harming law enforcement's interests instead of helping them. *See, e.g.*, 21 U.S.C. § 846 (imposing mandatory minimums for drug conspiracies). Mandatory minimums should not be written to make it difficult for prosecutors to lower sentences in exchange for information.

Imaged with the Permission of Yale Law Journal

substantive criminal law (and particularly, but not exclusively, about the offense of conspiracy), as well as about criminal procedure (which vests prosecutors with the discretion to make threats and offer concessions, including, of course, plea bargaining).[119]

This model helps explain why law focuses on an "agreement," a question that has puzzled commentators for some time.[120] Before the agreement is solidified, group identity has not yet taken hold and individuals are less likely to follow the group against their self-interest. Indeed, the process of joining a group often brings these tensions between self-identity and group identity to the fore.[121] Moreover, once an individual makes an agreement, cognitive dissonance manifests itself, making it difficult to dissuade an individual from her chosen path. Psychologists have shown that people conform their choices to decisions they have already made, creating a "sunk-cost trap" that locks in and escalates previous behavior.[122]

It may also be asked why conspiracy law employs a blunt punishment, such as the five-year prison term in the general federal conspiracy statute,[123] instead of always calibrating punishment to the object of the illegal agreement. After all, by lumping all criminal objects together, such statutes may create pernicious substitution effects whereby conspirators only

---

119. Group identity is only one factor that prevents conspirators from cooperating; fear of retaliation surely is another. But such fears can often be deterrents to joining an organization in the first place. *See infra* text accompanying notes 175-176. If a person nevertheless joins, law enforcement needs to develop ways to reduce the expected sanction the enterprise would levy on a cooperator, thus creating price discrimination of a different sort. *See supra* text accompanying note 99 (discussing the witness protection program); *infra* text accompanying note 196 (same).

120. *E.g.*, Dennis, *supra* note 6, at 41.

121. *See* Bettenhausen, *supra* note 29, at 349 (providing psychological studies supporting the claim that "[n]owhere is the conflict between self and group more evident than when a person first becomes a member of the group").

122. Robert Cialdini explains that there is a

> nearly obsessive desire to be (and to appear) consistent with what we have already done. Once we have made a choice or taken a stand, we will encounter personal and interpersonal pressures to behave consistently with that commitment. Those pressures will cause us to respond in ways that justify our earlier decision.

ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION 57 (rev. ed. 1993); *see also* ELLIOT ARONSON, THE SOCIAL ANIMAL 178-79 (7th ed. 1995) (describing the lock-in effect); George A. Akerlof & William T. Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 AM. ECON. REV. 307, 307-10 (1982) (providing an economic model of the problem); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1501 n.5 (1998) (discussing legal implications of cognitive dissonance).

123. *See supra* note 16 (describing 18 U.S.C. § 371 (2000)). Several statutes provide even larger punishments for particular types of conspiracy. *E.g.*, 18 U.S.C. § 1951 (subjecting Hobbs Act conspiracies to a twenty-year penalty equivalent to that imposed for the substantive offense). Whether the punishment is five years or more, the large fixed sentence will provide leverage to prosecutors who otherwise may lack the ability to threaten high sentences against minor participants. The Model Penal Code, which grades the punishment for conspiracy in general the same as that for the object offense, lacks this important information-extraction feature. *See* MODEL PENAL CODE § 5.05(1) (1995).

Imaged with the Permission of Yale Law Journal

undertake the most harmful acts. Consider, however, three functions of the penalty. First, the punishment for conspiracy provides a high baseline sentence that helps prosecutors secure cooperation. If prosecutors could only threaten potential cooperators with their personal wrongdoing, it might not be a sufficient inducement to flip them. The specific crime law enforcement agents discover may be too small (a likely result given the shadows in which conspiracies operate). Moreover, because the people most likely to be arrested are low-level operators who take the most visible risks, such as street-level drug dealers, the threat of a greater sentence may be necessary to induce cooperation. Second, *Pinkerton* liability can provide an inducement to moderate criminal activities. Because the individual bears the cost of the group's dangerous conduct, the substitution problems are lessened. Third, the five-year sentence for conspiracy is only a maximum, and thus can be reduced for minor conspiracies. Nevertheless, because a group formed for one (more minor) bad purpose may eventually succumb to the temptation of additional (more major) crimes, complementarity may require a relatively high sentence within the sentencing range to avoid escalation effects.[124]

Many have complained that conspiracy law permits sentences that are too long compared to the underlying acts committed. But a focus on information extraction reveals that this is the wrong comparison: People are being sentenced not only on the basis of what they *did*, but also on the basis of *what they knew and did not reveal*. This shift in the understanding of criminal penalties is underappreciated. Under this theory of moral wrong, the basis for sentencing is not only the underlying crime but also the information held. Information alone should not be the sine qua non of sentencing; a person's role in the offense is at least as, if not more, important. But a person who did not play a great role in the commission of offenses but had much information will receive a higher sentence than someone who played the same role but lacked it.[125]

---

124. In some jurisdictions, conspiracy liability does not extend to all crimes, but rather only to conspiracies for the most serious offenses. *E.g.*, OHIO REV. CODE ANN. § 2923.01(A) (Anderson 1996) (specifying the crimes eligible for conspiracy). Once the danger of groups is recognized, however, it becomes possible to understand how acts with minimal social danger (and that may themselves not even be illegal) can ultimately be harmful when committed by a group.

125. Flipping raises the possibility that low-level participants will receive higher sentences than leaders. The outlines of this so-called cooperation paradox are contestable, in that it harkens back to a paradigm in which lawbreakers were sentenced only for commissions. Under the information-based paradigm, it is to be expected that many low-level participants will not receive high sentences because they did not play a serious role and lacked the information necessary to help law enforcement. Empirical evidence so suggests: A 1998 study by the Sentencing Commission concluded that the "oft-cited 'truth' that drug conspiracy members at the top of the organization are more likely to secure reduced sentences due to substantial assistance than those lower in the criminal organization is not supported by these exploratory data." MAXFIELD & KRAMER, *supra* note 82, at 13. The study found that "the defendant's relative position in the drug trafficking conspiracy hierarchy was not proportionally related to his/her probability of receiving

Imaged with the Permission of Yale Law Journal

The conventional wisdom that American law rejects affirmative duties and that criminal liability only extends to commissions has obscured our understanding of information-based sentencing. Yet affirmative duties are often placed on those with "unclean hands," and liability in the conspiracy context occurs for an act of commission (the agreement) *and* an act of omission (not providing information to law enforcement). Whether one believes information-based sentencing is normatively justified, it is a shift in the paradigm of criminal law that has happened *sotto voce* and deserves discussion.

If conspiracy law centers around obtaining information, however, then we are back to the question of why an agreement is necessary. Why not just focus on people who have information and refuse to divulge it? While a deeper consideration of information-based sentencing will no doubt suggest that the case for revival of misprision of felony is stronger than is conventionally thought, in the current milieu conspiracy law has become a popularly accepted way to extract information. Juries may not convict for misprision of felony, prosecutors may not prosecute, and witnesses may not come forward.[126] The richer point is that conspiracy law is concerned not only with obtaining information, but also with creating dynamics that make conspiracies harder to form. In particular, agreements solidify group identities and create cognitive dissonance that together culminate in dangerous behavior. The fusion of these two elements—a commission that furthers group identity and an omission that produces social harm—generates an understanding of conspiracy's special status in American law.[127]

Naturally, flipping is possible even without the formal crime of conspiracy. I am consciously describing a more general shift in criminal

---

a substantial assistance departure." *Id.* at 12. Indeed, "passive participants were approximately twice as likely to receive §5K1.1 departures as were the highest-level defendants." *Id.* at 12-13.

126. *See* Katyal, *Deterrence's Difficulty*, *supra* note 3, at 2450-52. Current information-based sentencing does not resurrect misprision of felony. A voluntary act—joining a conspiracy—is a prerequisite before the omission of failing to tell law enforcement has legal consequence. The first portion, the voluntary act, is the crime; the second portion, the inaction, goes to *grading*.

127. Because the focus of this explanation of conspiracy centers on information, it is inappropriate to prosecute individuals who lacked knowledge of the conspiracy. Older doctrine required the government to prove that the defendant had such knowledge, but some courts have attached liability when a person knowingly contributes efforts in furtherance of a group's activity. *Compare* Ingram v. United States, 360 U.S. 672, 678 (1959) ("Without the knowledge, the intent cannot exist." (citation omitted)), *with* United States v. Crouch, 46 F.3d 871, 874 (8th Cir. 1995) (finding that a "person intentionally joins a conspiracy when the person knowingly contributes efforts in furtherance of the conspiracy's objectives"), United States v. Tranakos, 911 F.2d 1422, 1430 (10th Cir. 1990) (finding that a "defendant who acts in furtherance of the object of the conspiracy may be presumed to be a knowing participant"), *and* United States v. Becker, 569 F.2d 951, 961 (5th Cir. 1978) ("Once it has been established that a conspiracy exists and that a particular defendant was clearly connected to the conspiring group or acted in a manner which unmistakably forwarded the conspiracy, then only slight additional evidence suffices to permit an appellate court to find that the jury could reasonably infer that . . . a participant was in fact a *knowing* participant.").

Imaged with the Permission of Yale Law Journal

law, although three features explain why the offense of conspiracy has unique information-extraction potential. First, *timing*: The violation attaches at an earlier point in time, permitting law enforcement to intervene at a formative stage. A criminal organization ex ante will have to fear cooperators are in its midst from the moment of agreement, for it is at that point that its members have committed a crime. Ex post, without conspiracy, prosecutors may lack the leverage necessary for flipping because they do not know of other offenses until it is too late. Second, *sanction*: Because conspiracy law has a five-year term, it may provide a prosecutor with more bargaining power than will other crimes, particularly when the substantive crimes most visible to law enforcement carry the lowest penalties. Third, *evidence*: Conspiracy law has a series of doctrines attached to it, such as the hearsay exception and liberal rules on joinder, that facilitate information extraction.

There are ways to codify these advantages of conspiracy in other criminal offenses. Nevertheless, conspiracy law has evolved to become a crucial tool for information extraction by focusing on joint activity and by attaching liability at a point early enough to yield significant intelligence to law enforcement. Indeed, the doctrine could blunt the legislative temptation to give prosecutors more leverage by increasing prison terms for substantive offenses.[128] Using the single doctrine of conspiracy also places prosecutors on notice that information extraction is a crucial component of their mission; trying to use hundreds of substantive crimes to accomplish this task is more difficult.[129] And because individuals working alone will commit these substantive crimes, increasing sanctions on those crimes will be overinclusive and confusing.

The focus on information extraction sets up two points that will be highlighted later. First, if information is hard to glean in underground settings, a premium for information should not simply exist for information that *inculpates* others, but also for information that *exculpates*. Second, law should develop other mechanisms besides flipping witnesses to extract information, such as monetary rewards. These two points are connected, for rewards should not only go to those who help secure convictions, but also to those who help free the wrongly accused.

---

128. High sentences can reflect low probabilities of detection, but in recent years the penalties on several crimes (particularly drug offenses) have increased while the probability of detection has stayed relatively constant. Something else must be afoot. These sentences may have been increased to provide leverage for information extraction, particularly in light of the Sentencing Commission's cutback on conspiracy's baseline sentence. *See infra* text accompanying notes 267-270.

129. With appropriate guidelines on how much prosecutors can charge, conspiracy law may be a better way to serve law enforcement interests than the use of high mandatory minimums for substantive offenses. *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1963-66 (1992) (discussing how such minimums give prosecutors an unchecked opportunity to overcharge and generate easy pleas).

Imaged with the Permission of Yale Law Journal

B. *Reversing Contract Law Principles To Increase Transaction Costs and Uncertainty*

Many scholars tend to see criminal law through the prism of torts, but there is a sense in which the criminal law is a restriction on the ability to contract. In lawful society, people use contracts to structure their affairs in ways that reduce uncertainty about future performance and constrain opportunistic behavior.[130] The costs of contracting are considerably reduced by a regulatory climate that encourages the exchange of information—so that the parties know each other's terms, conditions, and reputation. The rule of mutual assent, furthermore, permits greater search efforts by quelling the fear of being in a contract after mere negotiation.[131] And state enforcement of contracts further increases certainty and decreases opportunistic behavior.[132]

Consider how the general criminal law inverts these doctrines. When the parties begin their search efforts, information is not freely available, so criminal organizations cannot easily seek the best or most trustworthy participants. The state's enforcement power is not extended to illegal agreements, promoting self-regarding behavior and reducing certainty at every stage in the contracting process. Mutual assent remains a touchstone, but disincentives to search efforts still exist. Because criminal agreements are not immediately apparent to law enforcement, investigation is required to know who agreed to conspire. Individuals who discussed joining a conspiracy will be obvious targets of these investigations, even if they declined to join the syndicates. This is not guilt, but investigation, by association; as such, even under a strict view of "agreement," there are high costs to search efforts.

There are other ways in which contract law and conspiracy can be brought together. As with any employment contract, a conspirator will expect compensation for her input and labor costs, and will also seek some premium for her legal risks.[133] In some conspiracies, compensation will take the form of splitting proceeds from the crime; in others, the

130. *See* Karl N. Llewellyn, *What Price Contract? An Essay in Perspective*, 40 YALE L.J. 704, 736-37 (1931) (stating that "the major importance of legal contract is to provide a framework for well-nigh every type of group organization . . . which affords a rough indication around which such relations vary, an occasional guide in cases of doubt, and a norm of ultimate appeal when the relations cease in fact to work").

131. *See* Steven Shavell, *Contracts*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, *supra* note 71, at 436, 436 (stating that mutual assent "means that search for contracting partners will not be chilled due to the risk of unwanted legal obligations").

132. *E.g.*, Russell Hardin, *Trust*, *in* 3 *id.* at 623, 624 ("We have the law to back contracts for major exchanges, to protect us in our ordinary dealings, and to reduce the likelihood of at least some massive end-game losses.").

133. *See* Sykes, *supra* note 11, at 1234 (using the same analysis in the vicarious liability setting). Even if the labor pool is large, the number of loyal conspirators is likely to be far smaller.

Imaged with the Permission of Yale Law Journal

conspirators will use a wage or commission structure. (There is nothing approximating the stock market system whereby an employee may receive an alienable share or option in the company, although in light of recent events, one wonders whether this system would help or hinder performance.) The appropriate premium for legal risk, however, is very difficult to determine. In essence, an incomplete contracts problem arises—the parties cannot specify all the terms because they are not omniscient and it would be expensive for them to try to do so.

The uncertainty about getting caught plays a subtle role at the time of contract formation. Legal risks cannot be contracted away because the parties cannot know the risk with precision; therefore, an agreement may be more difficult to strike. Each party could view the uncertainty differently, in a way that benefits its overall position, leading to disagreements and a breakdown of negotiations. In the single-actor assumption of criminal law, it is thought that increasing the certainty of enforcement promotes deterrence.[134] But in the multiactor context, such increases can make it easier for the parties to reach agreement.[135] A variable probability of detection therefore has advantages in the group-crime setting that do not appear in the single-actor one.

These disagreements about risk and payment streams will persist at every level of the conspiracy—leaders may feel their risks are higher, so too might subordinates—leading everyone to overstate their risks in exchange for higher pay and furthering cost deterrence.[136] Government can increase this uncertainty: It could, for example, use legal rules with more uncertain meanings (thereby suggesting that abolition of the lenity doctrine will have unique payoffs in the multiactor context) or establish incentives for conspirators to act in disloyal ways (such as whistleblowing). Such uncertainty will deter conspiracies from forming and, among those that do form, make it more difficult to compensate individuals for their levels of

134. *E.g.*, Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 414 (2000) ("[W]e have believed for centuries that certainty and swiftness of punishment are critical to the effectiveness of deterrence."); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 379 (1997) ("A high-certainty/low-severity strategy, in contrast [to a low-certainty/high-severity strategy], is more likely to generate a low crime-rate equilibrium.").

135. The argument here is not that governments must shy away from raising the probability of enforcement—rather it is that one cost of such a strategy is to make it easier for criminals in groups to operate, and that the resources needed to increase this probability may, in some circumstances, be better spent elsewhere. If, however, criminals have a preference for risk, then variability may induce more agreement instead of less.

136. For an analysis of this issue in torts, see Sykes, *supra* note 11, at 1245 ("If transaction costs prevent efficient shifting of risk to the principal, then the principal must compensate the agent more generously than he would in an ideal world. The costs of production increase . . . and economic welfare declines as principal-agent enterprises operate at a smaller scale and charge higher prices.").

Imaged with the Permission of Yale Law Journal

risk and force everyone to incur costs to ascertain the probability of detection.[137]

Probability of detection is, of course, only half of the story. Uncertainty about the sanction can promote deterrence too. Under the single-actor assumption, it is thought that sanctions of a fixed and known length will better serve deterrence because they eliminate the hope of leniency.[138] Yet, for group crime, uncertainty about the sanction will have the same effect as uncertainty about the probability of enforcement. When individuals are unsure of the length of the penalties that might be imposed against them, it can be more difficult for them to come to an agreement on who should bear what risks and for what price. (The fact that juveniles receive lower prison sentences may explain both why criminal organizations use juveniles so frequently and why they receive such little pay for their services.)[139] Blackstone made a similar, though largely neglected, point centuries ago:

> [I]f a distinction were constantly to be made between the punishment of principals and accessories . . . it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as his danger would be greater than that of his accomplices, by reason of the difference of his punishment.[140]

Blackstone's "differences in punishment," of course, is what price discrimination is all about. The existence of flipping therefore makes

---

137. Uncertainty about probability of detection also explains the puzzling evidentiary doctrine that a person who joins a conspiracy can be liable for statements uttered before she joined it. Joseph McSorley has noted:

> [O]nce a defendant's participation in the conspiracy is established, he or she may be held accountable—as relates to the conspiracy charge—for everything said, written, or done by any other conspirator in furtherance of the conspiracy, even where the acts were done *before* the defendant joined the conspiracy and even if he or she was unaware of precisely what was done and who did it.

MCSORLEY, *supra* note 89, at 107. These earlier statements, when made, augment the likelihood that law enforcement will learn of the scheme and, because they are admissible, raise the chance of conviction. As such, informational asymmetries raise the barriers to criminal agreement—existing conspirators know of the statements that have been made and new entrants do not.

138. *E.g.*, Andrew von Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 MD. L. REV. 6, 18 (1983) ("A rational deterrence strategy, supposedly, would make it more certain that all criminals convicted of major felonies would receive, at a minimum, a substantial punishment—thus eliminating this hope of leniency.").

139. Ethan A. Nadelmann, *Shooting Up: Crime and the Drug Laws*, NEW REPUBLIC, June 13, 1988, at 17 (finding that "the increasingly harsh criminal penalties imposed on adult drug dealers has [sic] led drug traffickers to recruit juveniles").

140. 4 WILLIAM BLACKSTONE, COMMENTARIES *39-40. The analysis of uncertainty regarding sanctions makes *Pinkerton* liability quite complicated, for it at once makes it more difficult for a person to know her legal risks (in that she might not have enough foresight to know what future crimes a court will claim she objectively knew her co-conspirators would commit), while also reducing the disparity in sanction among members of a conspiracy. The latter might shed light on why some conspiracies decide to split profits equally. *See infra* text accompanying note 212.

Imaged with the Permission of Yale Law Journal

contracting more difficult. Covenants not to compete and laws protecting proprietary information are two mechanisms by which corporations prevent employees from using company information to benefit themselves. But contracts that preclude self-interested behavior against illegal businesses are not enforced. Rather, the law seeks to encourage such deliberate misuse of information. Because defection can be hidden, individuals cannot easily trust that their co-conspirators will not be acting as informants down the road, and this makes it more difficult for firms to structure arrangements to entice persons to join.[141]

Some psychologists have found, however, that people have an "optimism bias" that leads them to understate risks. For example, engaged couples minimize the risk that they will get divorced, and taxi drivers overestimate their skills at avoiding accidents.[142] Thus, the possibility exists that enhancing the uncertainty about probability of detection and length of sanction may make it easier, not harder, to create agreement between potential conspirators. Yet, for the great bulk of individuals, optimism bias provides a further explanation of why the law should penalize criminal agreements. A key reason why the optimism bias arises has to do with the way the question is framed: Engaged couples and taxi drivers, for example, have already made certain lifestyle commitments, and cognitive dissonance principles explain why they would underestimate risks when asked about them.[143] And, in the group setting, there is some evidence that suggests that viewing oneself as part of a team may promote greater amounts of optimism about the team's activities.[144]

Until now we have been presupposing that the "contract" between the conspirators is akin to a written document. Of course, both law and common sense virtually ensure that no such documents will ever be

141. David M. Kreps, *Corporate Culture and Economic Theory*, *in* PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 90, 105 (James E. Alt & Kenneth Shepsle eds., 1990) ("[W]hen one player cannot observe directly that the agreement is being carried out, and when this player can only rely on noisy, indirect observations, the problem of finding self-enforcing arrangements is vastly more complicated.").

142. Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993) (marriage); James R. Dalziel & R.F. Soames Job, *Motor Vehicle Accidents, Fatigue and Optimism Bias in Taxi Drivers*, 29 ACCIDENT ANALYSIS & PREVENTION 489, 492 (1997) (taxi drivers).

143. *See, e.g.*, W. Kip Viscusi, *Using Warnings To Extend the Boundaries of Consumer Sovereignty*, 23 HARV. J.L. & PUB. POL'Y 211, 227 (1999). Cognitive dissonance is a major factor in explaining optimism bias, but it is certainly not the only factor. It is possible, for example, to imagine situations in which an individual, well before making an agreement, will be overly optimistic about the probabilities of getting caught. Yet, for a great number of marginal offenders, though not all, the agreement stage is where much of the optimism bias is likely to manifest itself due to cognitive dissonance and group antidisillusionment effects. *See supra* text accompanying note 52 (discussing buffering effects of groups); *supra* note 122 and accompanying text (discussing cognitive dissonance).

144. *E.g.*, Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129, 130-32 (1954) (finding such a result in sports).

Imaged with the Permission of Yale Law Journal

written.[145] The inability to memorialize agreements, coupled with the lack of legal enforcement of agreements between the parties, may discourage conspiracy. Transaction costs are increased, uncertainty about contractual terms is magnified, and the risk of disagreement within the group can loom even larger.[146]

Contractual analysis is one instance of the larger point that much is gained from reversing corporate law principles that promote efficiency. Consider Frank Easterbrook and Daniel Fischel's claim that corporate law endeavors to provide default rules to save time in reaching agreement, thereby reducing contracting costs.[147] Law performs this function, they argue, because no single firm has the incentive to work out the range of possible hypotheticals. Unlike corporate law, criminal law aims to increase the costs of reaching agreement. By getting law out of these organizations, each entity must take the costly step of developing its own governance structure.

Many enforceable default rules of partnership law promote their efficiency, such as: (1) "All partners have equal rights in the management and conduct of the partnership business";[148] (2) "Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners";[149] (3) "Every partner is an agent of the partnership for the purpose of its business, and the act of every partner . . . for apparently carrying on in the usual way . . . binds the partnership";[150] and (4) rules (too wordy to describe here) that govern discontinuation of the partnership.[151] Unlike legal partnerships, members of a conspiracy lack well-settled principles about voting arrangements, capital contributions, and methods of resolving disputes among partners. The

145. *See* PETER REUTER, DISORGANIZED CRIME 143 (1983) ("The need for concealment of participation ensures that disagreements are likely to be far more common in illegal markets than in legal markets . . . . Genuine misunderstandings about the terms of a contract are common in illegal markets, since oral contracts take into account only a very limited range of contingencies."). Of course, there are ways to enforce such contracts that go beyond the law, but the law may be able to destabilize such mechanisms. *See* Dick, *supra* note 71, at 720 ("In markets where contracts cannot be court enforced, private mechanisms including reputation and Mafia codes of honour can provide substitute means for contract enforcement." (citations omitted)).

146. These phenomena are not generated by conspiracy law alone, but rather by the broader set of criminal laws that punish substantive offenses. By making the act of agreement itself a crime, however, conspiracy law may induce such phenomena at an earlier point in time.

147. *See* EASTERBROOK & FISCHEL, *supra* note 66, at 34 ("[C]orporate law is a set of terms available off-the-rack so that participants in corporate ventures can save the cost of contracting . . . .").

148. UNIF. P'SHIP ACT § 18(e), 6 U.L.A. pt. II, at 101 (2001).

149. *Id.* § 18(h), 6 U.L.A. pt. II, at 101.

150. *Id.* § 9(1), 6 U.L.A. pt. I, at 553.

151. *See, e.g.*, *id.* § 31(1), 6 U.L.A. pt. II, at 370; *see also* WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 65 (2002) (stating that the Uniform Partnership Act and judicial decisions "serve[] in effect as an implied standard-form agreement of partnership" and that often "an effort to provide tailor-made rules to fit the needs of the individual firm would not be worth the cost in time and money").

Imaged with the Permission of Yale Law Journal

parties cannot go to the police or to the courts to resolve their disagreements. And, of course, withdrawal from the partnership is made far more complex.

The "duty of loyalty" in partnership and corporate law is another mechanism to increase the efficiency of the firm.[152] Members of criminal organizations, however, have no explicit legal duty to act fairly toward each other or the partnership more generally. Again, instead of being agnostic on the question regarding the duty of loyalty, law could go further and reward disloyalty. Flipping is one way to accomplish this end, but that may occur too late in the game. Instead, law could reward employees who self-deal and trade information.

Rewarding self-dealing members is one example of a larger strategy at play: destroying group efficiencies. Firms arise in part because it is too costly to write and enforce full contracts between the parties. Instead, a firm's "corporate culture" fills in the gaps.[153] If law can encourage conspiracies to adopt unappealing corporate cultures—such as ones filled with violence—it can reduce the number of people who might join conspiracies and simultaneously increase the number of defectors among those who have already joined. This is the focus of the next Section.

C. *Norms and Trust: Undermining Group Efficiencies*

To promote their efficiency, partnerships and corporations devise mechanisms that encourage their members to act in the interest of the enterprise and that discourage self-dealing. To understand these mechanisms, an economist might place relative emphasis on the role of contract, a psychologist on trust and reputation, and an attorney on law. Criminal enterprises use mechanisms to reduce self-interested behavior as well. The preceding Sections have discussed ways in which contracts and law are brought to bear on the problem, and this Section takes up devices that disrupt trust and social order within the conspiracy.

1. *Fracturing Trust*

Perhaps the most important asset of a firm is its trust between members. Trust is the glue that allows diverse individuals to work together easily. As

152. *See, e.g.*, Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, J.) (stating that partners "owe to one another . . . the duty of the finest loyalty"); KLEIN & COFFEE, *supra* note 151, at 39-40, 71-73 (outlining the fiduciary duty).

153. Kreps, *supra* note 141, at 92 (noting that "contingencies typically arise that were unforeseen at the time of the transaction itself" and that "transactions will potentially be too costly to undertake if the participants cannot rely on efficient and equitable adaptation to those unforeseen contingencies").

Imaged with the Permission of Yale Law Journal

Kenneth Arrow has stated, "Virtually every commercial transaction has within itself an element of trust, certainly any transaction conducted over a period of time. It can be plausibly argued that much of the economic backwardness in the world can be explained by the lack of mutual confidence . . . ."[154] More recent analysis has found that "[l]ow trust can also discourage innovation. If entrepreneurs must devote more time to monitoring possible malfeasance by partners, employees, and suppliers, they have less time to devote to innovation in new products or processes."[155] While conspiracies themselves defect from the legal order, they seek to promote trust and cooperation among their members.[156] To generate inefficiencies law should reduce this trust.

The ex post advantages of flipping are obvious from television shows. But the ex ante effect is subtler—it gives every member of a conspiracy an overt and powerful weapon against her confederates. The mere existence of these weapons diminishes trust, for trust declines and long-term cooperation suffers when parties possess visible defection opportunities.[157] Consider, for example, the Trucking Game. In the game, there are two manufacturers, and each one must transport goods for sale. The problem is that the shortest road to their sales point can be used by only one manufacturer at a time. Each manufacturer can run her trucks on the road to block the other's access. In addition, each controls a gate that permits blockage of the other's access:

154. Kenneth Arrow, *Gifts and Exchanges*, 1 PHIL. & PUB. AFF. 343, 357 (1972).

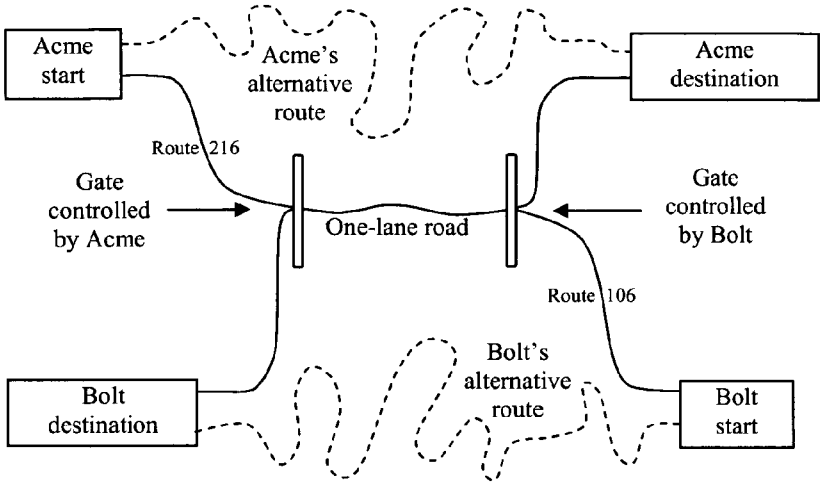
155. Stephen Knack & Philip Keefer, *Does Social Capital Have an Economic Payoff? A Cross Country Investigation*, 112 Q.J. ECON. 1251, 1252-53 (1997).

156. *See* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 86 (D.D. Raphael & A.L. Macfie eds., Clarendon Press 1976) (1759) ("[I]f there is any society among robbers and murderers, they must at least . . . abstain from robbing and murdering one another.").

157. Government efforts to fracture trust through flipping, moreover, will sometimes risk solidifying group identity, particularly for groups that define themselves in opposition to the law. But there may be acoustic separation between the ex ante and ex post effect, so that the less overt ex ante incentives to adopt inefficient practices do not carry these risks to the same extent.

Imaged with the Permission of Yale Law Journal

FIGURE 1.[158]



Experiments reveal that when the gates are placed on the roads, cooperation suffers markedly, and when the gates are removed, cooperation increases. Visible gates cue a defection strategy.[159]

The pervasive and well-understood legal practice of flipping, when combined with penalties for conspiracy, functions like these gates. These legal tools fragment trust among members of the conspiracy and inspire defection. As jealous types learn, once some distrust is present, it can spiral even further;[160] numerous studies have affirmed the common-sense notion

158. The following figure is based on the "Map of the Trucking Game" from David Good, *Individuals, Interpersonal Relations, and Trust*, *in* TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS 31, 35 (Diego Gambetta ed., 1988).

159. *Id.* at 35-36. Good also noted:

> The deleterious consequences of the players being able to threaten one another in the Trucking Game may partly be accounted for by the way in which the prominent positioning of the gates focuses attention on that potential threat. . . . [T]his prominence leads each to increase the subjective probability of the threat being implemented. This in turn could lead to a self-fulfilling prophecy as each attempts to get his retaliation in first.

Id. at 44; *see also* Morton Deutsch & Robert M. Krauss, *The Effect of Threat upon Interpersonal Bargaining*, 61 J. ABNORMAL & SOC. PSYCHOL. 181, 188 (1960) ("[T]he availability of threat clearly made it more difficult for bargainers to reach a mutually profitable arrangement . . . ."); Morton Deutsch & Robert M. Krauss, *Studies of Interpersonal Bargaining*, 6 J. CONFLICT RES. 52, 58-59 (1962) ("[I]f threat-potential exists within a bargaining relationship it is better to possess it oneself than to have the other party possess it. However, it is even better for neither party to possess it.").

160. Diego Gambetta, *Can We Trust Trust?*, *in* TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS, *supra* note 158, at 213, 234.

Imaged with the Permission of Yale Law Journal

that "sustained distrust can only lead to further distrust."[161] Trusting relationships are always hard to form,[162] and even harder in conspiracies because the harm imposed by a single traitor—via information—far outweighs the limited benefit of an extra member.

A common strategy to build trust is to begin with small acts of cooperation. For example, Palo Alto homeowners were asked to place a large, crude sign saying "drive carefully" in the front of their homes. Only seventeen percent agreed. Other homeowners were asked to perform a small task, either sign a petition or place a three-inch-square sign in their cars, and the vast majority of owners so agreed. Two weeks later, these individuals were approached to put up the crude sign and seventy-six percent did so—over four times the percentage of the first group. These findings have been replicated with many subsequent studies in a variety of locations and involving a number of different messages on the sign.[163] They suggest an explanation for conspiracy law's use of high penalties against those who join the conspiracy and take minor overt acts to further it. These acts, without a strong legal sanction, may be relatively costless to the co-conspirator but may promote group trust. Before trust thickens, strong legal

161. *Id.* at 213.

162. Philip Worchel has noted:

> It takes a series of positive experiences to establish a relationship of trust; sometimes it takes only one "betrayal" to establish distrust . . . . Once aroused, distrust is resistant to change . . . . Distrust produces a predisposition to perceive the other person as a threat, and perceiving the person as a threat leads to greater distrust. The "self fulfilling prophecy" tends to reinforce and increase distrust of the other person. The problem of reducing distrust is further complicated by the suppressive effect of communication. Distrust discourages the development of channels through which credible messages can be transmitted.

Philip Worchel, *Trust and Distrust*, *in* THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS, *supra* note 42, at 174, 185. This point suggests that law should encourage other forms of disloyalty besides flipping, such as taking monetary rewards for information. *See infra* Subsection III.B.3.

163. *See* Katyal, *Architecture*, *supra* note 3, at 1076-77 (discussing the studies). One of the richest accounts of visible cues and trust concerns the Minnesota Mycological Society. The costs of error are exceptionally high—if a member of the group trusts another mistakenly and eats a poisonous mushroom, she may die. Because of these high costs, and because exit from the group is easy (in that it is a voluntary association), the organization developed methods to promote the perception of mutual trustworthiness. For example, novices are induced to consume the dishes of others prepared at banquets, even when they may lack trust in the group. "Thus, even if members remain privately anxious, their public behavior connotes high levels of trust. Collectively, these displays constitute a potent form of social proof to members that their individual acts of trust are sensible." Roderick M. Kramer, *Trust and Distrust in Organizations: Emerging Perspectives, Enduring Questions*, 50 ANN. REV. PSYCHOL. 569, 579-80 (1999) (describing the study). A sustained socialization process also occurs whereby novices are taught about mushrooms and the group's members, and the result of these processes is to promote the long-term trustworthiness of members. Gary Alan Fine & Lori Holyfield, *Secrecy, Trust, and Dangerous Leisure: Generating Group Cohesion in Voluntary Organizations*, 59 SOC. PSYCHOL. Q. 22, 27-29 (1996). These methods of promoting trust—socialization processes and visible displays of trust despite private anxiety—have analogues in organized crime.

Imaged with the Permission of Yale Law Journal

sanctions are placed on these relatively minor acts in order to deter them. The hope is to disrupt cooperation and trust before they take root.

Groups promote efficiency because their members deal with one another on the basis of trust and sidestep costly information gathering about each other.[164] Flipping targets this group benefit by creating conditions under which group membership is not a salient enough trait to guarantee individual trustworthiness. By rewarding group members who defy the interest of the group, fuzziness is interjected into the signal of being a group member. Because members cannot know whether any of the others is trustworthy or cooperating with law enforcement, each of them will need to undertake her own investigation and/or precautionary measures. These measures undoubtedly will reduce one's gain from the criminal enterprise as well as, in the aggregate, the organization's gain. In this way, criminal law fragments trust because it forces criminal organizations to adopt a bundle of inefficient practices (monitoring, compartmentalization, and avoiding discussion) that each cue more distrust.[165]

a. *Encouraging Costly Monitoring*

When trust is weak, monitoring is common. Corporations expend resources to screen potential employees and to watch those that they hire. Conspiracies do the same thing, although the costs of monitoring can be even higher because defection is not visible and agreements are not written. By increasing the cost of criminal activity relative to the potential profit, flipping promotes cost deterrence.[166] This is a simple application of the idea

164. As Stanford Business Professor Roderick Kramer puts it, "[S]hared membership in a given category . . . bypasses the need for personal knowledge and the costs of negotiating reciprocity." Kramer, *supra* note 163, at 577 (internal quotation marks and citation omitted); *see also id.* at 582-83 (explaining how trust reduces transaction costs within organizations).

165. *See* David Laibson, *A Cue-Theory of Consumption*, 116 Q.J. ECON. 81 (2001) (arguing that behavior is often the result of various cues); Bernard Williams, *Formal Structures and Social Reality*, *in* TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS, *supra* note 158, at 3, 4 (stating that imperfect information exists in any cooperative relationship, "both about other people's preferences and about their assessment of probabilities," and that the acquisition of such information may be costly in that "any actual process of inquiry may itself change preferences, destroy information, [or] raise more questions").

166. Gianluca Fiorentini and Sam Peltzman have noted:

> [C]riminal organisations need to monitor strictly the activities of their members to be able to punish credibly their opportunistic behaviour, since they cannot rely on external judicial intervention. These monitoring costs increase more than proportionally with the number of their members, and therefore represent a rather stringent limit to the efficient operating scale of such organisations.

Gianluca Fiorentini & Sam Peltzman, *Introduction* to THE ECONOMICS OF ORGANISED CRIME 1, 12-13 (Gianluca Fiorentini & Sam Peltzman eds., 1995); *cf.* Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 324 (1996) (arguing that corporate criminal liability forces "an inefficiently high level of investment in monitoring"). Instead of monitoring, a firm may pay efficiency wages to stave off defection. *See generally* George Baker et al., *The Wage Policy of a Firm*, 109 Q.J. ECON. 921 (1994) (outlining some of the factors that legal firms use in

Imaged with the Permission of Yale Law Journal

in torts that when principals are liable for the sins of their agents, it increases the cost of hiring agents.[167]

Monitoring costs are not simply financial. If the firm is large enough, there may be layers of monitors, and the question of who will monitor the monitors looms large. Intermediate monitors could prove to be costly to the firm if one of them flips because of the greater information they possess—both against higher-ups as well as those below. (This point is somewhat similar to one made regarding vicarious liability for corporations, that they have a disincentive to monitor because doing so may increase their legal exposure.)[168] Apart from costs, there are also reasons why monitoring will not prevent flipping in many cases.[169]

Possibly the most severe cost of monitoring is that it flays trust in the group. When individuals believe that other members in a group are trustworthy, for example, they are much less likely to defect.[170] Monitoring can cue defection by making disloyalty seem like the norm. It "may simultaneously reduce the trust that others have," and it "introduces an asymmetry which disposes of mutual trust and promotes instead power and resentment."[171] Monitoring therefore may be "self-defeating, for while it may enforce 'cooperation' in specific acts, it also increases the probability of treacherous ones: betrayal, defection, and the classic stab in the back."[172]

---

setting wage policies); John W. Pratt & Richard J. Zeckhauser, *Principals and Agents: An Overview*, *in* PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 1, 10 (John W. Pratt & Richard J. Zeckhauser eds., 1985) ("If motivation is particularly important and monitoring is costly, wages may be set above the amounts workers could earn elsewhere; the small chance of termination will then be a powerful incentive."). These solutions are expensive as well, and to the extent criminal firms use them, cost deterrence again comes into play.

167. Sykes, *supra* note 11, at 1248 ("Vicarious liability reduces the value to the principal of the agent's services by adding to the expected cost of hiring an agent or, equivalently, reducing the value of the agent's marginal product."). High monitoring costs may alternatively promote cost deterrence on the part of consumers. If the conspiracy sells illegal products, monitoring costs may be passed on in the form of higher prices for the product (be it narcotics, prostitution, or whatever). The higher price may deter some people from engaging in the conduct at all, and may induce others to moderate their level of activity.

168. *See infra* note 246.

169. *See* Langevoort, *supra* note 58, at 1573 (discussing studies showing that people overestimate their ability to predict how others will behave based on personal factors such as character as well as underestimate situational factors).

170. David de Cremer et al., *"The Less I Trust, the Less I Contribute (or Not)?" The Effects of Trust, Accountability and Self-Monitoring in Social Dilemmas*, 31 EUR. J. SOC. PSYCHOL. 93, 94-95, 103 (2001) (arguing that low levels of trust increase rates of defection and that people who expect trust will cooperate); *see also* Edward L. Glaeser et al., *Measuring Trust*, 115 Q.J. ECON. 811, 840 (2000) (reporting on an experimental study that found that "to determine whether someone is trusting, ask him about specific instances of past trusting behaviors," but "[t]o determine whether someone is trustworthy, ask him if he trusts others").

171. Gambetta, *supra* note 160, at 213, 220 (emphasis omitted).

172. *Id.* at 220. Kramer has also noted:

> [T]here is increasing evidence that [monitoring] systems can actually undermine trust and may even elicit the very behaviors they are intended to suppress or eliminate. . . . First, there is evidence that when people think their behavior is under the control of extrinsic motivators, intrinsic motivation may be reduced. Thus, surveillance may

Imaged with the Permission of Yale Law Journal

Workers have more motivation and loyalty when they believe that their organization treats them with respect.[173] Accordingly, conspiracy law's inducement to monitor does not simply enhance cost deterrence, but also prevents crime by creating fissures of trust within an organization. An organization that does not provide the same "license to act creatively—as trusted members of the group" is less likely to motivate its employees, and less likely to cement group identity.[174]

Finally, enforcement of sanctions for suspected disloyalty can hurt the firm. Evidence suggests that conspiracies adopt a Beckerian approach—decreasing the probability of enforcement and increasing the sanction (serious physical violence, including death) to conserve costs.[175] Payments to kill a (suspected) informant may be quite steep and such practices may fragment the relationship of trust within the group if the leader was seen as acting rashly or erroneously. Prospective employees, moreover, will fear

---

> undermine individuals' motivation to engage in the very behaviors such monitoring is intended to induce or ensure. For example, innocent employees who are subjected to compulsory polygraphs, drug testing, and other forms of mass screening designed to deter misbehavior may become less committed to internal standards of honesty and integrity in the workplace.

Kramer, *supra* note 163, at 591 (citation omitted); *see also* Lawrence E. Mitchell, *Trust and Team Production in Post-Capitalist Society*, 24 J. CORP. L. 869, 884 (1999) ("[M]onitoring creates a destructive atmosphere of distrust. Psychological evidence is clear that people who know that they are distrusted tend to behave in accordance with that perception."); *id.* at 887 ("[Monitoring] can only exacerbate the anxiety and lack of trust that exists among workers. These conditions are not conditions in which team (that is, cooperative) production is likely to flourish.").

173. Tom R. Tyler, *Why People Cooperate with Organizations: An Identity-Based Perspective*, *in* 21 RESEARCH IN ORGANIZATIONAL BEHAVIOR 201, 201 (Barry M. Staw & Robert I. Sutton eds., 1999) ("When people receive favorable identity-relevant information from membership in an organization they respond behaviorally by cooperating with the organization . . . [and] by developing internal values that lead them to voluntarily engage in such cooperative behaviors."); Tom Tyler et al., *Understanding Why the Justice of Group Procedures Matters: A Test of the Psychological Dynamics of the Group-Value Model*, 70 J. PERSONALITY & SOC. PSYCHOL. 913, 927 (1996) (similar).

174. HASLAM, *supra* note 24, at 113; *see also* Langevoort, *supra* note 12, at 98 (stating that, in corporate law, monitoring of employees can promote "mistrust" and "embedded mistrust . . . sends a signal that wrongdoing is expected to be commonplace . . . [which] breeds a cynicism that by itself can lead to a lower degree of firm-regarding behavior"); Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 259 (1999) ("Boomerang effects . . . appear in work on surveillance. Performance monitoring inhibited intrinsic motivation to perform a task if the surveillant revealed a lack of trust and controlling intentions . . . ."). Close monitoring may induce some employees to act with even greater precision and may possibly even promote trust in some criminal groups. If such monitoring promotes the efficiency of the criminal firm, it will occur irrespective of the sanction for group crime. It is likely, however, that such sanctions distort the behavior of the firm by providing extra inducements for close monitoring, and thereby deter individuals from joining the conspiracy in the first place.

175. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 184 (1968) (outlining such a strategy). As one FBI official wrote, "By experience, custom, and practice, organized crime's conspiratorial groups are usually very quick and effective in controlling and disciplining their members, associates, and victims. Therefore, organized crime participants are unlikely to disassociate themselves from the conspiracies . . . ." PHILCOX, *supra* note 55, at 6. To the extent a conspiracy punishes every defection with lethal force, however, marginal deterrence is undermined and those who defect are likely to give away everything.

Imaged with the Permission of Yale Law Journal

joining the firm.[176] Accordingly, even when law enforcement "loses" a source due to retaliation, the impact on the firm can still be great. Nevertheless, attempts to minimize the prospect of retaliation, such as the aforementioned witness protection program, will promote defection and seed further distrust.

b. *Compartmentalizing Information and Chilling Effects*

Conspiracy law also reduces the efficiency of criminal enterprises and combats group identity by creating incentives for members of organizations not to share information with each other. Information is closely held within the criminal firm in order to minimize the damage from a flipped witness (*compartmentalization*), and the group's members avoid communicating because it increases the probability of detection (*chilling effects*).

The more information someone knows, the greater the chance that that person can use it to obtain a better deal from prosecutors. Accordingly, members of a conspiracy have an incentive to hold back information from colleagues.[177] Yet compartmentalization of information hurts organizations: Because one side of an organization does not always know what the other side is doing, many of the efficiencies from group behavior are undermined. Firms cannot easily take advantage of either economies of scale or specialization of labor, for the firm is unable to act as a collective entity.[178] Because information is tightly held in the conspiracy, moreover, initiative and solutions to problems from unexpected sources within the firm are unlikely to materialize. Instead, compartmentalization will promote groupthink, further reducing efficiency.[179]

176. *See* Worchel, *supra* note 162, at 183 ("[E]xperience or knowledge about the other person indicating a general propensity to be helpful or equitable in his or her relationship would tend to encourage the initial exposure [between two individuals]. One would be reluctant to risk being hurt if the other were known to be self-oriented or exploitative."); *cf.* Pratt & Zeckhauser, *supra* note 166, at 12-13 (arguing that lawful businesses employ high penalties for defection because the threat "is rarely carried out" and create "little deadweight loss because the probability that the penalty is paid is small").

177. *See* REUTER, *supra* note 145, at 147 ("Agents, wishing to control the dissemination of knowledge about their participation in illegal enterprises, can demand more autonomy so as to minimize the number of persons within the enterprise aware of their participation. This reduces the effectiveness of managerial control."); Annelise Anderson, *Organised Crime, Mafia and Governments*, *in* THE ECONOMICS OF ORGANISED CRIME, *supra* note 166, at 33, 45 (similar).

178. Specialization can be counterproductive without proper coordination. *See supra* note 76. Anyone who has worked with the intelligence community recognizes this cost; the classified information system, while necessary, decreases innovation because information is shared among a small and fairly homogenous set of people.

179. Janis found that groupthink was more likely to occur when the groups members (1) are insulated from the outside world, (2) lack a method for making decisions and resolving disputes, (3) engage in "defensive avoidance"—when there is some external threat and they perceive that their decision is already very good, (4) are not encouraged to act autonomously, (5) are prevented from consulting with outside experts or receiving information from people not in the group, and

Imaged with the Permission of Yale Law Journal

In addition, compartmentalization diminishes a key benefit of working in groups—information storage and retrieval—a particularly important benefit for groups that avoid using written records.[180] Flipping forces information to be more closely held, and thereby subject to less "storage" and slower retrieval. Holding information in this way, in turn, will fragment trust even further. The sharing of information is crucial to creating group identity and to motivating members.[181] Creating information-haves and information-have-nots strains a group's identity.

In addition to compartmentalization, discussion about illegal and legal acts is chilled by a legal regime that attempts to listen to conversations among conspirators and watches the streets for their joint presence. Law enforcement strategies, such as physical surveillance of hot spots of crime, wiretaps, and prohibitions on mail and wire fraud, not only serve the ex post goal of providing evidence for use in a trial, but ex ante they also disrupt communications between the players. Because members of a conspiracy fear being overheard or seen together, they do not communicate as much as they would otherwise, and this lack of communication reduces trust and increases friction.[182] The overt act requirement for conspiracy, which may be satisfied by a communication from one conspirator to another, may function as a tax on discussion, and can be justified by reducing opportunities for trust to develop and for group identity to grow.

---

(6) have a stable composition. *See* IRVING L. JANIS & LEON MANN, DECISION MAKING 131, 231-64 (1977). Conspiracy law works along each of these six dimensions to encourage groupthink in that it (1) isolates members of the group from society; (2) strips away methods of legal dispute resolution; (3) establishes an external threat; (4) creates incentives to centralize control and diminish individual decisionmaking; (5) raises the stakes of consulting outsiders significantly; and (6) destroys the employment relationships typically associated with the marketplace, so that employees cannot be hired and fired easily.

180. Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687, 695 (1996) (describing findings that groups store and retrieve information more easily than individuals).

181. Alexander Haslam notes:

> [T]he sharing of information to which all group members have access may have a positive motivational impact upon groups—making them feel committed and self-assured. . . . [S]haring common information is essential for a shared sense of self to emerge amongst group members. . . . [T]he process of sharing common information derives from and instantiates a sense of "we-ness" . . . .

HASLAM, *supra* note 24, at 134 (citations omitted); *see also* Kramer, *supra* note 163, at 588 ("[S]ocial categorization may heighten distrust and suspicion between individuals from different groups within an organization . . . [and it] may create a climate of presumptive distrust between groups within an organization.").

182. *See* Good, *supra* note 158, at 36 ("[T]he greater the amount of communication there is between the players in a wide variety of games, the greater the likelihood of there being a mutually beneficial outcome."); *see also id.* at 44-45 (observing that cooperation increases with communication); Edward H. Lorenz, *Neither Friends nor Strangers: Informal Networks of Subcontracting in French Industry*, *in* TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS, *supra* note 158, at 194, 207 (finding communication critical to trust among French subcontractors); TURNER ET AL., *supra* note 26, at 32-33 (summarizing the findings that cooperation in multiplayer prisoners' dilemmas is increased by "the extent of communication and contact between players").

Imaged with the Permission of Yale Law Journal

The emphasis on visible indicia of trust, moreover, explains why government publicity about a few defectors can sow distrust more generally among criminal firms.

More generally, group identity is most likely to emerge in the context of free-flowing discussion among members.[183] Accordingly, if conspiracy law can reduce the frequency of discussion by penalizing agreements and overt acts, it can weaken the identity of the group. Indeed, one of the most significant reasons why groups polarize concerns group discussion.[184] As a result, even if criminal law does not catch perpetrators red-handed, its surveillance of conspiracies and criminalization of overt acts may reduce group identity. These government strategies require criminal groups to eliminate most discussion of their options and strategy, to have such discussions among only a limited few, and to have these discussions underground. Part III will explore other ways to seed distrust within criminal enterprises, such as by publicizing instances of defection, targeting a conspiracy's payments to loyal individuals, financially rewarding disloyal conspirators, and increasing the cost of cooperating with a criminal group.

2. *Destabilizing Group Identity*

Perhaps the most pernicious aspect of a conspiracy is the way it takes advantage of group identity. Group identity promotes polarization, increases performance, and reduces defection. Conspiracy law, as we have seen, creates a series of structural incentives to minimize the formation and persistence of group identity. Monitoring, compartmentalization, and

183. HASLAM, *supra* note 24, at 53-55; *id.* at 133-34 ("[C]ommunication with these others may become necessary to define and coordinate the content and form of that social categorical self. In this way, communication is an essential path to social self-knowledge and to self-oriented collective behaviour." (emphasis omitted)); *see also* Paul G. Bain et al., *The Innovation Imperative: The Relationships Between Team Climate, Innovation, and Performance in Research and Development Teams*, 32 SMALL GROUP RES. 55, 56 (2001) (finding that open communication is critical to creative, well-functioning teams).

184. *See* TURNER ET AL., *supra* note 26, at 32-33 (summarizing the findings that cooperation in multiplayer prisoners' dilemmas is increased by "the extent of communication and contact between players"); Brauer et al., *supra* note 33, at 1020-21 (reporting on an empirical study that showed that repeated discussion leads to polarization); Sunstein, *supra* note 13, at 89 (stating that, without discussion, the shift toward risk "is only about half as large as the shift produced by discussion"). Prominent explanations for polarization all focus considerably on group discussion. Social comparison theory states that people seek approval from other members of the group, and therefore polarize in the direction of the other members. *See* TURNER ET AL., *supra* note 26, at 144-47 (providing a description of the theory). Persuasive argumentation theory claims that the group follows whichever arguments appear to be the most powerful. The group functions as an "echo chamber"—where individuals' previous positions become solidified and strengthened through discussion. *See* BROWN, *supra* note 32, at 200-26; HASLAM, *supra* note 24, at 153-73. A newer explanation claims that those who hold the riskiest position in groups are likely to lead them. *See* Daan van Knippenberg & Barbara van Knippenberg, *Who Takes the Lead in Risky Decision Making? Effects of Group Members' Risk Preferences and Prototypicality*, 83 ORG. BEHAV. & HUM. DECISION PROCESSES 213, 221, 229 (2000).

Imaged with the Permission of Yale Law Journal

chilling are some of these methods; later Subsections will consider others, such as stratifying compensation within the firm. Apart from incentives, however, the *process* of securing a defendant's cooperation can decimate group identity.

To understand this procedural point, return to Akerlof and Kranton's observation that individuals in a group act to restore identity when identity is threatened.[185] From this perspective, offering sentencing rewards to defendants can be counterproductive by provoking backlash and resentment. As law school graduates schooled in the prisoners' dilemma learn the hard way, sentencing rewards do not always induce flipping. One reason why is that cooperation with the government involves breaking identity with a group and acting in ways that are contrary to its interests. The identity view thus explains a phenomenon I encountered while working in the Justice Department—that when attempting to flip someone, the way to do it isn't as much to talk about their sentence payoffs, but to offer them a "new life," a mechanism to obtain "salvation," and a "way out."[186] And yet this is not the way many scholars understand flipping. For example, Graham Hughes writes that "most cooperation agreements would be difficult to fit into any concept of repentance or rehabilitation. These are agreements to sell a commodity—knowledge."[187] But an agreement to cooperate is far more than a purchase of information. To get people to cooperate, prosecutors often talk in religious terms—emphasizing that the first steps of a moral life start by telling the truth. Information extraction should not cloud this valuable function of cooperation agreements. Indeed, by emphasizing the role of repentance and salvation, cooperators are more likely to be reliable and to tell the truth. In the cold language of purchase-of-information, by contrast, a defendant-witness is more likely to tell a prosecutor what he wants to hear. An effective flipping strategy, therefore, cannot emphasize only information extraction; it must also stress redemption.[188]

185. *See supra* text accompanying note 39.

186. *See, e.g.*, Interview with Mary Jo White, Former United States Attorney, Southern District of New York, in New Haven, Conn. (Mar. 27, 2002) ("Often times, you can flip someone by appealing to Team America. Many defendants are sick of a life of crime, or are looking for a new path. Sentencing rewards of course matter for some people too, but it isn't as if there is a single formula.").

187. Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 13 (1992).

188. This idea also has important consequences for the treatment of defendants by law enforcement. If police and prosecutors in the interrogation room paint a negative identity of a potential cooperator, then they reaffirm that individual's group identity as a criminal conspirator. Instead, police and prosecutors need to appeal to the other identity within a person, an identity of goodness. In this respect, if police are suspected of being racists or not part of the community from which the criminal is drawn, then it will be very difficult to appeal to this latter identity of goodness because they do not have the credibility necessary to talk about giving people a "way out."

Imaged with the Permission of Yale Law Journal

Put differently, the argument here is that it is not simply the legal threat and calculation of odds that induce someone to flip, but often a shift in their identity. The simple descriptions of flipping, in both the prisoners' dilemma and on television, do not capture this dynamic. This is, ultimately, a story about government actors manipulating the identity of people. It does not involve massive government largesse in an effort to change the identities of everyone all at once (which is what the somewhat utopian work on social norms in criminal law scholarship has advocated[189])—but rather localized prosecutors and detectives doing so. In the group-crime setting, law does not need to go so far as to change everyone's *norms*; rather, law enforcement can undertake the far easier task of changing the way in which criminals view themselves. If individuals perceive themselves as promoting social good, they are more likely to act that way.

The architecture of federal sentencing can facilitate this shift in identity in significant and underappreciated ways. A key way that prosecutors encourage a defendant to flip, used thousands of times each year, is to hold out the promise that they will file a section 5K1.1 motion asking a judge to impose a lower sentence due to a defendant's "substantial assistance."[190] Unlike all other sentencing departures, the government must approve a section 5K motion and then submit a *request* to the court. This odd scheme, whereby a judge must approve a prosecutor's motion for departure, may be explained by identity shift. Because a defendant may need to convince not only a prosecutor, but also a judge, of her willingness to become a law-abider, it can further the transformation of identity.[191] The ritualized formality of the proceeding, which takes place in a somber courtroom with

189. *E.g.*, Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1. As Dorothea Kübler has recently explained, some norms are "bandwagon" ones that are difficult to change once they become entrenched, so that it may be very difficult once an organization inculcates a strong norm against defection to induce cooperation. *See* Dorothea Kübler, *On the Regulation of Social Norms*, 17 J.L. ECON. & ORG. 449, 454, 470 (2001).

190. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998) ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."); *see also* United States v. Mariano, 983 F.2d 1150, 1155 (1st Cir. 1993) (stating that the section 5K departure "provides defendants, *ex ante*, with an incentive to cooperate in the administration of justice"). Prosecutors in 1996 filed section 5K1.1 motions in 19.2% of all federal cases. Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 577 n.50 (1999); *see also id.* at 577 (stating that "substantial assistance is also far and away the most common ground for departure, with twice as many cases involving cooperation as all the other factors put together").

191. While judges no doubt look to it, a propensity to obey the law is not a formal element of section 5K1.1, in contrast to other departures, such as section 3E1.1's departure for acceptance of responsibility. *See* United States v. Craven, 239 F.3d 91, 99-100 (1st Cir. 2001) (noting that "presentence rehabilitation . . . can be factored adequately into the sentencing equation by an acceptance-of-responsibility credit" and that a change in attitude is the touchstone of rehabilitation). One way judges subtly look to propensity in section 5K settings is to inquire deeply about whether the defendant was absolutely forthright in the cooperation process.

Imaged with the Permission of Yale Law Journal

a judge presiding, marks the shift in identity away from being a member of a lawbreaking group toward being a valued member of law-abiding society. This might make some deals harder to strike because defendants fear the uncertainty of what a judge will do; yet the system not only seeks to extract information, but also to transform identity.

The persistence of group identity also provides an argument in favor of providing only modest sentencing reductions for cooperators. If the premium for cooperation is too great, it may clarify to the potential cooperator exactly how much of the cooperation arrangement is motivated by the individual's self-interest.[192] Without some time served in prison, the individual's identity is unlikely to be destabilized. This also suggests the need for a credible promise of rehabilitation and the chance for a fresh start. Otherwise individuals will lack the fundamental shift in identity necessary to feel that they are not merely "passing" in law-abiding society.[193] Prosecutors could bring identity shift into more explicit focus. For example, in deciding what sentencing reduction to propose, they could factor into the calculus the likelihood that a defendant's identity could be altered through cooperation. Plea agreements could also state specifically that they become void if the defendant engages in illegal conduct of any sort.[194] And prosecutors could permit joint flipping arrangements that benefit more than one member of the group.[195] The argument above also provides a new justification for the witness protection program, which literally forces a shift in identity and monitors compliance to ensure that a person does not revert back to lawbreaking.[196]

---

192. Appealing only to an individual's self-interest is likely to be unproductive for members who bear strong group identities because it is so destabilizing to their sense of self. For those individuals, prosecutors and detectives may resort to strategies that emphasize how a potential witness's cooperation is actually good for the members of the group. For example, they could point to rival gang activity and the risks of violence or allude to an undercover operation against the group that may turn violent unless action is taken to break up the syndicate.

193. For a rich illustration of some of the complexities this point raises, see Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

194. *See* Rowland, *supra* note 80, at 686 (discussing the clause). To the extent additional inducements are necessary to achieve cooperation, some of the inducements might be financial. Monetary rewards for cooperation may be incommensurate with jail time (in that a witness does not feel he is "trading" one year of his sentence for one year of time for his co-conspirator and because the government foots the bill for the testimony).

195. Studies on group identity show that it can form at a level apart from the entire entity, such as colleagues in a firm's working group. HASLAM, *supra* note 24, at 110 (describing studies); T.E. Becker, *Foci and Bases of Commitment: Are They Worth Making?*, 35 ACAD. MGMT. J. 232 (1992) (showing narrower identity formation); T.E. Becker & R.S. Billings, *Profiles of Commitment: An Empirical Test*, 14 J. ORGANISATIONAL BEHAV. 177 (1993) (similar). A criminal might not want to cooperate with the government because doing so places his friends in jeopardy, even though he might not have the same loyalty to the entire organization. For this reason, permitting two individuals to "jointly" flip or finding other ways to bring critical people into the cooperation regime will increase the amount of information prosecutors will have.

196. The importance of fracturing group identity is underscored by an article that coincidentally appeared the same month and in the same journal as the groundbreaking Akerlof and Kranton paper. Steven Levitt and Sudhir Venkatesh studied the financial arrangements of a

Imaged with the Permission of Yale Law Journal

3. *Exacerbating Team-Production Problems*

Most groups, including criminal ones, face the risk that their members will shirk dangerous duties. The team-production problem, to which corporate law scholars are devoting increasing attention, may therefore yield significant payoffs for understanding conspiracy. The problem arises when there exists "production in which 1) several types of resources are used . . . 2) the product is not a sum of separable outputs of each cooperating resource . . . [and] 3) not all resources used in team production belong to one person."[197] Because each additional criminal act can increase an individual's likelihood of being caught, and involves the personal expenditure of resources, a conspirator has an incentive to refrain from it and to free-ride off of the contributions of others. Conspirators may similarly shirk the performance of acts that enhance their syndicate's reputation, particularly when their contributions are not discernable to other members.

The inability to write contracts exacerbates these production problems because the regime cannot reliably specify what the distribution of profits will be. Any agreement made can be broken, and any agreement will be infected with inefficiencies anyway. If the profit-sharing arrangement is agreed to ex ante, each member of the conspiracy will have an incentive to shirk because the member will get the same share regardless of how hard she works. By contrast, if the arrangement is discerned ex post, it will invite rent-seeking behavior and generate squabbling over the take afterwards.[198]

---

large criminal gang. Because one of the leaders kept detailed financial records and agreed to cooperate with the authors, they were able to understand much of the way it operated. They found that "[s]treet-level sellers appear to earn roughly the minimum wage" and surmised that the "primary economic motivation for low-level gang members appears to be the possibility of rising up through the hierarchy." Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang's Finances*, 115 Q.J. ECON. 755, 757 (2000). But once the substantial risk of death from being a "foot soldier" is factored into the equation, the authors found it difficult to justify their decisions on economic grounds. *Id.* at 786-87. But the group identity perspective finds these decisions much easier to understand. Such decisions are reactions to a world in which employment opportunities are perceived to be limited, and in which a gang provides comfort and social support. Gang members may live with, indeed perpetrate, high levels of violence, but that behavior is consistent with reinforcing group identity.

Levitt and Venkatesh's paper, while providing extraordinarily useful data, does not provide much in the way of policy prescriptions. The suggestions—providing legitimate jobs for youths, enforcing laws against drug purchasers, and legalizing drugs—are familiar. *Id.* at 787. Incorporating group identity, however, generates many more ideas. Consider, for example, Levitt and Venkatesh's finding that gangs spent thousands of dollars in payments to families of deceased members. *Id.* at 769. A perspective rooted in identity explains why: The payment structure to the families of victims reaffirms the group-centered nature of the enterprise, an enterprise in which families are cared for and the dead are mourned. Law can attack these insurance agreements quite easily. *See infra* text accompanying notes 281-283.

197. Alchian & Demsetz, *supra* note 76, at 779. *See generally* Bengt Holmstrom, *Moral Hazard in Teams*, 13 BELL J. ECON. 324 (1982) (outlining the problem).

198. *See, e.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 24 J. CORP. L. 751, 752-53 (1999); Holmstrom, *supra* note 197, at 325-28 (explaining why

Imaged with the Permission of Yale Law Journal

These team-production problems are enhanced by the fact that in most conspiracies, the members wear two hats—they act as productive members of the conspiracy and also as potential monitors. Accordingly, the more law can force them to monitor each other (here, not only for defection, but also for productivity), the less time and resources they themselves have to engage in productive activity.[199] In short, a goal of criminal law should be to enhance the team-production problem. To do so, law should make it difficult to adopt the solutions to the problem that corporate law scholars have uncovered.

One solution to the team-production difficulty is to designate a team member as a "monitor" that pays employees fixed wages.[200] The monitor receives whatever is left after the wages, thus providing the monitor with an incentive to guard against shirking. Narcotics conspiracies have a somewhat different method of monitoring: They divide inputs by providing commissions for each sale. Law might punish such commission-based arrangements with special sentencing enhancements. By minimizing these arrangements, criminal law can generate more squabbling over individual effort and how much a particular employee should be paid, contributing to a further drop in productivity.

A second, closely related, solution is to use a hierarchical monitor to allocate financial rewards ex post.[201] An ex ante determination of profit division invites shirking, so the monitor's ex post solution can be the best one from the standpoint of the group. Because this is a plausible modus operandi, law might want to penalize such monitoring through sentencing enhancements on leaders.[202] Without monitors, each individual must watch the others for shirking. By reducing hierarchy, moreover, other inefficiencies are created, such as increasing the cost of decisionmaking and inviting possible holdouts.

A third solution to the team-production problem is to stimulate a group identity that detests shirking. Some analysis of gangs suggests that leaders try to do this.[203] For this reason, the law's ability to destabilize group

---

shirking is optimal once shares are specified in advance); *see also* EASTERBROOK & FISCHEL, *supra* note 66, at 9 ("So long as no monitor can determine what each member's marginal contribution to the team's output is, each member will be less than a perfectly faithful representative of the interests of the team . . . .").

199. This is the reverse of a problem identified by Talley in corporate law. *See* Talley, *supra* note 10, at 1001.

200. Alchian & Demsetz, *supra* note 76, at 781-83.

201. *See* Blair & Stout, *supra* note 198, at 767-71 (putting forth such a proposal in the corporate context).

202. *See infra* text accompanying notes 215-228.

203. *E.g.*, MARTIN SANCHEZ JANKOWSKI, ISLANDS IN THE STREET: GANGS AND AMERICAN URBAN SOCIETY 114 (1991) ("The leadership of the gang also encourages members to invest their time in collective economic projects by nurturing the social pressures to participate. Here, the leadership reinforces the ideology of group commitment, that every member must give of himself to the brothers of his gang.").

Imaged with the Permission of Yale Law Journal

identity will have a significant effect on team production. Explicit moderate sentencing rewards for conspirators who can prove they shirked their duties to the conspiracy may prove helpful as well.[204]

4. *Targeting Stakeholders*

The problem of conspiratorial intent is familiar to any student of criminal law: What distinguishes the seller of goods (such as the saleswoman who sells lingerie to a known prostitute) from a criminal? The test offered by Judge Learned Hand provides one answer:

> It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided.[205]

Hand's words are not simply about profiting from a criminal act; they also center on *identity*, about an individual taking on a group identity rather than a solitary one—"promote *their* venture *himself*" so that the venture is "his own." Merely focusing on the financial details misses this, for Hand's test is not just about brute economics, but also about the subtle question of whether the individual is advancing collective interests.

Nevertheless, Hand's formulation has received some rough treatment in the past half-century.[206] This is a mistake. Corporate law teaches us that those who have residual claims are more likely to care about the overall

204. Instead of trying to encourage shirking, criminal law could alternatively encourage inputs to be less divisible to exacerbate team-production problems. In one respect, individualistic criminal law already does this by encouraging crimes of diffusion. *See supra* text accompanying note 74. Conspiracy law therefore could be said to be at odds with the team-production problem, in that it eliminates an incentive to pool inputs. Nevertheless, incentives to pool remain under conspiracy law because doing so may reduce the probability of detection (even if it does not reduce the sanction). An individual who commits part of a crime will be less likely to be caught than someone who completes the entire crime. As such, the lost chance to exacerbate team-production problems is not overwhelming.

205. United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205, 210 (1940) (affirming the judgment below because the defendants did not have any knowledge of the conspiracy).

206. The Supreme Court in *Falcone* disregarded it, focusing only on whether the defendants had knowledge of the conspiracy. 311 U.S. at 210-11. However, two years later the Court began resurrecting part of the stake test, saying that it "is not irrelevant" to proof of criminal intent, though it "may not be essential." Direct Sales Co. v. United States, 319 U.S. 703, 713 (1943).

Imaged with the Permission of Yale Law Journal

success of the venture, and will accordingly demand more control over the organization.[207] To the extent that people have a stake in the venture, trust is increased and defection is minimized. This provides a powerful account for why conspiracy law should reach stakeholders and why Justice Holmes's early formulation of conspiracy as a "partnership in criminal purposes"[208] has significant promise.

Recent psychological findings also confirm that joint profit arrangements are likely to contribute to group identity. Consider one study in which subjects were asked to make paper chains. They worked alone in the first part of the experiment and were divided into three groups in its second part. Group A was told that the study was measuring the performance of the group as a whole, Group B was called a "work-team" and led to believe that they would be working together in the future, and Group C was told that they would receive a $20 bonus if the group's performance exceeded the average level of performance on the task. Performance was highest in the third group, where a bonus was awarded for group performance, and shirking was highest in the first group.[209] In a second paper-chain experiment, one group (*g*) was told that the study was measuring total group performance and that they would receive a personal cash reward if their personal contribution exceeded certain criteria. Three other groups were told that each group member would receive the same cash reward if (a) the best person's performance exceeded certain criteria, (b) the worst person's performance exceeded the criteria, or (c) if the average of the group exceeded the criteria. The study found that the existence of the reward led to enhanced performance in all four groups, but that productivity in the first group (*g*) was lower than it was in the other three.[210] Significantly, even though an individual had more control over the reward in the first circumstance, it was in the latter three groups that performance was higher!

These results reveal that the existence of a group reward made the group's identity salient and enhanced performance. Questionnaires given to the participants found that the latter three groups had a more robust social identity than did the first and that the latter three "perceived themselves as

207. WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 22 (1996). Of course, some commission-based strategies can reduce agency problems, *see, e.g.*, Steven C. Michael & Hollie J. Moore, *Returns to Franchising*, 2 J. CORP. FIN. 133, 134-37 (1995) (discussing this point in the context of franchising arrangements), but control remains a stronger inducement.

208. United States v. Kissel, 218 U.S. 601, 608 (1910). Indeed, Edward Lorenz's study of French subcontractors revealed that one of the best ways to increase trust is to develop partnerships. Lorenz, *supra* note 182, at 194, 209.

209. Stephen Worchel, *A Developmental View of the Search for Group Identity*, *in* S. WORCHEL ET AL., SOCIAL IDENTITY: INTERNATIONAL PERSPECTIVES 53, 53-74 (1998).

210. HASLAM, *supra* note 24, at 264-65. The other three groups did not have significant differences in performance.

Imaged with the Permission of Yale Law Journal

more of a group, liked each other more, and had a stronger desire to continue working together in the future."[211] This finding suggests that when individuals have stakes in the success of the enterprise, they are more likely to share an identity that enhances their performance. In this sense, Hand's test is a brilliant attempt to attack the foundations of social identity: Those groups that reward their members out of collective profits are similar to the latter three groups and the most likely to develop a salient social identity.[212]

This research also suggests that the offering of individual rewards to conspirators in exchange for information can splinter group identity. Conspiracy law encourages group members to focus on their individual goals instead of their collective ones by highlighting how each may pay the price for disloyalty by someone else through flipping arrangements.[213] Part III builds on these insights by suggesting other individualistic rewards for conspirators.

5. *Promoting Cost Deterrence and Attacking Leadership*

We have seen how conspiracy law permits prosecutors to extract information from one conspirator and use it to develop criminal cases against others. This Subsection uses cost deterrence to present an argument for a second complementary relationship. It explains how even if the law cannot threaten high-level leaders, it can deter them by attacking low-level street operators. This account, however, does not depend on cooperation agreements.

In the context of a single wrongdoer, an offender weighs an increase in the level of punishment against the expected gain produced by a criminal act. In some circumstances, an increase in expected punishment will not reduce those gains. In others, the increase in punishment might induce criminals to spend more to avoid detection (better thieves' tools, greater

211. *Id.* at 265. Diane Mackie has also found that group polarization is more likely when the members in a group focus on a shared goal as opposed to an individual one. *See* Diane M. Mackie, *Social Identification Effects in Group Polarization*, 50 J. PERSONALITY & SOC. PSYCHOL. 720, 725 (1986) (finding polarization when the rules gave the winning group a prize but not when the rules specified that the best group member would receive one).

212. *Cf.* Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 352 (1985) (arguing that a sharing model of law firm partner compensation is often superior because it "captures the gains from diversification and avoids the divergence between profit maximization for the firm and profit maximization for the individual partner that accompanies, to a greater or lesser extent, any productivity formula").

213. Concerns about stakeholders do not exactly mirror those regarding information extraction. A stakeholder may not have as much information as a nonstakeholder, so focusing on stakeholders will result in a loss of information for law enforcement. Yet stakeholders pose other harms to society by cementing group identity. Conspiracy law attempts to balance these goals by focusing on both the omission of not providing information and the commission of the agreement (with the intent behind the agreement being determined in part by whether the person is a stakeholder). But there are costs to this balancing scheme.

Imaged with the Permission of Yale Law Journal

information, etc.) and reduce the gain from crime. In the group-crime context, by contrast, cost deterrence is always at play. Any increase in punishment will affect the negotiating positions of each party to the transaction. When the expected punishment for some members increases, their gain must increase to induce commission of criminal acts.[214] Increases in the levels of punishment for any member therefore have cost-deterrence implications for others in the group. For example, if the penalty on street-level drug dealers is doubled, it reduces the gain of managers of drug organizations who must then pay their dealers more. The loss in gain at the top, in turn, reduces the incentives of managers to be in the business in the first place.

The beauty of this point is that it suggests that deterrence can work by reaching any member of the criminal conspiracy, instead of only top-level offenders. If these top-level offenders are difficult to punish, either because they are insulated from the decisionmaking process or are kept physically away from the reach of law enforcement, cost deterrence suggests another avenue to prevent criminal activity. An increase in the punishment for any member of the group will produce cost deterrence for every one of its members. Of course, money is not the only reason people conspire, but low wages can become a deterrent to people agreeing to commit a crime in the first place (before social identity takes root) and can prompt some of those who have joined to shirk their duties.

The theoretical underpinnings of cost deterrence, however, call into question schemes that enhance penalties for leaders. The Coase Theorem predicts that in the absence of transaction costs, where liability is assigned will not change the efficiency of the outcome. In the tort context, this rule suggests that regardless of where liability is placed—either on the agent or on the principal—an efficient result will be reached.[215] Likewise, it could be said that it does not matter whether liability is placed on leaders or subordinates of conspiracies because only the total level of punishment alters group behavior.[216] The legal system's allocation of punishments will be modified by side payments within the group, so that those who take greater legal risks will receive additional compensation.

---

214. This analysis flows naturally from the vicarious liability insight that when agents have wealth constraints, greater liability should be imposed on the principal in order to calibrate optimally relations between principal and agent in their internal contracting. *See* Alan O. Sykes, *An Efficiency Analysis of Vicarious Liability Under the Law of Agency*, 91 YALE L.J. 168 (1981).

215. Kornhauser, *supra* note 11, at 1347-48; Sykes, *supra* note 11, at 1257-58.

216. *See, e.g.*, A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45, 64 (2000) ("[T]he particular allocation of sanctions may not matter when, as would be the natural presumption, the principal and the agent can reallocate sanctions through their own contract."); Roberta Romano, *Theory of the Firm and Corporate Sentencing: Comment on Baysinger and Macey*, 71 B.U. L. REV. 377, 377 (1991) ("The Coase theorem suggests that the same efficient outcome will obtain whether liability is placed on the individual or the firm.").

Imaged with the Permission of Yale Law Journal

But in the course of emphasizing side payments, this Coasean analysis misses the way in which differential pay alters group dynamics. In particular, leaders who take higher wages are likely to destabilize group identity. Study after study reveals that for a leader to be successful and for a collective identity to emerge, a leader must be perceived as fair.[217] As an old French politician remarked of his supporters, "I must follow them; I am their leader."[218] J.P. Morgan once stated that "[v]ery high salaries . . . disrupt the team [and] quench[] any willingness to say 'we' and to exert oneself except in one's own immediate self-interest."[219] An exhaustive review of the literature by Alexander Haslam led him to conclude that "pay structures that are perceived to differentiate unfairly between leaders and followers (and which create a sense of 'us' and 'them') will undermine leadership and group productivity."[220] Viewed this way, singling out leaders for special punishment does not only deter leadership, it also destabilizes group identity.

An important feature of this system is that it works even if conventional deterrence is failing. That is, even if the leadership enhancement does not provide enough of an incentive for an individual to avoid a senior position, its existence will alter compensation differentials within the firm. When such differentials are large and known, they can destroy group identity or prevent such an identity from forming in the first place. As such, the Coasean argument does not prove that leadership enhancements fail to prevent crime; rather, it simply explains that the path of prevention can be complicated. Again, deterrence comes in many forms, and legal risks are just one. Here, crime is prevented by adjusting income within the firm through a threatened penalty; the adjustment has psychological repercussions on the group that reduce criminal activity.

In this respect, consider section 3B of the Sentencing Guidelines. That provision levies a four-level enhancement—approximately forty percent—on an organizer or leader with five or more participants or a group that is "otherwise extensive."[221] One could justify such rules on traditional

217. *See* HASLAM, *supra* note 24, at 66-67 (describing studies); E.P. HOLLANDER, LEADERS, GROUPS, AND INFLUENCE 231 (1964) ("[I]t is therefore important that the leader, by his behavior, manifest a loyalty to the needs and aspirations of group members."); Mario von Cranach, *Leadership as a Function of Group Action*, *in* CHANGING CONCEPTIONS OF LEADERSHIP 115, 128 (C.F. Graumann & Serge Moscovici eds., 1986).

218. HASLAM, *supra* note 24, at 66 (quoting Alexander Ledru-Rollin).

219. *Id.* at 83.

220. *Id.* at 304. Conversely, such enhancements might provide a rationale for high payments to leaders. Given most people's inability to empathize, and informational asymmetries between leaders and other group members about sanctions, this is an unlikely possibility (although empirical evidence would be illuminating). This is a circumstance where widespread knowledge about the law might actually reduce deterrence.

221. U.S. SENTENCING GUIDELINES MANUAL § 3B1.1(a) (1998). Under this guideline, managers or supervisors receive a three-level enhancement, and an organizer, leader, manager, or supervisor will receive a two-level enhancement if the organization lacks the five participants and

Imaged with the Permission of Yale Law Journal

accounts: such as that leaders are more culpable,[222] or the need for marginal deterrence to becoming a leader.[223] But there is more to the story. Section 3B forces leaders to extract more profit to compensate for extra risk, and that profit must be squeezed from somewhere. The two obvious places are subordinates in the criminal enterprise and customers. If the leader tries to pass off the costs to customers, however, that has cost-deterrence implications of its own. The extra price may scare off new customers, while encouraging existing customers to reduce the level of their criminal activity. If leaders instead reduce the gains of subordinates, it may induce some subordinates to leave the enterprise, posing many risks (from drawing in law enforcement to helping rival organizations). As such, leaders may prefer to handle an increase in punishment by reducing the gain for new entrants to the conspiracy. But that strategy, too, has drawbacks because it will make it more difficult to attract skilled and loyal employees.[224] Leaders who take too much money from subordinates might fracture the identity of the group, thereby decreasing its collective benefits and also raising the probability of defection.[225]

---

is not "otherwise extensive." *Id.* § 3B1.1(b)-(c). The focus on five is somewhat odd, in that it creates a cliff effect that encourages people to work in groups of four. It is even odder when one considers that the sentencing reductions for minor players do not focus on size at all—so that one receives the same reduction whether someone is a minor player in a conspiracy of one hundred or one in a conspiracy of three.

222. Consider Judge Posner's view:

> Anyone who agrees to join a criminal undertaking is a conspirator, and he is liable for all the criminal acts of the conspiracy that are foreseeable to him, regardless of how large or small his own role is. The result is that a minor participant in a major conspiracy is potentially subject to very severe punishment. One purpose of the discounting scheme in section 2B1.2 [sic] of the sentencing guidelines is to reduce the rigidity of this punishment scheme by differentiating the liability of the major and minor participants.

United States v. Almanza, 225 F.3d 845, 846 (7th Cir. 2000) (citations omitted); *see also* United States v. Ruelas, 106 F.3d 1416, 1419 (9th Cir. 1997) (finding that downward mitigation under section 3B1.2 depends on relative culpability).

223. Judge Easterbrook, for example, has observed that "giving chauffeurs the same punishment as bigwigs . . . reduces the marginal penalty for *being* a bigwig (although the chiefs do get separate enhancements)." United States v. Burnett, 66 F.3d 137, 140 (7th Cir. 1995).

224. Some empirical evidence suggests that "[t]he gang leader earns 10-20 times more than the average foot soldier." Levitt & Venkatesh, *supra* note 196, at 774; *see also* PADILLA, *supra* note 44, at 170 (stating that street-level employment "yields only modest wages" and "mere survival income"). This profit structure might be the result of penalties against leaders. Alternatively, they may reflect differences in probabilities of detection: If leaders are more likely to get caught, they will demand higher pay. So, too, with followers. These mechanisms promote cost deterrence, and may interfere with group identity.

225. When leaders are not able to pass on the costs of the increased sanction, there are other reasons to target leadership. Studies of gangs show that the action and disposition of a gang is typically due to the character of its leader. *See* LEWIS YABLONSKY, THE VIOLENT GANG 151-56 (1962). The most successful leaders are those who cement group identity, what some have termed "entrepreneurs of identity." HASLAM, *supra* note 24, at 63, 69. By minimizing the returns to leadership, section 3B reduces the marketplace of successful leaders and thereby diminishes groups' cohesiveness and effectiveness.

Imaged with the Permission of Yale Law Journal

Section 3B also greatly reduces sentences for minor players.[226] As a result, the group's fortunes do not rise and fall together in equal ways, and this divergence can lead to additional cooperation. Because the designation of whether someone is a minor, minimal, or major player is quite vague,[227] agreements between conspirators are more difficult to strike (returning to Blackstone's point), and individuals may flip earlier than they would otherwise, in hopes of securing a lower designation. From this perspective, *reducing* the length of the sanction for minor participants may actually promote deterrence by fragmenting group identity and by increasing precontractual uncertainty between the players if there is substantial variation in who receives the departure. Of course, these sentencing departures may have confounding deterrence effects that overwhelm this result, but the story is more complicated than the formula from the individualistic literature that raising sanctions increases deterrence.[228]

6. *Reversing Intellectual Property Law*

Conspiracies benefit from the creation of brand identity in several ways. As those familiar with *The Princess Bride* know, a group of outlaws can develop a reputation for toughness to lubricate dealings with the outside world.[229] A drug purchaser, for example, need not know the identity of every dealer in a firm; the reputation of the organization is a less costly

226. A minimal participant has his sentence reduced by four offense levels, while a minor participant has his sentence reduced by two offense levels. U.S. SENTENCING GUIDELINES MANUAL § 3B1.2. A defendant whose role is found to be between minimal and minor may have his sentence reduced by three offense levels. *Id.* A "minimal participant" is one who is "plainly among the least culpable of those involved in the conduct of a group," and his "lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as a minimal participant." *Id.* § 3B1.2 cmt. n.1. This definition accords with information-based sentencing, in that those who lack information to help law enforcement are less culpable. *See* United States v. Phibbs, 999 F.2d 1053, 1075-76 (6th Cir. 1993) (rejecting the minimal participant designation because the defendant had knowledge of the drug conspiracy's important details).

227. Timothy P. Tobin, *Drug Couriers: A Call for Action by the U.S. Sentencing Commission*, 7 GEO. MASON L. REV. 1055, 1056 (1999) ("Perhaps no aspect of the U.S. Sentencing Guidelines has created as much confusion and uncertainty for courts engaged in crucial sentencing decisions as section 3B1.2." (footnote omitted)).

228. *See* Becker, *supra* note 175, at 180 ("If the aim simply were deterrence, the probability of conviction, p, could be raised close to 1, and punishments, f, could be made to exceed the gain: in this way the number of offenses, O, could be reduced almost at will.").

229. PADILLA, *supra* note 44, at 110 ("[T]he gang provides individuals with a reputation, serving as a safeguard against possible customer snitching . . . ."); REUTER, *supra* note 145, at 151 (stating that a "'good reputation' becomes an important asset" in organized crime transactions); *cf.* RICHARD POSNER, THE ECONOMICS OF JUSTICE 143 (1981) ("I conjecture that in trades where, because of cost or other reasons, legal sanctions for breach of contract are ineffectual, businessmen will be extremely sensitive to accusations of sharp dealing because reputation is the only surety of faithful performance between contracting partners.").

Imaged with the Permission of Yale Law Journal

substitute.[230] So, too, the brand names for particular illegal narcotics themselves function as brands—such as the Nike ecstasy tablet and Bart Simpson LSD.

In legal markets, intellectual property law safeguards the name of the firm and its products to preserve reputations.[231] But these protections are stripped away for illegal firms and illegal products, permitting dilution of the trademarks. Nonmembers of a gang can *pose* as members (Joe claims to be part of the K-Street Crew) and products can be *counterfeited* (the Nike "ecstasy" tablet for sale is 100% sugar). Moreover, because a conspiracy cannot advertise itself or its products, its reputation further suffers. While criminal organizations will resort to word-of-mouth advertising and violence against posers and counterfeiters, these methods of enforcement are unlikely to be as successful as the methods legal firms have available to them.

The reputation of firms is particularly vulnerable to attack from posers. "Counterfeiting of such affiliation is a common phenomenon in illegal markets, where concealment makes checking credentials difficult."[232] Government might further this process of trademark dilution by reducing sentences of posers.[233] Such individuals diminish the value of the firms' signal, and may possibly even fray group identity by creating uncertainty about group boundaries. Law might also reward the sale of spurious products, like Nike sugar pills, that dilute the value of a brand. Current law in some instances punishes these sales with penalties similar to those for actual ecstasy;[234] these sentences could also be lowered.[235]

In addition, law could make it more difficult for organizations to standardize transactions. Narcotics dealers, for example, benefit from standard units of measurement, the "eighth" of marijuana, the "dimebag" of

230. PADILLA, *supra* note 44, at 111 (stating that the gang "provides customers with a reputable source from which to purchase drugs and other items, and . . . gives customers the background information necessary to trust that the merchandise they buy is authentic and first-rate.").

231. *See* Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 854 n.14 (1981) (stating that "trademark infringement inhibits competition and . . . deprives consumers of their ability to distinguish among the goods of competing manufacturers").

232. REUTER, *supra* note 145, at 144.

233. Information-extraction tools such as flipping and informants also reduce the reputational signals arising from group membership. *See supra* notes 163-165 (observing that firm membership is a proxy for loyalty).

234. *E.g.*, United States v. Sobrilski, 127 F.3d 669, 675 (8th Cir. 1997) (stating that "impossibility is no defense to a charge . . . of attempting to distribute a controlled substance" because "a person may be guilty of attempting to distribute such a substance even though, had the attempt succeeded, there would have been no crime").

235. Both posing and counterfeiting should still be punished for the harm they cause society, particularly in their conveyance of the impression that crime is rampant. These broken windows effects explain why the law should not decriminalize posing and counterfeiting, though it may want to recognize that these acts have less harm than sales of nonspurious products by actual members of a conspiracy.

Imaged with the Permission of Yale Law Journal

heroin, and so on. These practices facilitate quick transactions, reducing the possibility of being caught. Law could isolate a few of these standardized measurements and attach special penalties to these sales. These sentencing enhancements would lengthen transaction times and would force sales to depend even more heavily on reputation, thereby creating additional vulnerabilities that reversed-intellectual property law may exploit. These are not, of course, points about conspiracy law as such. But, just as with the contract law analysis, they point the way toward a comprehensive approach to the problem of group crime.

III. THE DOCTRINE OF CONSPIRACY

Federal conspiracy law evolved, somewhat unconsciously, to take advantage of many of the pressure points generated by the theory of group behavior outlined in Part II. In particular, concepts such as group identity, price discrimination, contractual uncertainty, and the destabilization of trust provide a new vantage point from which to understand the functions of various doctrines in federal law. This sharply contrasts with the trend in state law, which has moved in a different direction (prompted by the Model Penal Code's rejection of extra punishment for conspiracy, its decision to permit merger, and its refusal to permit *Pinkerton*).[236] The function of these federal doctrines, and their connection to the economic and psychological dangers of groups, suggest that the states should rethink their choices.

As promised, the case for such rethinking has centered on a utilitarian account. There are retributivist justifications that may be offered as well, insofar as the individual who agrees to commit a crime with another undertakes an act that is likely to produce social harm. In the same way that someone who drives drunk deserves punishment, the conspirator should be culpable for the dangerous inchoate agreement. Yet in addition to the individual's culpability, there is also a sense in which the criminal group is culpable too. Although the notion of collective guilt seems ill-fitting in our individualistic American system, some aspects of conspiracy law come close to it. As we will see, the *Pinkerton* doctrine makes each member of a group liable for the collective faults of the group in certain circumstances—thereby approximating collective guilt without outlawing particular groups or associations. And cooperation agreements, in practice, often make the liability of one individual the basis upon which to secure convictions against the larger organization. The retributivist case for conspiracy,

236. *See* MODEL PENAL CODE § 5.05(1) (1985) (grading punishment for conspiracy by the punishment for the object offense); *id.* § 1.07 cmt. (stating that "at least" sixteen jurisdictions had adopted or proposed provisions based upon section 1.07, which in effect requires merger); *id.* § 2.06 (rejecting *Pinkerton*); *id.* § 2.06 cmt. (noting that most states that have reformed their criminal codes reject *Pinkerton*).

Imaged with the Permission of Yale Law Journal

although well beyond the scope of this Article, is one worthy of further exploration and thought.

A. *Traditional Features*

1. *Extra Punishment for Group Activity*

Conspiracy law imposes two additional sanctions on group behavior. First, it takes the punishment a lone offender would receive and authorizes the government to double it when two offenders conspire to commit the same crime. Second, traditionally conspiracy law refused to permit merger, so that when *A* conspires with *B* to steal government funds, both are liable for the theft *and* the offense of conspiracy. The functional case for these doctrines begins by observing that the first method, doubling the total amount of punishment, rarely happens. Doubling is used as a threat to promote information extraction, but cooperating defendants do not receive the full sanction. Total punishment increases (though at a level below doubling), and is justified because of pernicious group dynamics at work in conspiracy—from polarization to conformity, performance success to loyalty. If government punished crimes equally, whether they were committed by one person or many, no legal incentive to desist from conspiracy would exist. To the contrary, additional co-conspirators would defray the legal risks of getting caught. The formation of such criminal groups, in turn, would threaten society even further because they would be spurred to commit greater crimes. Their behavior in groups would be, on average, more dangerous than their individual activities.[237]

But this raises the question of why, if groups cause so much danger, conspiracy law does not levy additional punishments upon existing conspirators when they add new members to their group. The answer to this

237. Some, including the influential Phillip Johnson, have called for the abolition of the conspiracy offense, reasoning that accomplice liability serves the same goals. *See* Johnson, *supra* note 1, at 1150-52; *see also* Goldberg v. State, 351 So. 2d 332, 334 (Fla. 1977) (arguing that "alternatives" such as attempt and accomplice liability "are available and could be used in lieu of a conspiracy charge" and that "[o]f course, the law of criminal attempt is sufficient to protect society against the danger of incipient wrongdoers"). Yet accomplice liability in fact does not train its eye on the evils of group conduct. After all, for accessory liability no "agreement" is necessary nor must a person have a "stake" in the venture. *See* Cox v. Adm'r United States Steel & Carnegie, 17 F.3d 1386, 1410 (11th Cir.) (stating that a "defendant may wittingly aid a criminal act and be liable as an aider and abettor, but not be liable for conspiracy, which requires knowledge of and voluntary participation in an agreement to do an illegal act" (citation omitted)), *modified on other grounds*, 30 F.3d 1347 (11th Cir. 1994); MCSORLEY, *supra* note 89, at 56. The structure and penalties of accomplice liability do not further information extraction nearly as well. Moreover, the conspiracy doctrine—by dint of its simplicity—serves useful purposes. The fact that it lumps so many offenses together, instead of varying the punishment by the object offense, is a virtue. Not only does it facilitate understanding of the law by laypersons, it also singles out the agreement as a generalized harm above and beyond the object offense.

Imaged with the Permission of Yale Law Journal

riddle is twofold. First, the law invests its resources primarily in deterring a potential new member of the group. Penalties against the existing members have already proven to be somewhat ineffective; applying those penal resources to potential entrants may generate more deterrence. Such penalties will also facilitate information extraction by providing leverage for flipping. Second, as we will see momentarily, *Pinkerton* provides other incentives to existing conspirators to moderate the size and activities of the group by making them liable for the substantive crimes of new members.

Nevertheless, how can the exclusion from merger be justified—particularly when criminal attempts merge?[238] Merger is inappropriate because the punishment for an object offense does not capture the harm of carrying out crime as a group. Liability for an attempt, by contrast, may merge with the substantive offense because attempt does not involve the pernicious group. Moreover, by attaching an additional penalty to the completion of a substantive offense, the merger exclusion bolsters marginal deterrence from inchoate to completed criminal conduct.

There is another reason to preclude merger. Recall that a fixed penalty for conspiracy is necessary to induce cooperation; the large baseline can compensate for circumstances in which prosecutors only know about a small crime committed by a potential witness. If the punishment for conspiracy merged downward—to the underlying offense—then prosecutors may lack leverage to flip witnesses (particularly for many state offenses that carry lower penalties). If, by contrast, the conspiracy charge merged upward—to the conspiracy charge—then the law would be creating massive substitution effects. If all conspiracies received the same punishment, regardless of their specific criminal aims, then these groups would have no incentive to refrain from the most dangerous conduct. Conspiracy law thus uses both—a general punishment that reflects the dangers of acting in groups and that facilitates information extraction *plus* a specific punishment calibrated to the particular crime to minimize

238. Attempt is considered a preparatory step that merges into the completed offense. *See* MODEL PENAL CODE § 1.07(4)(b). By contrast,

> a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable. And it is punishable as conspiracy, though the intended crime be accomplished.

United States v. Rabinowich, 238 U.S. 78, 85-86 (1915) (citations omitted); *see also* United States v. Felix, 503 U.S. 378, 391-92 (1992) ("[T]he conspiracy charge . . . was an offense distinct from any [substantive] crime for which he had been previously prosecuted, and the Double Jeopardy Clause did not bar his prosecution on that charge."); Callanan v. United States, 364 U.S. 587, 589-90 (1961) (discussing the common law against merger); Pinkerton v. United States, 328 U.S. 640, 643 (1946) (similar); Commonwealth v. Kingsbury, 5 Mass. (1 Tyng) 106 (1809) (same). After much debate, Britain approved a rule that requires prosecutors to justify bringing both the substantive and conspiracy counts and that gives a judge the power to overrule a prosecutor. *See* Practice Note, 2 All E.R. 540 (Q.B. 1977).

Imaged with the Permission of Yale Law Journal

substitution dangers.[239] The general punishment is weighted heavily against acting in groups in order to avoid the dangerous consequences of group identity and specialization of labor.

2. Pinkerton

The editors of the *Harvard Law Review* proclaimed in 1959 that "[n]o court which has taken the *Pinkerton* approach has offered an adequate rationale for convicting a conspirator for the crimes of his associates."[240] More recently, George Fletcher has claimed that while vicarious liability "might make some sense in the field of torts . . . it is patently absurd to think of conspirators controlling each other's acts."[241] Such views have led to the conventional wisdom that *Pinkerton* liability is some sort of criminal monster.

Nevertheless, a broad range of evidence suggests that conspirators often do influence, in profound ways, each other's behavior, not simply through their direct commands but also by their mere presence. This level of influence, in a world where criminal law looked only to commissions, would probably not justify *Pinkerton*. But the information-based paradigm yields a different answer because it calibrates liability on the basis of knowledge as well as activity level. *Pinkerton* should not be condemned before assessing its information-extraction function. Without it, there would be less flipping, and with less flipping, more coercive law enforcement techniques would be necessary. Privacy intrusions would increase, and the pressure to water down criminal procedure protections would be even greater.

The benefits of *Pinkerton* are not limited only to information extraction. In addition to punishing crimes of diffusion, the doctrine also increases precontractual uncertainty about the sanction. Under *Pinkerton*, a criminal takes her chances when she joins a conspiracy, in that she is liable for all the crimes that are within the scope of the organization. Greater liability

239. For another serious substitution problem and an attempted solution, see Katyal, *supra* note 20, at 1042-47 (arguing that conspiracy law creates substitution effects by encouraging individuals to conspire with their computers without additional penalties, and suggesting that criminal law treat computers as quasi-conspirators).

240. *Developments in the Law—Criminal Conspiracy*, *supra* note 85, at 998. The editors offered a rationale based on economies of scale, so that "which of the conspirators committed the substantive offense would be less significant in determining the defendant's liability than the fact that the crime was performed as part of a larger division of labor." *Id.* at 999. But if the provision of services to a group can be the basis on which an individual can be prosecuted for the group's sins, then the legal rule would swallow all conduct by anyone that benefits a group, such as the mailroom clerk who unknowingly sends out fraudulent mail on behalf of a group.

241. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 663 (1978); *see also* Statement from the Criminal Justice Section of the American Bar Association (Aug. 1975), *quoted in* Marcus, *supra* note 4, at 7 n.28 (finding that *Pinkerton* "goes too far, and does not easily admit of rational application").

Imaged with the Permission of Yale Law Journal

will deter some from joining the conspiracy, and it will also make the contract for payment tougher to strike.[242] Because people are less likely to know the full extent of their liability under *Pinkerton*, moreover, uncertainty increases and the conditions for trust thus diminish.[243] Psychological experiments have shown that uncertainty leads to less trust; in situations where a bad apple could poison a group, trust is weak.[244] Lawful partnerships operate under similar precepts since each member is liable for what the others do. Such arrangements work well when the members of the firms are homogenous, practice the same trade, have similar educational backgrounds, and are subject to the same ethical rules (such as law firms), but they become unwieldy and inefficient once heterogeneity is introduced. The criminal conspiracy, often composed of relatively heterogeneous members who lack the same reputational mechanisms to secure trust among each other, will face particular problems from joint liability. Put somewhat differently, *Pinkerton* reverses the well-known advantages of limited liability for corporations.[245]

---

242. This understanding of *Pinkerton*, therefore, provides one argument (although by no means a decisive one) for retention of the much-maligned felony murder rule in the context of group crime. The rule treats killings that occur during perpetration of a felony as murder. Under the rule, the contract becomes even more difficult to contemplate between the criminal enterprise ex ante, as the sanction is not simply what is within the scope of the conspiracy, but also possibly any death occurring while the group pursues its scope. Indeed, many early felony murder cases arose in circumstances akin to conspiracy. *See* Le Seignior Dacres Case, 72 Eng. Rep. 458 (K.B. 1535) (describing the facts as a group of men who went to hunt unlawfully in a park and who killed the keeper of the park when the keeper tried to stop them, and finding that all were guilty of the death); Salisbury v. Ellis, Plowden 101 (1553) (finding three defendants responsible for the death of a servant who was killed during an assault on another man). Today, the felony murder rule's definition in many states explicitly targets accomplices and co-conspirators. *See, e.g.*, 18 PA. CONS. STAT. § 2502(b) (1998) ("A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.").

243. Liability for complicity, which may exist even in non-*Pinkerton* jurisdictions, cannot capture these advantages because a specific mens rea to carry out the offense will generally be needed. *See, e.g.*, MODEL PENAL CODE §§ 2.06(2)(a)-2.06(4).

244. *See* Sharon G. Goto, *To Trust or Not To Trust: Situational and Dispositional Elements*, 24 SOC. BEHAV. & PERSONALITY 119, 129 (1996).

245. *See, e.g.*, Larry E. Ribstein, *The Deregulation of Limited Liability and the Death of Partnership*, 70 WASH. U. L.Q. 417, 447-48 (1992) (outlining costs to unlimited liability, including the difficulties "for owners to delegate decisionmaking functions to managers without retaining a significant monitoring role"). Information extraction may explain why *Pinkerton* employs an objective test for liability. Conspirators are responsible for objectively reasonably foreseeable acts of their compatriots that were in furtherance of the conspiracy, "but not acts in the conspiracy that were not within the scope of the defendant's agreement." United States v. Andrews, 953 F.2d 1312, 1319 (11th Cir. 1992); *see also* United States v. Garcia, 954 F.2d 12, 15 (1st Cir. 1992) (objective liability); State v. Bridges, 628 A.2d 270 (N.J. 1993) (reversing in part a lower court opinion requiring subjective liability for *Pinkerton* charges). This test better responds to the incentives of vicarious liability: If conspirators understand that they will be liable only for what they subjectively know, they will turn into ostriches and look the other way. The objective test attempts to divine, based on a person's agreement, how much information they should have had, and holds them liable for it. Objective liability helps avoid willful blindness and provides an incentive to hoard information. To blunt the ostrich defense and create ex ante incentives to gather information, some courts have held that willful blindness as to certain aims of a conspiracy will

Imaged with the Permission of Yale Law Journal

Furthermore, just as vicarious liability in torts will produce more monitoring, so too will *Pinkerton*. Here, the major reason why is that the increasing amounts of leverage will result in more instances of cooperation with law enforcement. In the lawful entity context, vicarious liability may force corporations to take wasteful precautions.[246] This is, however, exactly the result we want when the organization is an unlawful one. Monitoring will be driven by the climate of uncertainty about loyalty, so that more monitoring begets less trust, and less trust begets more monitoring. Like a romantic couple where one party suspects the other of infidelity and begins tracking the other's movements, the acts of monitoring themselves may contribute to a cycle of distrust, thereby eliminating many advantages of joint activity.

Yet there are reasons not to punish all members of a conspiracy equally. *Pinkerton* creates a strong incentive for someone not to join in a conspiracy at all, for any conspirator can be liable for the multitude of crimes carried out by the conspiracy. But for those who do join, it could generate negative substitution effects. If one will be held liable for the drug dealing of leaders even when the person is a small fry, the person might as well try to be a leader or ratchet up her activity level. This is a serious challenge, but there are three competing considerations. First, *Pinkerton* only attacks actions that were reasonably foreseeable within the scope of the agreement, and therefore creates incentives to reduce that scope. Second, other provisions in federal law, such as the sentencing enhancements for organizers, leaders, and managers, and the reductions for minimal and minor participants, produce marginal deterrence.[247] *Pinkerton* increases the punishment base, but the degree of liability within that base differs markedly due to one's role in the offense. Third, as we will see in a moment, the withdrawal defense provides clear incentives for participants to minimize their conduct and to weaken group identity, and thereby promotes marginal deterrence. Conspiracy law could build on this idea and permit partial withdrawal defenses. It could permit, for example, a defense to *Pinkerton* liability for those acts that a defendant made a genuine and honest attempt to prevent.

---

not insulate a party from liability. *See* United States v. Stone, 987 F.2d 469, 470-72 (7th Cir. 1993); United States v. Long, 977 F.2d 1264, 1271 (8th Cir. 1992).

246. *See generally* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994) (arguing that strict liability may induce firms to engage in suboptimal monitoring when monitoring efforts can be used against the firm to establish or magnify its liability); Fischel & Sykes, *supra* note 166, at 325 (finding that "penalties against corporations must be appropriately limited to avoid serious inefficiencies"); A. Mitchell Polinsky & Steven Shavell, *Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 INT'L REV. L. & ECON. 239, 240 (1993) (arguing that legitimate firms should have their penalties reduced if employees face public sanctions for wrongdoing because otherwise "the price of the firm's product would exceed the social cost of production").

247. *See supra* Subsection II.C.5.

Imaged with the Permission of Yale Law Journal

Such a rule may induce conspirators to voice caution about the group's activities, which can blunt polarization and group identity.

This defense of *Pinkerton*, like the rest of the Article, is confined to its functional justification. Unfair discrimination in the way the doctrine is applied, if any,[248] may very well be a reason to reject *Pinkerton* or to take other mitigating steps. Yet some level of unfairness will always be present in the criminal justice system. Unfortunately, innocents will be punished wrongly, and the less culpable will be found liable at times for more than they should. And, if further study shows that *Pinkerton* is applied unfairly in a great number of cases, then the advantages of the doctrine outlined above, particularly in preventing the formation of conspiracies, will have to be weighed against these costs. But, a precondition to this balancing is to understand the function of *Pinkerton*, in terms of providing an ex post mechanism to extract information and an ex ante incentive for conspiracies to adopt inefficient practices.

3. *Inchoate Liability*

Conspiracy, from the time of Lord Coke to the present, has been an inchoate offense.[249] This choice is no doubt disquieting to many.[250] Yet other inchoate doctrines, such as attempt, attach liability at a far later stage in criminal planning, for example, when there is "dangerous proximity to success."[251] And the psychological work on group identity makes the case for why conspiracy law should attach liability at the incipient stage. The argument has to do with *complementarity*—that the formation of a criminal group, even one that may be far from achieving its success regarding a particular crime, poses dangers to society because it is likely to have engaged in, or will engage in, other crimes. The penalty attaches to confederation for a bad end. Because groups are not only more likely to engage in crime than are individuals, but are also faster at accomplishing them once they set their minds to the task, preventative steps must be

248. Even the most vicious critics of *Pinkerton* have admitted that disparities in its application are quite rare. *E.g.*, Johnson, *supra* note 1, at 1150. Not only prosecutors, but also judges, can refuse to let a jury consider *Pinkerton* liability when they feel justice so requires. *See, e.g.*, United States v. Raffone, 693 F.2d 1343, 1346 (11th Cir. 1982) (holding that the failure to give the instruction prevents the conviction of a co-conspirator from being affirmed on a *Pinkerton* basis); United States v. Wilson, 657 F.2d 755, 762-63 (5th Cir. 1981) (same).

249. *See* The Poulterer's Case, 77 Eng. Rep. 813 (K.B. 1610) ("A false conspiracy betwix diverse persons shall be punished, although nothing be put in execution."); *supra* note 117.

250. *E.g.*, Dennis, *supra* note 6, at 46 ("Why should an agreement . . . be treated in effect as an exception to the proximity rule?").

251. *See* Hyde v. United States, 225 U.S. 347, 387-88 (1912) (Holmes, J., dissenting). As he colorfully put it, the agreement to murder a man fifty miles away would suffice for conspiracy because "it does not matter how remote the act may be from accomplishing the purpose," but attempt liability could not so exist. *Id.*

Imaged with the Permission of Yale Law Journal

commensurate.[252] Conspiracy law does this by attacking the group at the moment it is formed and not waiting until the group comes too close to success in carrying out any particular crime. It focuses not only on the actual harm a group has caused but also on its potential for harm.

The risk of information extraction forces criminal organizations to become less efficient—compartmentalizing information, monitoring, chilling discussion, and so on. These costly practices, and their accompanying destruction of trust within the criminal group, are most likely to occur when conspiracy liability is inchoate. Inchoate liability induces members of the group to defect early, for each has already committed a crime at the time of agreement. This gives law enforcement an omnipresent weapon to flip a conspirator, and also a crime with which to prosecute the other members of the group. And, ex ante, the criminal syndicate does not have to worry only about assuring loyalty of all members at the end of a crime but throughout the planning and development as well. Accordingly, the group constantly will need to undertake costly preventative measures in order to minimize the danger from flipped witnesses.

4. *Impossibility*

This year, the U.S. Supreme Court reversed a federal court of appeals and reaffirmed its view that a person can be guilty of conspiracy even when the object of the agreement is impossible.[253] In *United States v. Recio*, a Nevada police officer stopped two individuals driving a truck and discovered between ten and twelve million dollars in narcotics. One of the individuals cooperated with the government in a sting operation by revealing the criminal plan. The truck was driven to Idaho and the cooperator called a pager number. A caller returned the page and stated that someone would come get the truck. A few hours later, an individual, Mr.

252. United States v. Wallach, 935 F.2d 445, 470 (2d Cir. 1991) (stating that conspiracy "serves a preventative function by stopping criminal conduct in its early stages of growth before it has a full opportunity to bloom"); *Developments in the Law—Criminal Conspiracy*, *supra* note 85, at 924 ("When the defendant has chosen to act in concert with others, rather than to act alone, the point of justifiable intervention is reached at an earlier stage."). In Britain, this feature is viewed as conspiracy's chief advantage: "[T]he 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 been committed." *See Criminal Law: Report on Conspiracy and Criminal Law Reform*, *in* 7 LAW COMMISSION REPORTS 483, 495 (1979).

253. United States v. Recio, 123 S. Ct. 819, 822 (2003); *see also* United States v. Rabinowich, 238 U.S. 78, 86 (1915) ("A person may be guilty of conspiring, although incapable of committing the objective offense."); Beddow v. United States, 70 F.2d 674, 676 (8th Cir. 1934) (similar); Thompson v. State, 17 So. 512, 515 (Ala. 1895) (stating that "[t]he agreement is the gist of the offense" and that it is not "purged because subsequent events may render the consummation of the agreement impossible"); Neal Katyal, *Don't Gut Conspiracy Laws When We Need Them Most*, SLATE, Nov. 20, 2002, *at* http://slate.msn.com/?id=2074255 (analyzing *Recio*).

Imaged with the Permission of Yale Law Journal

Recio, drove up to the truck, got into it, and began driving the truck away. Government agents then arrested Recio. Recio's successful claim before the Ninth Circuit was that he could not be charged with a conspiracy when the drugs had already been seized unless the prosecution could prove that his decision to conspire predated the seizure. Otherwise, Recio stated, the object of the conspiracy, possession of narcotics with intent to distribute, was impossible.

The *Recio* case is a textbook illustration of the way conspiracy law singles out the agreement as a distinct malady because of the economic and psychological harm of groups. Unlike a substantive offense, as to which factual impossibility may be a defense,[254] the harm of a conspiracy is not confined to the likelihood that the agreement will be successful. Rather, the law of conspiracy aims to punish the criminal agreement out of a recognition that the agreement may produce other, unrelated, harms. Even the impossible agreement may further a malicious group identity, leading the individuals down a path of further criminal activity beyond their initial object. In this respect, impossibility must be contrasted with a mens rea defense: The type of person who believes (wrongly) that an object crime is possible, and intentionally agrees to further it, poses a special danger to society because he breathes life into a joint project dedicated to carrying out a crime—and this project may then grow beyond its original moorings.

While the Court did not specifically address the point, there was a marginal deterrence problem with the federal government's position in *Recio*. The government contended that the timing of the defendant's agreement to further the conspiracy, whether pre- or post-seizure, was irrelevant.[255] But if the government cannot tie any pre-seizure conduct of a defendant to the conspiracy, despite the many opportunities for flipping, the defendant is more likely to be a one-shot player. Accordingly, it may be appropriate to tweak the *Recio* holding so that a defendant could receive a lower sentence when the evidence suggests that she is not a repeat player.[256] Irrespective of the tweak, the prohibition on impossible criminal agreements targets, at an early stage, the escalation of criminal conduct before the agreements take on lives of their own. The court of appeals decision was out-of-step with this fundamental principle, and the Supreme Court was wise to reverse it.

254. *See, e.g.*, United States v. Petit, 841 F.2d 1546, 1549-50 (11th Cir. 1988) (holding that a defendant could not be guilty of the substantive offense of receiving stolen property when the police in a sting operation sold him nonstolen property, but that the defendant was guilty of conspiracy notwithstanding the impossibility defense).

255. *See* Brief for the United States, *Recio* (No. 01-1184), 2002 WL 1626147, at *20.

256. The facts of an individual case may create a rebuttable presumption that a defendant is a repeat player. In a case like *Recio*, for example, where the defendant drove an unguarded truck containing millions of dollars in narcotics, such an inference could be permissible.

Imaged with the Permission of Yale Law Journal

5. *Withdrawal*

Conspiracy law sets a tough standard for withdrawal. A defendant must show "that he has taken affirmative steps . . . to disavow or to defeat the objectives of the conspiracy; and . . . that he made a reasonable effort to communicate those acts to his co-conspirators or that he disclosed the scheme to law enforcement."[257] The rule is generally justified on the ground that it ensures "that withdrawal did occur and is not simply being invented *ex post*."[258] But the rule also has a robust ex ante effect.

The "disclosed the scheme to law enforcement" prong of withdrawal aids information extraction because it lowers the sentences of those who provide such information to authorities. As such, the doctrine nicely tracks the trend toward information-based sentencing: Liability attaches not because of what a person did, but because of what a person knew and did not reveal. The "communicate [to] co-conspirators" prong, permitting withdrawal without informing law enforcement, destabilizes conspiracies in two ways. First, because defection from groups is more common when members believe their activities are coming to a close, the withdrawal of one member can prompt defection from the others, thus weakening the group and providing additional opportunities for information extraction.[259] Second, the prong provides an incentive for conspirators to chip away at group identity and to reduce the dangerous effects of group behavior that their presence facilitates. Because conspirators sit in a unique position to influence the behavior of the group,[260] conspiracy law tries to align the incentives of individual members in ways that will reduce the group's criminal behavior. This is done in the shadow of the law—and works even when law enforcement never learns about the operation of the criminal conspiracy.[261]

257. United States v. Dabbs, 134 F.3d 1071, 1083 (11th Cir. 1998) (internal quotation marks and citations omitted); *see also* United States v. United States Gypsum Co., 438 U.S. 422, 464-65 (1978) ("Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment."); United States v. Pippin, 903 F.2d 1478, 1481 (11th Cir. 1990) (holding that refraining from criminal acts is not enough). Some jurisdictions distinguish between withdrawal and renunciation by defining the latter to include practices that thwart the success of the conspiracy and the former not to include them. While revoking one's membership will reduce the identity of a group somewhat, thwarting the conspiracy is likely to do more. The jurisdictions that draw this distinction should therefore provide greater benefits to renunciators than to withdrawers.

258. United States v. Greenfield, 44 F.3d 1141, 1150 (2d Cir. 1995).

259. *See supra* text accompanying note 102.

260. ROSS & NISBETT, *supra* note 27, at 9 ("[W]hen trying to get people to change familiar ways of doing things, social pressures and constraints exerted by the informal peer group represent the most potent restraining force that must be overcome and, at the same time, the most powerful inducing force that can be exploited to achieve success . . . .").

261. Even without the crime of conspiracy, renunciation and withdrawal can be defenses to attempt and complicity charges. But these offenses occur at a later point in the formation of

Imaged with the Permission of Yale Law Journal

Insights from psychology about the influence of minorities add much to understanding this effect. For example, the same Asch experiments about group conformity mentioned in Part I found that error rates were reduced by seventy-five percent when a single dissenter voiced disapproval of the majority's view of line lengths.[262] This finding suggests that the withdrawal doctrine's encouragement of conspiracy-thwarting behavior can have a long-term effect on the entity's duration and attainment of goals. Other studies have found that minorities in groups must be unwavering in order to influence the majority,[263] thereby illuminating why law requires an unequivocal withdrawal.[264]

The effect of withdrawal on sentencing also closely tracks the price-discrimination model. Withdrawal ends liability for further substantive offenses, but not the initial liability for the offense of conspiring or other substantive crimes already committed while the person was a member.[265] The withdrawal rule thus bolsters marginal deterrence by imposing a penalty on all conspirators, including withdrawers (thereby deterring some from making an initial agreement), and by providing some benefit for withdrawers, in that they avoid further substantive liability.[266]

---

criminal plans. *See supra* note 237. By contrast, conspiracy law provides incentives for early renunciation and withdrawal at a time when an individual is more receptive to them.

262. *See supra* text accompanying notes 29-30.

263. For example, Serge Moscovici asked subjects in groups of six to indicate the color of slides. In the first part of the experiment, two of the six people were confederates who claimed they saw green when everyone else was seeing blue slides. The slides were called green by the naive subjects approximately 8.5% of the time, and 32% reported seeing a green slide at least once (as opposed to a control group that almost never called the slides green (.25%)). In the second part of the experiment, the two confederates were inconsistent and stated their belief that the slides were green and blue in a random fashion. In that circumstance, the conformity effect dropped to an insignificant number—only 1.25% of the judgments were called green. SERGE MOSCOVICI, SOCIAL INFLUENCE AND SOCIAL CHANGE 92 (1976) ("What transforms the minority into a source or a target of influence is determined by the absence or presence of a definite stand, of a coherent point of view, of a norm of its own."); Brown, *supra* note 26, at 27-28 (describing Moscovici's studies).

264. *See* United States v. West, 877 F.2d 281 (4th Cir. 1989) (requiring an "affirmative action"); MODEL PENAL CODE § 5.03(6) (1985) (stating that a withdrawal must have "thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of [the individual's] criminal purpose"). Because this part of the withdrawal doctrine is rooted in the idea of weakening the group, it will often not be valid until it is communicated to the co-conspirators. *See, e.g.*, State v. Klein, 116 A. 596, 599-600 (Conn. 1922). Indeed, some statutes explicitly permit withdrawal only if the communication is made in time for the co-conspirators to withdraw as well. *See, e.g.*, WIS. STAT. ANN. § 939.05(2) (West 1996).

265. *See* United States v. Herron, 825 F.2d 50, 59 (5th Cir. 1987) (upholding a § 371 violation even though the defendant attempted to withdraw); United States v. Marolla, 766 F.2d 457, 461 (11th Cir. 1985) (precluding withdrawal once an overt act is committed).

266. In addition to these five issues, the theory outlined in Part II may help answer other doctrinal questions, such as the rules regarding statute of limitations and venue in conspiracy cases. The statute of limitations on conspiracy does not begin running until the conspiracy is terminated, and termination requires the success of the object of the conspiracy or abandonment. *See* United States v. Kissel, 218 U.S. 601 (1910). The limitations period is far longer in order to further information extraction and to combat the tendency of groups to engage in additional criminal conduct, as Section I.A demonstrated.

Imaged with the Permission of Yale Law Journal

B. *Further Aligning Theory and Doctrine*

The principal aim of this Article has been to detail the functional case for federal conspiracy doctrine. From this case, it is possible to sketch out some shifts in policy that, either collectively or individually, may further set doctrine in line with theory. These reforms can make conspiracies more difficult to assemble, tougher to maintain, and harder to keep together.

1. *Sentencing Reforms*

The current penalty structure operates in ways anathema to information extraction. This Subsection outlines several ways to promote information extraction and to destabilize group identity.

Reversing the Sentencing Commission's Changes. The Federal Sentencing Commission failed to consider many of the functions of conspiracy law. The Sentencing Guidelines calibrate sentences by looking to the base-offense level of the substantive offense—reversing the long tradition of exclusion from merger.[267] They also reduce this base-offense level for minor participants.[268] The Guidelines further require sentencing on the basis of "relevant conduct" and explicitly state that such conduct is narrower than *Pinkerton* because it is confined to criminal activity that a particular defendant agreed to undertake jointly.[269] In total, these changes reject the special danger posed by groups.

The venue rules permit a conspirator to be charged in any location where an overt act took place. These rules prompted Justice Holmes to argue that conspiracy would "make impossible hardships amounting to grievous wrongs" in an era when the nation extended "from ocean to ocean," for the government could "prosecute in any of twenty States in none of which the conspirators had been." Hyde v. United States, 225 U.S. 347, 386-87 (1912) (Holmes, J., dissenting). However, because larger criminal entities have a greater ability to bribe law enforcement and other officials, overlapping jurisdictions that investigate and prosecute conspiracies mitigate the impact of corruption in a particular police department or prosecutor's office. If conspiracy can be prosecuted at both the state and federal levels, and can be prosecuted by any office in which an overt act occurs, the number of potential prosecutors and investigators rises quickly. For this reason, the permissive venue rules offset heightened corruption risks. The point here is similar to the claim that states should enact "converse-1983" laws to prevent federal wrongdoing. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

267. *See* U.S. SENTENCING GUIDELINES MANUAL § 2X1.1(a)-(b)(2) (1998); *see also id.* § 2X1.1 cmt. n.2 ("Under § 2X1.1(a), the base offense level [for an attempt, conspiracy, or solicitation] will be the same as that for the substantive offense.").

268. *See supra* note 226.

269. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 cmt. n.2; *see also* Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1357 (1997). The Sentencing Commission did not erase the doctrine of *Pinkerton* liability (although it did cast aspersions at it in section 1B), so it is still possible for prosecutors to use it to seek substantive liability for a particular offense without being subject to the limits of "relevant conduct" in section 1B1.3. In practice, however, prosecutors almost always follow the direct route prescribed in the Guidelines for "jointly undertaken criminal activity" in section 1B.

Imaged with the Permission of Yale Law Journal

A simple example cuts through the jargon to demonstrate how severely these changes cripple information extraction. Suppose Abe lives in the pre-Guidelines regime and is a minor participant in a $1 million bank robbery. Bonnie is the main person behind this scheme, and while Abe certainly agrees to help out, he does not do much of the hard work. In the course of the conspiracy and without Abe's knowledge, Bonnie uses a firearm. The relevant statutes in the federal code impose a maximum 240-month sentence for bank robbery, 60 months for use of a firearm during a bank robbery, and 60 months for conspiracy.[270] Accordingly, without the Guidelines, Abe would be eligible for a sentence of up to 30 years—bank robbery plus the nonmerged conspiracy charge plus the *Pinkerton* use of a firearm. (Judges might not impose a 30-year sentence under these facts; the relevant issue is that a prosecutor could threaten it as leverage for information.) Now, suppose Abe lives under the Guidelines, where, for a first-time offender such as Abe, bank robbery has a maximum 78-month sentence and use of the firearm 57 months, and where conspiracy is not considered a separate substantive offense. Since Abe did not agree to the use of a firearm, he cannot be held liable for that under "relevant conduct." Abe is therefore only liable for the substantive bank-robbery charge, which reduces his sentence to 78 months. Furthermore, because he was a "minimal participant," his sentence is reduced even further, by 4 levels (27 months). This yields a 51-month sentence, or slightly more than 4 years. The formalization of these rules makes information extraction more difficult, and, for most crimes, which carry sentences far lower than bank robbery, extraction is even tougher.

A strong case therefore exists for the Guidelines to restore conspiracy to its traditional function by resuscitating the merger exception and *Pinkerton* liability. Of course, prosecutors are under no obligation to bring all of these charges in a given case, but their ability to do so enhances their information-extraction capabilities. Indeed, without a strong separate offense of conspiracy, lawmakers will be under pressure to impose high mandatory minimums for minor crimes to try to capture the information-extraction benefit conspiracy law currently provides, with potentially terrible consequences for those who commit crimes alone.

Target Repeat Players and Specialization. Government may consider targeting those who commit crimes with the same conspirators. If a

270. Under U.S. SENTENCING GUIDELINES MANUAL § 2B3.1, robbery of a financial institution that resulted in losses between $800,000 and $1,500,000 is a 26-level offense, which, for first-time offenders, has a maximum penalty of 78 months' imprisonment; under 18 U.S.C. § 2113(a) (2000), bank robbery has a maximum penalty of 240 months' imprisonment. And under U.S. SENTENCING GUIDELINES MANUAL § 2B3.1, use of a firearm during the course of a robbery increases the offense level by at least five, which, in this hypothetical, would result in a 31-level offense—a 57-month increase; under 18 U.S.C. § 2113(d), use of a dangerous weapon during a bank robbery increases the maximum sentence to 25 years, a 60-month increase.

Imaged with the Permission of Yale Law Journal

prosecutor can prove that the criminals are repeat players, then this fact will suggest a tightly knit conspiracy in which defection is more difficult.[271] *Pinkerton* liability essentially accomplishes this by increasing the penalties for long-term participants. But in a world without *Pinkerton*, a sentencing enhancement for repeat players would remove some of the rewards for acting in concert with the same individuals. Similarly, if a conspiracy uses mechanisms to keep members working over long time horizons (such as informal deferred compensation packages after a certain number of years worked and the like), these arrangements could be singled out for additional penalties. At the state level, much of this can be accomplished by creating a first-degree conspiracy offense for enterprises and a second-degree offense for single-shot agreements.

In addition, the law could directly attack the specialization-of-labor advantages of conspiracy. The current Guidelines might be thought to deal with these problems through enhancements for crimes committed with the use of special skills.[272] Special skills are likely to be discrete inputs that are observable by other members, and the law might want to discourage them for team-production and specialization reasons. But the law could go further and use enhancements when conspiracies have defined organizational structures and clear roles for their members. By contrast, current law on skills works at cross-purposes: It imposes the skills enhancement on everyone *except* leaders, managers, and others who had a substantial role in the offense.[273] This scheme creates negative substitution effects, in that it encourages those with special skills to be leaders, and encourages leaders to develop special skills. Apart from specialization, the sentencing process can also be used to encourage conspirators to commit acts of disloyalty by reducing the sentence of conspirators who can prove that they thwarted the conspiracy's criminal objectives.

Encourage Defection Races. The current system already facilitates a race to provide information to law enforcement, in that a prosecutor is likely to provide a larger sentencing reduction to those who first provide information.[274] But the law could be structured to create many more, and

271. Nalebuff, *supra* note 100, at 91 ("Of all the mechanisms that can sustain cooperation in the prisoners' dilemma, the most common is one in which the players have a repeated or ongoing relationship."); L.G. Telser, *A Theory of Self-Enforcing Agreements*, 53 J. BUS. 27, 44 (1980) (observing that self-enforcing agreements are not feasible when the date at which transactions between the parties cease is definitively known). The Model Penal Code takes an analogous view by suggesting that the group danger rationale only reaches those conspiracies that are continuing enterprises. *See* MODEL PENAL CODE § 5.03 cmt. (1985).

272. Under section 3B1.3, a defendant who used a "special skill, in a manner that significantly facilitated the commission or concealment of the offense," has his sentence increased by two levels. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3.

273. *Id.* ("[I]f this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role).").

274. Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 929 (1999) (stating that "the first person to

Imaged with the Permission of Yale Law Journal

much faster, races. Sentencing rewards could be more explicit, stating that when a conspirator's information is used to convict her co-conspirator of sentence X, then that flipped conspirator will have his or her own sentence reduced by a fraction of X.[275] Alternatively, sentencing enhancements could be used against conspirators who are convicted primarily on the basis of testimony from flipped witnesses. For example, the law could provide that if someone flips on A, and the prosecution's case was aided substantially by the testimony of that cooperator, then A's sentence increases by ten percent. The idea is to explain to the parties that a race is on, and that each needs to flip or others will. Like a multiplayer prisoners' dilemma, when information can come from many sources, each player has a large reason to defect, and to defect quickly.

Flipping could conceivably reduce deterrence. A new entrant might reason that her legal risks are lower because she can provide information, making the criminal agreement easier to contemplate.[276] If a person is thinking strategically to the point where she understands the benefits she has from flipping, however, that person is also likely to appreciate that her other conspirators can flip too. As such, flipping remains a disincentive to contracting with criminals. Even if the person does join, under conditions of mutual vulnerability, trust is not as likely to develop.[277] Rather, when a person is thinking about defection from the moment he joins, he is not likely to contribute to group identity.[278] Nevertheless, law enforcement might introduce some uncertainty into the flipping calculus through mechanisms like defection races. The race prevents a conspirator from acting with assurance about a reward, and promotes ex ante deterrence.

---

provide the government with information about the crime and the participation of others often receives the greater benefit" and that "defendants know early on from information provided by their lawyers or other inmates . . . that their best chance at a good sentence is to cooperate and cooperate early").

275. Explicit zero-sum sentencing, in which a greater sentence for a conspirator means less for the cooperator, will increase the rewards for flipping and at times may fracture group identity. Such schemes could, of course, be inducements for perjury. *See infra* note 315. For these reasons, explicit perjury laws against giving false statements to investigators, as well as setting the reward at a low fraction of X, may be appropriate.

276. *See* William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 23 (1975) ("A . . . problem that a system of awarding rights to enforcers on a first-come first-served basis creates is allowing the offender to nullify the deterrent effect of the law by turning himself in and receiving the fine or bounty to which an enforcer is entitled.").

277. *See supra* note 159 (discussing toll-gate studies). Moreover, so long as the penalty in the statute books is high, a cooperator is likely to receive a large sentence since sentencing departures generally reduce a percentage of the jail term. Because jail time is likely to have diminishing negative returns, so that the first day of imprisonment is worse than the one-hundredth, a system that halved sentences for cooperators would still provide an ample deterrent, provided the baseline sentence is sufficiently great.

278. In particular, flipping arrangements resemble the first paper-chain group, in which group identity is weak because individuals receive payoffs based on their personal performance. *See supra* text accompanying notes 209-211.

Imaged with the Permission of Yale Law Journal

There may also be ways to use the bifurcated trial process to extract information. As previously discussed, parties refuse to cooperate with law enforcement because of loyalty to the group, the hope that if everyone stays silent no case will exist, and the fear of reprisal. These reasons for silence are not as salient once a conspirator has been found guilty of a crime. Accordingly, a defendant could receive a modest reward for partially flipping and providing useful information to law enforcement at the sentencing phase. A more complex rule could seek to uncover deception about information: In the sentencing phase, if conspirator *A* can prove that conspirator *B* knew of an illegal act committed by *A*, and *B* did not reveal such information to the government, then *A*'s sentence would be reduced while *B*'s would be increased. Such rewards let the players know that defection is likely to be inevitable at some point and will minimize use of the ostrich defense throughout the investigation, trial, and sentencing phases.[279]

Use Third-Party Cooperation Agreements. Sometimes defendants will not possess useful information but know someone who does. Some courts, albeit rarely, have given defendants lower sentences when they convince third parties to help the government.[280] Such practices, if employed more often, could fragment group identity by sowing distrust. Anyone associated with a convicted criminal will be distrusted by the group because the convict will gain if the associate is induced to testify. Third-party agreements ex post result in significant information being provided to law enforcement, and ex ante fragment trust by enlarging the range of possible sources for law enforcement. Even if the government is not successful in flipping a defendant before trial or sentencing, these agreements extend the time horizon for extraction, further contributing to the climate of distrust within the firm.

Criminalizing Indemnification. Conspiracies often reward individuals who do not flip and go to jail by taking care of their families.[281] This is

279. Under this approach, conspirators would know that their claims about being out of the loop are likely to be rebutted in the sentencing phase. Unfortunately, the Guidelines' reductions for minor participants can hurt information extraction. Because this inquiry focuses on what defendants knew, defendants may fear that the information they provide will be used at sentencing to show that they are not minor participants. Such practices are formally barred by law, but the government could go further to permit sentencing proffers in front of separate prosecutors. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.8 cmt. n.3 (1998) (stating that "use of [proffered] information in a sentencing proceeding is restricted" by criminal and evidentiary rules).

280. *See* United States v. Doe, 870 F. Supp. 702, 704 n.2 (E.D. Va. 1994) (noting that such a procedure had been successfully used at least eleven times nationwide); *see also* G. Adam Schweickert, III, Note, *Third-Party Cooperation: A Welcome Addition to Substantial Assistance Departure Jurisprudence*, 30 CONN. L. REV. 1445 (1998) (describing the third-party cooperation process).

281. *See supra* note 196. Suicide bombers are often lured to commit such acts with similar promises. *See* Barbara Demick, *Israel Targets Pro-Iraq Palestinians over Money Gifts*, L.A. TIMES, Oct. 11, 2002, at 3 (making this observation).

Imaged with the Permission of Yale Law Journal

nothing more than an indemnification arrangement, and there is a wide literature suggesting that such arrangements in the corporate context encourage dangerous behavior.[282] Indeed, indemnification of judgments in the securities field is impermissible for directors and officers of corporations. The case for outlawing indemnification arrangements here is twofold: (1) These insurance arrangements are a substitute for additional payment to conspirators, and forcing the entity to pay more up-front in wages creates cost deterrence ex ante; and (2) ex post indemnification arrangements make it more difficult for law enforcement to extract information from criminal defendants.[283]

2. *Exculpatory Flipping*

The current sentencing scheme only rewards defendant-witnesses who direct blame at someone else, but the same logic that undergirds this system also applies to settings where individuals possess information suggesting that a suspect, defendant, or convict did not commit a crime. In a system that concerns itself so much with information extraction and trumpets the principle that it is "better to let ten guilty people go free than to convict one innocent," it is jarring to find no provision or practice regarding exculpatory flipping. Prosecutors and the Sentencing Commission should provide for sentencing departures in such circumstances.[284]

While exculpatory information may be more difficult to obtain than inculpatory data, conspirators may receive access to information about

---

282. John C. Coffee, Jr., *Litigation and Corporate Governance: An Essay on Steering Between Scylla and Charybdis*, 52 GEO. WASH. L. REV. 789, 825, n.94 (1984) (describing "the evident 'moral hazard' problem that arises in this context"); Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335, 362 (2001) ("The more complete the indemnification, the higher the likelihood of moral hazard assuming psychic costs are not prohibitive.").

283. Outlawing such indemnification agreements sounds difficult to enforce, insofar as it may be difficult to catch two people making a private agreement. Enforcement, however, would take place following a conspirator's arrest at a time when the government can monitor payments made to the family of the conspirator. It may seek forfeiture of that money and attempt to induce the family to cooperate in revealing the source of the money. Similarly, law can attack indemnification of death risks by requiring funeral homes to report suspicious arrangements (such as large cash payments); it could examine the financial transactions that families of homicide victims engage in after the death of the victim, and so on. Widespread publicity about the ease of such follow-the-money investigations will drive up the cost of adding co-conspirators to conspiracies.

284. In addition, rewards could be given to individuals who provide information that helps protect law enforcement's sources and methods. There is some evidence that this, at least, is happening. *See* Evan Pressman, *FBI Investigating Possible Probe Leak from U.S. Attorney's Office*, CNN.COM, June 26, 2001, *at* http://www.cnn.com/2001/LAW/06/26/usattorney.mobmole/index.html (stating that a mafia defendant "in an attempt to win reduced jail time" told the government of "a person associated with the United States attorney's office in the Southern District of New York" who gave the Genovese crime family "two lists of mafia members who were about to be indicted").

Imaged with the Permission of Yale Law Journal

wrongly accused or convicted individuals in the course of their dealings. In many cases, the line between inculpatory and exculpatory information will not be great, in that to exculpate one person, a witness will inculpate someone else. In those settings, a premium can be awarded for information that accomplishes both aims.

One drawback to this scheme is that it could encourage strategic withholding. If exculpatory information receives a special benefit, then individuals who have such information might save it for a circumstance in which they might need it, such as after they have been arrested. This drawback applies to inculpatory information as well (although holding back exculpatory information might increase the chance that the government will further their mistaken investigation). The solution, in both cases, is to reward information that comes out as soon as it is discovered. The longer someone sits on information, the less value it should receive.[285] Of course, some will sit on information because they do not see any payoff to disclosing it until they are staring at a prosecutor from across the table. For that reason, law should create lines of communication between information sources and police that pay for early disclosure of information. This is exactly what I will now consider.

3. *Nonsentencing Rewards*

The government can promote many of its goals without reducing criminal sentences by paying rewards for information when the information leads to criminal convictions. By discouraging the flow of knowledge among members of a conspiracy, inefficiencies are created by this kind of information warfare. Several reward schemes currently exist.[286] To get some sense of the amount of money the federal government spends on

285. Law enforcement will not always be able to discern whether someone sat on information. But those who provide information will need to provide corroborating details. Much of that information will have a date attached to it, such as a witness who claims to have seen something or have been told a fact by someone on a certain day. Because many defendant-witnesses will have to provide these details to back up their information, they will be hesitant to misstate the date at which they received the information. Their hesitation can be increased through a legal rule that places sentencing departures in jeopardy if a defendant has been shown to have lied about the date.

286. *E.g.*, 15 U.S.C. § 78u-1(e) (2000) (providing for a ten percent reward for information leading to insider-trading convictions); 18 U.S.C. § 1012 (2000) (authorizing punishment of those who accept rewards with the intent to defraud); *id.* § 1751(g) (authorizing the Attorney General to pay rewards for information about threats to the President); *id.* § 3056(c)(1)(D) (authorizing the Secret Service to offer rewards); United States v. Walker, 720 F.2d 1527, 1540 (11th Cir. 1983) (upholding rewards for a witness in a narcotics case and stating that "there are strong public policy justifications for permitting law enforcement officials to offer additional incentives to encourage citizens to come forward with knowledge of crimes"); Pub. No. 733, *Rewards for Information Given to the Internal Revenue Service*, *in* IRS MANUAL (CCH), *at* http://tax.cch.com/IPnetwork (providing that the District Director shall pay informants "10 percent of the first $75,000 recovered, 5 percent of the next $25,000, and 1 percent of any additional recovery").

Imaged with the Permission of Yale Law Journal

informants, I used the Freedom of Information Act (FOIA) to file requests from several law enforcement agencies. Unfortunately, the FBI took a view contrary to the other agencies and claimed that general FOIA exceptions precluded disclosure of this information.[287] But the Customs Service stated that it spent $13.23 million in 2000 and $16.80 million in 1999,[288] the Drug Enforcement Administration spent $33.57 million in 2000 and $30.77 million in 1999,[289] the Secret Service spent approximately $671,000 in 2000,[290] and the IRS spent $497,000 in the same year.[291] These low numbers suggest that the federal government primarily relies on flipped witnesses, rather than on monetary rewards.

At the state and local level, however, there is a remarkable development—the trend toward Crimestoppers Programs.[292] These programs anonymously pay for information that leads to a criminal arrest, typically for felonies.[293] These programs are localized and not always obvious to those with information. Moreover, the divergence in procedures nationwide is bound to create uncertainties. Indeed, the federal government does not have a Crimestoppers Program,[294] and its general reward statute

287. *See* Letter from John M. Kelso, Section Chief, Freedom of Information-Privacy Acts Section, Federal Bureau of Investigation, to Neal Katyal (Sept. 5, 2001) (on file with author) (applying three exceptions for declining to provide information). All FOIA requests were filed months before the tragedy of September 11, 2001.

288. Letter from Gloria L. Marshall, Director, Information Disclosure, U.S. Customs Service, to Neal Katyal (Oct. 23, 2001) (on file with author).

289. Letter from Katherine L. Myrick, Chief, Freedom of Information Operations Unit, Drug Enforcement Administration, to Neal Katyal (Sept. 21, 2001) (on file with author).

290. Letter from Gary L. Edwards, Freedom of Information and Privacy Acts Officer, U.S. Secret Service, to Neal Katyal (Sept. 28, 2001) (on file with author).

291. Letter from Symeria R. Rascoe, Disclosure Program Analyst, Internal Revenue Service, to Neal Katyal (Nov. 28, 2001) (on file with author). The 30-year-old IRS program receives more than 10,000 applications each year and has paid more than 17,000 informants $35.1 million in rewards. It has led to the recovery of more than $2.1 billion in taxes. Conspirators are eligible to receive rewards under this program. Marsha J. Ferziger & Daniel G. Currell, *Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs*, 1999 U. ILL. L. REV. 1141, 1142-43. The IRS keeps the identity of its informants confidential, even after the case is over and the agency has paid the bounty. I.R.C. § 301.7623-1(e) (2002); 19 C.F.R. § 161.15 (2002).

292. *See* Crime Stoppers Int'l, Inc., Statistics Since Inception, *at* http://www.c-s-i.org/stats.htm (last visited June 13, 2002) (providing activity and financial data for more than 1100 programs worldwide); Crime Stoppers USA, Inc., Membership List, *at* http://www.crimestopusa.com/member_display.htm (last visited June 13, 2002) (listing 142 programs but stating that its list is not exhaustive because several cities' programs, such as Washington, D.C., are not members).

293. A common procedure is to issue callers an identification number at the time of giving the information. Then callers are asked to call back in a week and give their identification number to see if they are eligible for a reward. If the caller is eligible, the police will advise them to go to a certain bank and present the teller with the identification number. Crime Stoppers of W. Cent. Fla., How Crime Stoppers Works, *at* http://www.crimestopperstb.com/Crimestoppers_Home.htm (last visited June 13, 2002).

294. Moreover, the FBI's web-based tip page does not appear to promise confidentiality or anonymity. *See* FBI, FBI Tips and Public Leads, *at* https://tips.fbi.gov (last visited Jan. 7, 2003). As such, criminals may fear that providing information to the police may result in their own

Imaged with the Permission of Yale Law Journal

specifically exempts co-conspirators from monetary rewards.[295] The federal government could take the lead and create a nationwide program and procedures that promote the visibility and reliability of monetary rewards. (Tracking the suggestion from the preceding Subsection, these monetary rewards should not only be for inculpatory information, but also for exculpatory information.) With greater certainty about payment will come greater amounts of information.[296] As information flows, conspiracies will also have to incur greater monitoring costs, thereby reducing their gains and fracturing trust even further.

Research about cognitive dissonance reveals a subtle benefit of Crimestoppers Programs—they prime conspirators for greater acts of defection. Because of the sunk-cost trap, individuals have a tendency to act in line with their previous decisions.[297] Indeed, marketers use a "foot-in-the-door" strategy—such as the pledges universities ask their graduating seniors to sign committing to small alumni contributions. Such tactics cue people to escalate their course of activity. Crimestoppers rewards, by encouraging conspirators to profit at the expense of their criminal group, can ultimately facilitate significant cooperation with prosecutors down the road. And a nationwide crimestoppers program would provide rewards not only to members of a conspiracy who turn on their co-conspirators, but also to other individuals as well, thus enlarging the pool of individuals who may provide information.[298]

---

capture. There may be ways to minimize this fear. For example, each time a tip comes in, an officer could assign a confidential code to the tip. The caller could be told to remember a certain passage on a page in a popular book, or a series of alphanumeric symbols. But the identity of the caller would not be known to law enforcement. If the caller were ever arrested, he could inform the authorities that he was a participant in the contingency reward program, and repeat the confidential code. (No tipper would ever have an incentive to reveal the confidential code, for doing so would risk letting another person use it to reduce a sentence.) The code could be checked to see if it provided any useful information, and, if so, a reward could be granted in the form of a lowered sentence.

295. 18 U.S.C. § 3059 (2000) allows for a maximum award of $25,000 for information leading to the capture of anyone charged with violation of a federal criminal law or to the arrest of any such person. But it specifically makes ineligible anyone who "knowingly participated in the offense" as well as "a person whose illegal activities are being prosecuted or investigated [and, in the judgment of the attorney general,] could benefit from the reward." *Id.*

296. Ferziger & Currell, *supra* note 291, at 1181. For example, when the False Claims Act was clarified to make qui tam rewards more likely and to remove administrative discretion to decline them, the number of qui tam suits increased markedly. *Id.* at 1155 ("The FCA change shows that an increase in certainty of reward, or at least the creation of a check on agency discretion, increases the incentive to inform.").

297. *See supra* text accompanying notes 122, 163.

298. One of the likely sources of information will be from rival firms. Because rivals often know each other's business dynamics, from illegal suppliers to the identities of group members, they are strategically positioned to provide information to the authorities. Their interests often align with law enforcement, insofar as removing a rival firm from operation can help secure greater profits for the conspiracy.

Some economists have argued that monopoly organizations might reduce violence; yet the brunt of organized crime still occurs in competitive markets that diminish these positive effects.

Imaged with the Permission of Yale Law Journal

In addition to rewarding individuals for information of someone's guilt or innocence, these programs can also target assets of criminal entities to incapacitate groups. Money-laundering statutes already accomplish this to some degree by reducing asset liquidity. But a conspiracy-based approach could go further, and provide a finder's fee, say ten percent, to those who report assets of criminals if they are recovered. Some small portion of this finder's fee could even be given to conspirators who provide such information. The idea is to use criminal law to target group resources in ways that make conspiracies harder to operate.[299]

Governments could also authorize civil suits against conspiracies. At least as early as the eighteenth century, England used qui tam actions to reward private citizens who brought actions against criminal enterprises.[300] A modern whistleblower statute could permit anyone, including a member of a conspiracy, to allege criminal wrongdoing and recover a small fraction of the judgment. Such statutes would authorize such suits if no indictment against the plaintiff has been brought, or if an indictment has been brought and the government has agreed to let the suit proceed.[301]

Under this scheme, nonconspirators may become whistleblowers, but conspirators often may not because doing so alerts officials to their illegal acts. Some, however, may bring suit because they believe that law enforcement already has learned of their criminal acts. In such a situation, whistleblower statutes could further the race to defect and quickly unravel the conspiracy. If a conspirator believes that the group's acts have been

---

See Dick, *supra* note 71, at 718. To the extent that firms can diminish competition, it may promote cost deterrence. If firms are battling over the street-level price of cocaine, they will attempt to sell it at the cheapest possible cost while maintaining a profit. But remove the rivals, and the incentive to sell it at that cost may disappear. The higher cost will generate additional profit for the conspiracy, but it will also deter new users from purchasing cocaine. On the other hand, these greater profits can be reinvested back into the criminal enterprise and a larger enterprise can have economies-of-scale advantages and a stronger reputation.

299. An anonymous system, however, can be clogged with spurious information (anyone who has doubts about this should check their e-mail). Individuals could generate lots of false information to throw the authorities off of a criminal trail. If this practice develops, it will severely compromise the ability to use anonymous tips. There are ways to use pseudonymity to minimize these costs. For example, every person picks a pseudonym and law enforcement would simply have a master list of all pseudonyms, but not the identities of each holder. Credibility would develop around pseudonyms, just as they do around Internet pseudonyms, and those who cry wolf too many times are likely to be disregarded by the cops. And those that provide useful information over time will engender quicker government responses.

300. *See* Langbein, *supra* note 91, at 84; Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 83-91.

301. The strategy here would be patterned after modern qui tam statutes, which allow private individuals to recover a certain percentage of money against those who defraud the federal government. In the first few years after the False Claims Act Amendments of 1986, which liberalized the qui tam suit, the government recovered more than one billion dollars. Press Release, U.S. Department of Justice, Justice Department Recovers over $1 Billion in Qui Tam Awards and Settlements (Oct. 18, 1995), *at* http://www.usdoj.gov/opa/pr/Pre_96/October95/542.txt.html. It permits a reward against an informant with unclean hands, so long as the informant is not convicted of a violation. Ferziger & Currell, *supra* note 291, at 1146.

Imaged with the Permission of Yale Law Journal

detected, he might file suit to reap the civil benefits and then try to seek a cooperation agreement.[302] Moreover, the fear of defection alone will create massive inefficiencies in the criminal organization, reducing its gain and promoting cost deterrence. It will also further destabilize group identity by providing individual rewards instead of joint ones.

If a new qui tam statute is politically unpalatable, a simple change to the standing requirements of RICO, so that members of a criminal organization could file civil suits against it, may have a powerful effect.[303] At present, only aggrieved parties can file suits against an entity; some judges have further held that only innocent parties have standing to sue.[304] Liberalizing the standing requirement creates monetary incentives for people to come forward and provide information.

On the other hand, such a change can create a further inducement to join a criminal enterprise by increasing the payoff and can send a negative message to the law-abiding majority. These objections may preclude adoption of the above changes, although flipping (an entrenched method of law enforcement) suffers from similar defects.[305]

4. *Publicity*

Law enforcement is not the only way to combat conspiracy. Government should seek to promote public messages, whether through advertising, media briefings, outreach to religious leaders, or other measures that make conspiracies more difficult to create and operate. For example, government should promote the view that many conspirators are receiving rewards for information, although of course such information will need to be sanitized to protect the identity of cooperators. Such publicity will deter people from joining a conspiracy by increasing the perceived probability of detection. Because people tend to get their understandings

302. Whistleblowers will be more likely to come forward if their lawyers can make proffers to prosecutors. This suggests that law enforcement could set up mechanisms to ease communication between potential defectors and the police, such as anonymous proffers given by legal counsel and separate teams of prosecutors that listen to and evaluate them. Accordingly, whistleblowing might be more common than one might initially suspect.

303. 18 U.S.C. § 1964 (2000) (stating that the current standing requirements permit civil suits to be filed by "[a]ny person injured in his business or property"). There are ways to structure the incentives to encourage races for information—such as providing a higher percentage or all of the reward to the first filer (a system like the one used for patents).

304. *E.g.*, Ross v. Bolton, No. 83 Civ. 8244 (WK), 1991 U.S. Dist. LEXIS 18717, at *7 (S.D.N.Y. Dec. 27, 1991) ("It was not the Congress' purpose in enacting RICO to provide civil remedies for one conspirator against another."); *see also* Loren E. Kalish, Note, *Plaintiffs in Complicity: Should There Be an Innocent Party Requirement for Civil RICO Actions?*, 47 EMORY L.J. 785, 789-802 (1998) (examining standing requirements).

305. *See supra* text accompanying notes 79-97 (outlining the advantages of cooperators to law enforcement); *supra* text accompanying notes 276-278 (explaining why flipping does not generally provide a further incentive to conspire ex ante).

Imaged with the Permission of Yale Law Journal

from other people, government can sometimes engineer an informational cascade.[306]

Furthermore, such publicity will induce greater numbers of people who have already joined a criminal group to defect. If conspirators learned that the government has persistently made use of information provided by co-conspirators, it could alter the impression that criminals are bonded to each other. Dan Kahan's brilliant analysis of reciprocity has shown that enforcement tactics that suggest crime is pervasive can often cue additional crime.[307] Similarly, law enforcement could publicize the fruits of every flipped witness and informant with the hopes of sowing distrust among the group. When individuals in a conspiracy distrust their compatriots, they are more likely to flip.[308]

At the same time that the law publicizes its successes with flipping, it should also act to counter the "advertisements" for conspiracies. Law enforcement could target symbols of group membership—via increased enforcement of law against those wearing visible identifiers such as gang colors—to minimize collective identity.[309] Group identity can also be destabilized by manipulating an individual's perception of his comparative and normative fit with other group members. Cooperation is more likely when a criminal is made to feel closer to a different group. For this reason,

306. Sunstein, *supra* note 13, at 82 ("The result of this process can be to produce snowball or cascade effects, as small or even large groups of people end up believing something—even if that something is false—simply because other people seem to believe that it is true.").

307. Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 342-43 (2001). Publicized flipping inverts the well-known scheme of promoting cooperation by cultivating the appearance that others are cooperating. *See* Craig D. Parks et al., *Actions of Similar Others as Inducements To Cooperate in Social Dilemmas*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 345, 346 (2001) (discussing public television's "viewers like you" fund-raising campaigns).

308. *See supra* note 170. One lesson from the psychological literature is that the more information people get about the lack of cooperation of their peers, the easier it is to induce defection. Indeed, somewhat perversely, people are more likely to cooperate when cooperation rates are unknown than when they know other parties are cooperating. Consider the delicious result obtained by Eldar Shafir and Amos Tversky's two-player prisoners' dilemmas. They found that 16% of subjects cooperated after they were told that the other player had cooperated, while only 3% cooperated when they were told that the other player had defected. By contrast, the rate of cooperation for individuals who were not told what the other player did was a whopping 37%—more than twice the cooperation rate of those who learned that the other player had cooperated! Eldar Shafir & Amos Tversky, *Thinking Through Uncertainty: Nonconsequential Reasoning and Choice*, 24 COGNITIVE PSYCHOL. 449, 454-55 (1992). They suggest that the players in the dark cooperate because they hope to induce cooperation by the other player. *Id.* at 458 (observing that players may have cooperated "as a way of 'inducing' cooperation from the other"). This suggests that publicity should cast the decisions about defectors as a fait accompli—that there are already unknown defectors among the group. Criminals might not want to flip because they fear that doing so implies that others have already flipped or they fear that defection will subtly cue others to defect as well. *See id.* (stating that people tend to "select actions that are diagnostic of favorable outcomes even though they do not cause those outcomes").

309. While outlawing such identifiers is in obvious tension with the First Amendment, law enforcement might accomplish much of the same by increasing the probability of enforcement of other laws (such as those regarding violence, drugs, and the like) against those who overtly display particular gang-identified symbols.

Imaged with the Permission of Yale Law Journal

community prosecutors and police may have the credibility to persuade residents that conspiracies are creating localized harms. Moreover, in the cooperation process, law enforcement should emphasize that the conspiracy is doing harm to the prospective witnesses' loved ones, their communities, and other institutions of personal value.[310]

Finally, conspiracies are attractive because they offer a new social identity. Accordingly, governments must also work with teachers, community leaders, prominent athletes, and others to attack the nonpecuniary reasons for group crime. Governments could get more involved, for example, in promoting their message in small groups in schools and religious institutions. Social psychologists have shown that many of the most successful ways to break group dynamics involve the introduction of new norms into the group through peer discussion.[311] Legal solutions to conspiracy should, therefore, be supplemented with aggressive outreach measures that combat the social dynamics that lead individuals to conspire.

5. *Prosecutorial Reforms*

The above account of conspiracy law is one that depends on trustworthy and knowledgeable prosecutors. In order for information extraction to work properly, prosecutors must accurately discern the level of knowledge individuals have, as well as the level that they should have, given their role in a conspiracy. They must develop judgment about which entities are likely to be engaging in real harm, and which ones are simply discussion groups.[312] Prosecutors must also develop relationships of trust

310. If government can get across the message that lawbreaking has not been rewarded as highly as the individual might think, then cooperation can also be induced. Psychologists have found that it is possible to increase cooperation by revealing that noncooperators do not receive high individual payoffs. Craig D. Parks et al., *Actions of Similar Others as Inducements To Cooperate in Social Dilemmas*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 345, 351-52 (2001) (empirical study). This finding suggests that if law enforcement can point to examples of heavy jail time, physical violence, and poor financial compensation over time, information extraction may increase.

311. For example, during World War II, nutritionists tried to change food consumption patterns away from traditional meats that were in short supply (like beef) toward sweetbreads and kidneys. Lectures were given and pamphlets were sent out, but behavior did not change. However, when homemakers were brought into groups where a trained leader explained how families could overcome their obstacles to these foods, discussion ensued and group commitments were forged, leading over thirty percent to try them. *See* ROSS & NISBETT, *supra* note 27, at 219-20. Similar findings have been found regarding health practices and childcare. *Id.*

312. First Amendment issues will arise in some cases, *see, e.g.*, United States v. Spock, 416 F.2d 165, 184-92 (1st Cir. 1969) (conspiracy prosecution of Dr. Spock); United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), but it is possible to carve out special rules, *see* Johnson, *supra* note 1, at 1139, 1156 (suggesting this possibility). *See generally* John J. Dystel, Note, *Conspiracy and the First Amendment*, 79 YALE L.J. 872 (1970). There may be other solutions to the problem, such as increasing the overt act requirement. *See* FLETCHER, *supra* note 241, at 225 (advocating this method).

Imaged with the Permission of Yale Law Journal

with criminal actors to create rival affections. Fastidious safeguards against the misuse of proffered evidence are also necessary.[313]

In order for flipping to shift group identity, prosecutors must focus particularly on the character and disposition of a cooperating defendant. Buying information through rote offering of lower sentences will not yield the same payoffs—either in terms of cooperation rates or long-term reductions in crime. The cooperation process has the potential to fold criminals back into the mainstream of society and offer them a second chance. However, reaching this potential requires prosecutors not to simply eye conviction rates, but also to develop a feel for the human side of cooperation and the shifting of identity. They must also learn to reverse the effects of cognitive dissonance by using "foot-in-the-door" strategies that first seek small acts of cooperation from potential witnesses and only later seek larger ones.[314]

These types of prosecutorial determinations are not capable of being legislated or imposed from above. Instead, they require day-to-day attention from the leadership in prosecutors' offices, good examples from supervisors, and extensive training of new attorneys. Some structural devices, such as institutionalizing review boards that examine how cooperating witnesses are treated in individual offices may help to instill such attitudes. Using insulated standing teams to hear proffers, subject to review by specialized ombudsmen, may also help. Those who make hiring decisions will need to review candidates' willingness not simply to win cases in front of them, but to take a long-term approach to crime. Ultimately, however, prosecutors will have to train and watch each other to ensure that they are maintaining fidelity to the purpose of conspiracy law.

The risk always looms that conspirators will lie.[315] Concerns about reliability, however, pervade the criminal justice system; restrictions on the use of flipped witnesses may force prosecutors to rely on more unreliable

313. If prosecutors use such information, it will ex ante lead to less information transmitted during the proffer. "Promises of immunity are important weapons in the fight against large-scale criminal enterprises; the government often snares big fish with information gained from little fish," but the system works "only if each side keeps its end of the bargain: the informant must provide accurate information, and the government must not use that information against the informant." United States v. Palumbo, 897 F.2d 245, 246 (7th Cir. 1990).

314. *See supra* text accompanying notes 122, 163.

315. For example, scandals in the 1730s drew attention to the perjury incentives created by Britain's monetary rewards. John Langbein has traced the decision to permit defendants access to counsel, in part, to these scandals. LANGBEIN, *supra* note 94 (manuscript at 96). Similar concerns existed during the English crown witness system, *see* Regina v. Farler, 173 Eng. Rep. 418, 419 (Worcester Assizes 1837) (stating that "the danger is, that when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others"), and manifested in some early American practices as well, *e.g.*, Harris v. State, 15 Tex. Ct. App. 629, 634 (1884) (warning that a state's promise to drop charges against one of six defendants, depending on which one gave the most powerful testimony to the grand jury, would tempt a witness to swear to "any and all things").

Imaged with the Permission of Yale Law Journal

sources, from unnamed confidential informants to mere innuendo.[316] Flipped witnesses in many cases will yield information that, on balance, is more reliable than other available sources.[317] As the Supreme Court has pointed out, the reliability concerns are not so great as to toss out the testimony altogether since prosecutorial techniques and the adversarial system can bring out inaccuracies.[318] Consider three prosecutorial devices. First, the government can delay the timing of the reward, so that the sentencing reduction is not effective until a prosecutor believes the defendant has provided accurate information and makes an application to a court. Second, a prosecutor can test an individual's testimony against other corroborating facts in the case. While corroboration will vary, well-trained prosecutors will seek high degrees of corroboration before using testimony from a cooperator-defendant because they know "the proven rule of thumb that the jury will not accept the word of a criminal unless it is corroborated by other reliable evidence."[319] Third, the prosecution can conduct a proffer session in which the witness walks the prosecutor through every relevant fact and detail. The same walk-through can be carried out again later in the

316. Indeed, a system of flipping may encourage conspirators to document criminal activity and overt acts. Such documentation not only provides additional reliability in the event that the person is actually flipped, it also may be discovered independently by law enforcement and thereby increase the probability of detection of the group. For example, under the crown witness system, one highway robber maintained a journal of his offenses precisely to provide evidence deemed sufficiently reliable to the Crown. Upon being apprehended and "[b]eing asked by the court what was his design for keeping a journal, . . . he replied . . . [that] it was for his own safety, that he might be more exact when he would have the opportunity to save himself by becoming an evidence." Peter Linebaugh, *The Ordinary of Newgate and His Account*, *in* CRIME IN ENGLAND 1550-1800, at 246, 265 (J.S. Cockburn ed., 1977). I am grateful to John Langbein for directing me to this source.

317. Because the witnesses have been on the inside of an operation, they are particularly suited to knowing the details of a conspiracy. The prosecution, moreover, can insist on a defendant's "full and fair" cooperation and "truthful" testimony in exchange for a recommendation of leniency. *See generally* H. Lloyd King, Jr., *Why Prosecutors Are Permitted To Offer Witness Inducements: A Matter of Constitutional Authority*, 29 STETSON L. REV. 155, 179 (1999) ("Critics of witness inducement agreements have failed to offer empirical evidence in support of their claims that these agreements produce inherently unreliable evidence.").

318. The Court in *Hoffa v. United States* stated that the cooperating witness,

> perhaps even more than most informers, may have had motives to lie. But it does not follow that his testimony was untrue, nor does it follow that his testimony was constitutionally inadmissible. The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination and the credibility of his testimony to be determined by a properly instructed jury.

385 U.S. 293, 311 (1966).

319. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1425 (1996); *see also id.* at 1385 ("Ordinary decent people are predisposed to dislike, distrust, and frequently despise criminals who 'sell out' and become prosecution witnesses."); Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 45 (1999) (stating that "[a]s a rule, such testimony helps the government only where it is woven into a fabric of corroborating detail from untainted sources"); Yaroshefsky, *supra* note 274, at 932-35 (discussing corroboration).

Imaged with the Permission of Yale Law Journal

investigation, and if there are variances in detail, the prosecutor can begin to sense that something is afoot.

Other traditional tools promote reliability as well. Prosecutors are required to disclose cooperation arrangements to the defense,[320] and the defense is permitted to impeach a witness's credibility on the basis of a promise for a reduced sentence. Jury instructions further clarify reliability concerns.[321] Perjury law provides additional safeguards when witnesses testify; a revitalized approach could attach liability not only for statements made under oath, but also for false statements that were intentionally made to law enforcement during the investigation stage.

Other steps could be taken. For example, the *United States Attorneys Manual* and other prosecution guides could be rewritten to reflect the centrality of reliability and honesty in the cooperation process.[322] Formal review within the executive branch of prosecutorial decisions and reliability may also prove helpful.[323] Jury instructions could be written to focus more on reliability.[324] So, too, government attention during the proffer process, witness segregation, and perhaps even polygraph testing may be used.[325] In

320. *Giglio v. United States* requires prosecutors to disclose evidence to defense attorneys that goes to the credibility of government witnesses, including promises of immunity, if the evidence could reasonably affect the jury's judgment. 405 U.S. 150, 154 (1972). In addition, Rule 11(e)(2) requires disclosure of a plea agreement to the court "in open court or, on a showing of good cause, in camera." FED. R. CRIM. P. 11(e)(2).

321. "The use of informers . . . may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions." Lee v. United States, 343 U.S. 747, 757 (1952); *see also* Cool v. United States, 409 U.S. 100, 103 (1972) (observing that "[a]ccomplice instructions have long been in use and have been repeatedly approved," and that "[i]n most instances, they represent no more than a commonsense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon his veracity"); Washington v. Texas, 388 U.S. 14, 22 (1967) (similar).

322. *See* David A. Sklansky, *Starr,* Singleton, *and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509, 528-30 (1999) (making such a proposal).

323. The United States Department of Justice recently decided to strengthen its procedures regarding confidential informants, creating a special Confidential Informant Review Committee. *See* U.S. Dep't of Justice, Guidelines Regarding the Use of Confidential Informants (Jan. 8, 2001), *at* http://www.usdoj.gov/ag/readingroom/ciguidelines.htm. These new regulations specifically do not apply to cooperating witnesses, *see id.* pt. I.A.2, but they could be extended to such witnesses. Formal review would also help avoid a key explanation for unreliability: inexperienced line prosecutors. *See* Yaroshefksy, *supra* note 274, at 950-52.

324. Consider the following pattern jury instructions in the Sixth Circuit:

> The use of paid informants is common and permissible. But you should consider [such a witness's] testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by what the government gave him.
>
> . . . Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

1 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL AND CRIMINAL § 15.02, at 480 (4th ed. 1992).

325. Rowland, *supra* note 80, at 681-84 (suggesting such alternatives to bolster reliability). A seasoned former law enforcement official, Judge Trott of the Ninth Circuit, has warned that "[c]riminals are likely to say and do almost anything to get what they want, especially when what

Imaged with the Permission of Yale Law Journal

addition, it may be possible to modify discovery rules further to provide more information to defense attorneys about cooperators.[326]

It is of course possible that prosecutors cannot be trusted with such discretion, with respect to both cooperator reliability and the doctrine of conspiracy more generally. As indicated at the outset, this Article has not tried to answer this criticism, for it is ultimately an empirical matter that we are presently unequipped to answer. There are reasons to doubt that prosecutors, in whom our system confides so much, are incapable of the task—such as their popular accountability, codes of ethics, training, supervision, and the like.[327] If these mechanisms ultimately fail and conspiracy law must be abandoned or cabined, however, this Article has detailed the severe law enforcement costs and missed opportunities that arise from untrustworthy prosecutors.

The unscrupulous prosecutor problem, after all, is one far larger than conspiracy law itself. If we deal with it by curbing conspiracy doctrine, it may risk leading these bad apples toward even more unsavory and less reliable practices. (Indeed, hiding concepts like information extraction forces the government to claim that a defendant's commissions justify the large sentences authorized by conspiracy law—inviting ridicule in some cases and deflecting from training prosecutors to be fairer and more accurate assessors of information potential.)[328] By drawing attention to the functional benefits of conspiracy law and highlighting the role of

---

they want is to get out of trouble with the law." Trott, *supra* note 319, at 1383. But even Judge Trott's harsh warning recognized that "[n]otwithstanding all the problems . . . the fact of the matter is that police and prosecutors cannot do without [using criminals as witnesses]—period." *Id.* at 1390. He continues: "[F]requently the only persons who qualify as witnesses to serious crime are the criminals themselves. Terrorist cells are difficult to penetrate. Mafia leaders use underlings to do their dirty work. . . . Snitches . . . are therefore indispensable weapons in a prosecutor's battle to protect a community from criminals." *Id.* at 1391. Judge Trott usefully put forth many other suggestions for prosecutors to use to promote reliability, such as building a case on the basis of evidence that corroborates the cooperator's story rather than using the witness herself, getting all the information in writing, and using particular interrogation techniques. *Id.* at 1392-413.

326. *See* Hughes, *supra* note 187, at 29-30. Procedures might also be developed whereby judges screen cooperating witnesses before they testify (a process somewhat similar to a *Daubert* hearing for scientific expert testimony).

327. The pardon power also may check abuse. *See, e.g.*, Anthony Lewis, *A Christmas Carol*, N.Y. TIMES, Dec. 23, 2000, at A19 (describing the presidential pardon of Dorothy Gaines, a minor player in a drug conspiracy).

328. As such, the benefits of conspiracy law are sufficiently strong that it may be worth trying to trade other devices, such as mandatory minimums, to retain the doctrine. *See supra* note 118 (noting problems with mandatory minimums); Scott & Stuntz, *supra* note 129, at 1963-66 (discussing the harms of mandatory minimums, particularly in the plea bargain context); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2141-42 (2002) (discussing trading certain doctrines for others to aid law enforcement and protect citizens). Many cooperation agreements undoubtedly take place in the low-visibility plea setting, but because these agreements may later become more visible in the course of trying or sentencing co-conspirators, avenues for error checking may present themselves. Other general mechanisms to regulate plea bargaining may also reduce abuse. *See* Scott & Stuntz, *supra* note 129, at 1950-51, 1957-66.

Imaged with the Permission of Yale Law Journal

information extraction, this Article has endeavored to start the debate on whether the conspiracy doctrine as actually implemented promotes net social good.

CONCLUSION

Criminal law can profitably borrow from insights generated by corporate law scholars and organizational theorists. This body of work is generally concerned with making legitimate enterprises operate in a more efficient manner. By reverse engineering these concepts, law can stymie criminal conspiracies. In particular, conspiracy law should encourage the use of excessive monitoring, chill discussion within the firm, lead it to compartmentalize information, strive to create team-production problems, impose vicarious liability to make illegal firms more inefficient, make it difficult for the parties to use default rules and off-the-rack principles to reduce transaction costs, refuse to extend legal enforcement to intra-firm disputes, and water down their intellectual property. Federal law attempts to do some of this, although its choices are often unconscious and consistently undertheorized.

Work by psychologists both refines and supplements this picture. Groups behave differently than individuals, in their proclivities toward risk, in their ability to perform tasks, in their loyalty structures, and in their belief systems. Because this psychological data demonstrates that criminal groups pose special dangers to society, additional punishment for conspiracy is appropriate. The psychological insights also generate policy prescriptions for undermining groups once they have formed. In particular, legal doctrines that create an atmosphere of distrust within the firm are likely to fray group identity, contributing to more defections and less productivity. The lessons of group behavior also illustrate why particular sentencing processes—such as the section 5K motion—can alter dangerous social identities through solemn courtroom proceedings.

No doubt this analysis will fail to persuade everyone. Those who distrust prosecutors and the safeguards in the criminal justice system will still have the same objections to conspiracy law. My aim here has been more modest—to detail the substantial and underappreciated benefits of conspiracy law on information extraction as well as on the formation and identity of criminal groups. Understanding these benefits will generate a more informed debate on the contours of conspiracy law, and may lead those disinclined to trust the criminal justice system to fix that system before abolishing a doctrine that serves many useful purposes.

More generally, underlying the claims regarding conspiracy are three larger methodological moves that deserve further analysis. *First*, criminal law, as with other areas of law, has neglected group behavior due to

Imaged with the Permission of Yale Law Journal

legalistic and microeconomic concerns with individual behavior. To recall one illustration, the individualistic assumption that greater certainty regarding a sanction will promote deterrence operates quite differently with respect to groups. *Second*, theories of criminal law have neglected the role of information. Blinded by aphorisms about American law's avoidance of affirmative duties, we have lost sight of just how much our system grades offenders on omissions. This analysis suggests, for instance, that the case for revival of misprision of felony is stronger than many have assumed. *Third*, a proper approach to criminal law requires an understanding of both psychology and economics. An economist, for example, may focus too much on price discounts for cooperation, whereas social identity is crucial to understanding why individuals do not flip even with massive discounts. A psychologist, by contrast, may slight important features of group behavior, from specialization to team production.

Twentieth-century criminal law began with great interdisciplinary promise in incorporating advances in psychiatry, and concluded with the hope of integrating microeconomics into its picture. By viewing conspiracy through this refurbished interdisciplinary lens, law can move further in its quest to understand and respond to dangerous forms of human behavior.

Imaged with the Permission of Yale Law Journal