COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

ABOLISH CONSPIRACY

*Evan D. Bernick**

Criminal conspiracy seems as American as apple pie. Every state criminalizes conspiracy, and there are dozens of federal conspiracy statutes. The crime of conspiracy is the darling of prosecutors across the political spectrum. It has been wielded against poor Black teens and White TV moguls; anti-carceral and anti-abortion activists; rap stars and a President. Conspiracy's hold on U.S. criminal systems is firm.

I seek to break that hold. I contend that the crime of conspiracy promotes surveillance of, and violence against, poor people of color. It is a menace to freedom of expression, the rights of criminal defendants, and the rule of law. Its purported benefits remain unsubstantiated; its costs have been understated when they have not been outright ignored. And it can't be reformed. It should be abolished.

This story begins in the Star Chamber and culminates in present-day Georgia and Chicago. It is the story of nineteenth-century labor strikes and twenty-first-century drill rap; Emma Goldman, Angela Davis, Young Thug, and Lil Durk; the Smith Act and the RICO Act; the Conspiracy Eight and Cop City. I uncover and build upon a tradition of conspiracy criticism which grew out of left social movements. Finding that these movement critiques of conspiracy have not only been vindicated but exceeded by experience, I re-up, update, and double down.

INTRODUCTION 949
I. SOUTHERN TAKEOVER 951
A. Georgia Crime Stories 951
B. "STOP RICO" 954
C. Making Conspirators 961
II. STAR CHAMBER MUSIC 966

* Associate Professor of Law, Northern Illinois University College of Law. Thanks to Jocelyn Simonson, Cynthia Godsoe, and Guha Krishnamurthi for comments, suggestions, and inspiration.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

A. Origins and Development 966
1. Common Law Conspiracy 966
2. Enslavers' Conspiracy 969
3. Conspiracy Against White Supremacy 971
4. Conspiracy of Capital 973
5. Statutory Conspiracy 974
6. Conspiracy and Confrontation 977
B. Anti-Conspiracy 979
1. Class Warfare 979
2. Censorship 983
3. Rule of Law 985
III. CONSPIRACY RULES EVERYTHING AROUND ME 991
A. Conspiracy Against Movements 992
B. Conspiracy Against Organized Crime 998
C. Neoliberal Conspiracy Theory 1002
IV. DON'T BELIEVE THE HYPE 1008
A. Re-Upping Anti-Conspiracy 1008
1. Class Warfare 1008
2. Censorship 1009
3. Rule of Law 1016
B. Uncounted Costs 1019
1. Surveillance 1019
2. Infiltration 1022
3. Violence 1024
4. Multiplication 1027
5. Legitimacy and Estrangement 1029
C. Unsubstantiated Benefits 1031
1. Group Dangerousness 1031
2. Deterrence 1034
3. Morality 1036
D. Don't Know, Don't Criminalize 1038
V. ABOLITION, AGAINST ALL ODDS 1040
A. "Why Not Reform?" 1040
B. "What About White-Collar Crime?" 1044
C. "What About the Real Gangsters?" 1048
D. "What About White Supremacy?" 1054
E. "What's the Alternative?" 1058
CONCLUSION 1059

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

INTRODUCTION

We all have a job to combat the conspiracy

- Gang Starr, "Conspiracy" (1992)

Conspiracy is all around us. Every state makes it a crime to agree to and act in furtherance of plans to accomplish unlawful goals, and there are dozens of federal conspiracy statutes. The crime of conspiracy is the darling of prosecutors across the political spectrum. It has been wielded against poor Black teens and White TV moguls; anti-carceral and anti-abortion activists; rap stars and the President of the United States. Conspiracy's hold on U.S. criminal systems is so firm that it is difficult to imagine them without it.

This Article seeks to break that hold. The criminalization of conspiracy promotes surveillance of and violence against poor people of color. It is a menace to free speech, the right of a criminal defendant to confront adverse witnesses, and the rule of law. The benefits of conspiracy criminalization have been persistently exaggerated; the costs have been consistently understated. And we lack grounds for confidence that conspiracy can be made to do more good than harm. Accordingly, the crime of conspiracy should be abolished.

My call for conspiracy abolition is radical but not unprecedented. I uncover and build upon conspiracy criticism that grew out of social movements in the late nineteenth century. Finding that this criticism has not merely been vindicated but exceeded by experience, I re-up, update, and double down.

I begin by spotlighting three Georgia conspiracy prosecutions which drew national attention and critical commentary in recent years. The first is the prosecution of rapper Jeffery Williams (known as "Young Thug") and twenty-seven other people associated with an Atlanta-based hip-hop label, Young Stoner Life Records, for their alleged participation in a violent street gang. The second is the prosecution of Donald Trump and eighteen other people for collaborating to overturn the results of the 2020 presidential election. Finally, I discuss the prosecution of sixty-one activists for organizing to prevent the construction of a police training facility that they have termed "Cop City." I use these prosecutions to introduce longstanding popular anxieties about conspiracy.

Part II provides a genealogy of conspiracy criminalization and criticism. I trace conspiracy's Anglo-American roots and then detail

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

how conspiracy became notorious for its late nineteenth-century use against the labor movement. Labor organizers and movement lawyers denounced conspiracy as a weapon of class warfare, an instrument of censorship, and a betrayal of the rule of law. In the mid-twentieth century, left antiwar and racial-justice activists identified conspiracy as a means of suppressing transformative social change and enforcing White supremacy.[1] Conspiracy skepticism became mainstream within legal scholarship, and several Supreme Court Justices expressed it.

Part III describes how conspiracy was entrenched. Despite some occasional misgivings about particular statutes—most notably, the Racketeer Influenced and Corrupt Organizations ("RICO") Act[2]—the Supreme Court eventually made its peace with conspiracy criminalization. It even adapted constitutional doctrine to accommodate conspiracy's expansion. Law professors and judges used tools from law and economics to elaborate consequentialist arguments for conspiracy. They claimed that conspiracy deterred the formation and hastened the fragmentation of criminal groups that posed distinctive dangers.

Part IV critiques normative conspiracy theory. I catalogue conspiracy's underappreciated social costs. These costs arise from surveillance, infiltration, violence, and censorship, all of which have a disparate impact on poor people of color. That disparate impact threatens to estrange people from and delegitimize civil-social institutions that are perceived as excluding them. I go on to question the claimed benefits of conspiracy, finding that these claims rest upon unsubstantiated and dubious empirical premises.

Part V considers objections to abolition. Reforms that are aimed at particularly injurious features of conspiracy might be better than nothing. But we should have no illusions that conspiracy can be made a social positive.

[1] I capitalize "Black" when referring to African American identification and members of other African diaspora culture and "White" when referring to non-Black individuals of European ancestry. I agree with Etienne Toussaint that "[w]hile race as a tool for human categorization is a social construction that too often essentializes and oversimplifies, racial categorizations are employed with tangible effect in the United States to exploit, suppress, and dehumanize subordinated populations." Etienne C. Toussaint, Tragedies of the Cultural Commons, 110 Calif. L. Rev. 1777, 1779 n.4 (2022).

[2] See generally 18 U.S.C. §§ 1961–1968.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

I. SOUTHERN TAKEOVER

A. Georgia Crime Stories

In May 2022, a Fulton County grand jury charged twenty-eight people associated with Young Stoner Life Records with fifty-six different criminal acts, including armed robbery, carjacking, murder, and conspiracy.[3] Among them was one of the most popular and influential musicians in the world.[4] The indictment alleges that Jeffery Williams (a.k.a. Young Thug) co-founded and supported a violent street gang, Young Slime Life ("YSL"), through a variety of means, including his music.[5] It charged Williams with conspiracy to violate Georgia's RICO Act and participation in a criminal street gang.[6] Among the alleged acts in furtherance of conspiracy were Williams's lyrics in a rap song, "Eww," which include such lines as "YSL won't fold, pick his ass

[3] See Indictment at 1–5, State v. Adams, No. 22SC182273 (Ga. Super. Ct. Fulton Cnty. May 9, 2022) [hereinafter YSL Indictment], https://www.courthousenews.com/wp-content/uploads/2022/05/young-slime-life-indictment.pdf [https://perma.cc/9H4D-YJFD]; Jennifer Roback, Who Are the Alleged YSL Gang Members?, U.S. Sun (May 11, 2022, at 10:46 ET), https://www.the-sun.com/entertainment/5312665/alleged-ysl-gang-members-young-thug-gunna-georgia/ [https://perma.cc/D5AU-NE34].

[4] See Jeff Weiss, Why Young Thug Is the 21st Century's Most Influential Rapper, BBC (Oct. 21, 2019), https://www.bbc.com/culture/article/20191021-why-young-thug-is-the-21st-centurys-most-influential-rapper. Several of Young Thug's albums, including 2023's *Business Is Business*, have topped Billboard's R&B/Hip-Hop album chart upon release. See Trevor Anderson, 'Business' As Usual: Young Thug Debuts at No. 1 on Top R&B/Hip-Hop Albums Chart, Billboard (July 6, 2023), https://www.billboard.com/pro/young-thug-business-is-business-number-1-top-rb-hip-hop-albums-chart/.

[5] YSL Indictment, supra note 3, at 12, 33. Sergio Kitchens, another high-profile Atlanta rapper (known as "Gunna"), was also charged with conspiracy. Id. at 1–2. Prosecutors utilized language from a song that features Gunna, Young Thug, and Duke (Martinez Arnold), alleging that the choice of the word "slatts," combined with the use of the words "FN" and "Glock," constituted an overt act in support of the YSL enterprise. "Slatts" was said to be associated with the acronym "SLATT," which is short for "Slime Love All the Time." Taken together with "FN" and "Glock" (both of which refer to guns), the prosecution claimed that the song was intended to support gang activity. Id. at 47. Kitchens entered an *Alford* plea, which allowed him to maintain his innocence while pleading guilty and accepting his sentence. See North Carolina v. Alford, 400 U.S. 25, 27–29, 36–37 (1970). He was sentenced to five years in prison. Because one year of the sentence was commuted to time served and the remaining four years were suspended, Kitchens was released immediately. See Joe Coscarelli & Richard Fausset, Atlanta Rapper Gunna Reaches Plea Deal in YSL Gang Case, N.Y. Times (Dec. 14, 2022), https://www.nytimes.com/2022/12/14/arts/music/gunna-plea-ysl-case.html.

[6] YSL Indictment, supra note 3, at 10–11, 86.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

off from the balcony" and "YSL, wipe a n---- nose."[7] The prosecution also labeled social media photos displaying tattoos, shirts, and hand gestures as overt conspiratorial acts.[8]

Another Georgia RICO case was still more explosive. Following a two-year investigation into Georgia-based interference in the 2020 presidential election, a Fulton County grand jury indicted then-President Donald Trump and eighteen other people.[9] The indictment alleges that Trump and his allies organized a criminal enterprise, through which they directed a group of campaign contractors to copy data and software from voting machines, harassed an election worker and pressured her to confess to crimes she did not commit, and attempted to persuade Georgia legislators to appoint a new slate of electors who would cast votes for Trump.[10]

Georgia's RICO case against Trump ran on a separate track from a federal prosecution of Trump. Three of the four federal charges were conspiracy charges—to defraud the United States, to obstruct an official proceeding, and to deprive people of their right to vote in an election.[11] The charges arose from the alleged organization of slates of "fake electors" across the country and also from Trump's role in the violent attack on the Capitol by his supporters on January 6, 2021.[12]

Social media activity was cited in both Trump indictments. The Georgia indictment alleges that Trump and his former lawyer Rudy Giuliani engaged in "overt act[s] in furtherance of the conspiracy" by

[7] Id. at 15. See Young Thug, "Eww," Genius (Apr. 20, 2014), https://genius.com/Young-thug-eww-lyrics [https://perma.cc/GTR3-MX7J]. These aren't the only lyrics that are said to constitute overt acts, but they're representative. For an itemized description of every lyrical "act," see Jennifer Zhan, Here Are the Rap Lyrics Being Used in the YSL Trial, Vulture, https://www.vulture.com/article/young-thug-lyrics-ysl-indictment.html [https://perma.cc/WP2L-QEFZ] (last updated Nov. 27, 2023).

[8] YSL Indictment, supra note 3, at 15, 40, 42, 48, 50.

[9] See Indictment at 15, State v. Trump, No. 23SC188947 (Ga. Super. Ct. Fulton Cnty. Aug. 14, 2023) [hereinafter Georgia Trump Indictment], https://d3i6fh83elv35t.cloudfront.net/static/2023/08/CRIMINAL-INDICTMENT-Trump-Fulton-County-GA.pdf [https://perma.cc/U7VF-7BAF]; Hannah Grabenstein, Read the Full Georgia Indictment Against Trump and 18 Allies, PBS News (Aug. 15, 2023, at 00:28 ET) https://www.pbs.org/newshour/politics/read-the-full-georgia-indictment-against-trump-and-18-allies [https://perma.cc/54GF-FLXR].

[10] Georgia Trump Indictment, supra note 9, at 15–19, 27.

[11] See Indictment at 1–2, United States v. Trump, 704 F. Supp. 3d 196 (D.D.C. 2023) (No. 23-cr-00257) [hereinafter Federal Trump Indictment], https://d3i6fh83elv35t.cloudfront.net/static/2023/08/trump-indictment.pdf [https://perma.cc/S4RX-JRZZ].

[12] Id. at 21–22, 41.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

(among other things) posting on Twitter about testimony regarding "[b]allot stuffing by Dems" in Georgia that would "lead[] to an easy win," retweeting posts by unindicted conspirators that encouraged people to "call your [Georgia] state Senate & House Reps & ask them to sign the petition for a special session" of the Georgia General Assembly at which presidential electors would be unlawfully appointed, and demanding that Governor Brian Kemp "resign from office" because "[h]e is an obstructionist who refuses to admit that we won Georgia, BIG!"[13] The federal indictment cites tweets in which Trump lied about former Vice President Mike Pence "ha[ving] the power to reject fraudulently chosen electors," urged Pence to "send [votes] back to the States," and described rioters at the Capitol as "peaceful."[14]

Approximately two weeks after indicting Trump, the same Fulton County grand jury indicted sixty-one anti-carceral activists associated with a broader movement to prevent the construction of "Cop City"—a massive police training complex slated to be built on eighty-five acres of the Weelaunee Forest in DeKalb County, Georgia. The "Stop Cop City" movement began with a formation to defund the Atlanta Police called "Defund APD, Refund Communities," which worked alongside Community Movement Builders and the Atlanta Democratic Socialists of America.[15] The movement grew for nearly two years into a broad and decentralized coalition.[16] Its growth was met with police raids, arrests, and the killing of twenty-six-year-old queer Venezuelan climate activist Manuel Paez Terán, or "Tortuguita."[17]

The Cop City indictment begins with a lengthy "Anarchy Background" that purports to describe the ideology of "militant

[13] Georgia Trump Indictment, supra note 9, at 26–27, 29, 30, 46.

[14] Federal Trump Indictment, supra note 11, at 35–36, 40.

[15] Indictment at 1–3, State v. Beamon, No. 23SC189192 (Ga. Super. Ct. Fulton Cnty. Aug. 29, 2023) [hereinafter Cop City Indictment]; Amna A. Akbar, The Fight Against Cop City, Dissent (Spring 2023), https://www.dissentmagazine.org/article/the-fight-against-cop-city/ [https://perma.cc/4C5X-VJJ2].

[16] Micah Herskind & Kamau Franklin, The Struggle to Stop Cop City—By Any Means Necessary, The Forge (Sep. 7, 2023), https://forgeorganizing.org/article/struggle-stop-cop-city-any-means-necessary [https://perma.cc/R3GT-L4BZ].

[17] Aja Arnold, Atlanta Police Target Bail Fund Organizers in Latest Crackdown on 'Stop Cop City' Movement, The Appeal (June 2, 2023), https://theappeal.org/cop-city-bail-fund-arrests-atlanta-solidarity-fund/ [https://perma.cc/H2ZC-RU7Y]; Natasha Lennard, Police Shot Atlanta Cop City Protester 57 Times, Autopsy Finds, The Intercept (Apr. 20, 2023, at 14:17 ET), https://theintercept.com/2023/04/20/atlanta-cop-city-protester-autopsy/.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

anarchists."[18] It charges the defendants with being members of a criminal enterprise, "Defend the Atlanta Forest."[19] The indictment frames concepts like mutual aid and solidarity as pretexts for violent insurgency against a state that is "inherently oppressive and violent."[20] "Zines"—literature advocating anarchist ideals and proposing political strategy—are branded as incendiary propaganda, calculated to "promot[e] the false idea that the group is non-violent," "manipulate the media," and "radicalize the civilian."[21]

Scores of "overt acts" in furtherance of the alleged conspiracy include the transfer of funds for tools, food, generators, and tents to be used to "occupy the DeKalb forest."[22] Others entail calling for a "Week of Action" and encouraging people to "flood the phones" of a contractor to advocate that the contractor "pull out of its contract to build the Atlanta Public Safety Training Facility."[23] Even the signing of "ACAB"—for "All Cops are Bastards"—on an official form is said to be part of a conspiracy.[24] Activists responded to the state's indictment with a parodic "People's RICO," which detailed "an active criminal enterprise with clear intentions to extort and conspire to destroy our treasured South River Forest."[25]

B. "STOP RICO"

All three Georgia prosecutions triggered criticism. Critics claimed that the prosecutions were politically motivated efforts to criminalize constitutionally protected speech. These criticisms came from different quarters, and I'm not suggesting that they're all comparably meritorious. But we'll see that they resonate with longstanding concerns about conspiracy criminalization.

Those familiar with gangster rap will immediately appreciate critics' concerns about classifying Williams's lyrics as conspiratorial acts.[26]

[18] Cop City Indictment, supra note 15, at 25–26.
[19] Id. at 24.
[20] Id. at 27.
[21] Id. at 28, 46–47.
[22] Id. at 41, 57–58, 63–64, 68, 73, 81–82.
[23] Id. at 54–55.
[24] Id. at 35, 83.
[25] The People's RICO, https://thepeoplesrico.org/ [https://perma.cc/Y6M5-D55G] (last visited May 12, 2026).
[26] See, e.g., Maxime Tamsett & Nick Valencia, Some Rap Lyrics Will Be Allowed in YSL RICO Case, Judge Rules. Why Critics Have Called That a Double Standard, CNN (Nov. 10,

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

Fictional accounts of violent exploits are part of the genre.[27] Williams's sometime-collaborator Drake earned headlines by uploading pictures of himself wearing a "STOP RICO" hoodie in a show of support for Williams.[28] Although Drake grew up comfortably middle class with no organic gang connections,[29] his lyrics on "Back to Back" are practically indistinguishable from those in the YSL indictment:

> Yeah, trigger fingers turn to Twitter fingers
>
> Yeah, you gettin' bodied by a singin' n----
>
> I'm not the type of n---- that'll type to n-----[30]

Were we to take these lyrics literally, we would have to conclude that Drake is claiming that he prefers to kill rivals rather than respond to them on social media and was issuing a death threat against Philadelphia rapper Meek Mill.[31] Which might seem so ridiculous as to be unworthy of concern that law enforcement would take it literally. But Fulton County Chief Superior Court Judge Ural Glanville admitted Williams's lyrics into evidence.[32]

2023, at 10:13 ET), https://www.cnn.com/2023/11/10/us/ysl-gang-trial-lyrics-evidence/index.html [https://perma.cc/Y4FR-CSEK] (summarizing popular criticisms of the use of rap lyrics as evidence at trial).

[27] See generally Soren Baker, The History of Gangster Rap: From Schooly D to Kendrick Lamar, the Rise of a Great American Art Form (2018) (describing gangster rap as narrative, fictionalized storytelling about American violence and crime in urban warzones).

[28] See Ellie Robinson, Drake Shows Support for Young Thug and Gunna with 'Free YSL' Call in 'Sticky' Video, NME (Aug. 3, 2022), https://www.nme.com/news/music/drake-shows-support-for-young-thug-and-gunna-with-free-ysl-call-in-sticky-video-3282370 [https://perma.cc/ECB2-X2SG]; Mark Elibert, Drake Shows Solidarity With Young Thug With Custom "STOP RICO" Hoodie, Complex (Aug. 12, 2023), https://www.complex.com/music/a/markelibert/drake-support-young-thug-rico-hoodie [https://perma.cc/99GY-LACF].

[29] Shamika Sanders, Drake's Middle Class Problem: Why the Rapper Is Stuck on the Struggle Story, HelloBeautiful (Mar. 6, 2013), https://hellobeautiful.com/2624596/drakes-obsession-with-the-struggle-is-rose-colored/ [https://perma.cc/AKV2-AQW7].

[30] See YSL Indictment, supra note 3, at 34; Drake, "Back to Back," Genius (July 29, 2015), https://genius.com/Drake-back-to-back-lyrics [https://perma.cc/TVN8-E4AG].

[31] See Miranda J., Hip-Hop Reacts to Drake's "Back to Back" Diss Track, XXL (July 29, 2015), https://www.xxlmag.com/hip-hop-reacts-to-drakes-back-to-back-diss-track/ [https://perma.cc/V2QN-Q9GG] (reporting fans' reactions to Drake's diss track and noting that he has "undoubtedly occupied the throne of the ongoing beef").

[32] See Bill Donahue, Judge Rules Young Thug's Lyrics Can Be Used in YSL RICO Case: 'The First Amendment Is Not on Trial,' Billboard (Nov. 9, 2023), https://www.billboard.com/business/legal/young-thug-lyrics-can-be-used-ysl-rico-case-judge-ruling-1235467208/ [https://perma.cc/ZX48-MDHB].

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

Critics of the YSL prosecution argue that the admission of Williams's lyrics presented risks of prejudice and juror confusion that could lead to wrongful conviction and chill Black artistic expression.[33] But this wasn't the first time that prosecutors sought to introduce rap lyrics as evidence of conspiracy. The first opinion in which an appellate court considered and ultimately accepted arguments for admitting rap lyrics into evidence was published in 1991.[34]

Derek Foster was caught on an Amtrak train from Los Angeles to Chicago transporting suitcases full of cocaine and PCP, as well as supplies for packing them.[35] The federal government charged Foster with possession of cocaine and PCP with intent to distribute the

[33] See Andrew Jensen Kerr, When to Admit Art as Evidence, 101 Wash. U. L. Rev. Online 29, 30, 40 (2023) (contending that "rap as a genre is particularly vulnerable to being misunderstood" and proposing that "the jury listen to Young Thug's sonic output, but without any explanation or commentary from police or a so-called defense 'expert' on rap"); see also Jerry Iannelli, Young Thug's 'Racketeering' Charges Are Absurd, The Appeal (May 18, 2022), https://theappeal.org/young-thug-gunna-ysl-rico-charges/ [https://perma.cc/V3XU-N92N] (arguing that prosecutors use RICO charges to "push groups of (often low-income) Black and brown defendants to turn on one another or take plea deals to avoid decades in prison"); Safia Samee Ali, Black Rappers Call Out Double Standard of Using Hip-Hop Lyrics as Evidence in Rapper Young Thug's Criminal Trial, NBC News (Jan. 13, 2023, at 15:19 ET), https://www.nbcnews.com/news/us-news/black-rappers-call-double-standard-using-hip-hop-lyrics-evidence-rappe-rcna65529 [https://perma.cc/8RB3-9B8E] (relaying first-hand perspectives of rap artists whose lyrics were used against them at trial); Chris Richards, Is Young Thug on Trial for Using His Imagination?, Wash. Post (Mar. 27, 2024), https://www.washingtonpost.com/entertainment/music/2024/03/27/young-thug-trial-lyrics-rap-racism/ (articulating the "sickening, nonsensical" nature of the YSL trial's "flagrant punishment of Black creative thought"); Eamon Whalen, Rap on Trial Is Now Mainstream, Mother Jones (Mar. 23, 2023), https://www.motherjones.com/criminal-justice/2023/03/young-thug-gunna-rap-on-trial-lyrics-ysl-atlanta-erik-nielson/ [https://perma.cc/H5KQ-MRW8] (investigating the tension between the State's scapegoating of rap's sensationalist incentives and the State's reticence to address the underlying causes of that sensationalism); Elliot Williams, Opinion, The Danger in Putting Rap Lyrics on Trial, CNN (Dec. 7, 2023, at 11:48 ET), https://www.cnn.com/2023/12/06/opinions/young-thug-lyrics-rico-trial-fani-willis-williams/index.html [https://perma.cc/K68C-3FTW] (detailing the potential for prejudice against defendants in cases involving the use of rap lyrics as evidence); Emma H. Lu, Is Art Evidence? Rap's Right in Court, Harv. Crimson (Dec. 12, 2023), https://www.thecrimson.com/article/2023/12/12/rap-lines-used-in-court-hip-hop-justice-ysl/ [https://perma.cc/S4K4-5YTL] (noting the exceptional nature of the use of rap lyrics as evidence).

[34] See Erik Nielson & Andrea L. Dennis, Rap On Trial: Race, Lyrics, and Guilt in America 59–62 (2019). Reyna Araibi notes that "[a]t the same time that its influence grew, and its artists reached previously unheard-of levels of commercial success, rap music came under intensifying scrutiny from police and politicians who criticized the genre and censored its artists." Reyna Araibi, "Every Rhyme I Write": Rap Music as Evidence in Criminal Trials, 62 Ariz. L. Rev. 805, 807 (2020) (footnotes omitted).

[35] United States v. Foster, 939 F.2d 445, 448–49 (7th Cir. 1991).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

substances.[36] Prosecutors claimed that rap lyrics that police found in a notebook in Foster's duffle bag evinced Foster's knowledge that his suitcases contained drugs and his purpose of distributing them. Here are a few bars:

> Key for Key, Pound for pound I'm the biggest Dope Dealer and I serve all over town.
>
> Rock 4 Rock Self 4 Self. Give me a key let me go to work more Dollars than your average [business] man.[37]

A police officer testified that "key" and "rock" were familiar terms in cocaine trafficking.[38] A Seventh Circuit panel agreed, rejecting Foster's argument that the lyrics lacked probative value because they were fictional: "[I]n writing about this 'fictional' character, Foster exhibited knowledge of an activity that is far from fictional."[39]

Erik Nielson and Andrea Dennis contend that prosecutorial use of rap lyrics "follows general trends in criminal justice which show that young men of color are disproportionately targeted, arrested, convicted, and sentenced to harsher penalties than their white counterparts."[40] They draw upon studies spanning decades that find that people are more likely to attribute violent intent to Black people as compared to White people, interpret rap lyrics as evidence that someone is capable of committing murder, and deem lyrics to be literally true when characterized as rap as compared to country and heavy metal.[41]

---

[36] Id. at 449.

[37] Id.

[38] Id. at 449 n.1.

[39] Id. at 456.

[40] Nielson & Dennis, supra note 34, at 71.

[41] See, e.g., Adam Dunbar & Charis E. Kubrin, Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments, 14 J. Experimental Criminology 507 (2018) (finding that participants were more likely to attribute violent intent to a songwriter if they imagined the writer to be Black rather than White); Adam Dunbar, Charis E. Kubrin & Nicholas Scurich, The Threatening Nature of "Rap" Music, 22 Psych., Pub. Pol'y & L. 280, 280 (2016) (evaluating the impact of genre-specific stereotypes on the evaluation of violent song lyrics); Stuart P. Fischoff, Gangsta' Rap and a Murder in Bakersfield, 29 J. Applied Soc. Psych. 795 (1999) (finding that exposure to rap lyrics exerted a significant prejudicial impact on participants' evaluation of the character of the songwriter, even greater than the fact of being charged with murder); Carrie B. Fried, Bad Rap for Rap: Bias in Reactions to Music Lyrics, 26 J. Applied Soc. Psych. 2135 (1996) (exploring how the singer's race and genre of music can change whether subjects perceive the music as objectionable); Carrie B. Fried, Who's Afraid of Rap: Differential Reactions to

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

After negotiations with the prosecution broke down, Williams pleaded guilty without an agreement as to his sentence.[42] Prosecutors recommended a forty-five-year sentence, including twenty-five years in prison and twenty years on probation.[43] Judge Paige Reese Whitaker sentenced him to forty years, including five years in prison and fifteen years on probation, the violation of which would result in another twenty years in prison.[44] But because Whitaker commuted his prison sentence to time served, Williams walked out of the court without spending another day in state custody.[45] Williams's probation includes onerous terms—including a ten-year ban from metropolitan Atlanta (with exceptions)—but falls well short of the prosecution's own recommendation of twenty-five years in prison and twenty years on probation, to say nothing of the 150 years Williams faced if convicted on all charges.[46] He did not admit to being a gang kingpin, and his sentence was based on gun and drug possession charges.

Critics assailed law enforcement treatment of Cop City activists long before the indictment, tracing a pattern of state repression.[47] In early 2021, shortly after then-Mayor of Atlanta Keisha Lance Bottoms announced plans to construct the training facility and the city's Police

Music Lyrics, 29 J. Applied Soc. Psych. 705 (1999) (analyzing the effects of music genre and race of the vocalist on reactions to violent song lyrics).

[42] Kate Brumback, Rapper Young Thug Is a Free Man. Here Are Things to Know About His Plea., Associated Press, https://apnews.com/article/young-thug-trial-probation-guilty-plea-0f52263908d42e0f488b78c0641ecfa4 [https://perma.cc/S9WS-KCGY] (last updated Nov. 1, 2024, at 15:57 ET).

[43] Id.

[44] Id.

[45] Id.

[46] Conviction on the RICO charge alone could have sent him to prison for up to twenty years. See Ga. Code Ann. § 16-14-5(a) (2024).

[47] See, e.g., Arnold, supra note 17 (reporting on law enforcement's measures against Stop Cop City organizers as an effort to suppress constitutionally protected political expression and protest activity); Jamiles Lartey, What the Fight Over Atlanta's 'Cop City' Reveals About Policing of Protests, The Marshall Project (June 24, 2023, at 12:00 ET), https://www.themarshallproject.org/2023/06/24/atlanta-cop-city-protest-police [https://perma.cc/YK44-PPCP] (describing the coercive tactics deployed by law enforcement against Cop City activists); Nathan J. Robinson, The "Cop City" Indictment Is Preposterous and Terrifying, Current Affs. (Sep. 7, 2023), https://www.currentaffairs.org/news/2023/09/the-cop-city-indictment-is-preposterous-and-terrifying [https://perma.cc/WRK9-6BTZ] (arguing that prosecutorial theories in the Cop City indictment function as political repression); Zohra Ahmed & Elizabeth Taxel, How Georgia Indicted a Movement, The Nation (Sep. 12, 2023), https://www.thenation.com/article/society/cop-city-indictment-atlanta/ (tracing the trajectory of state escalation to incapacitate a social movement).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

Foundation proposed that it be established in Weelaunee Forest, activists started putting up hammocks and temporary shelters in the woods.[48] There followed months of teach-ins, community events, walks, and musical performances in the forest.[49]

In May 2022, Atlanta police used force to push campers out.[50] By September 2023, police had killed one activist and arrested and charged more than thirty others with domestic terrorism.[51] Those charges made it difficult to make bail, and police responded to efforts to help activists with the costs by raiding and charging three members of a local bail fund with charity fraud and money laundering.[52] Writing in the wake of the bail fund charges, Jocelyn Simonson described how Georgia had adopted a theory that "to be part of a group supporting protesters is, itself, a crime."[53] On September 29, 2025, Fulton County Judge Kevin Farmer dismissed the racketeering charges on the ground that Georgia Attorney General Chris Carr had not secured Governor Brian Kemp's permission to pursue them.[54]

Taking seriously *any* criticisms of the Trump RICO indictment is a challenge because many of them were patently unserious. For example,

[48] Nitish Pahwa, RICOp City, Slate (Sep. 13, 2023, at 05:45 ET), https://slate.com/news-and-politics/2023/09/cop-city-defend-the-atlanta-forest-rico-charges-criminal-conspiracy.html.

[49] Id.; The City in the Forest: Reinventing Resistance for an Age of Climate Crisis and Police Militarization, CrimethInc. (Apr. 11, 2022), https://crimethinc.com/2022/04/11/the-city-in-the-forest-reinventing-resistance-for-an-age-of-ecological-collapse-and-police-militarization [https://perma.cc/E6Z3-37P9].

[50] Pahwa, supra note 48.

[51] Id.; Chauncey Alcorn, Key Dates and Moments in Atlanta's 'Cop City' Controversy, Capital B Atlanta (June 5, 2023), https://atlanta.capitalbnews.org/cop-city-timeline/ [https://perma.cc/PM29-8CWV].

[52] Pahwa, supra note 48.

[53] Jocelyn Simonson, The Details of the Atlanta Bail Fund Arrest Are More Horrific Than First Described, Slate (June 1, 2023, at 13:33 ET), https://slate.com/news-and-politics/2023/06/cop-city-tortuguita-atlanta-bail-fund-arrest-horror.html; see also Jocelyn Simonson, Forget Trump, the Latest Georgia RICO Case Is a Disaster for Civil Liberties, Slate (Sep. 7, 2023, at 17:17 ET), https://slate.com/news-and-politics/2023/09/forget-trump-georgia-rico-case-disaster.html (tracing a repressive pattern and denouncing the indictment as "nothing less than the full-throated criminalization of social solidarity and political dissent").

[54] See R.J. Rico, Georgia Judge to Toss Landmark Racketeering Charges Against 'Cop City' Protesters, Associated Press, https://apnews.com/article/atlanta-cop-city-rico-charges-61-9d0928ca44c5ddc931cd640a8805664a [https://perma.cc/6MAD-C4QE] (last updated Sep. 9, 2025, at 15:36 ET); Order Granting Motion to Dismiss and Quash Indictment / Plea in Abatement of Indictment for Lack of Prosecutorial Authority at 2, 4, State v. Carroll, No. 23SC189192 (Ga. Super. Ct. Fulton Cnty. Dec. 30, 2025).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

Trump's lawyers invoked *United States v. Alvarez*[55] for the proposition that the First Amendment prohibits the government from prosecuting someone for telling lies about "matters of public concern."[56] In that case, Alvarez was prosecuted for falsely claiming to have received a Congressional Medal of Valor, and a 6-3 Supreme Court overturned his conviction. The only criminal conduct at issue *was* the false statement, which was made punishable by the federal Stolen Valor Act.[57] By contrast, Georgia prosecutors alleged that Trump did not merely make false claims—he did so *in order to persuade Georgia officials to take unlawful actions, in pursuance of an unlawful goal.*[58]

But hold up. In all three instances, we see what is claimed to be constitutionally protected speech being used to satisfy the elements of a criminal offense. Suppose you think that in at least one of these cases, the use is justified; in at least one other case, unjustified. It is worth asking how often "mistakes" happen.

Some critics of the Cop City indictment have emphasized RICO's connection to efforts to dismantle the mafia and suggested that the indictment represented a novel, abusive application of conspiracy.[59] But there is nothing new about the criminalization of political organizing through conspiracy. Dan Berger writes that "[w]hile the charges against the Stop Cop City activists will rightly strike many as both outlandish and terrifying, RICO has a long history of being used as an expansive

[55] 567 U.S. 709 (2012).

[56] See Post-Hearing Brief in Support of President Trump's Adopted Demurrers & Motions Raising First Amendment As-Applied Challenges at 6, 9–10, State v. Trump, No. 23SC188947 (Ga. Super. Ct. Fulton Cnty. Dec. 18, 2023).

[57] *Alvarez*, 567 U.S. at 713–14.

[58] Georgia Trump Indictment, supra note 9, at 17.

[59] E.g., Meg O'Connor, Cop City Protestors Hit With RICO Charges in Latest Act of Political Repression, The Appeal (Sep. 5, 2023), https://theappeal.org/cop-city-protesters-hit-with-rico-charges-in-latest-act-of-political-repression/ [https://perma.cc/HN4P-FLC2] (reporting objections to the "broad and unprecedented" use of anti-racketeering laws against political protesters while noting RICO's origins in targeting "organized crime syndicates like the mafia"); Alleen Brown, How Georgia's Organized Crime Law Swept Up Dozens of Nonviolent 'Cop City' Activists, Grist (Sep. 6, 2023), https://grist.org/protest/cop-city-atlanta-forest-rico-indictment/ [https://perma.cc/27BS-DHQY] (highlighting the nonviolent nature of most of the activists' alleged criminal conduct and noting the lack of precedent for charging environmental activists under RICO laws); Joe Lancaster, Georgia Judge Issues Potentially Unconstitutional Gag Order in 'Cop City' Trial, Reason (Dec. 11, 2023, at 16:38 ET), https://reason.com/2023/12/11/georgia-judge-issues-potentially-unconstitutional-gag-order-in-cop-city-trial/ [https://perma.cc/8YD5-R536] (noting that Georgia is prosecuting Cop City opponents under RICO statues that were "originally drafted to go after mafia bosses").

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

assault on leftwing radicals."[60] He situates the indictment in the context of many "examples in the 1980s of the government using catch-all conspiracy charges to target leftwing groups, including Puerto Rican independence activists and Black revolutionaries."[61]

All power can be abused. But at some point, we must consider whether the costs of abuse exceed any benefits from proper exercise. Indeed, that possibility *has been* considered throughout conspiracy's history. The Georgia prosecutions invite us to revisit that history and consider that possibility once more. First, however, we need to map conspiracy's contemporary content.

C. Making Conspirators

I will focus on formal and substantive modes of conspiracy criminalization.[62] By "formal" criminalization I mean legislation, judicial decisions, treatises, rules of evidence, and other written texts that describe and decide the elements of conspiracy and how they may be proven against defendants, as well as prescribe punishments for people convicted of conspiracy.[63] By "substantive" criminalization I mean investigative techniques, arrest practices, charging policies, and sentencing policies, among other state interventions—whether or not expressly authorized by written texts—that degrade the civic standing of suspected, alleged, and convicted conspirators.[64]

Conspiracy typically has three elements. First, an agreement to commit an unlawful act.[65] Second, an overt act in furtherance of the

[60] Dan Berger, RICO and Stop Cop City: The Long War Against the Left, The Abusable Past (Sep. 11, 2023), https://abusablepast.org/rico-and-stop-cop-city-the-long-war-against-the-left/ [https://perma.cc/AEB6-FM3C]; see also Tadhg Larabee & Eva Rosenfeld, The Criminalization of Solidarity: The Stop Cop City Prosecutions, Dissent (Spring 2024), https://www.dissentmagazine.org/article/the-criminalization-of-solidarity-the-stop-cop-city-prosecutions/ [https://perma.cc/8BUJ-69SK] (situating Cop City in a history of conspiracy-based repression "target[ing] growing socialist parties and increasingly militant unions with laws against criminal syndicalism, espionage, and sedition" and detailing how RICO "has been applied in controversial crackdowns, especially on poor, black neighborhoods, where police can tenuously link many people to small-time gang activity").

[61] Berger, supra note 60.

[62] This distinction is borrowed from Nicola Lacey, In Search of Criminal Responsibility: Ideas, Interests, and Institutions 14–18 (2016).

[63] Id.

[64] Id.

[65] Steven R. Morrison, The System of Modern Criminal Conspiracy, 63 Cath. U. L. Rev. 371, 403 (2014).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

agreement.[66] Third, intentions on the part of the conspirator to enter the agreement and to commit the unlawful act.[67] Whereas at common law, you could be convicted either of conspiring to commit a crime or actually committing it but not both, today, conspiracy generally does not "merge."[68] You can be convicted of conspiring to commit a crime *and* of the conspired-for crime.

The unlawful agreement need not be proven through direct evidence that a discrete offer was made and accepted.[69] Indeed, the precise nature of the agreement or the working relationship between the parties needn't ever be articulated.[70] Mere presence, guilty knowledge, or even close association with an alleged coconspirator is insufficient on its own to prove participation in a conspiracy.[71] But together, such circumstances can raise an inference of intentional participation.[72]

Most states have limited the "object" of conspiratorial agreements to actual crimes.[73] But other states require only that the object or the means of its accomplishment be unlawful. Of these, some states require proof of illegality injurious to the public health or welfare.[74] A smaller number

[66] Id.

[67] Id.

[68] See Callanan v. United States, 364 U.S. 587, 589–90 (1961) (describing how conspiracy merged under the common law, the historical rationale for "merging" of charges for conspiracy and the completed crime, and why the process of merging was abandoned); Beth Allison Davis & Josh Vitullo, Note, Federal Criminal Conspiracy, 38 Am. Crim. L. Rev. 777, 791, 810 (2001) (further noting the fact that modern conspirators may be charged for both substantive offenses and the related conspiracy offense). This differentiates conspiracy from other "inchoate" offenses like attempt and solicitation.

[69] Morrison, supra note 65, at 405.

[70] Id.

[71] Id.

[72] Id.

[73] E.g., Conn. Gen. Stat. § 53a-48(a) (2024); 720 Ill. Comp. Stat. 5/8-2 (2025); Iowa Code § 706.1 (2026); Me. Stat. tit. 17-A, § 151(1) (2023); N.J. Stat. Ann. § 2C:5-2(a) (West 2026).

[74] See, e.g., Commonwealth v. Dyer, 138 N.E. 296, 303 (Mass. 1923) (stating that "where no crime is contemplated either as the end or the means," conspiracy is still a criminal offense if "the illegal but noncriminal element involves prejudice to the general welfare or oppression of the individual of sufficient gravity to be injurious to the public interest"); State v. Burnham, 15 N.H. 396, 401–02 (1844) ("[A] conspiracy is a confederacy to do an unlawful act, or a lawful act by unlawful means, whether to the prejudice of an individual, or of the public, and . . . it is not necessary that its object should be the commission of a crime."); Commonwealth v. Donoghue, 63 S.W.2d 3, 8 (Ky. 1933) (stating that any conspiracy to "willfully obstruct or prevent public justice or to do any act injurious to the administration of law . . . is clearly an indictable offense").

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

of states have gone in the other direction by limiting criminal conspiracies to agreements to commit felonies.[75]

The overt-act requirement is easily satisfied.[76] Overt acts don't have to be illegal; they may even be constitutionally protected. For instance, your use of social media to post a gang logo or to opine that "billionaires shouldn't exist" is, standing alone, protected by the First Amendment. But both expressions may also be admitted into evidence at your conspiracy trial if they take place prior to a gang-related drive-by shooting or a bank robbery, respectively. Many federal statutes omit the overt-act requirement entirely.[77]

Suppose we have an agreement, an overt act, and the specific intention to commit a particular crime. Most U.S. jurisdictions hold defendants responsible for other, unplanned crimes committed by their coconspirators in furtherance of the planned crime.[78] It is enough that those unplanned acts in furtherance are reasonably foreseeable.[79]

Conspiracy comes with a distinctive set of procedural and evidentiary advantages for the prosecution. Jointly indicted defendants are generally tried together, and multi-defendant conspiracy trials are common.[80] Because venue for conspiracy is proper in any district in which any act in furtherance of a conspiracy takes place, prosecutors have broad

[75] See, e.g., Alaska Stat. § 11.31.120(a) (2025); Neb. Rev. Stat. § 28-202 (2025); N.M. Stat. Ann. § 30-28-2 (2025).

[76] R. Michael Cassidy & Gregory I. Massing, The Model Penal Code's Wrong Turn: Renunciation as a Defense to Criminal Conspiracy, 64 Fla. L. Rev. 353, 359 (2012) (noting that the overt-act requirement is generally not difficult to prove since "even minor, noncriminal acts in furtherance of the objective will suffice").

[77] Paul Marcus, The Crime of Conspiracy Thrives in Decisions of the United States Supreme Court, 64 Kan. L. Rev. 373, 386–87 (2015) (explaining that several federal conspiracy statutes—such as 21 U.S.C. § 846—contain no explicit overt-act element, so the government need not prove any act in furtherance of the agreement).

[78] This doctrine is associated with *Pinkerton v. United States*, 328 U.S. 640 (1946). See Matthew A. Pauley, The *Pinkerton* Doctrine and Murder, 4 Pierce L. Rev. 1, 2–3 (2005) (explaining that under the *Pinkerton* doctrine, "[i]f [a] court finds that A, B, C, and D were in a conspiracy to rob the banks, and if C committed murder in furtherance of that conspiracy, then A, B, and D are all also guilty of murder, as long as they could reasonably have foreseen that such an event would occur in the course of their conspiracy . . . even though A, B, and D never met the bank guard, never assisted or encouraged C to kill him, never wanted C to kill him or knew C would kill him, and never even visited the bank or entered the state in which the bank was located!").

[79] Pauley, supra note 78, at 3.

[80] Marcus, supra note 77, at 399–400 (noting that courts generally try jointly indicted defendants together and that joint trials are common).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

latitude to choose a friendly forum.[81] The period of limitations in a conspiracy prosecution doesn't begin to run until the conspiracy is either affirmatively withdrawn from or accomplished.[82] Accordingly, even if substantive offenses committed early in the conspiracy cannot be prosecuted because their individual limitation period has run, they may still be prosecuted as overt acts in furtherance of the conspiracy as long as the overall statute of limitations for conspiracy has not expired.[83] The Federal Rules of Evidence specify a coconspirator exception to the general rule excluding hearsay evidence, enabling prosecutors to introduce damaging out-of-court statements by witnesses who can't be cross-examined.[84]

Substantively, conspiracies are investigated and prosecuted by common means. Conspiracy investigations depend upon surveillance that is often performed by confidential informants and undercover agents.[85] Much of the evidence gathered through surveillance consists of speech and other forms of expression.[86] Steven Morrison observes that conspiracy's act and mental-state requirements are difficult to disentangle in practice because they tend to be proven by the same kinds of evidence.[87] The prosecution will seek to prove agreement and unlawful intentions by introducing evidence of presence, knowledge,

[81] Naomi Price & Jason Jarvis, Conspiracy Jurisdiction, 76 Stan. L. Rev. 403, 415–16 (2024) (noting early conspiracy cases recognizing that venue and jurisdiction lie where the unlawful agreement was formed or where any overt act in furtherance of the conspiracy occurred).

[82] See Hyde v. United States, 225 U.S. 347, 367–69 (1912) ("As the overt acts give jurisdiction for trial, it is not essential where the conspiracy is formed so far as the jurisdiction of the court in which the indictment is found and tried is concerned.").

[83] See Matthew N. Rose, Note, Criminal Law—Federal Conspiracy Law—Changing the Withdrawal Standard for Members of a Conspiracy, 45 U. Ark. Little Rock L. Rev. 713, 716 (2023).

[84] See Fed. R. Evid. 801–802 (specifying that coconspirator statements made during and in furtherance of a conspiracy are not hearsay when offered against an opposing party).

[85] See Neal Kumar Katyal, Conspiracy Theory, 112 Yale L.J. 1307, 1328 (2003) ("Because many conspiracies operate in a shadowy netherworld without complaining 'victims,' conspirators are valuable sources, and many prosecutions would not be possible without them.").

[86] See Steven R. Morrison, Conspiracy Law's Threat to Free Speech, 15 U. Pa. J. Const. L. 865, 868–70, 876–77, 887 (2013) (explaining how speech and other forms of expression—such as instant messages, videos, and images—are used as evidence in conspiracy prosecutions).

[87] Id. at 868–70.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

and associations from which an agreement, intentions to agree, and intentions to accomplish the agreement's object can be inferred.[88]

Conspiracy sentencing is often contingent upon the assistance that defendants provide to prosecutors. Neal Katyal details how federal prosecutors induce defendants to "flip" on their coconspirators, by promising to file Section 5K1.1 motions, which request a judge to impose a lower sentence due to a defendant's "substantial assistance."[89] Together with the reduction of sentences for minor players, Katyal claims that what amounts to snitching-based sentencing "promote[s] deterrence by fragmenting group identity and by increasing precontractual uncertainty between the players."[90]

Conspiracy charges are common.[91] Data suggests that "more than one-quarter of all federal criminal prosecutions and a large number of state cases involve prosecutions for conspiracy."[92] Conspiracy has since the late 1970s been described as one of the most commonly charged crimes in the federal system.[93] In fiscal year 2001, out of the 36,798 defendants in criminal cases filed in United States district courts, 2,251 were in criminal conspiracy cases—as compared to 107 civil rights defendants, 1,767 counterfeiting defendants, and 2,060 robbery defendants.[94] The most frequently reported conviction of an offense carrying a mandatory minimum penalty in fiscal year 2016 was 21

[88] Id. at 893–94.

[89] See Katyal, supra note 85, at 1357; U.S. Sent'g Guidelines Manual § 5K1.1 (U.S. Sent'g Comm'n 2025) ("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, a sentence that is below the otherwise applicable guideline range may be appropriate.").

[90] Katyal, supra note 85, at 1367. I challenge this claim in a later discussion. See infra Subsection IV.C.2.

[91] See United States v. Reynolds, 919 F.2d 435, 439 (7th Cir. 1990) ("[P]rosecutors seem to have conspiracy on their word processors as Count I; rare is the case omitting such a charge.").

[92] Katyal, supra note 85, at 1310.

[93] See, e.g., Paul Marcus, Conspiracy: The Criminal Agreement in Theory and in Practice, 65 Geo. L.J. 925, 946–47 (1977). Unfortunately, precise numbers are extremely difficult to come by. See J.S. Nelson, The Intracorporate Conspiracy Trap, 36 Cardozo L. Rev. 969, 987 n.106 (2015) (noting that "data on the relative number of conspiracy charges in [federal and state] court systems are not easily available through the Bureau of Justice Statistics").

[94] Bureau of Just. Stat., U.S. Dep't of Just., Federal Criminal Case Processing Statistics Data Tool, https://fccps.bjs.ojp.gov/home.html?dashboard=FJSP-CriminalCodeStats&tab=CriminalCodeStatistics&ccm=1 [https://perma.cc/T436-XRDG] (last visited Feb. 18, 2026).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

U.S.C. § 846: Attempt and Conspiracy to Commit a Drug Trafficking Offense.[95]

It was not always like this. The next Part describes what has changed and what has not with respect to the content and criticism of conspiracy.

II. STAR CHAMBER MUSIC

A. Origins and Development

1. Common Law Conspiracy

Sir James Fitzjames Stephen, among the first and foremost historians of English criminal law, observed in 1883 that "[i]n very early times the word [conspiracy] had a completely different meaning from that which we attach to it."[96] Stephen highlighted two fourteenth-century statutes, which criminalized "combination[s] *to carry on legal proceedings* in a vexatious or improper way."[97] One of the first courts that sustained an information for a conspiracy that was unconnected to a judicial proceeding—an unlawful agreement by London brewers to "diminish the King's revenue"—recognized that "the acceptance of [conspiracy] . . . by the common law courts . . . did not come about without some misgivings."[98]

Initially, you could not be convicted of conspiracy unless you actually procured a false indictment and the target of the conspiracy was ultimately acquitted.[99] The narrow focus on false indictments appears to have been inspired by perceived aristocratic threats to royal

[95] U.S. Sent'g Comm'n, Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System 15 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf [https://perma.cc/Y2D2-GVEP].

[96] 2 James Fitzjames Stephen, A History of the Criminal Law of England 227–28 (London, MacMillan & Co. 1883).

[97] Id. at 228 (emphasis added).

[98] See Richard Arens, Conspiracy Revisited, 3 Buff. L. Rev. 242, 245–46 (1954) (first quoting Rex v. Sterling (1664) 83 Eng. Rep. 331; 1 Lev. 126; and then quoting Albert J. Harno, Intent in Criminal Conspiracy, 89 U. Pa. L. Rev. 624, 627 (1941)).

[99] See 3 Edward Coke, The Institutes of the Laws of England 143 (London, M. Flesher 1644) (defining conspiracy as "a consultation and agreement betweene two or more, to appeale, or indict an Innocent falsely, and maliciously of felony, whom accordingly they cause to be indicted or appealed; and afterward the party is lawfully acquitted by the verdict of twelve men").

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

administration.[100] Aristocrats were able to extend their power by procuring oaths of solidarity from witnesses and jurors, including agreements to procure false indictments.[101] Because social order depended upon oaths of loyalty to rulers, conspiracy was conceptualized as a crime against the entire community because of its capacity to undermine that order.[102]

Conspiracy expanded as suspicion of nonstate organization intersected with fears of restive underclasses. In the wake of the Black Death, labor legislation froze wages and prices.[103] Artisans who formed sworn associations to resist these laws were prosecuted as conspirators.[104] Social order depended upon oaths of loyalty to lords as well as rulers, who sought the enforcement of manorial rights.[105] Thus, in the sixteenth and seventeenth centuries, agreements by "copyholders" to deprive landlords of their rights as landowners were punished in the Court of the Star Chamber, where the monarchy exercised its authority.[106]

In 1611, *The Poulterers' Case* made the agreement to secure a false indictment a standalone offense.[107] Subsequent cases extended conspiracy's scope to agreements to commit unlawful acts that were unrelated to judicial proceedings.[108] Owing in part to a confusing 1716 statement by an influential treatise-writer, Serjeant William Hawkins, that "all confederacies whatsoever, wrongfully to prejudice a third

[100] See Alan Harding, The Origins of the Crime of Conspiracy, 33 Transactions Royal Hist. Soc'y 89, 92, 99–100 (1983) (linking the early conspiracy doctrine to aristocratic interference with royal power).

[101] See id. at 92–93 (discussing the centrality of oath-taking in legal procedures in the Middle Ages and how oath-taking in litigation gave objective form to political dissent against rulers).

[102] Id. at 92, 106.

[103] Id. at 105.

[104] Id. at 105–06.

[105] Id. at 92, 105.

[106] Id. at 105; see also David Chan Smith, Sir Edward Coke and the Reformation of the Laws: Religion, Politics and Jurisprudence, 1578–1616, at 27–28 (J.H. Baker ed., 2014) (discussing the copyhold litigation in greater detail).

[107] The Poulterers' Case (1611) 77 Eng. Rep. 813; 9 Co. Rep. 55 b; Harno, supra note 98, at 625 (explaining that *The Poulterers' Case* treated a mere agreement to procure a false indictment as a substantive, indictable offense, even if nothing was carried out).

[108] See 5 W.S. Holdsworth, A History of English Law 205 (1924) (explaining that "just as [the Star Chamber] punished all kinds of attempts to commit wrongful acts, so, a fortiori, it punished all kinds of conspiracies to commit the many varied offences punishable either by it or by the common law courts" (footnote omitted)).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

person, are highly criminal at common law," conspiracy was used in the eighteenth and nineteenth centuries to criminalize agreements to engage in noncriminal acts.[109] Hawkins's formulation "enabled judges to punish by criminal process such concerted conduct as seemed to them socially oppressive or undesirable, even though the actual deeds committed constituted of themselves no crime, either by statute or by common law."[110]

Many instances of unlawful concerted conduct were labor combinations. From 1800 to 1824, the Combinations Act threatened with imprisonment any laborer who "enter[ed] into any Combination to obtain an Advance of Wages, or to lessen or alter the Hours or Duration of the Time of Working."[111] Prosecutions continued even after labor combinations were decriminalized. The first recorded American conspiracy trial took place in 1806 and involved a strike of Philadelphia shoemaker apprentices who sought to raise their wages.[112]

Often neglected in general histories of conspiracy criminalization and even in critiques of conspiracy is the use of conspiracy during the antebellum period to criminalize enslaved people. Although this did not result in changes in formal definitions of conspiracy, it illustrates important features of conspiracy's substantive content.

[109] 1 William Hawkins, A Treatise of the Pleas of the Crown 446 (London, John Curwood ed., 8th ed. 1824). Commentators have criticized this formulation for over a century. See, e.g., Amasa M. Eaton, Conspiracy to Commit Acts Not Criminal *Per Se*, 6 Colum. L. Rev. 215, 218–19 (1906) ("The authorities cited by [Hawkins] furnish no support to this statement, unless by 'wrongfully' Hawkins meant 'criminal means.'" (footnote omitted)); Frank P. Blair, The Judge-Made Law of Conspiracy, 37 Am. L. Rev. 33, 46 (1903) (stating that if Hawkins meant more than that false indictments were highly criminal, he is "open to the criticism of stating a proposition not only unsupported by his authorities, but in flat contradiction of them and baldly untrue"). But critics acknowledged that Hawkins's formulation "came to be considered as a sacred and final dispensation" of conspiracy law. Francis B. Sayre, Criminal Conspiracy, 35 Harv. L. Rev 393, 405 (1922) [hereinafter Sayre, Criminal Conspiracy].

[110] Sayre, Criminal Conspiracy, supra note 109, at 406.

[111] 39 & 40 Geo. 3, c. 106, § 3 (1800); William D. Grampp, The Economists and the Combination Laws, 93 Q.J. Econ. 501, 501 (1979).

[112] Thomas Lloyd, The Trial of the Boot and Shoemakers of Philadelphia, on an Indictment for a Combination and Conspiracy to Raise Their Wages 2–6 (Philadelphia, B. Graves 1806); see also Christopher L. Tomlins, Law, Labor, and Ideology in the Early American Republic 110–13 (1993) (describing the nineteenth-century American context of labor conspiracy cases and their roots in English judicial practice).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

2. Enslavers' Conspiracy

In his mesmerizing history of slave revolts in the seventeenth and eighteenth centuries, Professor Jason Sharples documents how elites throughout the Atlantic world lived in perpetual fear of uprisings.[113] Some of this fear was attributable to large-scale violent uprisings like the Haitian Revolution.[114] But there emerged local sources of fear as well, and local disputes between White elites about how best to prevent uprisings in their own communities.[115] Would it be more effective to increase supervision of enslaved people and thus make it easier to discover developing plots? Or instead to allow enslaved and freed people to gather with little supervision, thus mitigating racial antagonism? Conspiracy was a preferred tool of those who favored the first option.[116]

Sharples finds that testimonies and confessions regarding slave conspiracies in British America were remarkably homogenous. The alleged plots often involved the general slaughter of White men and rape of White women—precisely what enslavers most feared.[117] Investigators used torture to elicit testimonies and confessions that seemed to confirm those fears.[118] Enslavers then brutally executed alleged plotters, terrifying a subject population into further confessions that began the cycle all over again.[119]

[113] See generally Jason T. Sharples, The World That Fear Made: Slave Revolts and Conspiracy Scares in Early America (2020) (exploring the features of colonial-era slavery that led slaveholders to believe that permitting slaves to associate freely would lead them to conspire to overthrow their masters and the measures taken by colonial governments to prevent this possibility, as well as the methods slaves adopted to cope with these oppressive measures).

[114] Id. at 251 (describing the Haitian Revolution as a cautionary example recurringly used by White Americans to warn that emancipation or reform would enable violent rebellion of enslaved persons and racial catastrophe).

[115] Id. at 246 (depicting how exaggerated reports of Haitian racial violence fueled enduring White fears of Black sovereignty, justified preemptive repression, and shaped U.S. policy debates over internal security and slavery).

[116] Id. at 5 (arguing that alleged "conspiracies" were often speculative constructions used by enslavers, rather than evidence of actual rebellion).

[117] Id. at 4.

[118] Id. at 13 (emphasizing that torture and fear under slavery produced "epistemic violence," shaping coerced testimony into distorted accounts of alleged conspiracies).

[119] Id. at 15, 67 (detailing how courts used coerced testimony and public punishments—ranging from minor whippings to mass executions—to manage White fear and terrorize enslaved populations).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

This system encouraged misunderstanding, manipulation, and false incrimination. Suspected conspirators found that they could escape death by describing conspiracies of great scope and scale.[120] To avoid violence to their families and friends, they accused acquaintances and enemies.[121] To avoid suspicion, enslaved people avoided social gatherings, lest their speech and actions be taken to evince unlawful agreements.[122]

Through the 1720s, enslaved people were generally excluded from Southern courts, except in noncapital cases.[123] Enslavers relaxed evidentiary rules to produce conspiracy convictions, often in violation of normal common law rules.[124] Again, the testimony was often produced by torture—and the common law did not permit torture.[125]

Of course, enslaved people did conspire to secure their freedom. In the spring of 1800, Gabriel Prosser organized a general uprising involving enslaved artisans, resident aliens, and non-Black workers.[126] Louisiana was the site of a major slave revolt in 1811 that involved about 500 insurgents.[127] Nat Turner instilled panic and terror throughout enslaving states when in 1831 he and his coconspirators killed fifty-five adults and children of the planter class.[128] Maroon communities offered refuge to runaway Black slaves and inspiration and material support for

[120] Id. at 19 (explaining how some enslaved people survived by turning informant, exaggerating plots, and tailoring testimony to align with colonial fears).

[121] Id.

[122] Id. at 149 (describing how colonial surveillance and informants distorted normal social networks, undermining trust within enslaved communities).

[123] Thomas D. Morris, Slaves and the Rules of Evidence in Criminal Trials, 68 Chi.-Kent L. Rev. 1209, 1238 (1993).

[124] Id. at 1215 (describing how Virginia courts modified testimony rules to secure convictions of enslaved people, reflecting White anxiety about rebellion rather than standard legal practice).

[125] Id. at 1224 (depicting how enslaved people in Virginia during the mid-1700s sometimes testified against other enslaved people—often to reduce their own punishment and "in order to save their [own] lives"—producing evidence that courts relied upon for convictions).

[126] See Cedric J. Robinson, Black Movements in America 33–34 (1997).

[127] Id. at 34–35 (providing a more in-depth account of the 1811 Louisiana revolt, which organized into companies, marched on New Orleans, and attacked plantations before being suppressed).

[128] Id. at 37–39 (providing a more in-depth account of Nat Turner's 1831 uprising, which sparked widespread panic, military mobilization, and harsher restrictions on enslaved people).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

nearby slave revolts.[129] From 1830 to the Civil War, the Underground Railroad conspired to transport an estimated 66,000 enslaved people to freedom.[130]

You might be wondering at this point whether the evils of antebellum conspiracy criminalization are relevant to contemporary conspiracy. Perhaps you are appalled by the investigation, prosecution, and punishment of conspiracy by enslaved people and their allies because you are appalled by slavery and torture. Maybe you are not appalled by surveillance and snitching to discover and thwart agreements to commit crimes.

But I want you to consider the possibility that the brutalization and fragmentation of enslaved communities arose from durable features of conspiracy criminalization. That the detection of unlawful agreements has always required surveillance, depended upon informants, and chilled social activities in which racialized communities engage. That the possibility of misunderstandings attributable to cultural differences and racial stereotypes has always been present. And that the legacy of rightful conspiracies against laws enacted by conspiring elites continues to shape perceptions of conspiracy criminalization.

3. Conspiracy Against White Supremacy

By the mid-nineteenth century, American conspiracy remained in an unsettled state. There was no federal conspiracy statute, and state conspiracy law was largely judge-made. As late as 1843, a Pennsylvania court lamented that state "decisions have gone on no distinctive principle; nor are they always consistent."[131]

The Civil War catalyzed a turn to statutory conspiracy and wrought major changes in its use. Once used to subjugate enslaved people, conspiracy was taken up by an antislavery Reconstruction Congress to target unlawful agreements promoting White supremacy. Freed people

[129] See Michael A. Gomez, Exchanging Our Country Marks: The Transformation of African Identities in the Colonial and Antebellum South 52–53 (1998) (describing Maroon communities in Louisiana as "self-sufficient," storing arms, cultivating land, and conducting raids on the world outside the swamp); Robinson, supra note 126, at 39 (detailing the support and inspiration lent by Maroon communities to nearby slave revolts).

[130] Walda Katz-Fishman & Jerome Scott, The South and the Black Radical Tradition: Then and Now, 28 Critical Socio. 169, 177 (2002).

[131] Mifflin v. Commonwealth, 5 Watts & Serg. 461, 461–62 (Pa. 1843) (commenting on the "unsettled state" of the law of conspiracy in a case involving a joint scheme to help an "infant" escape her guardian and marry without consent).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

and their allies were terrorized by the Ku Klux Klan and their sympathizers, with the assistance of local law enforcement and state governments.[132] Responding to President Ulysses S. Grant's call for protective legislation, Congress passed two enforcement acts proscribing private conduct threatening civil rights.[133]

The Enforcement Act of 1870 focused on voting rights. It declared that citizens otherwise qualified to vote could do so without regard to race, color, or previous condition of servitude, and it outlawed private interference with the right to vote.[134] The Act also made it a felony to conspire or ride the public highways to deprive any citizen of "any right or privilege granted or secured to him by the Constitution or laws of the United States."[135] Finally, it authorized the military to "aid in the execution of judicial process issued under this act."[136]

The Enforcement Act of 1871—also known as the "Ku Klux Klan Act"—prohibited conspiracies by private individuals to prevent any "person" from "exercising any right or privilege of a citizen of the United States."[137] The Ku Klux Klan Act targeted conspiracies "with intent to deny to any citizen of the United States the due and equal protection of the laws."[138] It included both a criminal conspiratorial provision and several civil conspiratorial provisions.[139]

The newly created Department of Justice ("DOJ") was tasked with implementing the Enforcement Acts. Established in 1870 to consolidate legal advocacy and policy under the authority of the Attorney General and enforce the Thirteenth, Fourteenth, and Fifteenth Amendments, the DOJ institutionalized a federal commitment to civil rights enforcement.[140] In 1872, Frederick Douglass declared that "thousands

[132] See Wyn Craig Wade, The Fiery Cross: The Ku Klux Klan in America 37–40 (1987) (describing how Klan members and allied local authorities used raids, intimidation, and secret organizational hierarchies to terrorize freed people and their supporters).

[133] See Enforcement Act of 1870, Pub. L. No. 41-114, 16 Stat. 140; Ku Klux Klan Act, Pub. L. No. 42-22, 17 Stat. 13 (1871).

[134] Enforcement Act §§ 1, 4–5.

[135] Id. § 6.

[136] Id. § 13.

[137] See Ku Klux Klan Act § 2.

[138] Id.

[139] Id. §§ 1–2, 6.

[140] See Robert J. Kaczorowski, Federal Enforcement of Civil Rights During the First Reconstruction, 23 Fordham Urb. L.J. 155, 157–58 (1995) (detailing how Congress created the DOJ to centralize federal prosecutions and counter Klan violence, making civil rights enforcement a core function of the Attorney General).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

have openly acknowledged the crimes charged, the organizations stand confessed to the amazement of all good men North and South, and peace has come to many places as never before. The scourging and slaughter of our people have so far ceased."[141] Conspiracy did not eradicate the Klan, nor did it prevent the Klan's resurgence in the early twentieth century. The experience did, however, show that conspiracy could be used to prevent and punish racial subjugation rather than to reinforce it.

4. Conspiracy of Capital

Nothing galvanized criticism of conspiracy like its use against organized labor. Major themes in this criticism can be traced from labor-movement activism and lawyering through the work of progressive legal scholars and judges.

Formally, labor unions were not deemed by courts to be conspiracies during the antebellum period.[142] But Victoria Hattam documents a postbellum resurgence in conspiracy prosecutions and a transformation in judicial reasoning that tracks political-economic conflict.[143] An immiserated industrial proletariat[144] sought to organize in response to increasing employer control over their pace and manner of work, production-contingent pay, and appalling working conditions.[145] Employers and the state met them first with conspiracy prosecutions,

[141] Frederick Douglass, U.S. Grant and the Colored People (1872), *reprinted in* 1 The Frederick Douglass Papers, Series Four: Journalism and Other Writings 163, 172 (John R. McKivigan ed., 2021); see also Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, at 458 (2014) (characterizing the crackdown on the Klan as a "success" because it "restor[ed] order, reinvigorat[ed] the morale of Southern Republicans, and enabl[ed] blacks to exercise their rights as citizens").

[142] The leading statement was Massachusetts Chief Justice Lemuel Shaw's opinion in *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 134 (1842), which articulated that labor unions, without unlawful purpose or means, did not constitute a criminal conspiracy. See Gary Minda, The Common Law, Labor and Antitrust, 11 Indus. Rels. L.J. 461, 502 (1989) (describing how "[c]riminal and civil prosecutions for labor conspiracies became comparatively insignificant after *Hunt* was decided").

[143] See Victoria C. Hattam, Labor Visions and State Power: The Origins of Business Unionism in the United States 30–75 (1993).

[144] See William E. Forbath, The Ambiguities of Free Labor: Labor and the Law in the Gilded Age, 1985 Wis. L. Rev. 767, 801 (describing how from the 1820s to the 1870s, "workers and artisans everywhere experienced the emergence of capitalist labor relations as a rupture with the past—a new organization of work which entailed a new and 'degrading' work discipline, a new subjection and dependence, a new kind of inequality").

[145] See Hattam, supra note 143, at 152, 156 (documenting postbellum labor organizations' repeated but frustrated efforts for legislative reform as courts undermined statutory protections for organizing and workplace conditions).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

then with injunctions against strikes and boycotts.[146] Between 1877 and 1970, U.S. presidents dispatched the Army to put down more than eleven strikes; between 1886 and 1895, state governors called out National Guard units 328 times, one-third of which were officially listed as responding to "labor troubles."[147] Corporations also hired private detective agencies that engaged in espionage, provocation, and armed strikebreaking.[148]

Labor-conspiracy prosecutions left a lasting mark on conspiracy criminalization outside their immediate context. They generated what remains the most influential justificatory theory of conspiracy: the group-danger theory. The notion that conspiracies constitute distinct evils worthy of criminalization because of the dangers of group crime appeared for the first time in a criminal law treatise in 1897.[149] This was three years after a countrywide railroad strike that began at the Pullman Palace Car Company's model town and factory (much more on this shortly) was violently suppressed by state militiamen, National Guardsmen, and federal troops.[150]

5. Statutory Conspiracy

The codification of conspiracy in the late nineteenth century did not bring clarity or constraint. Typical state statutes criminalized agreements "to commit any act injurious to the public health, to public morals, or to

[146] Id. at 162 (explaining how fears of working-class unrest and the instability of conspiracy convictions led the judiciary to favor injunctions over criminal conspiracy prosecutions as a preferred means of regulating labor conflict).

[147] Michael Mark Cohen, The Conspiracy of Capital: Law, Violence, and American Popular Radicalism in the Age of Monopoly 56 (2019).

[148] Id. at 54 (observing that employers' use of private detectives, strikebreakers, and other coordinated anti-labor strategies was treated as lawful and protected by the judiciary).

[149] 2 Emlin McClain, A Treatise on the Criminal Law as Now Administered in the United States 157 (Chicago, Callaghan & Co. 1897) (describing "unlawful combination and confederacy" as inherently "dangerous to the public peace and welfare" and criminal as a wrong distinct from the underlying offense). Steven Morrison notes that McClain cited *United States v. Cassidy*, 67 F. 698 (N.D. Cal. 1895), which arose from the prosecution of Southern Pacific railway employees for conspiracy during the Pullman Strike. Morrison, supra note 65, at 384. The judge instructed the jury that "[a] conspiracy becomes powerful and effective in the accomplishment of its illegal purpose in proportion to the numbers, power, and strength of the combination to effect it" and that "as it involves a number in a lawless enterprise, it is proportionately demoralizing to the well-being and character of the men engaged in it, and, as a consequence, to the safety of the community to which they belong." *Cassidy*, 67 F. at 703.

[150] See Morrison, supra note 65, at 384.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

pervert or obstruct justice, or the due administration of the laws."[151] Any limitation that might have resulted from the requirement of an overt "act" in furtherance of the conspiratorial agreement was undermined by imprecision in the description of the prohibited purpose. Moreover, the overt act did not need to be illegal or even dangerous.[152] Doctrines governing attempted crimes focused on whether the defendant had proceeded beyond "'preparatory' action" to "commencement of the consummation" of a particular crime.[153] By contrast, conspiracy's overt-act requirement wasn't tethered to the conspiracy's progress and thus to the likelihood that the underlying crime would be completed.[154]

The first federal conspiracy statute was enacted in 1867. It prohibited conspiracy "to commit any offense against the laws of the United States, or to defraud the United States in any manner whatever."[155] Abraham Goldstein points out that "[t]he original statute prohibited conspiracy to 'defraud the United States in any manner whatever,' and contained a number of other criminal provisions, all of which, unlike the conspiracy section (§ 30), were on their face concerned with revenue offenses."[156] The provision ended up elsewhere, however, and in *United States v. Hirsch*[157] the Court interpreted its coverage more broadly. Justice Samuel Miller reasoned that "[t]he conspiracy here described is a conspiracy to commit any offence against the United States" and that "[t]he fraud mentioned is *any* fraud against them."[158] *Haas v. Henkel*[159] ultimately severed any connection between conspiracy to defraud the United States and common law notions of fraud, holding that "[t]he statute is broad enough in its terms to include any conspiracy for the

[151] See, e.g., Cal. Penal Code § 182(a)(5) (West 2025) (enacted in 1872) ("[T]wo or more persons [may not] conspire . . . [t]o commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.").

[152] See Abraham S. Goldstein, Conspiracy to Defraud the United States, 68 Yale L.J. 405, 406 (1959) (explaining that conspiracy doctrine places primary weight on the agreement itself, permitting any overt act—even "a completely innocent one"—to satisfy statutory requirements).

[153] Id. (contrasting attempt doctrine's requirement that intent advance beyond mere preparation to the commencement of the crime with conspiracy's lesser emphasis on action).

[154] Id. at 417–18; Act of Mar. 2, 1867, ch. 169, § 30, 14 Stat. 471, 484 (requiring only that a party to a conspiracy commit "any" act "effect[ing] the object thereof," without linking that act to meaningful progress toward completing the underlying offense).

[155] § 30, 14 Stat. at 484.

[156] Goldstein, supra note 152, at 418 n.36 (citing §§ 26, 28–30, 32, 14 Stat. at 483–84).

[157] 100 U.S. 33 (1879).

[158] Id. at 35 (emphasis added).

[159] 216 U.S. 462 (1910).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

purpose of impairing, obstructing or defeating the lawful function of any department of Government."[160]

Courts interpreted the statute to create liability for unplanned crimes. The germinal case was *Pinkerton v. United States*,[161] upholding the conviction of Daniel Pinkerton and Walter Pinkerton for conspiracy and substantive offenses involving unlawful possession, transportation, and dealing in whiskey, in fraud of the federal revenues.[162] The jury was instructed that Daniel could be convicted of the substantive offenses on the basis of proof of (1) a criminal agreement with Walter to commit similar offenses and (2) Walter's overt acts in the furtherance of the charged offenses, without regard to whether Daniel participated in, aided or abetted, or was aware of those offenses.[163] In dicta, Justice William O. Douglas wrote:

> A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan *which could not be reasonably foreseen* as a necessary or natural consequence of the unlawful agreement.[164]

Goldstein argues that if "defraud the United States" was originally a "catch-all category" for common law fraud offenses that were not federally criminalized, it had become unnecessary for that purpose by the early twentieth century.[165] But the language was broad, and as federal substantive offenses proliferated, the conspiracy statute gave prosecutors "maximum flexibility in framing [their] charge[s] and presenting [their] proof[s]."[166] Thus, if statutory codification held the promise of placing limits on conspiracy's scope, it did not deliver on that promise.

---

[160] Id. at 479.

[161] 328 U.S. 640 (1946).

[162] Id. at 641 (describing the offenses and convictions involved in the case); id. at 648 (Rutledge, J., dissenting) (providing further description of the facts making up the charges and offenses).

[163] Id. at 648 (Rutledge, J., dissenting).

[164] Id. at 647–48 (majority opinion) (emphasis added).

[165] Goldstein, supra note 152, at 440 (explaining that while the 1867 statute initially functioned as a gap-filler in a sparse federal criminal code, later expansion of specific fraud statutes rendered that function largely obsolete).

[166] Id.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

6. Conspiracy and Confrontation

The general rule in the United States through the mid-nineteenth century was that out-of-court statements could not be introduced against a criminal defendant.[167] Hearsay was "no evidence," with narrow exceptions.[168]

One exception was testimony under "Marian procedures," named for the English statutes on which they were based.[169] In many states, justices of the peace were required to make written records of the sworn depositions of a witness of a felony at the time of arrest.[170] They then certified the record to the trial court and placed the witness under recognizance to appear and testify at trial.[171] This evidence could be introduced without a prior opportunity for defense cross-examination.[172] Another exception allowed the introduction of dying declarations by the victim of a homicide about the identity of the killer.[173] Prosecutors could also introduce coconspirator statements to corroborate or impeach trial testimony as well as to prove the general existence of a conspiracy.[174] But those statements could not be used as evidence of a defendant's participation in a conspiracy or some other crime.[175]

Today, the Federal Rules of Evidence except from the prohibition against hearsay any statements made "by a party's coconspirator during and in furtherance of the conspiracy."[176] The coconspirator exception

[167] See Thomas Y. Davies, Selective Originalism: Sorting Out Which Aspects of *Giles*'s Forfeiture Exception to Confrontation Were or Were Not "Established at the Time of the Founding," 13 Lewis & Clark L. Rev. 605, 642 (2009).

[168] Id. at 643 (concluding that framing-era law treated unsworn hearsay as inadmissible, with narrow exceptions for sworn Marian testimony or dying declarations made under the equivalent of an oath).

[169] Thomas Y. Davies, What Did the Framers Know, and When Did They Know It? Fictional Originalism in *Crawford v. Washington*, 71 Brook. L. Rev. 105, 128–29 (2005) (describing the procedural requirements for pretrial felony examinations conducted under the Marian statutes).

[170] Id. at 128.

[171] Id. at 129.

[172] Id.

[173] See Evan D. Bernick, Fourteenth Amendment Confrontation, 51 Hofstra L. Rev. 1, 48 (2022).

[174] See Thomas Y. Davies, Not "The Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the *Crawford-Davis* "Testimonial" Formulation of the Scope of the Original Confrontation Clause, 15 J.L. & Pol'y 349, 392–93 (2007) (noting that framing-era law allowed only limited exceptions to the hearsay ban, including using out-of-court statements to corroborate or impeach witnesses or show the existence of a conspiracy).

[175] Id.

[176] Fed. R. Evid. 801(d)(2)(E).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

was first defended via an analogy to the law of partnership.[177] Partners are deemed agents of one another when they act in furtherance of their partnership and are civilly liable for one another's actions, so each partner in crime is criminally liable for acts in furtherance of their criminal enterprise.[178] The exception has also been defended on the ground that coconspirator statements are particularly reliable because they are made against the penal interest of the declarant.[179]

These defenses are unpersuasive.[180] The agency defense founders upon the reality that coconspirator statements are admissible in *any* kind of trial, not only conspiracy prosecutions. The penal-interest defense would at most justify an inference of reliability concerning any statement by the declarant *that implicated the declarant*. We lack a convincing explanation for why alleged coconspirators might care nearly as much about the penal interests of their partners in crime.

The weakness of these defenses suggests that the actual explanation for the coconspirator exception might be its perceived necessity.[181] Conspiracy has always been a difficult crime to prosecute. As conspiracy's substantive scope continually expanded—from agreements to secure false indictments to agreements to achieve criminal ends to

[177] See Van Riper v. United States, 13 F.2d 961, 967 (2d Cir. 1926) (reasoning that when people "enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime' ").

[178] Id.

[179] E.g., United States v. Perez, 702 F.2d 33, 37 (2d Cir. 1983) (asserting that a statement which falls within the coconspirator exception is likely to be reliable "because a declaration in furtherance of a conspiracy would be against the penal interest of the declarant").

[180] See, e.g., Fed. R. Evid. 801 advisory committee's note ("[T]he agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established."); Christopher B. Mueller, The Federal Coconspirator Exception: Action, Assertion, and Hearsay, 12 Hofstra L. Rev. 323, 324 (1984) (describing the exception as an "embarrassment" that "seems to have been created by accident"); Robert B. Humphreys, In Search of the Reliable Conspirator: A Proposed Amendment to Federal Rule of Evidence 801(d)(2)(E), 30 Am. Crim. L. Rev. 337, 339 (1993) (arguing that the exception is "overly inclusive, admitting into evidence statements that are unreliable and inadequately tested by courtroom confrontation").

[181] E.g., Joseph H. Levie, Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule, 52 Mich. L. Rev. 1159, 1166 (1954) ("The true reason for the exception explains both its growth and the parallelism of that expansion to the expansion of the law of conspiracy. That reason is simple: there is great probative need for such testimony."); United States v. Gil, 604 F.2d 546, 549 (7th Cir. 1979) ("It has also been candidly proposed by commentators, and implicitly acknowledged by the Advisory Committee for the Federal Rules of Evidence, that the exception is largely a result of necessity, since it is most often invoked in conspiracy cases in which the proof would otherwise be very difficult and the evidence largely circumstantial.").

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

agreements to achieve unlawful ends—perhaps the rules of evidence were relaxed to make it easier for prosecutors to target an increasing number of conspiratorial agreements.

B. Anti-Conspiracy

In the late nineteenth century, conspiracy criticism went mainstream. The immediate inspiration was the use of conspiracy against labor unions, and labor movement lawyers were in the critical vanguard of anti-conspiracy. Progressive academics and jurists drew from movement lawyers' work but expressed skepticism of conspiracy rather than outright rejecting it.

1. Class Warfare

Michael Mark Cohen has documented how labor movement lawyers used labor conspiracy trials as opportunities to both expose conspiracy as an instrument of class rule and turn the rhetoric of conspiracy against their oppressors.[182] Few did so as successfully as Clarence Darrow, who first adopted this strategy when defending Eugene Debs against conspiracy charges.

Before he emerged as the most visible socialist in the country, Debs was the founder and leader of the American Railway Union ("ARU").[183] On May 11, 1894, rail laborers who worked for the Pullman Company—of which thirty-five percent were ARU members—struck in protest against steep wage cuts and layoffs.[184] After a month of striking, the ARU organized a solidarity boycott of all trains carrying Pullman cars, eventually inspiring more than 100,000 workers across twenty railroads in twenty-six states to strike.[185] The Chicago General Managers' Association ("GMA") responded by not allowing any trains to travel without Pullman coaches and U.S. Mail cars, and railroad work ground to a halt.[186] When this lockout failed to break the strike, the GMA sought federal intervention.[187]

[182] See Cohen, supra note 147, at 30.
[183] Id. at 70.
[184] Id. at 71.
[185] Id.
[186] Id.
[187] Id. (describing how local authorities, including the mayor of Chicago and governor of Illinois, determined the strike to be legal, resulting in GMA's appeal to federal courts and President Cleveland to quell the strike).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

Attorney General Richard Olney appointed Edwin Walker—the general counsel for one of the GMA's most powerful member railroads—as special U.S. attorney to enjoin the strike and prosecute Debs for conspiracy.[188] Walker secured a federal injunction that criminalized "doing any act whatever in the furtherance of any conspiracy or combination to restrain said railroads."[189] Debs defied the order.[190] On July 4, 1894, President Grover Cleveland sent thousands of federal troops into Chicago to enforce the injunction and arrest Debs.[191] Debs faced two court proceedings—one for civil contempt, one for criminal conspiracy.[192]

Darrow defended Debs by means of a threefold strategy. First, deny that Debs's actions constituted any crime.[193] Second, bring moral odium upon conspiracy criminalization.[194] Third, charge the railroads, their servants, and capitalism itself with conspiracy against workers.[195] As Cohen puts it, Darrow "transform[ed] the court proceedings into a melodrama of class struggle."[196]

In Darrow's presentation, Debs's prosecution was itself a conspiracy in the original legal sense—a malicious prosecution. Since its expansion beyond false indictments, conspiracy had always been thus: "Conspiracy, from the days of tyranny in England down to the day the General Managers Association used it as a club, has been the favorite weapon of every tyrant."[197] Darrow adduced evidence that the GMA had

[188] Id. at 71–72.

[189] Id. at 72.

[190] Because of the sweeping nature of the injunction, virtually any union activity was prohibited, so rather than surrender entirely, Debs elected to stand firm and ignore the order, and the strike continued. Id.

[191] See id.

[192] Id.

[193] Id. at 73.

[194] Id. at 74 (praising Darrow's strategy of "[p]itting the ruthless capitalists against the heroic union leader" who had become the working American's "symbol of defiance of corporate tyranny and government corruption").

[195] Id.

[196] Id. In this respect, Darrow anticipated the conspiracy trials of the 1960s. See generally Pnina Lahav, Theater in the Courtroom: The Chicago Conspiracy Trial, 16 Law & Literature 381, 383–86 (2004) (analyzing the theatrical nature of the Chicago Conspiracy Trial, where conspiracy charges were leveled against activists protesting the Vietnam War in Chicago in 1968, and wherein all parties positioned themselves as "soldiers in the battle of good against evil").

[197] Daniel Novak, The Pullman Strike Cases: Debs, Darrow, and the Labor Injunction, *in* American Political Trials 129, 139–40 (Michal R. Belknap ed., 1981).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

conspired to "reduce the wages and compensation of their employés" and use the courts to "overcome successively and in detail any lawful and peaceable resistance that the employés, or any of them, might make to the reduction of their compensation."[198]

In an 1898 trial of three union men charged with conspiracy, Darrow claimed that the prosecution was making use of "the opinions of imbecile judges in the employ of powerful knaves" to itself accomplish a conspiracy in the original sense of the term.[199] "It was an ancient law that a man who conspired to use the courts to destroy his fellow-men was guilty of treason to the State," explained Darrow in his closing arguments, expressly invoking conspiracy's roots in malicious prosecution to indict the factory owners who were "hounding innocent men to their deaths or to a prison pen."[200] These arguments were published in pamphlet form.[201]

Darrow's strategy both shaped and was shaped by the labor movement. The Supreme Court upheld the labor injunction, and Debs was imprisoned for contempt.[202] After he was released, he went on a speaking tour in which he told his story under the title, "Who Are the Real Conspirators?"[203] Darrow made use of his own platform as the most famous labor movement lawyer in the country to criticize conspiracy as class domination, observing acidly that "[w]hen they want a working man for anything excepting work they want him for conspiracy."[204]

The strategy of turning conspiracy prosecutions into sites of class struggle was embraced as well by nonlawyers. Anarchist Emma Goldman responded to her conviction for conspiracy to obstruct U.S. war efforts during World War I by declaring in open court, "I protest against the conspiracy of imperialist capitalism against the life and the liberty of the American people."[205] The editors of *The Masses* in 1914 decried "the conspiracy to 'get' labor agitators by a misuse of the

[198] United States v. Debs, 64 F. 724, 735 (C.C.N.D. Ill. 1894).

[199] Clarence Darrow, Somewhere There Is a Conspiracy, *in* Attorney for the Damned: Clarence Darrow in the Courtroom 267, 297 (Arthur Weinberg ed., 2012).

[200] Cohen, supra note 147, at 59, 61.

[201] Id. at 63.

[202] Id. at 73; see In re Debs, 158 U.S. 564, 599–600 (1895).

[203] Cohen, supra note 147, at 77.

[204] Clarence S. Darrow, Industrial Conspiracies 4 (1912).

[205] 2 Emma Goldman, Living My Life 704 (1931).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

conspiracy law."[206] A labor-aligned paper published excerpts from arguments of counsel for boycotters in which conspiracy was described as an "odious engine of oppression" under the headline "Star Chamber Tactics."[207] Seventy-five thousand working men in New York signed a petition demanding that the New York constitutional convention adopt an anti-conspiracy law that protected unions' right to exist.[208]

These class-warfare critiques resonated with progressive legal academics. Francis Sayre's influential 1922 article "Criminal Conspiracy" begins by centering the "very difficult and delicate function" that the law must perform "[i]n those fields of industrial controversy where passion runs high and where class conscious groups are arrayed in bitter fight."[209] He highlights the risk that "class groups will see in legal decisions only the prejudice and bias of the individual judges" and "popular respect for the law . . . will wane to a possible danger point."[210] To Sayre, conspiracy is "one of the principal legal weapons with which lawyers press their attack in labor controversies" by taking advantage of its "vague" and "uncertain" "fundamental nature."[211] He contends that conspiracy's use against the working class "has rendered the courts open to the bitter and constant cry of class partisanship."[212]

So deeply did the perception that conspiracy was an instrument of class warfare penetrate popular consciousness that papers could without

[206] Max Eastman, Knowledge and Revolution, The Masses, Sep. 1914, at 6.

[207] Star Chamber Tactics, 3 Workmen's Advocate, Feb. 12, 1887, at 1.

[208] See Current Comment, 2 Pittsburg Messenger, July 27, 1894, at 2. On the three-decades-long anti-conspiracy push that produced New York and Pennsylvania legislation nominally legalizing unions but was of limited efficacy because of the turn to injunctions, see Hattam, supra note 143, at 139–52. See also Cohen, supra note 147, at 68 (explaining that "[e]nforcing statutory protections proved impossible because each of the anti-conspiracy laws contained provisions that banned the use of 'force, threats or menace of harm to persons or property'" and "district attorneys continued to convict strikers on conspiracy charges after claiming that they had used 'intimidation tactics' such as organizing picket lines, taunting scabs, and threatening boycotts").

[209] Sayre, Criminal Conspiracy, supra note 109, at 393; see also Francis Bowes Sayre, Labor and the Courts, 39 Yale L.J. 682, 684 (1930) ("Because of its vague and elastic limits the crime of conspiracy has often been seized upon by reactionary courts as a convenient means whereby to reach desired convictions of groups or combinations whose activities were felt to be oppressive but could not be brought within the precise limits of definite crimes." (footnote omitted)).

[210] Sayre, Criminal Conspiracy, supra note 109, at 393.

[211] Id.

[212] Id. at 427.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

extensive explanation comment upon the irony of a successful effort by workers to "invoke[] . . . conspiracy law against employers."[213] When in 1921 the International Ladies Garment Workers Union secured an injunction restraining a manufacturers' association from violating an agreement with the union, the *Lake Geneva News* noted that conspiracy "has frequently been resorted to by employers against their labor."[214] It expressed the hope that this use of the law "against both sides" would lead to a general appreciation that conspiracy was an "impracticable and ineffective instrument."[215]

2. Censorship

Labor activists contended that conspiracy criminalization deprived them of the freedom of speech. Among the most prominent were the International Workers of the World, whose civil disobedience won them the support of liberal civil libertarians. The "Wobblies" participated in "free speech fights" across the western United States, determined to organize a disenfranchised working class and undeterred by police or vigilante violence.[216]

Illustrative is a free-speech campaign that took place in San Diego in the spring of 1912. The Wobblies were prosecuted for conspiring to violate ordinances against street speaking.[217] Convicted conspirators faced sentences that were six times as severe as those which could be imposed for violating the street-speaking ordinances themselves.[218] The *International Socialist Review* inveighed against what it called "an attempt to revive an old English conspiracy law and to apply it to the labor disturbances in America" and worried that "[s]ocialists everywhere may be railroaded to the penitentiary."[219]

The persecution of the Wobblies anticipated repression of the left during and after World War I. When the United States declared war on Germany in 1917, Congress passed the Espionage Act, which expanded federal conspiracy law to include conspiracy to overthrow the federal

[213] See Both Ways For Once, Lake Geneva News, Dec. 29, 1921, at 4.
[214] Id.
[215] Id.
[216] See Laura Weinrib, The Taming of Free Speech: America's Civil Liberties Compromise 26–31 (2016).
[217] Cohen, supra note 147, at 170.
[218] Id.
[219] Id.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

government.[220] Eleven months later, a Sedition Act broadly prohibited advocating, defending, or suggesting acts intended to incite resistance to the United States, promote the cause of its enemies, or hinder the war itself.[221]

The censorship of antiwar speech led to high-profile conspiracy trials in which defendants put the prosecution and the charged offenses on trial. Prosecutors in New York accused the staff of *The Masses* of conspiring against the war effort by, among other things, publishing poems and cartoons.[222] Editor Max Eastman made plain the stakes during an address to the jury, asserting that "[t]he only thing that is proven against us is that we agree in believing in the philosophy of socialism."[223] The strategy succeeded; the *Masses* trials produced two hung juries and a landmark victory for freedom of speech during wartime.[224] And the strategy brought left and liberal odium upon conspiracy because of its use as a means of censorship.[225]

So, too, did a string of raids conducted by the DOJ in 1919 and 1920 under the leadership of Attorney General A. Mitchell Palmer. Five months after a bomb exploded at Palmer's house, federal and local officials arrested thousands of suspected subversives, many of whom were targeted solely for their membership in the Communist Party.[226] In the summer of 1920, a group of twelve respected lawyers and legal academics, including progressive luminaries Zechariah Chafee Jr., Ernst Freund, Felix Frankfurter, and Roscoe Pound, issued a "Report upon the Illegal Practices of the United States Department of Justice."[227] The

[220] Id. at 212 (citing Espionage Act, ch. 30, 40 Stat. 217 (1917) (defining prohibited acts and specifying that "[i]f two or more persons conspire to violate [those prohibitions listed], and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished")).

[221] Sedition Act, ch. 75, 40 Stat. 553 (1918).

[222] Cohen, supra note 147, at 214–15 (describing charges laid against an editor, a cartoonist, and two journalists of *The Masses* for their publications).

[223] Id. at 214.

[224] Id. at 215 ("[W]hen the first *Masses* trial ended in a hung jury (with one utterly recalcitrant vote for acquittal), prosecutors expanded the case for a second trial, which similarly ended in a hung jury.").

[225] Id. at 214–15 (describing the defendants' refusal to take the charges seriously).

[226] See id. at 224–26.

[227] Laura Weinrib, Power and Premises: The Contested Meanings of the *Abrams* Dissent, 51 Seton Hall L. Rev. 61, 90 (2020) (citing Nat'l Popular Gov't League, Report upon the Illegal Practices of the United States Department of Justice (1920)) (characterizing the report as a condemnation of the DOJ's "lawless methods" and constitutional violations).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

report condemned the government's lawless methods and its "continued violation of [the] Constitution."[228]

Chafee's 1919 article "Freedom of Speech in War Time" encouraged Supreme Court Justices Oliver Wendell Holmes Jr. and Louis Brandeis to reconceptualize and strengthen the First Amendment.[229] Shortly after reading Chafee's article, Justice Holmes (joined by Justice Brandeis) dissented from the Court's decision in *Abrams v. United States*[230] to uphold the Espionage Act convictions of self-proclaimed "revolutionists" who distributed leaflets opposing American interference with the Russian Revolution.[231] In subsequent cases, Justices Holmes and Brandeis indicated that they would reverse convictions and, if necessary, invalidate legislation on First Amendment grounds.[232]

3. Rule of Law

Of movement-generated critiques of conspiracy, it was the most bourgeois that gained the most elite traction.[233] This critique emphasized

[228] Nat'l Popular Gov't League, supra note 227, at 3–7 (condemning DOJ actions such as warrantless arrests in violation of due process, detention without access to counsel, warrantless searches and seizures, general mistreatment of suspected dissidents, engaging in entrapment, and disseminating propaganda).

[229] See Laura Weinrib, Against Intolerance: The Red Scare Roots of Legal Liberalism, 18 J. Gilded Age & Progressive Era 7, 17 (2019) (describing Chafee's article as "the template for the progressive theory of free speech").

[230] 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting) (concluding that the conviction of the defendants in this case for producing leaflets that criticized the President's actions in WWI directly infringed on their right to free speech under the First Amendment).

[231] Weinrib, supra note 229, at 17.

[232] Id. at 18 (characterizing the continued dissents by Justices Holmes and Brandeis in speech cases as largely academic, due to a continued failure to sway a majority of the Justices).

[233] Cf. E.P. Thompson, Whigs and Hunters: The Origin of the Black Act 267 (1975) ("[I]f the actuality of the law's operation in class-divided societies has, again and again, fallen short of its own rhetoric of equity, yet the notion of the rule of law is itself an unqualified good."). For leftist responses to Thompson's contention, see, e.g., Morton J. Horwitz, The Rule of Law: An Unqualified Human Good?, 86 Yale L.J. 561, 564–66 (1977) (contending that the rule of law "undoubtedly restrains power, but it also prevents power's benevolent exercise," going on to say that it "*promotes* substantive inequality by . . . radically separat[ing] law from politics, means from ends, processes from outcomes" and "enabl[ing] the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage"); Inga Clendinnen, Understanding the Heathen at Home: E.P. Thompson and His School, 18 Hist. Stud. 435 (1979) (comparing Thompson's work with that of Standish Meacham, along with a previous book by Thompson, Douglas Hay, and Peter Lineburgh); Adrian Merritt, The Nature and Function of Law: A Criticism of E.P. Thompson's "Whigs and Hunters," 7 Brit. J.L. & Soc'y 194 (1980) (characterizing Thompson's analysis as a

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

conspiracy's uncertain scope, the distinctively lax procedural rules that accompanied it, and the corresponding *arbitrary* power that conspiracy conferred upon the state to target alleged conspirators as officials chose, without meaningful accountability.[234] The net effect was to deny a suspected conspirator a fair shot at avoiding criminalization. Consider August Spies's appeal to the jury shortly before he was sentenced to death for throwing a bomb into Haymarket Square during a three-day strike for the eight-hour day and killing a police officer. Spies urged that "[i]f the opinions of the [c]ourt are good, there is no person in this country who could not be lawfully hanged."[235]

Scholars like Sayre advanced this rule-of-law critique by tracing confusion in common law conspiracy doctrine about exactly what sort of agreements could be conspiratorial and collecting vague statutes.[236] In 1925, the Conference of Senior Circuit Judges (presided over by Chief Justice William Howard Taft) criticized "the prevalent use of conspiracy" by federal district attorneys, specifically condemned conspiracy charges brought "for the purpose—or at least with the effect—of bringing in much improper evidence," and emphasized that "the rules of evidence in conspiracy cases make them most difficult to

specific response to fabricated criticisms of his ideologies that results in an account that is both incomplete and inadequate); Perry Anderson, Arguments Within English Marxism 69–74, 197–207 (1980) (discussing Thompson's work together with that of other theorists, including Poulantzas, Cohen, and Althusser, and criticizing Thompson's sweeping conclusions about the abstract concept of the rule of law). For a summary of the discourse, see Christopher Tomlins, Marxist Legal History, *in* The Oxford Handbook of Legal History 515, 524–29 (Markus D. Dubber & Christopher Tomlins eds., 2018).

[234] On arbitrary power, see, e.g., Philip Pettit, Republicanism: A Theory of Freedom and Government 5, 52–58 (1997) (defining freedom as non-domination, which requires the exercise of power to be non-arbitrary); Quentin Skinner, Freedom as the Absence of Arbitrary Power, *in* Republicanism and Political Theory 83 (Cécile Laborde & John Maynor eds., 2008) (elaborating on Pettit's theory of arbitrary power as antithetical to liberty, which requires only that a person's actions may be restricted in some fashion, and contrasting with a negative theory of liberty that requires actual prevention to find an absence of freedom); Alex Gourevitch, From Slavery to the Cooperative Commonwealth: Labor and Republican Liberty in the Nineteenth Century 13 (2015) (defining the master-slave relationship based on the arbitrariness of a master's power over a slave).

[235] See 12 American State Trials 279 (John D. Lawson ed., 1919).

[236] See Sayre, Criminal Conspiracy, supra note 109, at 406 (describing how the rule (associated with Serjeant Hawkins) that a conspired-for act need not be unlawful enabled judges to "punish by criminal process such concerted conduct as seemed to them socially oppressive or undesirable, even though the actual deeds committed constituted of themselves no crime, either by statute or by common law").

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

try without prejudice to an innocent defendant."[237] The following year, Judge Learned Hand labeled conspiracy "that darling of the modern prosecutor's nursery."[238]

In the 1940s, a steady stream of rule-of-law critiques of conspiracy flowed from the legal academy. Albert Harno began a 1941 article by stating that "[i]n the long category of crimes there is none, not excepting criminal attempt, more difficult to confine within the boundaries of definitive statement than conspiracy."[239] He averred that conspiracy was a "powerful instrument in the hands of prosecuting attorneys and the courts" and that "[o]wing to the elasticity of the crime and its vague boundaries, there can be no doubt that it presents serious potential dangers of abuse."[240] Like Sayre, he saw imprecision in the definition of intent as particularly menacing and called for greater specificity.[241]

These rule-of-law critiques were embraced by Supreme Court Justices. Concurring in *Krulewitch v. United States*,[242] Justice Robert Jackson drew upon Sayre and Harno to contend that "[t]he modern crime of conspiracy is so vague that it almost defies definition" and that "loose practice as to this offense constitutes a serious threat to fairness in our administration of justice."[243] He added that "there are procedural advantages from using [conspiracy] which add to the danger of unguarded extension of the concept."[244]

---

[237] 1925 Att'y Gen. Ann. Rep. 5–6; see also Gordon Ireland, Double Jeopardy and Conspiracy in the Federal Courts, 40 J. Crim. L. & Criminology 445, 456 (1949) ("The practice of United States Attorneys in using conspiracy charges to secure more freedom as to evidence and avoidance of the statute of limitations to obtain more and easier and double convictions, to bolster their personal records for diligence and efficiency, has been the subject of various strictures from the bench.").

[238] Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925). For a similar observation from New York District Judge Holt, see United States v. Kissel, 173 F. 823, 828 (C.C.S.D.N.Y. 1909) ("There seems to be an increasing tendency in recent years for public prosecutors to indict for conspiracies when crimes have been committed. A conspiracy to commit a crime may be a sufficiently serious offense to be properly punished; but, when a crime has been actually committed by two or more persons, there is usually no proper reason why they should be indicted for the agreement to commit the crime, instead of for the crime itself."), *rev'd*, 218 U.S. 601 (1910).

[239] Harno, supra note 98, at 624.

[240] Id. at 645–46.

[241] Id. at 636 ("The verbalisms of the courts describing the intent in conspiracy are well-nigh terrifying.").

[242] 336 U.S. 440 (1949).

[243] Id. at 446 (Jackson, J., concurring).

[244] Id. at 452.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

First, because conspiracy is "considered . . . to have been committed in any district where any one of the conspirators did any one of the acts, however innocent, intended to accomplish its object," the prosecution can "compel one to defend at a great distance from any place he ever did any act because some accused confederate did some trivial and by itself innocent act in the chosen district."[245] Here, Justice Jackson cited Justice Oliver Wendell Holmes Jr.'s misgivings about loosened requirements for venue in *Hyde v. United States.*[246] Writing on behalf of four dissenting Justices, Justice Holmes remonstrated that allowing the government to prosecute a defendant in any jurisdiction where an overt conspiratorial act takes place is "one of the wrongs that our forefathers meant to prevent" by requiring that "the trial of crimes shall be held in the State and district where the crimes shall have been committed."[247]

Second, the coconspirator exception to the hearsay rule enables the prosecution to confront the accused "with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself."[248] Justice Jackson acknowledged that the prosecution is required to make an initial showing of the conspiracy's existence to invoke the exception and that jurors are instructed that the existence of a conspiracy cannot be proven through coconspirator statements.[249] But he dismissed the "assumption that prejudicial effects can be overcome by instructions to the jury" on the ground that "all practicing lawyers know [it] to be unmitigated fiction."[250]

Third, Justice Jackson underscored that conspiracy prosecutions are often joint trials involving multiple defendants. Because "[t]here generally will be evidence of wrongdoing by somebody," a defendant runs the risk of being presumed guilty by association.[251] In identifying this among "many practical difficulties in defending against the charge of conspiracy," Justice Jackson cited an article by Harold O'Dougherty,

[245] Id. at 452–53.

[246] Id. at 452 n.19 (quoting Hyde v. United States, 225 U.S. 347, 387 (1912) (Holmes, J., dissenting)) (characterizing Justice Holmes's dissent as "a vigorous protest which did not hesitate to brand the doctrine as oppressive" and counter to the intent of the constitutional framers).

[247] *Hyde*, 225 U.S. at 386–87 (Holmes, J., dissenting); see U.S. Const. amend. VI.

[248] *Krulewitch*, 336 U.S. at 453 (Jackson, J., concurring).

[249] Id.

[250] Id.

[251] Id. at 454.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

then a U.S. Attorney practicing in Brooklyn.[252] In it, O'Dougherty recounted how "the State, and particularly the Federal, governments have lately seized upon this flexible, pliable, and destructive weapon for the purpose of surer and more frequent convictions."[253]

This wasn't the only occasion on which Justice Jackson expressed conspiracy skepticism. In a 1947 address to the New York State Bar concerning his work prosecuting Nazi war criminals at Nuremberg, Justice Jackson described conspiracy as "the great dragnet procedure of our law" and a "somewhat dangerous procedure" that lawyers from civil-law nations "[did] not understand."[254] He noted that even after the conspiracy principle was included in the Charter of the International Military Tribunal, "we [U.S. prosecutors] sometimes had difficulty convincing our associates that the sweep of the conspiracy charge could be so broad."[255]

Justice Jackson wasn't alone in his conspiracy skepticism. Justice Felix Frankfurter (joined by Jackson) wrote in a separate opinion in *Von Moltke v. Gillies*[256] of "[t]he too easy abuses to which a charge of conspiracy may be put" and noted that "[b]ecause of its complexity, the law of criminal conspiracy, as it has unfolded, is more difficult of comprehension by the laity than that which defines other types of crimes."[257] By the early 1950s, the rule-of-law critique had become sufficiently widespread that features of it went under a common label: guilt by association.[258] This label gained traction as Congress and the states set up commissions to investigate "Un-American" activities,[259] President Harry Truman issued an executive order directing inquiry into

[252] Id. at 454 & n.21; see Harold St. L. O'Dougherty, Prosecution and Defense Under Conspiracy Indictments, 9 Brook. L. Rev. 263 (1940).

[253] O'Dougherty, supra note 252, at 263.

[254] 70 Rep. N.Y. State Bar Ass'n 154 (1947).

[255] Id.

[256] 332 U.S. 708 (1948).

[257] Id. at 727–28 (opinion of Frankfurter, J.).

[258] A fact lamented by supporters of these measures. See, e.g., Arthur E. Sutherland, Jr., Freedom and Internal Security, 64 Harv. L. Rev. 383, 402 (1951) (complaining that "[t]hose who argue on the side of un-constitutionality in a case involving anti-Communist legislation are apt to mention 'guilt by association' as a powerful exorcism").

[259] See, e.g., Nick Fischer, Spider Web: The Birth of American Anticommunism 125–26 (2016) (discussing John Bond Trevor's role in bolstering American anticommunism, including the creation of a Special Committee to Investigate Un-American Activities).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

the loyalty of all federal employees,[260] and the DOJ prosecuted alleged communists for seditious conspiracy under the 1940 Smith Act.[261]

Writing in 1948, John Lord O'Brian described how over the past decades, "prosecutors have been steadily increasing the use of the drag-net conspiracy procedure in preference to prosecutions for substantive crimes."[262] He heaped scorn on "[t]he idea that it may safely be left to a jury to distinguish between the degrees of guilt of, say, a dozen or more defendants in long court trials."[263] Following the Supreme Court's decision in *Dennis v. United States*[264] to uphold the convictions of two Black communists, Henry Winston and Benjamin Davis, Jr.,[265] against First Amendment challenges, Richard Arens wrote that "the political conspiracy . . . confronts us as a judge-made law of substantive crime on an *ad hoc* basis" and claimed that "[i]ts vagueness provides unlimited possibilities for abuse."[266]

But elite rule-of-law critics didn't challenge conspiracy's basic legitimacy—indeed, they made a point of affirming it. Justice Jackson in his closing argument at Nuremberg included conspiracy among the "rules which every society has found necessary in order to reach men . . . who never get blood on their own hands but who lay plans that result in the shedding of blood."[267] His misgivings about conspiracy's expansion did not stop him from joining *Dennis*.[268] And Arens's critique of *Dennis* takes for granted that "[n]one can question . . . the reasonableness of the superimposition of the general prohibition against conspiracy over . . . various overt crimes against security."[269]

[260] See Exec. Order No. 9835, 3 C.F.R. 627 (1943–1948); Landon R.Y. Storrs, The Second Red Scare and the Unmaking of the New Deal Left 110–11 (2013).

[261] See Nina Farnia, Imperialism and Black Dissent, 75 Stan. L. Rev. 397, 413–18 (2023).

[262] John Lord O'Brian, Loyalty Tests and Guilt by Association, 61 Harv. L. Rev. 592, 599–600 (1948).

[263] Id. at 600.

[264] 341 U.S. 494 (1951).

[265] Id. at 516–17 (plurality opinion). For an exhaustive account of the impact of the Smith Act and the National Security Act of 1947 on Black dissent, see Farnia, supra note 261, at 427–37. Farnia's wide-ranging analysis of the ways in which the State has—across time, place, and governmental unit—treated Black organization as a threat is essential reading.

[266] Arens, supra note 98, at 267.

[267] The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany pt. 19, at 401 (1946).

[268] 341 U.S. at 572 (Jackson, J., concurring).

[269] Arens, supra note 98, at 265 (footnote omitted).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

III. CONSPIRACY RULES EVERYTHING AROUND ME

When the drafters of the 1962 Model Penal Code ("MPC") undertook to reform American criminalization, conspiracy was in their sights. But their proposals failed to address even moderate critics' concerns.

The MPC drafters' fears that "law would lose all sense of just proportion"[270] if *Pinkerton* took hold in the states did little to discourage the doctrine from spreading. Their proposal of an affirmative defense for those who "after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose" was more successful, but only a bare majority of states recognize it, and federal courts do not.[271] And the MPC—unlike the common law[272]—endorses unilateral conspiracy.[273] Under the unilateral approach to conspiracy, a defendant who agrees with someone else to commit a crime and intends that it be committed can be prosecuted—even if the person with whom they agree is a police agent.[274]

Conspiracy continued to expand during the 1960s and 1970s. Its use against left social movements led activists and aligned lawyers to denounce it as a means of repressing Black freedom struggles and other movements for transformative social change. Academic critics considered radical possibilities, with a noteworthy demand for abolition appearing alongside more-numerous calls for reform.

By the 1990s, conspiracy had become entrenched. Within legal academia, a new defense of conspiracy emerged, relying upon an

---

[270] See Model Penal Code and Commentaries § 2.06 cmt. 6(a) at 307 (A.L.I., Official Draft and Revised Comments 1985).

[271] See Model Penal Code § 5.03(6) (A.L.I., Proposed Official Draft 1962); Cassidy & Massing, supra note 76, at 366–68, 372–73 (explaining the federal government's more stringent "withdrawal" approach, as well as the broad categories of approaches taken by the twenty-six states that have found some level of merit in the Model Penal Code's renunciation defense).

[272] See Dierdre A. Burgman, Unilateral Conspiracy: Three Critical Perspectives, 29 DePaul L. Rev. 75, 77 (1979) (arguing that the unilateral approach to conspiracy, which incorporates "feigned agreement[s]" into the doctrine, loses sight of the original common law purpose of punishing the added threat of a multi-person criminal collaboration).

[273] See Model Penal Code and Commentaries § 5.03 cmt. 2(b) at 398–99 (A.L.I., Official Draft and Revised Comments 1985) (adopting an approach to conspiracy that does not require the existence of a second guilty conspirator in order to charge the first).

[274] Paul Marcus, The Proposed Federal Criminal Code: Conspiracy Provisions, 1978 U. Ill. L.F. 379, 384 (critiquing a 1978 House bill's inclusion of language that adopts the Model Penal Code's unilateral agreement approach).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

economic analysis and insights from organizational theory. The Supreme Court eventually abandoned any concern with the formal or substantive reach of conspiracy criminalization.

A. Conspiracy Against Movements

From the late 1950s through the early 1970s, federal and state governments engaged in systematic and brutal repression of suspected communists, civil rights organizations, Black radical activists, Chicano activists, American Indian activists, and "New Left" activists who opposed the Vietnam War. Conspiracy played a leading role in this repression.

During the Vietnam War, the Nixon Administration prosecuted antiwar activism as conspiracy. The "Boston Five," Dr. Benjamin Spock, Michael Ferber, Mitchell Goodman, Reverend William Sloane Coffin, and Marcus Raskin, were indicted for conspiracy on the basis of a fall 1967 effort to encourage draft-age men to resist the draft.[275] This effort consisted of publishing "A Call to Resist Illegitimate Authority," a pamphlet which urged resistance and pledged support for resisters; participating in a draft card turn-in ceremony at a church; and participating in a demonstration in front of the DOJ that included additional turn-ins.[276] Only Raskin escaped conviction.[277]

Other prosecutions were less successful from the state's standpoint. The trial of the "Chicago Eight"—seven, after Black Panther Bobby Seale's trial was separated—for conspiracy to incite a riot at the 1968 Democratic Convention revealed a pattern of illegal wiretaps and infiltration[278] and resulted in the acquittal of Seale, David Dellinger, Rennie Davis, John Froines, Tom Hayden, Abbie Hoffman, Jerry Rubin, and Lee Weiner.[279] In July 1972, the Nixon Administration indicted several members of the Vietnam Veterans Against the War for a conspiracy to disrupt the Republican National Convention in Miami by

[275] See Robert N. Strassfeld, "Lose in Vietnam, Bring the Boys Home," 82 N.C. L. Rev. 1891, 1898–99 (2004) (citing Michael S. Foley, Confronting the War Machine: Draft Resistance During the Vietnam War 227 (2003)).

[276] Id. at 1898–99 (citing Foley, supra note 275, at 90–109, 131–32) (reporting a detailed account of the planning and execution of the church and DOJ turn-in demonstrations).

[277] Id. at 1899.

[278] Stephanie B. Goldberg, Lessons of the '60s, A.B.A. J., May 15, 1987, at 32, 33–35 (describing the trial theatrics and comedy of errors that led to acquittal of conspiracy and contempt charges).

[279] United States v. Dellinger, 472 F.2d 340, 348 n.3, 409 (7th Cir. 1972).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

staging an armed attack on the convention.[280] As in the Chicago Seven case, the government's case fell apart when the defense successfully put the prosecution on trial—in this case, revealing that virtually all of the talk of violence had come from undercover government agents.[281] So, too, did the prosecution of the "Harrisburg Seven," including Father Philip Berrigan and Sister Elizabeth McAlister, for conspiracy to kidnap Secretary of State Henry Kissinger and to blow up heating tunnels in Washington, D.C., fail to produce a conviction.[282]

Even when federal conspiracy trials didn't result in convictions, however, they depleted movement resources. The 1970 prosecution of "Seattle Eight" antiwar activists for conspiracy to incite a riot at a march in Seattle collapsed after the prosecution's key witness—an FBI informer—admitted that he had helped to instigate the violence.[283] But the trial devastated a growing protest movement thanks to the money and time spent on legal defense and the jailing of all defendants—key organizers in Seattle—for substantial periods as a consequence of contempt convictions.[284] The American Indian Movement ("AIM") was devastated by two years' worth of trials following the occupation of Wounded Knee.[285] Although most of the activists were acquitted, AIM was ultimately bankrupted by the legal expenses incurred through defending key leaders and organizers.[286]

States, too, relied upon conspiracy to suppress movement activism. The leaders of the Montgomery boycott against segregated public transportation—including Martin Luther King Jr.—were indicted by an Alabama grand jury with conspiring to disrupt lawful business by

[280] Strassfeld, supra note 275, at 1903.

[281] Id.

[282] Id. at 1904 (citing Nancy Zaroulis & Gerald Sullivan, Who Spoke Up? American Protest Against the War in Vietnam, 1963–1975, at 378 (1984)).

[283] See Robert Justin Goldstein, Political Repression in Modern America from 1870 to the Present 475 (1978) (describing how FBI informer Horace L. Packer supplied drugs, weapons, spray paint, and items for Molotov cocktails to campus radicals).

[284] Id. at 534.

[285] See Paul Chaat Smith & Robert Allen Warrior, Like a Hurricane: The Indian Movement from Alcatraz to Wounded Knee 270–71 (1996) (detailing the devastating and bankrupting effect of mass arrests—more than 500 during the seven weeks of Wounded Knee occupation—of AIM's leaders and supporters on the movement).

[286] Id. at 271 (describing the government as "the real victor" due to AIM's resulting bankruptcy from trial litigation, despite the Wounded Knee Legal Defense/Offense Committee winning ninety-two percent of cases).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

running a carpool service.[287] King was convicted, assessed court costs, and fined $500; when he refused to pay, he was sentenced to hard labor in Montgomery County for 140 days for the fine and 246 additional days for the court costs.[288] Although this one-year sentence was postponed during King's appeal, it would be another year before the Supreme Court expressly ruled in favor of the boycotters, and city appeals and delays kept the Court's enforcement order from arriving for another month.[289]

In the spring of 1968, over ten thousand Chicano high school students walked out of local high schools in protest of abysmal educational conditions.[290] Thirteen community leaders and college students were indicted for conspiracy to commit a variety of misdemeanors.[291] The conspiracy charge—a felony—exposed the "East L.A. Thirteen" to potential sentences of up to forty-five years in prison.[292] Oscar Acosta, the lead attorney representing the Thirteen, was a politically prepared Chicano activist who painted the prosecution as a means of quelling dissent.[293] He succeeded in getting the charges dismissed on the ground that the defendants' actions were protected by the First Amendment.[294] But the case dragged on for two years and illustrated the lengths to which state authorities would go to target activism.[295]

California was also the site of Angela Davis's prosecution for conspiracy to kidnap and murder a judge. Davis had been fighting a

[287] Randall Kennedy, Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott, 98 Yale L.J. 999, 1029 (1989) (offering a detailed account of Martin Luther King Jr.'s Montgomery bus boycott trial and its effects on the movement).

[288] Id. at 1034 n.217 (citing Transcript of Trial at 577, State v. King, No. 7399 (Ala. Ct. App. 1956)).

[289] See Christopher Coleman, Laurence D. Nee & Leonard S. Rubinowitz, Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest, 30 Law & Soc. Inquiry 663, 717 n.134 (2005) (explaining that the desegregation mandate from the Court was delayed by the city's request for a rehearing, causing the carpool operation to shut down temporarily).

[290] Ian F. Haney López, Racism on Trial: The Chicano Fight for Justice 1 (2003). López utilizes the stories of two criminal prosecutions—the East L.A. Thirteen and the Biltmore Six—from 1968 student demonstrations to examine the Chicano movement in East Los Angeles. Id. at 1–4.

[291] Id. at 27.

[292] Id.

[293] Id. at 27–32 (offering a colorful, bird's-eye view of Acosta's biography and demeanor as the Thirteen's attorney).

[294] Id. at 32.

[295] Id.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

legal battle with California governor Ronald Reagan and the state's university regents to retain her position as a philosophy professor at UCLA and leading the defense of three incarcerated Black men who had been charged with the murder of a White guard at Soledad Prison.[296] She was charged in connection with a fatal botched prisoner-escape in San Rafael, California, that was led by Jonathan Jackson, the younger brother of George Jackson—one of the incarcerated men.[297] Jonathan smuggled guns registered in Davis's name into a courtroom where he and three San Quentin prisoners took hostage Judge Harold J. Haley, assistant district attorney Gary Thomas, and three female jurors.[298] San Quentin guards and sheriff's deputies opened fire on the van where Jackson had led the hostages, killing Judge Haley, Jackson, and two of the prisoners, and paralyzing Thomas.[299] Davis was acquitted after a thirteen-week trial that garnered international attention.[300]

Movement lawyers drew attention to the role that conspiracy was playing in this repression. Haywood Burns, the radical civil rights lawyer (and eventual dean of CUNY Law School) who played a central role in the acquittal of Angela Davis and defended the prisoners who were indicted following the 1974 uprising at Attica Prison in New York, included conspiracy prosecutions as examples of how

> Black people are, as well, increasingly victimized by the growing political uses of the law against the unpopular and the politically controversial, as the law is used for a tool of political repression in the service of racism, and in opposition to the legitimate aspirations of the black community for change.[301]

He described how conspiracy had "long been a charge to which the state would resort in attacking the controversial and/or politically disfavored defendant" because "[t]he rules of evidence become much more elastic under such a charge, and no substantive crime need be

[296] Bettina Aptheker, The Morning Breaks: The Trial of Angela Davis xi–xiv, 9 (2d ed. 1999).

[297] Id. at xi–xiii.

[298] Id.

[299] Id. at xiii, 198.

[300] Id. at xxi; Shanta N. Covington, New Documentary Details How Angela Davis Became Angela Davis, NBC News (Mar. 31, 2013, at 14:15 ET), https://www.nbcnews.com/id/wbna 51387194 [https://perma.cc/FX4H-2P54].

[301] Haywood Burns, Black People and the Tyranny of American Law, 407 Annals Am. Acad. Pol. & Soc. Sci. 156, 161–63 (1973).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

proven."[302] Howard Moore, lead counsel for Davis at her trial, detailed how conspiracy "immeasurably enhances the State's chances of securing a conviction" and gives "the State great latitude in both the kind of evidence it may offer and the order of the proof."[303] It is because of these durable features of conspiracy that it could be readily put to repressive use against Black radicals: "[A] jury may convict [Angela], because she is Black and a Communist, because of what they think she thought, or even worse, would think."[304]

As progressive scholars in the early twentieth century adopted watered-down versions of labor movement critiques of conspiracy, liberal scholars struck notes similar to those sounded by mid-twentieth-century movement lawyers. Thus, David Filvaroff's "Conspiracy and the First Amendment" detailed how conspiracy is "obviously well adapted to the political and ideological uses to which it has been put," owing to its vague substance, undemanding elements, and pro-prosecutorial procedural structures.[305] He contended that conspiracy is "subject to abuse in even the run-of-the-mine criminal case" and "demands heightened critical analysis when basic political rights may be at stake."[306] But he stopped short of suggesting that conspiracy has no legitimate use. Disrupting this "rough consensus" within criminal scholarship that conspiracy "is a necessary doctrine in some respects, but also one that is overbroad and invites abuse," Philip Johnson in 1973 called for its outright abolition.[307]

Ironically, Johnson's argument for conspiracy abolition dwells less on conspiracy's harms than some calls for reform. He's primarily concerned with demonstrating that conspiracy's benefits have been overstated. It is not necessary to prosecute organized crime; accomplice liability is sufficient to convict the leaders of criminal enterprises for criminal acts "committed under [their] general supervision" and there are "inevitably specific criminal acts with which [they] may be

[302] Id. at 163.

[303] Howard Moore, Jr., Angela—Symbol of Resistance, *in* If They Come in the Morning: Voices of Resistance 191, 199 (Angela Y. Davis ed., 1971).

[304] Id.

[305] David B. Filvaroff, Conspiracy and the First Amendment, 121 U. Pa. L. Rev. 189, 189–92 (1972).

[306] Id. at 193.

[307] See generally Phillip E. Johnson, The Unnecessary Crime of Conspiracy, 61 Calif. L. Rev. 1137, 1137–39 (1973) (arguing that reform alone cannot fix a doctrine that is inherently unsound and that, therefore, abolition is necessary).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

charged."[308] Meanwhile, conspiracy costs us "clarity and simplicity" in criminalization by obstructing our consideration of "the needs of law enforcement" and "the legitimate interests of criminal defendants."[309] Its broad substantive sweep makes it possible to criminalize advocacy of unlawful conduct without triggering the same inquiry into "the balance between the values of public order and free political expression" that would take place regarding a statute that expressly "penalize[d] advocacy of violence at a demonstration or organizing a disruptive demonstration."[310]

Johnson does not stake out a position concerning the optimal balance between the needs of law enforcement and the legitimate interests of criminal defendants, public order, and free speech. His contention is that conspiracy's sweep makes the discovery of that balance difficult. So, too, do conspiracy's distinctive procedures. Using conspiracy to determine questions of joinder, for instance, "often force[s] defendants to endure the disadvantages of a joint trial without any significant compensating gain in efficiency" because the evidence against each defendant might be distinct.[311] Even when a substantial part of the evidence is the same, it takes "time and effort to insure that the jury d[oes] not become confused."[312]

Johnson concludes his case for abolition with an expression of pessimism about its catching on anytime soon.[313] This was not so much prescient as observant. His article was published three years after the enactment of the most sweeping conspiracy statute in the United States Code. Reform had come to nothing; abolition was a dream, articulated in the distant hope that "law reformers of the future" would be receptive.[314] The implementation of that statute would vindicate Johnson's pessimism.

[308] Id. at 1153.
[309] Id. at 1146, 1188.
[310] Id. at 1156.
[311] Id. at 1173–74.
[312] Id. at 1174–75.
[313] Id. at 1188 ("Abolition of conspiracy is not an idea whose time has come, because law enforcement interests erroneously regard the doctrine as a vital weapon against organized crime and because critics of conspiracy have attacked it piecemeal rather than in its entirety.").
[314] Id.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

B. Conspiracy Against Organized Crime

The origins of the Racketeer Influenced and Corrupt Organizations Act are conventionally traced to the felt imperative to combat organized crime—specifically, the Italian mafia. Mafia activity was indeed a focal concern during RICO's framing and played an important role in the public case for RICO's necessity.[315] But the capacious text of the statute suggests broader concerns, and careful attention to the political-economic context in which it took shape confirms them.

RICO was enacted at the peak of federal and state efforts to use conspiracy to suppress left social movements. In an important article detailing this context, Benjamin Levin draws attention to the *New York Times* issue announcing RICO's passage.[316] The headline is situated alongside a front-page story about armed Black students occupying Cornell University buildings, and other articles cover the war in Vietnam and conflict between the post-colonial state of Biafra and the U.S.-backed Nigerian government.[317] He points out as well that legislators soon called for the application of RICO to radical leftists and that J. Edgar Hoover presented a report stating that anarchists were plotting to infiltrate and overthrow the government.[318] Even if RICO was not consciously designed to maintain an existing political-economic order, it should not surprise us that it emerged as a fit instrument for that purpose rather than one precisely tailored to the mob.

RICO has operated in practice as a massive delegation to prosecutors and judges, who have developed the law of enterprise legitimacy. RICO's text criminalizes the investment of money obtained through a "pattern" of criminal activity in an "enterprise," the acquisition of an

[315] See generally John L. McClellan, The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?, 46 Notre Dame L. Rev. 55, 60 (1970) (advancing this case and stating that "[o]ur society cannot long safely permit the operation within it of an underworld organization as powerful and as immune from social accountability as La Cosa Nostra").

[316] See Benjamin Levin, American Gangsters: RICO, Criminal Syndicates, and Conspiracy Law as Market Control, 48 Harv. C.R.-C.L. L. Rev. 105, 138–40 (2013) (documenting *New York Times* stories on student demonstrations, collective unrest, and the threat of communism that were issued alongside Nixon's headline statement about combatting the mafia with RICO, shedding light on a collective movement against capitalism and state power at the time).

[317] Id. at 139.

[318] Id. at 142 n.175 (first citing Barry M. Goldwater, Liberals and Their Issues, L.A. Times, Sep. 27, 1970, at F7; and then citing Ronald J. Ostrow, Hoover Tells Anarchist Plot to Kidnap Official, L.A. Times, Nov. 28, 1970, at 1).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

interest in an "enterprise" through a "pattern" of criminal activity, and the conducting of "enterprise" affairs through a "pattern" of criminal activity.[319] Carissa Byrne Hessick points out that "[t]here is no common law understanding of the terms 'enterprise' or 'pattern,' and Congress did not provide a particularly helpful definition of the terms."[320] Enterprise is defined to "include[] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[321] "[A]ssociated in fact" is not defined, leaving it up to prosecutors and judges to define it without either statutory or common law precedents to assist them.[322]

RICO's stated purpose of protecting legitimate enterprises from infiltration was to be furthered through its operative provisions. The term "enterprise" everywhere appears to connote legitimacy.[323] If, however, you have the goal of eradicating organized crime because of harms or risks of harm that it imposes apart from infiltration, it will not do to target only the latter.[324] The DOJ soon adopted the view that criminal organizations are themselves enterprises and that directing or participating in them violates RICO.[325] The Supreme Court in 1981 agreed, highlighting RICO's own instruction that its provisions "be liberally construed to effectuate its remedial purposes."[326]

This is not to say that RICO gave prosecutors a blank check. In a monumental four-part critique of RICO published in 1987, then-Professor Gerard Lynch presented a sample of 236 RICO cases and categorized the predicate acts alleged in each.[327] Of these, ten involved violent extortion, another ten involved arson, and six involved political

[319] 18 U.S.C. § 1962(a)–(c).

[320] Carissa Byrne Hessick, The Myth of Common Law Crimes, 105 Va. L. Rev. 965, 998 (2019).

[321] 18 U.S.C. § 1961(4).

[322] Hessick, supra note 320, at 998 & n.164.

[323] See Gerard E. Lynch, RICO: The Crime of Being a Criminal, Parts I & II, 87 Colum. L. Rev. 661, 681–85 (1987) (explaining how RICO grew past its original call to protect legitimate business enterprises from infiltration).

[324] Stephen F. Smith, Proportionality and Federalization, 91 Va. L. Rev. 879, 910 (2005) ("There is . . . enough money to be made in purely criminal endeavors so that organized crime will not wither and die if prevented from expanding into legitimate spheres of the national economy.").

[325] Id. (describing the way the DOJ "ingeniously reconceptualized" RICO).

[326] See United States v. Turkette, 452 U.S. 576, 587 (1981) (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947–48).

[327] Lynch, supra note 323, at 735.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

violence.[328] Still, most offenses were not labeled violent. Lynch counted thirty-five cases of fraud, thirteen cases of tax/regulatory corruption, and sixteen cases involving corruption in government contracting.[329] He ultimately concluded that RICO "has not been frequently abused in application."[330] The thrust of his critique, however, was that prosecutors were making law. They had *exceeded* "the virtually unlimited sweep of [RICO's] language" in ways that "correspond to what law enforcement officials apparently believe to be substantive and procedural gaps in the federal criminal code."[331]

Concern about RICO expansion was not unusual in 1987. Seven years earlier, Barry Tarlow had dubbed RICO "The New Darling of the Prosecutor's Nursery."[332] He criticized Congress, the courts, and prosecutors for "promulgat[ing] a vague statute," "broadly interpret[ing] it in derogation of their obligation to narrowly construe criminal statutes," and abusing their discretion by "ignor[ing] the rising chorus of criticism by employing the statute more frequently and urging even broader constructions," respectively.[333] Following a string of high-profile RICO indictments targeting fraudulent investment schemes, Justice Antonin Scalia raised constitutional questions about the term "pattern" in a 1989 concurrence.[334] He suggested that this language might be void for vagueness and lamented as well that RICO's civil provisions "validate[d] the federalization of broad areas of state common law of frauds."[335] Scalia's concurrence was joined by Chief Justice William Rehnquist, Justice Sandra Day O'Connor, and Justice

[328] Id.

[329] Id.

[330] See Gerard E. Lynch, RICO: The Crime of Being a Criminal, Parts III & IV, 87 Colum. L. Rev. 920, 983–84 (1987).

[331] Lynch, supra note 323, at 662–63.

[332] Barry Tarlow, RICO: The New Darling of the Prosecutor's Nursery, 49 Fordham L. Rev. 165 (1980).

[333] Id. at 169, 306.

[334] See H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 255–56 (1989) (Scalia, J., concurring).

[335] See id. (alteration in original) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 501 (1985) (Marshall, J., dissenting)); see also id. ("RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws . . . . No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.").

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

Anthony Kennedy and was taken by some to invite constitutional litigation.[336]

The Court ultimately contributed to RICO expansion. *United States v. Turkette*[337] held that a RICO "enterprise" *need not* be a legitimate business—it could be a criminal organization—without specifying just what it *needs to* be. The result was a circuit split over whether an enterprise "associated in fact" needed to have a structure independent from the commission of the predicate racketeering offenses.[338] Nearly four decades after *Turkette*, the Supreme Court held that it did not. In determining that predicate racketeering offenses are sufficient to prove the existence of a structured "enterprise," *Boyle v. United States*[339] emphasizes that a RICO enterprise needn't have defined roles, a chain of command, regular meetings, or internal disciplinary rules.[340] What an enterprise does need is "at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."[341]

Writing in 2002, Paul Marcus—himself a persistent critic of conspiracy's expansion—observed that "one almost never hears today

[336] Id. at 251; see, e.g., Joseph E. Bauerschmidt, Note, "Mother of Mercy—Is This the End of Rico?"—Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO "Pattern," 65 Notre Dame L. Rev. 1106, 1110–11 (1990) (arguing that the challenges made to RICO under void for vagueness are unsubstantiated); Peter Skomorowsky, Comment, Is This the End of Big RICO? Comment on Justice Scalia's Concurring Opinion in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 35 N.Y.L. Sch. L. Rev. 733, 733 (1990) (exploring the Court's issues with "pattern" and concluding that it should be found void for vagueness); George Clemon Freeman, Jr. & Kyle E. McSlarrow, RICO and the Due Process "Void for Vagueness" Test, 45 Bus. Law. 1003, 1008–10 (1990) (outlining three reasons to find RICO unconstitutionally vague: insufficiency of enforcement guidance, absence of fair warning, and unlawful delegation of legislative power); Michael S. Kelley, "Something Beyond": The Unconstitutional Vagueness of RICO's Pattern Requirement, 40 Cath. U. L. Rev. 331, 380–94 (1991) (finding congressional and judicial disagreement, as well as policy arguments regarding the pattern requirement, compelling reasons to hold RICO facially or partially vague); Jed S. Rakoff, The Unconstitutionality of RICO, N.Y.L.J., Jan. 11, 1990, at 3, 3 (predicting that RICO would soon be held vague in the onslaught of challenges that ensued after Scalia's concurrence).

[337] 452 U.S. 576, 587 (1981).

[338] Lucy Litt, Note, RICO: Rethinking Interpretations of Criminal Organizations, 26 Berkeley J. Crim. L., Fall 2021, at 71, 117–18 (describing the split between the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits on the one hand and the Second, Ninth, and Eleventh Circuits on the other).

[339] 556 U.S. 938 (2009).

[340] Id. at 948.

[341] Id. at 946.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

the earlier cries . . . which claimed that the statute is too broad in application and too vague in definition."[342] Marcus's observation applied beyond RICO to conspiracy more generally. He lamented that as "Americans have decided to get tough on crime[,] . . . questions about the necessity for—and wisdom of—the wide use of the conspiracy charge have all but disappeared" from law journals and from the United States Reports.[343] They have given way to consequentialist defenses of conspiracy's expansion.

C. Neoliberal Conspiracy Theory

One of the most extensive judicial discussions of conspiracy criminalization in the late twentieth century appears in an opinion rejecting an effort to extend conspiracy's scope. Writing for a Seventh Circuit panel in the 1991 case of *United States v. Townsend*,[344] Judge Joel Flaum begins with Justice Jackson's *Krulewitch* concurrence. Flaum approves of Justice Jackson's description of conspiracy's development as revealing "the tendency of a principle to expand itself to the limit of its logic."[345] Judge Flaum then articulates his understanding of the "logic" of conspiracy. Writes Judge Flaum: "We punish conspiracy because joint action is, generally, more dangerous than individual action," in the specific sense that it "pose[s] an additional risk that the object of the conspiracy will be achieved."[346] That additional risk is what "warrant[s] additional penalties."[347]

Judge Flaum might have rested this group-dangerousness claim on controlling precedents. But he cites other authorities, too. Drawing upon economist Ronald Coase's analysis of legally organized firms, he asserts that just as "business combinations . . . lower the transaction costs of legitimate profit-seeking endeavors," conspiracies "lower the transaction costs of committing crimes."[348]

---

[342] Paul Marcus, Re-Evaluating Large Multiple-Defendant Criminal Prosecutions, 11 Wm. & Mary Bill Rts. J. 67, 68 (2002).

[343] Id. at 67–68 (footnotes omitted).

[344] 924 F.2d 1385 (7th Cir. 1991).

[345] Id. at 1388 (quoting United States v. Krulewitch, 336 U.S. 440, 445 (1949) (Jackson, J., concurring)).

[346] Id. at 1394.

[347] Id.

[348] Id. (citing Ronald Coase, The Firm, The Market, and The Law 6–7 (1988)) ("In the jargon of economists, business combinations—whether corporations, partnerships, joint ventures, or other variations—exist because they lower the transaction costs of legitimate

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

Judge Flaum's opinion expresses late twentieth-century common sense regarding conspiracy criminalization. Conspiracy had become grounded in the economic analysis of criminalization, which sharply distinguished between market and non-market activity, counseling laissez-faire regarding the former and interventionism regarding the latter.[349] Lowering transaction costs was a positive good in the context of legitimate markets; by contrast, the state ought to deter criminal transactions by raising their costs.

The leading early application of the economic analysis of criminalization to conspiracy was Judge Richard Posner's brief discussion in his 1985 article "An Economic Theory of the Criminal Law." Posner asserts that "[t]he special treatment of conspiracies makes sense because they are (though only on average, of course) more dangerous than one-man crimes." [350] Specifically, he writes that conspiracies

> are more dangerous in being able to commit more crimes (just as a firm can produce more goods or services than an individual) and perhaps do so more efficiently (in a private, not social, sense) by being able to take advantage of the division of labor—for example, by posting one member of the conspiracy as a sentinel, another to drive the getaway car, and another to fence the goods stolen.[351]

Judge Posner qualifies his argument by allowing that "these advantages are offset to some extent by the fact that a conspiracy is more vulnerable to being detected because of the scale of its activities." [352] Owing, however, to economies of scale and the (purported) fact that "some of the most serious crimes, such as insurrection, can be committed only by conspiracies[,]" Posner

profit-seeking endeavors. Conspiracies exist for the same reason—to lower the transaction costs of committing crimes."). Flaum quotes Coase at length concerning the transaction-cost-lowering character of business combinations but tellingly inserts "whether legitimate or illegitimate." Id. Coase did not discuss criminal activity, so this extension is Flaum's own.

[349] See Bernard E. Harcourt, The Illusion of Free Markets: Punishment and the Myth of Natural Order 147 (2011) (labelling as "neoliberal penalty" the view that "[t]he relationship between the market and the penal system is binary: there is a market option, which is the space of ordered exchange, and it is marked off from the fraud and coercion option, which is the space of market bypassing, the space outside the market").

[350] Richard A. Posner, An Economic Theory of the Criminal Law, 85 Colum. L. Rev. 1193, 1218 (1985).

[351] Id. at 1219.

[352] Id.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

concludes that "the optimal punishment of conspiracies is indeed more severe than that of individuals."[353]

Pause on the word "optimal." Posner theorizes criminalization as a means of regulating behavior that would otherwise cause a net loss in social welfare. *Optimal* criminalization efficiently minimizes net-loss behavior, not by reducing it to zero but by deterring or empowering others to prevent it without thereby incurring an equal or greater social loss.[354] Thus, conspiracy isn't optimal unless the arrest, prosecution, and punishment of conspiracy across the whole range of bad acts labeled "conspiracy" minimize total social losses—including those caused by efforts to deter and prevent conspiracy.[355]

Now observe Posner's tentative language. "On average." "Perhaps do." The "optimal" label is unambiguously commendatory. But it's unsupported by empirical data and is, upon careful inspection, hedged. Only "if conspiracies are more dangerous than one-man crimes" because groups can commit crimes more efficiently is the "special treatment of

[353] Id. That a person can't commit some crimes without satisfying the elements of conspiracy is hardly a defense of conspiracy as a standalone offense. The proponent of conspiracy criminalization must explain what conspiracy adds, given that the latter crimes are already . . . criminal. They also need a separate argument for criminalizing conspiracies to commit crimes that can be committed without satisfying conspiracy's elements (and are also already illegal). Posner's case for conspiracy thus ultimately turns upon deterrence, which would add something if it were demonstrated.

[354] See Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169, 180 (1968) ("If the aim simply were deterrence, the probability of conviction, *p*, could be raised close to 1, and punishments . . . could be made to exceed the gain: in this way the number of offenses . . . could be reduced almost at will. However, an increase in *p* increases the social cost of offenses through its effect on the cost of combatting offenses . . . ."); A. Mitchell Polinsky & Steven Shavell, The Theory of Public Enforcement of Law, *in* 1 Handbook of Law and Economics 403, 406 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (defining social welfare as "the benefits that individuals obtain from their behavior, less the costs that they incur to avoid causing harm, the harm that they do cause, the cost of catching violators, and the costs of imposing sanctions on them (including any costs associated with risk aversion)"); Peter N. Salib, Why Prison?: An Economic Critique, 22 Berkeley J. Crim. L., Fall 2017, at 111, 114 (criticizing law-and-economics scholars for "simply assum[ing] that prison is the best criminal punishment for achieving optimal deterrence" without demonstrating that it achieves deterrence "at the lowest social cost" (emphasis omitted)); Alex Raskolnikov, Criminal Deterrence: A Review of the Missing Literature, 28 Sup. Ct. Econ. Rev. 1, 27 (2020) ("[T]he clear objective of the optimal deterrence theory is to identify the acts that should be deterred, the socially optimal level of deterrence, and the least costly combination of enforcement tools that achieves that level. The theory's goal is to devise welfare-maximizing legal regimes.").

[355] See Salib, supra note 354, at 122–23.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

conspiracy"—its punishment as a separate offense, its "procedural advantages [for] the prosecutor"—justified.[356]

It would be another decade and a half before anyone tried to provide empirical support for Posner's group-danger claim. Neal Katyal's 2003 article "Conspiracy Theory" uses the tools of law and economics and organizational theory to tout underappreciated benefits of conspiracy criminalization.[357] It remains the most widely cited normative case for modern conspiracy criminalization.[358]

[356] Posner, supra note 350, at 1218–19.

[357] Katyal, supra note 85.

[358] See Andrew Ingram, Pinkerton Short-Circuits the Model Penal Code, 64 Vill. L. Rev. 71, 81 (2019) (describing Katyal's article as "the most robust policy apology for *Pinkerton* and conspiracy generally"). It has long received generally respectful treatment from conspiracy critics. See, e.g., Peter Margulies, Guantanamo by Other Means: Conspiracy Prosecutions and Law Enforcement Dilemmas after September 11, 43 Gonz. L. Rev. 513, 514 n.7 (2007) (describing it as "the most insightful defense of conspiracy doctrine"); Steven R. Morrison, Requiring Proof of Conspiratorial Dangerousness, 88 Tul. L. Rev. 483, 486 (2013) (questioning Katyal's extrapolation from data regarding extreme group behavior to a claim about the distinctive dangers of criminal groups but stating that "[b]ecause criminal groups tend toward criminal extremes, the Katyalian exigency of criminalizing conspiracies as stand-alone crimes is more normatively correct than [Abraham] Goldsteinian skepticism"). The harshest criticism I've encountered comes from overseas. See Andrew Green & Claire McGourlay, The Wolf Packs in Our Midst and Other Products of Criminal Joint Enterprise Prosecutions, 79 J. Crim. L. 280, 291 (2015) (criticizing Katyal for relying upon studies which involve "groups of strangers, brought together for the purposes of the research, who are presented with fictitious dilemmas about which they are asked to make decisions following discussions" and selectively redacting the studies to support his thesis—for example, omitting that they found variations across cultural contexts); Alice Irving, Criminalising Preparation: The Limits of the Law 146 n.511, 159, 174 (2019) (Ph.D. dissertation, University of Oxford), https://ora.ox.ac.uk/objects/uuid:f628f4fb-38c4-4ae7-8468-0bd0b6019e34/files/mc09278f7a8d20d837f98c10a9726c6a9 [https://perma.cc/HV8L-MCE5] (noting that Katyal's work has been "enthusiastically and unquestioningly cited by those predisposed toward the conspiracy offence, including the England and Wales Law Commission"; calling his "extrapolat[ion] from . . . psychological data on group behaviour" a "stretch"; and describing his single-minded focus on deterrence "odd . . . in the context of broader criminal law theory").

Another widely cited 2003 article touts the "functional advantages" of conspiracy criminalization alongside other forms of collective sanction. See Daryl J. Levinson, Collective Sanctions, 56 Stan. L. Rev. 345, 398–99 (2003). Levinson relies almost entirely upon Katyal's empirical claims in defending conspiracy against "[m]oral theorists" who "deride [conspiracy] doctrines as foreign invasions by private law principles of vicarious liability." Id. at 398. The confidence of Levinson's assertion that conspiracy "will have predictable effects on group dynamics" because it "raises the costs of group crime, relative to individual crime," in the ways that Katyal describes is particularly striking in light of Levinson's acknowledgment in a footnote that "[e]ven without conspiracy law, prosecutors may be able to generate extremely severe sentences by stacking other charges." Id. at 398,

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

Katyal asserts that "[a] wide body of psychological research over the last century reveals that people tend to act differently in groups than they do as individuals."[359] People in groups "are more likely to have extreme attitudes and behavior."[360] And—at least in circumstances "in which an individual's input to the team product was not visible and shirking therefore more likely"[361]—they are also likely to be more effective, "tend[ing] to have more solutions to problems, to generate them faster, and to find more creative solutions than do individuals."[362] From this, Katyal infers that "[c]onspiracies, which often cultivate [group] identity, . . . can be more productive (and impose greater harm) than isolated individuals."[363]

Katyal contends that conspiracy enables a prosecutor to extract information from members of a criminal group. This information is used to develop cases against other members and ultimately dismantle the groups. By giving prosecutors leverage to "flip" conspirators against their comrades, conspiracy raises the costs for conspirators of group crime, including monitoring, compartmentalization, and avoidance of discussions.[364] It also "seed[s] distrust," inhibits joint action, encourages defection, and "make[s] criminal enterprises unattractive places in which to work."[365] Ideally, the price of group crime becomes so high that criminal groups don't form at all. Failing that, conspiracy can deter people from joining existing groups, as well as make groups less effective in pursuing their goals and more likely to dissolve.

Many of the primary mechanisms through which Katyal claims that conspiracy extracts information will by now be familiar. First, conspiracy's broad liability rules enable its elements to be satisfied early and easily. Thus, "[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."[366] Second,

399 & n.260. Because Levinson draws so extensively from Katyal and because conspiracy is not the focus of Levinson's article, I will address only Katyal's arguments.

[359] Katyal, supra note 85, at 1316.

[360] Id. at 1318.

[361] Id. at 1324.

[362] Id.

[363] Id.

[364] See id. at 1350–58 (describing how these actions can impose greater monitoring costs, lead to compartmentalization of information, and disrupt group identity).

[365] Id. at 1334, 1355.

[366] Id. at 1340.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

conspiracy carries heavier penalties than those imposed for "the substantive crimes most visible to law enforcement."[367] Conspiracy's hearsay exception and joinder preferences further increase prosecutorial leverage.

Katyal doesn't present his argument as a full reckoning with conspiracy's costs and benefits. But he expresses a hope that the argument will convert conspiracy's critics into reformers who are no longer bent on "abolishing a doctrine that serves many useful purposes."[368] His article is thus an effort to "start the debate on whether the conspiracy doctrine as actually implemented promotes net social good" on a strong foot for the "pro" position.[369]

What can be called neoliberal conspiracy theory—after the political-economic order from which it emerged, and of which its law-and-economics analysis is characteristic—remains standard.[370] Several scholars have offered modest challenges to Katyal's account, questioning its one-sidedness and scope.[371] A handful have persistently critiqued conspiracy's expansion[372] and raised concerns about particular

[367] Id.

[368] Id. at 1397.

[369] Id.

[370] On neoliberalism and law, see David Singh Grewal & Jedediah Purdy, Introduction: Law and Neoliberalism, 77 Law & Contemp. Probs., no. 3, 2014, at 1, 2–3 (discussing the role of neoliberalism in the "contest in capital democracies between capitalist imperatives and democratic demands"); Corinne Blalock, Neoliberalism and the Crisis of Legal Theory, 77 Law & Contemp. Probs., no. 4, 2014, at 71, 86–88 (considering the relationship between legal structures and neoliberalism). On the connection between neoliberalism, the law-and-economics movement, and harsh, exclusionary criminalization, see generally Harcourt, supra note 349.

[371] See, e.g., Miriam Hechler Baer, Cooperation's Cost, 88 Wash. U. L. Rev. 903, 924–26 (2010) ("[C]ooperation's effect on ex ante conduct is not easy to control, and, at least in some instances, it may leave society worse off."); Morrison, supra note 358, at 485–86 (noting some of Katyal's assumptions based on data); Laurent Sacharoff, Conspiracy as Contract, 50 U.C. Davis L. Rev. 405, 447 (2016) (observing that Katyal's view "runs head long into the ancient and contemporary principle that we may not punish mere guilt by association"); Emilie Kurth, Note, Drug Conspiracy Sentencing and Social Injustice, 91 U. Colo. L. Rev 1215, 1242–44 (2020) (arguing instead for "individual culpability").

[372] None more insistently than Paul Marcus. See, e.g., Marcus, supra note 77 (cataloguing the pro-government position of the Supreme Court in five prominent conspiracy cases through the turn of the century); Marcus, supra note 93 (combining empirical and theoretical analyses to demonstrate the weakness of both theoretical and practical justifications of conspiracy doctrine as applied to the vast majority of conspiracy prosecutions); Paul Marcus, Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area, 1 Wm. & Mary Bill Rts. J. 1 (1992) (integrating practitioner perspectives into a survey of developments in conspiracy law throughout the late twentieth century).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

uses of conspiracy—for instance, in the prosecution of terrorism or drug offenses, or in connection with the freedom of speech.[373] But in spite of Katyal's invitation, a full accounting of the positive and negative social consequences of conspiracy criminalization has not yet taken place. The next Part steps into the breach, revisiting movement critiques and weighing conspiracy's social costs and benefits in light of what we've learned over the last century and a half.

IV. DON'T BELIEVE THE HYPE

A. Re-Upping Anti-Conspiracy

1. Class Warfare

Those who called for conspiracy abolition in the late nineteenth century appropriated not only the language but the structure of the crime of conspiracy. They claimed that the crime itself had a nefarious purpose—that of promoting the interests of capital. The twentieth century did little to refute this criticism. Even after the formal decriminalization of unions, fear of nonstate collective action disruptive of "free" U.S. markets persisted, and conspiracy was used to target communists, socialists, anarchists, and other leftist groups. The Smith Act, the Espionage Act, and the RICO Act have all been deployed to ward off perceived threats to the political-economic status quo by criminalizing and censoring those who challenge their legitimacy or obstruct their operation.[374]

But conceptualizing conspiracy as itself a conspiracy threatens to understate its costs. A similar class-instrumentalism plagued accounts of racism that were common currency among late-nineteenth-century leftists. On these latter accounts, racism was a means through which capitalists *intentionally* divided the working class—as Cohen puts it, "a kind of cover story used to trick white workers into undermining their

[373] See, e.g., Margulies, supra note 358, at 535 (articulating the accountability and transparency obfuscations of conspiracy prosecutions in the war on terror); Kurth, supra note 371, at 1218–19 (illustrating the oppressive nature of the conspiracy-wide approach to drug conspiracy prosecutions on poor people of color); Martin H. Redish & Michael J.T. Downey, Criminal Conspiracy as Free Expression, 76 Alb. L. Rev. 697, 698 (2012) (establishing that certain "expressive elements" of criminal conspiracy doctrine are deserving of "substantial constitutional protection").

[374] See supra Section II.B.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

own class interests."[375] Racism was not worth reckoning with in its own right—race hatred existed because capitalists willed it, and it would disappear once capitalism was abolished. The effect was to leave the labor movement "largely silent on the presence of white supremacy both within its own ranks and as a hegemonic racial formation in the Age of Monopoly."[376]

But the class-warfare critique of conspiracy still has descriptive bite. Analyzing the text of RICO "in the context of the socio-political turmoil of 1969," Levin finds that its superficially neutral language reflects "its grounding in a particular orientation to the market."[377] The statute declares that "money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions," which seems a neutral enough concern.[378] Reflect, however, that the line between what was legitimate and criminal would be drawn and enforced by officials politically primed to perceive anything disruptive to the existing social order as illegitimate—including everything from high school students demanding adequate educational resources to La Cosa Nostra. Thus situated, we can understand how RICO came to be used to "subdue nonstate actors and informal markets that threaten[] the hegemony of state-supporting and state-derived formal markets and formal market actors."[379]

2. Censorship

An alleged conspirator can face punishment as a direct consequence of the content of their speech, notwithstanding modern First Amendment doctrine that mandates strict scrutiny for content-based speech restrictions.[380] These expressive costs have throughout U.S. history been race-class differentiated and disproportionately borne by proponents of radical political change.

Enslaved people were denied the freedom to associate with one another and express themselves.[381] To gather and speak was to risk

[375] Cohen, supra note 147, at 240.
[376] Id. at 11.
[377] Levin, supra note 316, at 145.
[378] Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923.
[379] Levin, supra note 316, at 107.
[380] See Redish & Downey, supra note 373, at 727.
[381] See Donald F. Tibbs & Shelly Chauncey, From Slavery to Hip-Hop: Punishing Black Speech and What's "Unconstitutional" About Prosecuting Young Black Men Through Art,

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

being monitored and misunderstood in ways that precipitated mass arrests and executions, owing to a combination of racialized fears and basic unfamiliarity with Black expression.[382] More specifically, as Donald Tibbs and Shelly Chauncey put it, "White slave owners interpreted the emotional cries of slaves as intentions to revolt."[383]

Again, enslaved people did conspire against their enslavers. But slave conspiracy prosecutions weren't designed to accurately ascertain culpability, and any conviction of actual conspirators would have been a chance occurrence. Enslaved defendants were "prosecuted on the flimsiest evidence that their words were proof of their intentions, motives, and future impending actions."[384] Prosecutors secured convictions by coercing enslaved witnesses to testify to plots that confirmed racialized fears.[385]

Enslaved people responded to the risk of lethal misunderstandings through a variety of coping mechanisms. Among them was "a system of coded language to prevent outsiders and informants from understanding their conversations."[386] "Code switching" by race-class marginalized groups persists to this day.[387] Black teens in urban areas express themselves in distinctive ways in order to elude the understanding of outsiders.[388] But they aren't always able to accurately predict whether a particular tweet will be seen as threatening or as evidence of a crime. And if they guess wrong, they quickly lose control of the interpretation of their expression to police and prosecutors.

Summarizing his conversations with New York prosecutors in connection with a series of 2011 gang indictments in Harlem, Jeffrey Lane states that "[the prosecution] exercised editorial control" by deciding "which content to include and exclude; where to start and end quotes; and when and how to summarize the defendants'

52 Wash. U. J.L. & Pol'y 33, 43–45 (2016) (describing the ways the law was used to punish "loose talk" and other "Black speech" during slavery).

[382] See id.

[383] Id. at 58.

[384] Id. at 40.

[385] See Sharples, supra note 113, at 239.

[386] See Andrea L. Dennis, A Snitch in Time: An Historical Sketch of Black Informing During Slavery, 97 Marq. L. Rev. 279, 318–19 (2013).

[387] See Jeffrey Lane & Fanny A. Ramirez, Carceral Communication: Mass Incarceration as Communicative Phenomenon, 26 New Media & Soc'y 674, 683 (2024) (describing a prisoner speaking in code to avoid any possible eavesdropping).

[388] Id. at 678 (describing how teens chose the kinds of social media they would use, among other things, in part based on concerns over surveillance).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

communication."[389] Lane finds as well that the effects of the latter indictments reverberated for months, chilling teen and young adult social media use across Harlem. Even efforts to discourage others from making threats or otherwise cool down conflicts on what Lane calls the "digital street" could be labelled overt acts—for instance, one defendant's Facebook message instructing another to "take down a Facebook post because it was 'HOT.'"[390]

Artistic expression by members of race-class marginalized groups carries similar risks. There's no more vivid example than the use of rap lyrics by prosecutors in conspiracy cases. Tryon Woods describes how rap music—and more broadly, hip-hop culture—emerged from "ongoing state violence against urban black communities and their concomitant structural dispossession."[391] Take the life, times, and music legacy of Tupac Shakur.

In 1970, Tupac's mother, Afeni Shakur, was arrested and prosecuted along with twenty other Black Panthers on several counts of conspiracy to bomb police stations and other public places in New York.[392] FBI agents constantly approached Tupac at school, seeking the whereabouts of his stepfather, Mutulu Shakur, a member of the Black Liberation

[389] Jeffrey Lane, The Digital Street 146–47 (2019).

[390] Id. at 153.

[391] Tryon P. Woods, "Beat It Like a Cop": The Erotic Cultural Politics of Punishment in the Era of Postracialism, 31 Soc. Text, Spring 2013, at 21, 23. No legal scholar has explored this relationship more thoroughly than Paul Butler, who in the 2000s developed what he termed a "hip-hop theory of justice." See Paul Butler, Let's Get Free: A Hip-Hop Theory of Justice (2009) [hereinafter Butler, Let's Get Free]. Butler's immersion in hip-hop culture and his encyclopedic knowledge of and passionate love for rap music generated provocative, original, and insightful critiques of criminalization that warrant revisiting, even as Butler's own positions have become more radical. Compare id. at 18 (opining that a "monster who molests little kids" should be "*under* the jail"), with Paul Butler, The Constitution of the War on Black People, Balkinization (May 9, 2024), https://balkin.blogspot.com/2024/05/the-constitution-of-war-on-black-people.html [https://perma.cc/A3R4-UNHB] (humorously attributing this "dumb" language to "brain damage from long term cannabis consumption, although I feel like alcohol should get some of the blame" and stating that "many of my academic critiques of the war on drugs apply as well to using the carceral system to deal with people who have caused harm, including that treatment is a more productive response than punishment, and that even if punishment is appropriate, US sentences are way too long"). For a thoughtful critique that anticipated Butler's own trajectory, see Matthew Murrell, Note, This is Real Hip-Hop: Hip-Hop's Rejection of Paul Butler's Theory of Justice in *Let's Get Free*, 99 Geo. L.J. 1179, 1181 (2011).

[392] Rudy Johnson, Joan Bird and Afeni Shakur, Self-Styled Soldiers in the Panther 'Class Struggle,' N.Y. Times (July 19, 1970), https://www.nytimes.com/1970/07/19/archives/joan-bird-and-afeni-shakur-selfstyledsoldiers-in-the-panther-class.html.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

Army ("BLA")—an independent armed group that formed out of a schism within the Black Panther Party.[393] Mutulu evaded capture for more than five years following a robbery of an armored truck in which a guard and two police officers were killed; he was then prosecuted and convicted of murder.[394] He and others involved in the BLA were indicted on RICO charges that encompassed a number of robberies, as well as Black Panther-turned-BLA member Assata Shakur's 1979 escape from a New Jersey prison.[395]

Tupac's lyrics are packed with descriptions of criminal deeds. Neither when he penned them nor today were they unusual for the genre. To listen to gangster rap is to be immersed in a world of violence, drug dealing, and sexual hedonism. The overwhelming majority of what one hears from Tupac—or Scarface, or the Wu-Tang Clan, or Chief Keef—never happened. But much of it depends for its force upon conveying authentic experiences within criminogenic environments. Whether because of their own ignorance or their desire to exploit that of others, police, prosecutors, and other public officials have weaponized this authenticity, using it to justify boycotts,[396] bans on performances *by hologram*,[397] and criminal investigations.[398]

[393] Woods, supra note 391, at 27.

[394] Michael Eric Dyson, Holler If You Hear Me: Searching for Tupac Shakur 50 (2001).

[395] Id.

[396] See Andrea L. Dennis, Black Contemporary Social Movements, Resource Mobilization, and Black Musical Activism, 79 Law & Contemp. Probs., no. 3, 2016, at 29, 47–48 ("In 1989, the FBI sent a letter to N.W.A.'s record label accusing the song 'Fuck tha Police' of misrepresenting and disrespecting law enforcement, and of encouraging violence against the police . . . . During the group's thirty-six-date tour, . . . police officials pressured venues by threatening or actually refusing to provide security."); see also S. Leigh Savidge, Welcome To Death Row: The Uncensored Oral History of Death Row Records in the Words of Those Who Were There 233 (2015) (quoting investigator Paul Palladino: "One of the benefits that Suge Knight gave people to join Death Row was to say that, 'I have a legal team, people that have a lot of experience in the criminal area that can help you.'").

[397] See Joe Coscarelli, Hologram Performance by Chief Keef Is Shut Down by Police, N.Y. Times (July 26, 2015), https://www.nytimes.com/2015/07/27/arts/music/hologram-performance-by-chief-keef-is-shut-down-by-police.html.

[398] See Jason Leopold, A Close Look at the FBI's File on Wu-Tang Clan, Vice (Oct. 12, 2016, at 20:00 ET), https://www.vice.com/en/article/vdqzny/a-close-look-at-the-fbis-file-on-wu-tang-clan-foia-v23n07 [https://perma.cc/TR4G-5TS8] ("Between 1999 and ODB's death in 2004, the FBI worked alongside the New York Police Department to investigate Wu-Tang Clan for a wide range of alleged federal crimes. They never filed any charges, but the FBI devoted substantial resources to the inquiry in an effort to take the Wu down . . . . NYPD detectives sought the FBI's assistance in order to mount a RICO prosecution against the Wu-Tang Clan 'organization.'").

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

Conspiracy's broad liability rules and unique advantages for the prosecution invite the introduction of rap lyrics as evidence of criminal activity. Post-*Boyle*, prosecutors in RICO cases can use what are allegedly lyrical references to predicate racketeering acts to demonstrate the existence of an associated-in-fact criminal enterprise. Within and without RICO, the coconspirator exception to the hearsay rule permits the use of lyrics against defendants even when the rapper is unavailable for cross-examination.

Judges who admit rap lyrics into evidence sometimes emphasize that the defendant is not being prosecuted for musical expression but for underlying criminal activity.[399] The comparison is to the bank robber who orders a teller to hand over the money and is prosecuted, not for *speaking* but for *threatening* the use of force. It's important to see why this comparison is question-begging. Whereas the order to the teller clearly satisfies an element of robbery, critics of the admission of rap lyrics contend that the latter rarely help jurors determine whether an element of a crime has been satisfied and often hinder them from doing so. Conspiracy is not the only crime that makes it possible for artistic speech to be misinterpreted as expressing criminal intent or constituting a criminal act. But its distinctive structures make it comparatively easy for artistic speech to be introduced and comparatively hard for defendants to exclude it.

Turning, then, to the repression of overtly political speech—a constant in conspiracy criminalization across the centuries. Not even the most ardent defenders of conspiracy would deny that conspiracy prosecutions have, on occasion, been political. It's worth pausing on an ambiguity in "political." A political prosecution might be motivated by some conscious prosecutorial intention to punish someone either primarily or exclusively because of the alleged conspirator's politics. A conspiracy defender might concede that some nontrivial number of prosecutions under the Smith Act were political in this sense. Alternatively, a political prosecution might also be a prosecution that is best explained by politics, regardless of the motivations behind it. A prosecutor might pursue a conspiracy charge against a political activist that is predicated upon a supposed plot to violently overthrow the government, genuinely but incorrectly believing in that plot's existence (or its violence) because of their political commitments.

[399] See Nielson & Dennis, supra note 34, at 110.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

Dan Kahan and Donald Braman describe "[s]everal overlapping psychological mechanisms [that] are likely to induce individuals to conform their beliefs about putatively dangerous activities to their cultural evaluations of those activities."[400] These mechanisms include cognitive-dissonance avoidance, affect, and group polarization.[401] Cognitive-dissonance avoidance encourages people to "believe that what's noble is also benign, and what's base [is] dangerous" because the alternative is "psychically disabling."[402] Believing that base things are harmless not only "force[s] one to renounce commitments and affiliations essential to one's identity" but frays relationships by inviting arguments with others who they respect.[403] These costs can be avoided by interpreting empirical data to vindicate your values and those of other members of your group.[404] Affect further "harnesses factual belief to cultural value" by linking up perceptions of whether activities are

[400] Dan M. Kahan & Donald Braman, Cultural Cognition and Public Policy, 24 Yale L. & Pol'y Rev. 149, 155 (2006) [hereinafter Kahan & Braman, Public Policy]. The literature on cultural cognition is dense, and Braman and Kahan are among the most influential and prolific contributors to it. See, e.g., Dan M. Kahan & Donald Braman, More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions, 151 U. Pa. L. Rev. 1291, 1299 (2003) (applying the cultural theory of risk to individual attitudes on gun control); Dan M. Kahan, Paul Slovic, Donald Braman & John Gastil, Fear of Democracy: A Cultural Evaluation of Sunstein on Risk, 119 Harv. L. Rev. 1071, 1083–88 (2006) (reviewing Cass R. Sunstein, Laws of Fear: Beyond the Precautionary Principle (2005)) (explaining the importance of cultural worldviews in the cultural theory of risk); Dan M. Kahan, The Cognitively Illiberal State, 60 Stan. L. Rev. 115, 125–28 (2007) (describing how the cultural cognition of harm has spurred the desire to enshrine illiberal and partisan orthodoxy in law); Dan M. Kahan, Cultural Cognition as a Conception of the Cultural Theory of Risk, *in* Handbook of Risk Theory: Epistemology, Decision Theory, Ethics, and Social Implications of Risk 726, 726 (Sabine Roeser et al. eds., 2012) (identifying cultural cognition's core features as measuring cultural worldviews, examining social and psychological mechanisms that shape risk perceptions, and promoting understanding of risk management and mitigation policies); Dan M. Kahan, David A. Hoffman & Donald Braman, Whose Eyes Are You Going to Believe? *Scott v. Harris* and the Perils of Cognitive Illiberalism, 122 Harv. L. Rev. 837, 881–902 (2009) (describing an empirical study demonstrating how cultural worldviews impacted the necessity of deadly force determination in *Scott v. Harris* and transformed a view of social reality reflected in law into a partisan one); Dan M. Kahan, Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law, 125 Harv. L. Rev. 1, 7–8 (2011) (arguing that the Court's increasing application of motivated reasoning undermines neutral constitutional decision-making). For a summary of the literature, see Jeffrey J. Rachlinkski, What Is Cultural Cognition, and Why Does It Matter?, 17 Ann. Rev. L. & Soc. Sci. 277, 279–80 (2021).

[401] Kahan & Braman, Public Policy, supra note 400, at 155–56.

[402] See id. at 155.

[403] Id. at 155–56.

[404] Id. at 156–57.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

harmful to value-driven emotional reactions to those activities.[405] Group polarization eases people's cognitive loads by filtering conflicting claims and data through deliberative process that is dominated by like-minded individuals.[406] If the group itself is initially conflicted, the conflict will be resolved through the predominance of a position that is weakly supported, coupled with the muting of opposition as people avoid disagreeing with their epistemic peers.[407] Kahan and Braman insist that such cultural cognition can be counteracted. But its prevalence is a "problem to be solved,"[408] and there exists an extensive empirical literature regarding the cultural cognition of jurors, prosecutors, and police.[409]

I am not making any claim about the relative frequency of these modes of political prosecution. There may be very few "pure" cases of either mode. An individual actor may be consciously politically motivated to some degree and make unconscious cognitive errors owing to political values. Many actors whose motivations and values may significantly differ play roles in any given prosecution.

I *am* claiming, however, that conspiracy's structures encourage both modes of political prosecution, as well as mixtures of the two. Officials who intend to use conspiracy to punish people because of political beliefs, who do not so intend but are unconsciously steered towards their political adversaries, or who exhibit some combination of those things have considerable space and resources to do so. Conspiracy's broad liability rules and prosecution-friendly procedures can operate to coerce pleas from people who might otherwise be able to convince a jury that they were the victims of political prosecution. In the few cases where alleged conspirators do take their chances at trial, the evidence will consist largely in speech. The more radical and unpopular the cause, the

[405] Id. at 155.
[406] Id. at 156.
[407] Id.
[408] Id. at 164.
[409] See, e.g., Maggie Wittlin, The Results of Deliberation, 15 U.N.H. L. Rev. 161, 189–95 (2016) (arguing cultural cognition research demonstrates the need for jury deliberation on potentially culturally divisive cases); Hadar Aviram, Legally Blind: Hyperadversarialism, *Brady* Violations, and the Prosecutorial Organizational Culture, 87 St. John's L. Rev. 1, 34–35 (2013) (describing cultural cognition studies that identify confirmation biases as a leading influence on prosecutorial discovery and disclosure practices); Dan M. Kahan, Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases, 158 U. Pa. L. Rev. 729, 761 (2010) (applying the cultural-cognition thesis to rape law reform and attitudes regarding acquaintance rape).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

easier it will be for the same cognitive biases that lead prosecutors to code speech with which they disagree as criminal to nudge jurors towards conviction.

3. Rule of Law

The tendencies within conspiracy that prompted rule-of-law concerns in the late nineteenth and early twentieth centuries became more pronounced in the subsequent decades. The preference for joint trials hardened into a strong presumption. Massive, complex, conspiracy trials became more frequent. Confrontation rights slackened. The effect was to greatly empower prosecutors to extract guilty pleas from defendants who were subsequently punished without trial.

Courts once presumed in favor of granting severance motions in multi-defendant conspiracy trials where the defendants offered antagonistic defenses.[410] *Zafiro v. United States*[411] reversed this presumption by proclaiming that "[m]utually antagonistic defenses are not prejudicial *per se*."[412] Courts once read overt-act requirements into conspiracy statutes that did not specifically state them.[413] The Court in *United States v. Shabani*[414] disapproved of this practice at the federal level on the ground that the requirement did not exist at common law.[415] It did not even consider the fact that conspiracy's substantive scope had greatly expanded over the centuries.

Even as it committed itself to a Founding-era understanding of the right to confront adverse witnesses, the Court in *Crawford v. Washington*[416] embraced the coconspirator exception to the hearsay rule despite its post-Founding origins.[417] The Court has not seriously considered whether unlawful agreements might enjoy some measure of

[410] See Scott Hamilton Dewey, The Case of the Missing Holding: The Misreading of *Zafiro v. United States*, the Misreplication of Precedent, and the Misfiring of Judicial Process in Federal Jurisprudence on the Doctrine of Mutually Exclusive Defenses, 41 Valparaiso U. L. Rev. 149, 152 (2006).

[411] 506 U.S. 534 (1993).

[412] Id. at 538.

[413] See United States v. Shabani, 993 F.2d 1419, 1421–22 (9th Cir. 1993), *rev'd*, 513 U.S. 10 (1994).

[414] 513 U.S. 10 (1994).

[415] Id. at 13–14.

[416] 541 U.S. 36 (2004).

[417] Id. at 56; see also Davies, supra note 174, at 391–94 (explaining that the non-testimonial hearsay admissible in *Crawford* would not be admissible under framing-era evidence law).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

constitutional protection, even after it imposed demanding imminence requirements on restrictions on advocacy of unlawful conduct.[418] A number of scholars have concluded that they do not.[419]

The Court has also limited the scope of defendant-protective constitutional doctrine that emerged from conspiracy skepticism. In *Bruton v. United States*,[420] the Court held that the Confrontation Clause required separate trials where a codefendant's confession inculpated the defendant and there was no opportunity for cross-examination.[421] The Court acknowledged that "[j]oint trials do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial" and recognized the general rule that jurors are presumed to follow their instructions.[422] But it concluded that there are "some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."[423] In support of this conclusion the Court cited Justice Jackson's concurrence in *Krulewitch*.[424]

Bruton's rule was subsequently limited to confessions that inculpate the defendant by name. *Richardson v. Marsh*[425] held that *Bruton* did not apply to a redacted confession that "was not incriminating on its face, and became so only when linked with evidence introduced later at trial."[426] Writing for the majority, Justice Antonin Scalia asserted that

[418] See Redish & Downey, supra note 373, at 714; Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (holding that speech advocating crime is constitutionally protected unless it is "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action").

[419] See, e.g., Kent Greenawalt, Speech, Crime, and the Uses of Language 6–7 (1989) (listing conspiracy among communicative activities that are constitutionally unprotected); Amanda Shanor, First Amendment Coverage, 93 N.Y.U. L. Rev. 318, 320–21 (2018) ("Many activities that are colloquially considered 'speech' are not subject to constitutional challenge, let alone review or decision: the regulation of contracts, commercial and securities fraud, perjury, conspiracy and solicitation, workplace harassment, the compelled speech of tax returns, and large swaths of the administrative state, including antitrust, securities, and pharmaceutical regulation, to name just a few.").

[420] 391 U.S. 123 (1968).

[421] Id. at 126, 136–37.

[422] Id. at 134–35.

[423] Id. at 135.

[424] See id. at 129 (citing Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)).

[425] 481 U.S. 200 (1987).

[426] Id. at 208.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

"[j]oint trials play a vital role in the criminal justice system, accounting for almost one-third of federal criminal trials in the past five years" and highlighted the importance of joint trials in cases "involving large conspiracies to import and distribute illegal drugs."[427] *Samia v. United States*[428] relied upon *Richardson* in determining that replacing one of three defendants' names with "some 'other person'" in limiting instructions to not consider one defendant's confession against the other was permitted by the Confrontation Clause.[429] Lauding the "vital role" of joint trials, Justice Clarence Thomas's opinion for the Court further limited a precedent that recognized the uniquely heightened risk of prejudice inherent in conspiracy prosecutions.[430]

Most criminal convictions are the product of pleas.[431] Conspiracy gives prosecutors considerable leverage to extract pleas because of its comparatively undemanding elements and its prosecutor-friendly procedural structures. By endorsing the constitutionality of conviction without trial, making conspiracy's elements still less demanding, and strengthening its pro-prosecution structures, the Court has increased that leverage.[432] We'll see that conspiracy's defenders do not deny any of this. Rather, they consider the increased leverage beneficial.

---

[427] Id. at 209.

[428] 143 S. Ct. 2004 (2023).

[429] Id. at 2014, 2017. As Justice Elena Kagan pointed out in her dissent, the prosecution alleged that only two defendants—Samia and Carl David Stillwell—actually participated in a conspired-for murder. It would have been obvious that Stillwell's reference in his confession to "the other person" whom he said pulled the trigger was a reference to Samia. See id. at 2022–23 (Kagan, J., dissenting).

[430] Id. at 2018 (majority opinion) (quoting *Richardson*, 481 U.S. at 209).

[431] About ninety-eight percent. U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2025, Table D-4, at 1, https://www.uscourts.gov/sites/default/files/document/jb_d4_0930.2025.pdf [https://perma.cc/PT3F-K3X6] (last visited Feb. 25, 2026) (reporting that in fiscal year 2025, ninety-eight percent of criminal defendants in federal district court whose cases were not dismissed pleaded guilty); see Stephanos Bibas, Transparency and Participation in Criminal Procedure, 81 N.Y.U. L. Rev. 911, 912 (2006); Darryl K. Brown, Judicial Power to Regulate Plea Bargaining, 57 Wm. & Mary L. Rev. 1225, 1228 (2016) (exploring the "pervasiveness of plea bargaining" at the state and federal level and proposing an expanded judicial role in the regulation of the plea bargaining process).

[432] The Court embraced plea bargaining over the course of the 1970s. See, e.g., Parker v. North Carolina, 397 U.S. 790, 797–98 (1970) (holding that a plea remains intelligent even when counsel misjudged the admissibility of defendant's confession); North Carolina v. Alford, 400 U.S. 25, 37 (1970) (holding that defendants may consent to the imposition of a prison sentence without admitting participation in the crime itself); Santobello v. New York, 404 U.S. 257, 262–63 (1971) (holding that prosecutors may not breach the terms the defendant bargained and negotiated for); Chaffin v. Stynchcombe, 412 U.S. 17, 35 (1973)

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

B. Uncounted Costs

Conspiracy does not have a fixed essence. The transformations in formal content—from what we now think of as malicious prosecution to a catch-all concept encompassing group crime—are sufficient to illustrate this, even without taking into account substantive changes in the ways that conspiracy is investigated, prosecuted, and punished.

Still, we have seen enough of American conspiracy to make some generalizations about what conspiracy is and isn't in the United States. We can also identify durable features of conspiracy that have produced undercounted social costs. Those costs have exceeded even some of the most pessimistic assessments of conspiracy's critics.

1. Surveillance

Conspiracy comes with surveillance. Unlawful agreements are made and carried out through secretive means, so gathering evidence of their existence and activities requires tracking, watching, and listening. When a suspected conspirator is a member of a race-class marginalized group that is already disproportionately policed, conspiracy exacerbates their disparate treatment.

Conspiracy has served as the legal justification for the surveillance of race-class marginalized communities for far too long for the connection to be dismissed as accidental. A crime predicated upon community, conspiracy focuses state attention on communities that are perceived to be criminogenic. To the extent that those perceptions are racialized, so will the attention be racialized. Investigating conspiracy thus entails racialized surveillance.

It is difficult to conceive of antebellum surveillance as analogous to a crime analytics bureau's browsing of alerts posted by social media software that sifts billions of tweets, likes, and posts and flags potential

(holding that a rendition of a higher sentence by jury upon retrial does not place an impermissible burden on the right to appeal a conviction); Bordenkircher v. Hayes, 434 U.S. 357, 364–65 (1978) (holding that prosecutors may threaten and carry out more serious charges if the defendant does not plead guilty); Corbitt v. New Jersey, 439 U.S. 212, 223–26 (1978) (holding that the State may constitutionally encourage defendants to plead guilty by offering substantial benefits). In 2012, Justice Kennedy wrote for the Court that there now exists a "system of pleas, not a system of trials." Lafler v. Cooper, 566 U.S. 156, 170 (2012).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

threats.[433] Or the use of body-worn cameras to scan crowds to be analyzed by facial recognition and movement software. But police have for centuries filtered suspected conspirators from the general population through visual observation and interpretation of various forms of expression. New technologies are making it increasingly feasible and affordable to do so on a massive scale and are advertised as doing so without the influence of racialized biases.[434]

The truth does not appear to match the advertising. In a 2017 case study of the Los Angeles Police Department, Sarah Brayne details how even where "research does not necessarily suggest the police intentionally use big data maliciously," the burdens of novel surveillance technologies are not felt equally, owing to "the data collection and analysis process itself."[435] For instance, "individuals living in low-income, minority areas have a higher probability of their 'risk' being quantified than those in more advantaged neighborhoods."[436] Big-data algorithms also draw from nonpolice data gathered by medical, financial, educational, and labor market institutions, interaction with which may thereby be chilled just as interaction with criminalization systems is, for similar reasons. The result may be the perpetuation of disadvantage in respect of "future health outcomes, financial self-sufficiency, acquisition of human capital, and upward economic mobility."[437]

How does this happen? Even though certain "dragnet surveillance tools . . . collect information on everyone, rather than merely those under suspicion, the likelihood of being inputted into the system is not randomly distributed."[438] Crime rates are contingent upon visibility, reportage, and enforcement patterns that are themselves unequal.[439] Accordingly, deploying an algorithm that captures everyone in a high-crime area guarantees that "minority individuals and individuals in poor

[433] See LAPD Social Media Monitoring Documents, Brennan Ctr. for Just. (Dec. 15, 2021), https://www.brennancenter.org/our-work/research-reports/lapd-social-media-monitoring-documents#internal-docs [https://perma.cc/GZ6Q-AWZD].

[434] Matthew E. Cavanaugh, Note, Somebody's Tracking Me: Applying Use Restrictions to Facial Recognition Tracking, 105 Minn. L. Rev. 2443, 2486–88 (2021).

[435] Sarah Brayne, Big Data Surveillance: The Case of Policing, 82 Am. Socio. Rev. 977, 999–1000 (2017).

[436] Id. at 997.

[437] Id. at 999.

[438] Id. at 998.

[439] See id. (explaining systematic biases in crime data stemming from visibility and reporting and their influence on surveillance patterns).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

neighborhoods have a higher probability of being in the primary (and thus secondary) surveillance net than do people in neighborhoods where the police are not conducting point-driven or other data-intensive forms of policing."[440]

Conspiracy is not just useful for prosecutors. Conspiracy provides authority for police to include people in gang databases who have not yet been charged with any crime. Inclusion in these databases provides authority for heightened surveillance, including monitoring on social media.[441] The conspiratorial circle expands to the point where dozens or even hundreds of people can be arrested and indicted as conspirators for their overt acts in service of a gang conspiracy—even if they are not gang members.

Consider what Preet Bharara, then-U.S. Attorney for the Southern District of New York, described as the "largest 'gang takedown' in New York City history"—a collaborative project between the New York Police Department and federal prosecutors to secure the 2016 indictment of 120 defendants for RICO conspiracy, two narcotics charges, and a charge of possession or use of a firearm in connection with the RICO or narcotics charge.[442] Half of the "Bronx 120" were not alleged to be members of any gang being targeted.[443] Social media activity collected from Facebook, Instagram, and YouTube accounts, including posts about gang rivalries and rap videos referencing gang affiliation, was used in scores of sentencing submissions and arguments against bail.[444] Babe Howell and Priscilla Bustamante counted 100 search warrants that were executed on Facebook and Instagram, each of which could range into the tens or even hundreds of thousands of pages.[445]

We cannot blame conspiracy alone for the disproportionate surveillance of race-class marginalized communities. But the investigation of conspiracy encourages more surveillance than does the investigation of more visible forms of criminal conduct.

---

[440] Id.

[441] See Keegan Stephan, Note, Conspiracy: Contemporary Gang Policing and Prosecutions, 40 Cardozo L. Rev. 991, 1021 (2018) (explaining how prosecutors link people to crimes based on their connections and interactions on social media).

[442] Babe Howell & Priscilla Bustamante, Report on the Bronx 120 Mass "Gang" Prosecution 4, 15 (2019), https://bronx120.report/ [https://perma.cc/8SEG-R99F].

[443] Id. at 9.

[444] Id. at 27.

[445] Id.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

2. Infiltration

Throughout U.S. history, people have planned around surveillance by law enforcement in ways that enable them to elude detection and avoid attracting attention. The investigation and prosecution of conspiracy have historically depended upon infiltration, either by police themselves or by informants. The development of increasingly sophisticated surveillance technologies may decrease the perceived need for infiltration. But to this point it has instead digitized infiltration, with police and informants passing on information from interactions on various forms of social media.

Narcotics-related conspiracies remain the most frequently investigated, charged, and prosecuted conspiracies. And they continue to pose evidentiary problems that, as Ian Weinstein puts it, "only a snitch can solve."[446] The use of informants is most prevalent in the investigation of drug offenses, which is to say that it is most prevalent in poor urban communities of color where drug enforcement (though not drug use)[447] is most prevalent.

In her pioneering research on snitching, Alexandra Natapoff describes the consequences of this "vast informant deployment."[448] These include not only diminished privacy but increases in criminal activity and erosion of perceptions of state legitimacy. Informants are permitted to commit crimes in return for their assistance, and members of the community know it. Because of this, "protecting and rewarding informants has become an important part of law enforcement, identifying informants with the law enforcement function not only in the eyes of agents, lawyers, and judges, but insofar as the favorable treatment becomes known, in the eyes of the public as well."[449]

[446] Ian Weinstein, Regulating the Market for Snitches, 47 Buff. L. Rev. 563, 597 (1999).

[447] See David W. Koch, Jaewon Lee & Kyunghee Lee, Coloring the War on Drugs: Arrest Disparities in Black, Brown, and White, 8 Race & Soc. Probs. 313, 319 (2016) (explaining Whites use more marijuana and drugs compared to their Black and Hispanic counterparts).

[448] See Alexandra Natapoff, Snitching: The Institutional and Communal Consequences, 73 U. Cin. L. Rev. 645, 695 (2004) [hereinafter Natapoff, Consequences] (explaining how widespread informant deployment leads to lesser privacy, dignity, and autonomy interests in poor and urban communities); see also Alexandra Natapoff, Snitching: Criminal Informants and the Erosion of American Justice 115 (2009) [hereinafter Natapoff, Informants] (claiming that widespread use of informants undermines legitimacy when police tolerate crime from their informants).

[449] Natapoff, Consequences, supra note 448, at 672.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

Other costs arise from the memories and experiences of particular communities. Thus, "Stop Snitching" norms within Black communities discourage cooperation with police through social ostracism and outright violence. Chuck D—one half of the pathbreaking rap group Public Enemy that in the late 1980s shaped the emergent art form as much through Black Power themes as through eclectic and ferocious production[450]—said the following of these norms in 2005:

> Rap is bridging jail mentality straight into the middle schools via radio and video overdosing. There's a big anti-snitching thing moving in the hoods of America, but dig this—the term 'snitch' was best applied to those that ratted revolutionaries like Huey P Newton, Bobby Seale, Che Guevera to the fascist governments during the 60's and 70s. Let's not let stupid cats use hip hop to again twist this meaning for the sake of some 'innerganghood' violent drug thug crime dogs, who've sacrificed the black community's women and children. Not the same . . . and rap needs to speak and protect the people sometimes and not contribute to genocidal systems.[451]

Chuck D unequivocally condemns "Stop Snitching." Still, he acknowledges that it is appropriate to condemn those who "ratted revolutions . . . [t]o the fascist governments."[452] He insists that this is "[n]ot the same" as condemning those who inform on "violent drug thug crime dogs" who are themselves part of "genocidal systems."[453] But the historical context he provides helps explain the prevalence of what he considers a confusion.

Further, even if snitching on a drug dealer is "not the same" as snitching on Huey Newton, cooperation does not necessarily further the interests of the Black community. In describing how "America's history of criminal justice enforcement of and within the Black community—both recent and centuries old—provides [a] rationale for some Black

[450] Given name Carlton Ridenhour. See generally Russell Myrie, Don't Rhyme for the Sake of Riddlin': The Authorized Story of Public Enemy (2008) (tracing the story of Public Enemy and its musical success); Brian Coleman, Check the Technique: Liner Notes for Hip-Hop Junkies 349–60 (2007) (explaining the trajectory of Public Enemy's career).

[451] Dennis, supra note 386, at 283 n.13 (quoting Chuck D, Chuck D's Christmas List: What I Should Want in Hip Hop 2006, Hip Hop Sports Network (Dec. 14, 2005, at 12:24 ET), https://web.archive.org/web/20220327013741/http://hiphopsports.typepad.com/hhsn/2005/12/chuck_ds_christ.html [https://perma.cc/MGH8-2XNW]).

[452] Id.

[453] Id.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

Americans who oppose informing," Andrea Dennis emphasizes that "[v]iewpoints on snitching and informing are highly contested and deeply entrenched."[454] These viewpoints cannot be chalked up entirely to the cynical manipulation of confused people.

Dennis argues that a prospective informer might reasonably consider that informing "leads to unnecessary and disproportionate incarceration of Blacks, particularly Black men; invites and contributes to government abuses, such as police brutality and unreliable convictions; [and] fractionates the Black community by pitting community members, friends, and family members against each other."[455] Grant that such considerations do not justify general norms against snitching. Unless and until the norms change, snitching may "expose[] Blacks to retaliation that the government is unwilling or unable to prevent."[456] Because conspiracy depends upon infiltration, we must weigh the costs of retaliatory violence alongside conspiracy's purported benefits.

3. Violence

The indictment of the Bronx 120 preceded a significant drop in homicides, non-fatal shootings, and shots fired.[457] Among the examples of speech that appears to have been chilled by the indictments was the posting of pictures with guns.[458] It might be thought that any chilling of such speech is worth it.

There are other costs to consider, though. What about prosecutions that rely upon speech that has not been chilled and are based on misinterpretation of what has been said? Lane offers the example of Akil, who was characterized as a gang member based on his Facebook likes.[459] Akil maintained his innocence.[460] But he was denied bail, and he spent nineteen months in Rikers Island before being granted bail by

[454] Id. at 284, 333; see also Butler, Let's Get Free, supra note 391, at 86 (contending that although "[n]o responsible citizen would discourage people from reporting dangerous crimes[,] . . . if the hip-hop anti-snitching project is ultimately successful in reducing police dependence on paid informants, future generations may regard these citizens as true American patriots").

[455] Dennis, supra note 386, at 333.

[456] Id.

[457] See Lane, supra note 389, at 150–51.

[458] See id. at 151–55 (describing a chilling effect on people posting guns and rap lyrics on Facebook).

[459] Id. at 156.

[460] Id.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

the second judge to preside over his case.[461] Four months later, the judge dismissed the case on the ground of a lack of speedy trial.[462] He spent nearly two years in one of the most violent prisons in the United States without being convicted of a crime.[463]

Further, conspiracy's defenders acknowledge that its structures encourage a particular kind of speech: snitching. And they have not reckoned with the ways in which encouraging snitching not only fragments and alienates communities that have historically been singled out for infiltration, but also encourages violence.

For example, those who subscribe to the group-danger theory of conspiracy would doubtlessly regard a drive-by shooting that is intended to consolidate gang control over disputed territory as illustrative of the distinctive dangers of criminal groups. It is possible for individuals to commit such shootings. But (the group-danger theory goes) they are less likely to do so on their own or carry them out successfully. Conspiracy raises the expected costs to would-be criminal groups of such activity. It makes such groups who would otherwise engage in that activity less likely to form and more likely to fray.

If such groups do form, however, conspiracy may encourage them to act violently. Conspiracy defenders celebrate the fact that conspiracy encourages members of criminal groups to snitch. But groups may respond by violently retaliating against suspected snitches. At first approximation, a drive-by that is intended to both kill a snitch and send a message about the perils of snitching would seem no less socially costly than the killing of a rival gang member that is intended to consolidate gang territory.

Thus, Miriam Baer takes Katyal to task for failing to recognize that increasing gangs' monitoring costs may encourage behavior that "generate[s] additional costs to society."[464] Suppose those costs do make groups less likely to form and more likely to fray. The groups that do form may become more dangerous. They may be "leaner and more efficient," evading detection by virtue of being smaller and more tightly organized.[465] She notes that the prices of illegal substances dropped and that their availability increased during the peak of drug enforcement in

[461] Id. at 156–57.
[462] Id. at 157.
[463] Id.
[464] Baer, supra note 371, at 925 (emphasis omitted).
[465] See id. at 925–26.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

the United States and that "[s]ome researchers theorize that price dropped and output expanded because law enforcement efforts broke up previously large cartels."[466] They may also be more dangerous because of the ways in which they secure loyalty at the point of initiation and discourage defection.

Loyalty is secured through initiation rites that involve particularly violent criminal activity. Indeed, Cecelia Harper finds that "all initiations are extremely violent, brutal, and can be fatal in some instances."[467] As for defection, Baer points out that "[w]hen one gang member threatens to kill another member if she snitches on the group, the second gang member may respond by committing *more* crime on the group's behalf in order to prove her loyalty."[468] Taken all together, she cautions that "attempts to reduce the agency costs of cooperation may result in more, and not less, harm to society."[469]

Conspiracy's defenders sometimes talk of the distinctive harms and dangers from conspiracy without defining harm or danger, perhaps because they assume that crime is inherently harmful/dangerous. Do not grant that assumption. Crimes of violence are *the* crimes—those that are invoked to expand criminalization, those that are used to justify criminalization in principle, those that are punished most harshly.[470] The label of violence is distinctive—it comes with mandatory minimum sentences, penalty enhancements, and possible deportation for noncitizens.[471]

Alice Ristroph observes that "clear account[s] of what makes a crime *violent*" are in short supply and that definitions can differ across

[466] Id. at 926. Baer doesn't assert the existence of this perverse incentive—she points out that Katyal and Daryl Levinson (who follows Katyal) don't consider it. See also id. at 925 n.80 (criticizing Levinson for touting the benefits of flipping low-level cooperators without "consider[ing] the extent to which prosecutors might fail to distinguish culpability among conspirators and inadvertently favor 'high-level' conspirators who inculpate their unlucky, less culpable colleagues").

[467] Cecelia M. Harper, Note, How Do I Divorce My Gang?: Modifying the Defense of Withdrawal for a Gang-Related Conspiracy, 50 Valparaiso U. L. Rev. 765, 772 (2016).

[468] Baer, supra note 371, at 925.

[469] Id.

[470] See Alice Ristroph, Criminal Law in the Shadow of Violence, 62 Ala. L. Rev. 571, 611–12 (2011) (claiming that violent crime is the primary reason for criminal law, policing, and prisons).

[471] Id. at 604; see also David Alan Sklansky, A Pattern of Violence: How the Law Classifies Crimes and What It Means for Justice 41 (2021) (claiming no distinction plays a bigger role in the American criminal justice system than the line between violent and nonviolent crimes).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

jurisdictions and even across and within statutes.[472] The label "violent" has been applied not only to "crimes that involve actual or threatened physical injury" but to offenses that create a "*risk* of physical injury—or even more remotely, 'potential risk.'"[473] Still, to the extent that the concept of violent crime has any boundaries, the crimes committed during gang initiation rites and against snitches—murder, aggravated assault, rape, robbery—are at the core. Any benefits that conspiracy might be able to produce must be weighed against those particularly high costs.

4. Multiplication

Prosecutors generally submit evidence of completed crimes for each conspiracy defendant.[474] Thus, the elements of substantive offenses do constrain prosecutorial power. But those constraints are relaxed as compared to conspired-for crimes. Accordingly, conspiracy multiplies any costs that would in its absence be incurred through the investigation and prosecution of those crimes. It does so by enabling police and prosecutors to cast wider nets and to ensure that fewer suspects and defendants get away. If the investigation and prosecution of drug crimes generally entail discriminatory enforcement, prosecution, and punishment, conspiracy multiplies those costs by making it easier for police to make drug arrests and prosecutors to secure convictions.

If a defendant is accused of participation in a drug conspiracy, evidence of drug crimes committed by any alleged member of the alleged conspiracy can be admitted at trial as evidence of the defendant's intent to join that conspiracy.[475] The defendant will likely be tried alongside other alleged participants, with the attendant risk of guilt by association. Out-of-court statements implicating them in a drug crime, delivered by "unavailable" witnesses whose hearsay statements are not barred by the Confrontation Clause, will be admitted against them.

Indeed, charging conspiracy makes it less likely that there will be a trial at all. Conspiracy thus raises any social costs generated by convictions without trial. If convictions without trial are costly because

[472] Ristroph, supra note 470, at 573.

[473] Id. at 573–74.

[474] Howell & Bustamante, supra note 442, at 7 (explaining the procedural and evidentiary rules governing conspiracy prosecutions).

[475] United States v. Townsend, 924 F.2d 1385, 1388 (7th Cir. 1991).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

(among other things) they reduce democratic accountability in the imposition of the state's most severe sanctions[476] and increase the risk of convicting the innocent,[477] conspiracy increases those democratic and wrongful-conviction costs by encouraging more plea bargaining.

Of course, trials are not infallible truth-discovery mechanisms. Some people convicted of conspiracy might never have been arrested or successfully prosecuted at all had the state been compelled to prosecute them for substantive offenses—even if they in fact committed those substantive offenses. Any benefits from these convictions would need to be counted alongside costs.

There is, however, a widely acknowledged normative asymmetry here. "Blackstone's ratio," which posits that "it is better that ten guilty persons escape than that one innocent suffer," has been used to justify the distinctively demanding standards of proof in criminal trials since the mid-eighteenth century.[478] In a system of pleas, which does convict the innocent absent proof of guilt beyond reasonable doubt, invoking the ratio risks doing justificatory work for the system that actual practice can't support. Still, even if you reject Blackstone's ratio, you must reckon with the ways in which conspiracy multiplies any costs associated with investigating, prosecuting, and punishing the underlying conspired-for offenses—including those of wrongful conviction.

[476] See, e.g., Stephanos Bibas, Restoring Democratic Moral Judgment Within Bureaucratic Criminal Justice, 111 Nw. U. L. Rev. 1677, 1684–85 (2017) ("The Framers were deeply suspicious of state actors abusing criminal punishment. They built in democratic checks and balances such as grand and petit juries, sacrificing efficiency for public accountability. But plea bargaining's efficiency depends upon bypassing or subverting these checks and balances. The result is concentrated power, empowering prosecutors to exercise much hidden discretion with little accountability." (footnote omitted)).

[477] See, e.g., Gregory M. Gilchrist, Plea Bargains, Convictions and Legitimacy, 48 Am. Crim. L. Rev. 143, 146 (2011) ("Sometimes innocent people plead guilty because they do not believe they can prevail at trial. Sometimes they do so because they do not wish to risk the more severe sentence that will result if they lose at trial. Sometimes they do so for personal reasons. The practice of plea bargaining—granting a benefit to the defendant in exchange for the waiver of certain trial and appellate rights—provides an incentive to plead guilty.").

[478] 2 William Blackstone, Commentaries *358. Frederick Schauer observes that Blackstone's ratio is not a purely epistemic instrument—it's a moral one. Thus, "it is hardly clear that the same ratio is applicable when the stakes are different," as in a civil case. Frederick Schauer, Slightly Guilty, 1993 U. Chi. Legal F. 83, 88.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

5. Legitimacy and Estrangement

For many years, leading criminal law scholars and policymakers have operated on the premise that making up a legitimacy deficit, or filling a legitimacy gap between police forces and policed communities, ought to be a political priority.[479] That there *is* such a deficit/gap is relatively uncontroversial; the *ought* has been challenged.

Some advocates of the legitimacy frame see legitimacy as socially valuable because people who perceive an authority as legitimate are more likely to comply with it.[480] Thus, if people have trust and confidence that the police will fulfill a role that is assumed to be overall socially beneficial, legitimators argue that police will be more effective in fulfilling that role and thereby producing social benefits.[481] If you

[479] See, e.g., Steven E. Clark, Blackstone and the Balance of Eyewitness Identification Evidence, 74 Alb. L. Rev. 1105, 1105 (2011) ("The Blackstone Ratio clearly acknowledges that there are two kinds of errors that can be made within the criminal justice system, and that one, the false conviction, is far worse than the other, the false acquittal.").

[480] See, e.g., Tom R. Tyler, Why People Obey the Law (1990) (examining the extent to which normative factors influence compliance with the law); Tom R. Tyler & Cheryl J. Wakslak, Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority, 42 Criminology 253, 254–55 (2004) (reporting empirical studies showing that public perceptions of racial profiling are shaped by police behavior and strongly influence public support for law enforcement); Tracey Meares, The Legitimacy of Police Among Young African-American Men, 92 Marq. L. Rev. 651, 653 (2009) (explaining how repeated police contact undermines legitimacy among young Black men absent fair and respectful treatment by officers); Josh Bowers & Paul H. Robinson, Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility, 47 Wake Forest L. Rev. 211, 212–13 (2012) (distinguishing procedural legitimacy from moral credibility and arguing that each independently promotes compliance, cooperation, and deference to criminal law); Tracey L. Meares, Tom R. Tyler & Jacob Gardener, Lawful or Fair? How Cops and Laypeople Perceive Good Policing, 105 J. Crim. L. & Criminology 297, 301 (2016) (arguing that the public evaluates police conduct through procedural justice rather than compliance with constitutional standards).

[481] E.g., Tom R. Tyler & Justin Sevier, How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures, 77 Alb. L. Rev. 1095, 1103 (2014) ("Legitimacy . . . is linked to desirable law related behavior. The first concern of the courts is with public acceptance of their role as the authorities responsible for maintaining order."); Paul H. Robinson & Lindsey Holcomb, The Criminogenic Effects of Damaging Criminal Law's Moral Credibility, 31 S. Cal. Interdisc. L.J. 277, 277 (2022) (adducing empirical evidence of a connection between communal perceptions of moral legitimacy and "willingness to defer to the law's demands" and "internalize [the law's] norms" and contending that criminalization should track communal justice judgments to avoid losses in perceived legitimacy). This isn't to say that these authors argue for uncritical deference. See Bowers & Robinson, supra note 480, at 282 ("We should want the system to cultivate deference for its morally laden directives. We may even

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

strongly reject that assumption, however, cultivating perceptions of legitimacy is a much more morally fraught enterprise. Perhaps people should perceive as illegitimate an institution that consistently imposes costs on them and benefits others.

Monica Bell contends that the concept of legal estrangement better captures the relationship between police and poor communities of color than does legitimacy.[482] Estrangement shifts the focus from whether individuals think it is a good thing to obey the law or believe police to be legitimate as an abstract proposition, to whether marginalized groups experience the law/police in ways that convey their inclusion or exclusion from the political community.[483] Bell argues that "estrangement can help scholars understand situations where, even *despite* the embrace of legality by African Americans and residents of high-poverty neighborhoods, and regardless of the degree to which they embrace law enforcement officials as legitimate authorities, they are nonetheless structurally ostracized through law's ideals and priorities."[484]

Capturing the ways in which conspiracy criminalization contributes to estrangement requires more granular data than is presently available. We do, however, know a great deal about the disproportionate policing of race-class marginalized communities; we know a bit about how surveillance and snitching affect policed communities; and we have seen that conspiracy criminalization depends upon surveillance and snitching.

Brayne finds that people who have been stopped, arrested, convicted, or incarcerated are less likely to interact with not only police but the state and civil-social institutions more generally, including medical, financial, employment, and educational institutions.[485] Natapoff's work on snitching is replete with examples—including from children as young as fourteen—of people for whom the prevalence of snitching and the seeming immunity that informants receive to commit crimes lead them to believe that there exists a deep hypocrisy in the law's treatment

want the system to cultivate deference for its amoral or morally ambiguous directives. But we should not want the system to cultivate deference for its immoral directives.").

[482] See Monica C. Bell, Police Reform and the Dismantling of Legal Estrangement, 126 Yale L.J. 2054, 2066 (2017) (proposing legal estrangement as an alternative to legitimacy-based accounts of police mistrust).

[483] See id. at 2100.

[484] Id. at 2085–86.

[485] See Brayne, supra note 435, at 999 (examining criminal justice's "chilling effect" of surveillance practices on other institutions).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

of race-class marginalized communities.[486] Whether we use the frame of legitimacy, estrangement, or both, we find that conspiracy carries with it structures that have unevenly distributed social costs.

C. Unsubstantiated Benefits

The leading justifications for conspiracy criminalization remain consequentialist. The advertised consequences of conspiracy criminalization include deterring conspiracies before they form and dismantling them with dispatch. For the most part these beneficial social consequences are counted without regard to competing costs. As the costs have been understated, the benefits have been overstated.

1. Group Dangerousness

The most influential normative argument for conspiracy criminalization depends upon an empirical premise. The premise is that criminal groups present dangers over and above those presented by their individual members. It was not until several decades after the group-danger theory had won widespread judicial acceptance that a scholar presented empirical data in support of it.[487]

On Neal Katyal's account, criminal groups are distinctively dangerous because they are more likely than individuals to succeed in their criminal plans and to commit more crimes. Katyal draws upon psychological studies which find that group membership encourages

[486] See Natapoff, Informants, supra note 448, at 44.

[487] See, e.g., Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 924–25 (1959) ("The antisocial potentialities of a conspiracy, unlike those of an attempt, are not confined to the objects specifically contemplated at any given time. The existence of a grouping for criminal purposes provides a continuing focal point for further crimes either related or unrelated to those immediately envisaged." (citing United States v. Rabinowich, 238 U.S. 78, 88 (1915))); Callanan v. United States, 364 U.S. 587, 593–94 (1961) ("Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise."); Iannelli v. United States, 420 U.S. 770, 778 (1975) ("This Court repeatedly has recognized that a conspiracy poses distinct dangers quite apart from those of the substantive offense.").

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

loyalty, diffuses responsibility, and creates structures through which people are encouraged to take extreme positions and disregard the opinions and interests of outsiders.[488] He also makes use of economic literature that details how firms are able increase profits by decreasing transaction costs, realizing economies of scale, and specializing.[489]

As several critics have observed, most of the empirical research upon which Katyal bases this claim does not focus on criminal groups.[490] The psychological research finds that people behave differently in groups, full stop, and the economic literature focuses on legally incorporated firms. There is one notable exception—a 1991 study conducted by Paul Cromwell, James Olson, and D'Aunn Wester Avary, consisting in an interview with thirty burglars.[491] The burglars were interviewed alone and also in the presence of their usual accomplices about whether they would select certain sites for burglary.[492] Katyal highlights the study's findings that "the number of burglaries would increase in a group" and that "burglars in groups are more likely to be aroused."[493] He infers from the former that group crime means more crime; from the latter, "the possibility that group crimes lead to unplanned violence."[494]

Katyal does not mention that the burglars' self-reported apprehension rates increased *fivefold* when they worked in groups.[495] The increased apprehension rates raise questions about the efficiency of criminal firms that Katyal only acknowledges—without substantially engaging—in a footnote conceding that there are diseconomies of scale in noncriminal

[488] See Katyal, supra note 85, at 1316–22 (explaining that criminal group behavior heightens social harm by fostering conformity, polarization, and reduced willingness to abandon criminal activity).

[489] See id. at 1325–27 (explaining that conspiracies increase criminal capacity through specialization, economies of scale, and information diffusion).

[490] E.g., Morrison, supra note 358, at 485–86; Sacharoff, supra note 371, at 447.

[491] See Paul F. Cromwell, James N. Olson & D'Aunn Wester Avary, Breaking and Entering: An Ethnographic Analysis of Burglary (1991) (presenting the findings of that study as well as other related research).

[492] Id. at 18, 68–69.

[493] Katyal, supra note 85, at 1319 & n.37.

[494] Id.

[495] Indeed, the authors make clear that arousal can be counterproductive and find that their own data suggests as much. See Cromwell et al., supra note 491, at 70 (finding that self-reported apprehension rate "support[s] the hypothesis that performance is impaired [by arousal] on complex, poorly learned responses"); id. at 60 ("To the burglar, . . . whose task is complex, a highly aroused state . . . would be counterproductive, because to enter a residence, search for and seize property, and leave undetected, he or she must attend to even the most subtle environmental cues.").

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

firms.[496] We are left in the dark about the circumstances in which criminal groups are more likely to succeed in achieving their goals than individuals.

Further, Katyal's inference from group arousal to group violence is unwarranted. In Cromwell and his coauthors' usage, arousal is an emotional state—an aroused person is anxious, fearful, excited, or the like.[497] The psychological research on which the authors rely found that aroused people can respond to a reduced range of cues.[498] They might be more "concentrated or focused" on certain things and more effective in tasks that involve "automatic behavior patterns," but they will neglect other things and may be impaired in their performance of tasks that require "creativeness and spontaneity."[499] It does not follow from any of that that an aroused burglar is more likely to commit crimes other than burglary, much less violent crimes. Even if members of burglary conspiracies are thus aroused, it is not obvious why participation in a mail-fraud conspiracy would have a similar effect.

The empirical case for group dangerousness remains weak. And not even Katyal contends that we should criminalize all group associations because groups are more dangerous than individuals. Even if we were prepared to generalize from a single study into burglar behavior, we still could not accept his broader thesis. The most we could say is that groups of criminals are more likely to *try* to commit crimes than individual criminals. But we would also have to say that they are more likely to be apprehended if they do so. Does that make them more or less dangerous? Katyal doesn't ask or answer.

[496] See Katyal, supra note 85, at 1327 n.76; see also Posner, supra note 350, at 1219 (flagging the possibility that any advantages that come with the division of labor might be "offset to some extent by the fact that a conspiracy is more vulnerable to being detected because of the scale of its activities").

[497] The authors' usage is informed by Robert Zajonc's influential drive theory of social facilitation, which was first articulated in Robert B. Zajonc, Social Facilitation, 149 Sci. 269, 270 (1965) (explaining how social presence amplifies dominant responses). See also Robert B. Zajonc & Stephen M. Sales, Social Facilitation of Dominant and Subordinate Responses, 2 J. Experimental Soc. Psych. 160, 160 (1966) (demonstrating experimentally that the presence of an audience enhances dominant responses while inhibiting subordinate responses); Robert B. Zajonc, Compresence, *in* Psychology of Group Influence 35, 36–37 (Paul B. Paulus ed., 1980) (introducing "compresence" as a mechanism by which the physical presence of others exerts behavioral and psychological influence without direct interaction).

[498] Cromwell et al., supra note 491, at 60.

[499] Id.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

2. Deterrence

Katyal toggles between two accounts of conspiracy's deterrent value. One holds that conspiracy deters the creation of criminal organizations.[500] Another holds that conspiracy deters people from either joining or continuing to participate in organizations.[501] Both accounts depend upon the premise of group dangerousness. People will commit crimes when it is efficient, i.e., cost-justified for them to do so; groups make crime more efficient; by raising the expected costs of group crime, conspiracy can deter those for whom it would otherwise be cost-justified.

We have seen that the empirical case for group dangerousness is weak. But there are deeper problems with any deterrence-based case for conspiracy. One way to raise the expected costs of group crime would be to summarily execute suspected conspirators. That this idea has not been seriously considered illustrates an important nuance in law-and-economics approaches to criminalization that we have already encountered. Deterrence is a value to be optimized, not maximized. Conspiracy's deterrent benefits ought to exceed any social costs that it generates.

It is therefore startling that extant law-and-economics-based conspiracy defenses are so one-sided. They describe how conspiracy makes socially costly group crime prohibitively expensive without going on to consider whether conspiracy itself is prohibitively expensive. I don't just mean in the economic sense (although certainly investigating conspiracy, prosecuting conspiracy, paying judges and lawyers and bailiffs, detaining suspects pretrial, and imprisoning people convicted of crimes all cost money). No one has yet tried to put a dollar amount on the costs of group crime, so those who defend conspiracy on deterrence grounds must be relying upon a broader theory of social cost.

But neither Posner nor Katyal nor anyone else has specifically articulated any such theory. The question of conspiracy criminalization's optimality is thus as-yet unanswerable. Perhaps we shouldn't be thinking about conspiracy in cost-benefit terms at all. Still,

[500] See Katyal, supra note 85, at 1312–13 ("The law strives to prevent conspiracies from forming with high up-front penalties for those who join . . . .").

[501] See id. at 1348 ("The pervasive and well-understood legal practice of flipping, when combined with penalties for conspiracy, . . . fragment[s] trust among members of the conspiracy and inspire[s] defection.").

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

those who use the language of law-and-economics to contend for conspiracy ought to define and demonstrate its optimality.

Making matters worse, deterrence-based justifications for any kind of criminalization must depend upon empirical claims that are very difficult to substantiate. John Darley and Paul Robinson have urged, in a series of articles summarizing and analyzing the implications of behavioral science research into the effects of criminal rules on behavior, that the conditions under which people are likely to be deterred by criminalization are rarely satisfied.[502] People may not know the rules; if they do, they might not be able to guide their conduct in accordance with them; if they are, the expected benefits of violation may still exceed the expected costs. This is true for first-time offenders as well as career criminals.[503]

Robinson and Darley do not question whether "having a criminal justice system that imposes punishment can and does deter violations."[504] But they deny that "the manipulation of rules for determining liability and punishment within that system—traditionally governed by deterrence analysis—can send the more nuanced messages that are needed to influence the conduct of potential offenders in a more precise way."[505] In the case of conspiracy, the underlying conspired-for conduct is already illegal, so punishment will be threatened regardless of whether the conspiracy itself is a violation.[506]

[502] See, e.g., Paul H. Robinson & John M. Darley, The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best, 91 Geo. L.J. 949, 977 (2003) [hereinafter Robinson & Darley, Deterrence] (contending that criminal law rules are poor instruments of deterrence because actors rarely possess the knowledge, rationality, and opportunity required for deterrent effects); Paul H. Robinson & John M. Darley, Does Criminal Law Deter? A Behavioural Science Investigation, 24 Oxford J. Legal Stud. 173, 173 (2004) (demonstrating that ignorance of legal rules, cognitive biases, group dynamics, and situational pressures systematically undermines deterrence); John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, The Ex Ante Function of the Criminal Law, 35 Law & Soc'y Rev. 165, 168 (2001) (showing that criminal law fails in its ex ante function because people do not know legal rules and instead project personal moral judgments onto the law).

[503] See Robinson & Darley, Deterrence, supra note 502, at 951, 954.

[504] Id. at 1001.

[505] Id.

[506] See Richard H. McAdams, Present Bias and Criminal Law, 2011 U. Ill. L. Rev. 1607, 1617 ("If the offender is not deterred from committing a crime by the deferred substantive sanctions, then it is not clear why conspiracy sanctions—also deferred—will do any better . . . ."). McAdams acknowledges the possibility that the threat of arrest may have a stronger deterrent effect than the threat of conspiracy's heightened penalties because the threat of arrest is immediate. But he notes that this would depend upon the assumption "that the police actually make some arrests for the early crime." Id. at 1619. We can add that it

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

Supposing that conspiracy criminalization *does* produce *some* deterrent benefits, the question of optimality looms again. Robinson and Darley urge that even if the demanding conditions under which it is reasonable to predict a deterrent effect from a criminal rule are satisfied, we should not assume that the rule ought to be adopted or retained.

At the root of the epistemological and motivational problems that make deterrence difficult is a gap between what the law is and what people think it ought to be. Deterrence only has bite in contexts where "the community members [are] aware that the legal codes deviate[] from their sense of what [is] morally right, either by being draconian in criminalizing actions that the community regard[s] as not immoral, or failing to criminalize actions that the community does think are immoral." [507] Thus, deterrence benefits must be weighed against legitimacy costs. Those costs can become sufficiently severe to make the deterring rule "not only be a waste of time, energy, and resources" but "criminogenic" as people come to regard criminal systems with "contempt."[508] So if any deterrence is to be had from conspiracy, we cannot assume that it's optimal.

3. Morality

Those of a moralist persuasion may find it objectionable to evaluate conspiracy solely in cost-benefit terms. [509] If conspiracy is morally

also depends upon the belief that police make such arrests often enough to make the possibility salient to decision-making. The gap between the law on the books and the law on the ground is a fixture of American criminalization. See Douglas Husak, Is the Criminal Law Important?, 1 Ohio St. J. Crim. L. 261, 263 (2003) ("I am frequently asked how the law will respond to a person who uses or sells small quantities of drugs, especially marijuana. How will the criminal law deal with this individual? This question is simple and straightforward. . . . Despite the prevalence of these behaviors and the frequency with which I am asked about them, I am forced to admit that I cannot answer this question with any confidence. My knowledge of the criminal law—and even my specialty in drug policy—gives me little guidance about the probable fate of the person in question.").

[507] Robinson & Darley, Deterrence, supra note 502, at 1002.

[508] Id.

[509] See, e.g., R.A. Duff, Towards a Modest Legal Moralism, 8 Crim. L. & Phil. 217, 223 (2014) (arguing that criminal law cannot be justified purely by instrumental cost-benefit analysis because its distinctive function is to censure public moral wrongs rather than to optimize social outcomes); Ekow N. Yankah, Republican Responsibility in Criminal Law, 9 Crim. L. & Phil. 457, 458 (2015) (rejecting consequentialist and efficiency-based accounts of punishment in favor of a moral theory centered on civic equality and responsibility); Michael Moore, Placing Blame: A General Theory of the Criminal Law 193–96 (1997)

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

wrong in a sense that implicates the proper function of criminalization, perhaps it ought be criminalized without regard to whether doing so has beneficial consequences.

But conspiracy is not often defended on moralist grounds. Katyal suggests that conspirators might justifiably be punished not only for the crime of conspiracy but for the "moral wrong" of declining to supply information to the government.[510] This begs far too many moral questions—about the weight of the moral obligation to tell the truth, about whether that obligation applies in this setting, about whether it is weighty enough to justify the particular punishment enhancements that come with sentencing based on supposedly withheld information—to be worth engaging here.

Jens David Ohlin offers a qualified moralist defense of *Pinkerton* liability, focusing narrowly on the justification for vicarious liability.[511] He draws upon philosophical work defending the coherence of group agency and at times suggests that accurately capturing moral culpability is a desirable end in itself.[512] But he insists that his model "correctly shows how group criminal behavior is produced"[513] and underscores the importance of his intervention by stating that "individuals often coordinate their actions to produce increasingly complex criminal operations that were once unthinkable."[514] These are empirical claims about the consequences of conspiratorial activity, and (like Katyal's) they lack empirical support.

I am skeptical of the prospects of any moralist case for conspiracy criminalization that does not rest to some extent upon consequences. Why would intending to commit an unlawful act with someone else be morally worse than intending oneself to commit the same act? If conspiracy merits criminalization as a public wrong, it seems that it

(examining the independent moral significance of wrongdoing separate from its impacts on society generally).

[510] See Katyal, supra note 85, at 1338 ("Under this theory of moral wrong, the basis for sentencing is not only the underlying crime but also the information held."). The connection with the obligation to tell the truth is asserted (but barely defended). See id. at 1356 ("[P]rosecutors often talk in religious terms—emphasizing that the first steps of a moral life start by telling the truth."). Katyal does not explain why he thinks that such prosecutor-talk gives us any moral insight.

[511] Jens David Ohlin, Group Think: The Law of Conspiracy and Collective Reason, 98 J. Crim. L. & Criminology 147, 150 (2007).

[512] Id. at 161, 163–69.

[513] Id. at 172.

[514] Id. at 170, 172.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

should be because the combination of an agreement, criminal intentions, and some minimal overt act has some effect on the social world. As arch-moralist Michael Moore has put it, "[W]hat the conspirator is punished for is his own role (minimal as it sometimes is) in bringing about the prohibited result."[515] Absent some contribution to the likelihood that a prohibited result will be brought about—a consequence!—treating conspiracy differently than individual attempts seems impossible to justify. Rather than speculate about what such a case might look like, I will move on.

D. Don't Know, Don't Criminalize

I have raised doubts about whether existing arguments for conspiracy succeed. But I have not tried to prove that criminal groups are not more dangerous than individual criminals or that conspiracy does not deter group crime. And yet I have called for conspiracy abolition rather than skepticism. Shouldn't the advocate of such sweeping change bear the burden of justifying it?

Probably the most oft-cited justification for defendant-favoring features of criminal law is the moral asymmetry between punishing the innocent and allowing the guilty to go free—an asymmetry captured by Blackstone's ratio. It is not immediately obvious why a consequentialist ought to accept Blackstone's ratio. Grant that it is wrong for the state to punish an innocent person. One guilty person who is allowed to go free may have gotten away with injuring an innocent person. They may injure future innocents. Add more guilty people and the asymmetry seems increasingly questionable.

The effects of being labeled a criminal in the United States put the asymmetry between punishing the innocent and allowing the guilty to go free on firm consequentialist ground. U.S. criminal systems bind, maim, and kill. They expose those whom they label criminals to injuries in jails and prisons that can exceed anything that incarcerated people did or would inflict on anyone else. They degrade civic status, exclude from political institutions and economic opportunities, and otherwise relegate people to the margins of social life.[516] The criminalization of one

[515] Michael S. Moore, The Strictness of Strict Liability, 12 Crim. L. & Phil. 513, 523 (2018).

[516] See Alice Ristroph, The Curriculum of the Carceral State, 120 Colum. L. Rev. 1631, 1698 (2020) (explaining how criminal conviction degrades civic status and relegates

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

innocent person will inflict unjustified, certain, and severe injuries on them—regardless of the nature of the crime of conviction. We cannot say the same thing about the acquittal of one guilty person.

Indeed, a person who has been wrongfully acquitted of conspiracy cannot be assumed to have injured anyone or even to have planned to do so. Any injury inflicted or threatened by conspirators is not attributable to their being conspirators but to the underlying offense, for which they could, in the absence of conspiracy, be prosecuted. Conspiracy's defenders could respond that it is more difficult to prosecute injurious crimes than it is to prosecute conspiracy to commit them and that the availability of conspiracy as a charge deters planning or executing injurious crimes. But this nuanced response would concede the point—injurious consequences don't always follow the wrongful acquittal of conspirators. By contrast, a wrongful conviction of a non-conspirator will always injure them.

Now consider conspiracy as a cluster of criminal systems. Because those systems regularly inflict certain and severe injuries, they must be normatively justified. I do not propose that standards of empirical proof that govern criminal trials be used to evaluate normative cases for particular modes of criminalization. Defenders of conspiracy need not prove beyond a reasonable doubt that conspiracy criminalization is justified. They should do more than one-sided benefit-counting with limited empirical support.

Unless and until they do, we should regard the case for conspiracy as unproven. In the meantime, we should dismantle as much of a presumptively unjustified criminalization apparatus as we can. Conspiracy's defenders have been effectively given the benefit of the doubt about whether it is doing more good than harm for at least half a century since the most widely cited case for abolition was published. If after all this time we just do not know, we should not criminalize conspiracy. Having recognized that we do not know, we would be morally culpable if we supported its criminalization.[517]

individuals to the social and political margins, often through harms exceeding the underlying offense).

[517] See Gideon Rosen, Culpability and Ignorance, 103 Procs. Aristotelian Soc'y 61, 63–64 (2003) ("[W]henever a person acts badly from some sort of ignorance . . . . [I]f he has been neither negligent nor reckless in the management of his opinion—then his ignorance is blameless and so is the act done from ignorance. On the other hand, if he *has* been reckless or negligent or otherwise irresponsible in his epistemic conduct, then he is culpable for his

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

I doubt every reader will be persuaded to adopt a presumption against criminalization. Those who do might still urge that the presumption can be rebutted, either by indicating the availability of more politically feasible measures short of abolition to reduce conspiracy's costs or raising questions about what in the absence of conspiracy can be done in response to those kinds of harms that make conspiracy seem necessary. The next Part anticipates and responds to these and other objections.

V. ABOLITION, AGAINST ALL ODDS

A. "Why Not Reform?"

An outlier in 1973, Johnson's case for conspiracy abolition became increasingly lonely as the decades passed. Conspiracy reform might seem more attractive than conspiracy abolition, if only because it is more politically feasible. But to justify the pursuit of reform as an end rather than a means to abolition, we would need some basis for confidence that conspiracy could somehow, someway, be made into something that is more beneficial than it is costly.

Steven Morrison proposes that conspiracy be limited to dangerous offenses.[518] He points out that Katyal's case for group dangerousness relies on studies of noncriminal groups and thus invites "confirmation bias that tends to view all suspicious group conduct as criminal conspiratorial conduct."[519] Morrison argues that requiring proof of dangerousness would enable authorities to prevent and punish criminal groups that actually do produce the distinct evils that have been used to justify conspiracy criminalization—without "enabling the prosecution of many conspiracies and apparent conspiracies that may not in fact be dangerous."[520] He notes that conspiracy statutes in several states follow the Model Penal Code in allowing for the downgrading of conspiracies that present little danger and allowing courts to dismiss prosecutions in extreme cases.[521] Thus, Arkansas provides an affirmative defense to a prosecution for attempt, solicitation, or conspiracy where the conduct

ignorance and for what he does in light of it (provided he has no further excuse)." (footnote omitted)).

[518] Morrison, supra note 358, at 487.

[519] Id. at 487–88.

[520] Id. at 491.

[521] Model Penal Code § 5.05(2) (A.L.I., Proposed Official Draft 1962); Morrison, supra note 358, at 509.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

charged is "inherently unlikely to result or to culminate in the commission of a crime" and "[n]either the conduct nor the defendant presents a public danger warranting imposition of criminal liability."[522]

The constraining power of any dangerousness requirement is contingent upon the definition of dangerousness. Morrison defines a "dangerous" conspiracy as one that "may result or culminate in the commission of a crime such that the conduct or the offender presents a public danger."[523] He goes on to distinguish between a conspiracy to steal cactuses and a conspiracy to transport internationally over $10,000 (earned through a restaurant business) to one's relatives on the ground that the former and not the latter is dangerous.[524] Stealing cactuses, claims Morrison, is "*malum in se*"—wrong in itself—because it "deprived others of property," whereas sending lawfully earned money to one's relatives is "more akin to a regulatory violation, and so was *malum prohibitum*."[525]

Morrison overstates the consistency between his proposal and current law. The few statutes that Morrison cites do not require proof of dangerousness beyond a reasonable doubt.[526] Arkansas's provision of an affirmative defense is the strongest statutory commitment to a dangerousness limitation; the other provisions he mentions allow only for downgrading or dismissal.[527] Morrison also finds that few lawyers in the relevant states are even aware of the limitations.[528]

Further, there are two fundamental flaws in Morrison's definition. It is not helpful to be told that conspiracy is dangerous when the conduct or offender is dangerous unless we are told what constitutes danger. The examples suggest that danger is associated with *malum in se* rather than *malum prohibitum* crimes. But this does not get us very far, either.

Youngjae Lee details why "it is often not a straightforward matter to demonstrate that a violation of a *malum prohibitum* offense is not

[522] Ark. Code Ann. § 5-3-101 (2025).
[523] Morrison, supra note 358, at 499.
[524] Id. at 499–500, 502.
[525] Id.
[526] See Colo. Rev. Stat. § 18-2-206(3) (2026); 18 Pa. Cons. Stat. § 905(b) (2024); N.J. Stat. Ann. § 2C:5-4(b) (West 2025); Ark. Code Ann. § 5-3-101 (2025).
[527] Ark. Code Ann. § 5-3-101 (2025).
[528] See Morrison, supra note 358, at 511 (finding that many criminal defense attorneys are unaware of statutory dangerousness limitations on conspiracy law).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

wrongful."[529] He offers the example of a weapons possession case.[530] By itself, possession does not hurt anyone. But "by having a gun, one would be increasing the amount of risk that exists in one's community" and perhaps "encouraging others to obtain one, which can also increase the risk of gun-related violence."[531] Further, even if we granted that possession is not morally wrong, it might still be dangerous—perhaps more so than *malum in se* cactus theft. What to do when *in se* crimes are not dangerous or *prohibitum* crimes are?

Another difficulty would remain even if we settled upon a list of dangerous offenses. Any such list of offenses would likely include what are labeled violent crimes. And imprisonment for such crimes is overwhelmingly responsible for race-class stratified mass incarceration.[532] Morrison predicts that his proposal "w[ill] not undermine the public safety function of the criminal law" because "dangerous actual criminal conspiracies" "comprise the majority of conspiracy cases."[533] If true, this might mollify political opposition to conspiracy reform. But it also means that the majority of those who are surveilled, arrested, and prosecuted for conspiracy will not benefit from his proposal.

Can we rest comfortably with this outcome because the latter people are dangerous actual conspirators? Let's go back to the cactus conspiracy. Morrison labels this a "dangerous" conspiracy because cactus theft is wrongful and "actual" because "cacti were actually trafficked."[534] He seems to have inferred that they were actually trafficked from the fact that someone pleaded guilty to conspiring to trafficking them. This is too quick; it is well-documented that people plead guilty to crimes that they haven't really committed.[535]

[529] Youngjae Lee, *Mala Prohibita*, the Wrongfulness Constraint, and the Problem of Overcriminalization, 41 Law & Phil. 375, 377 (2022).

[530] Id. at 382.

[531] Id.

[532] See generally John F. Pfaff, Locked In: The True Causes of Mass Incarceration—and How to Achieve Real Reform (2017) (arguing that increasingly aggressive prosecutorial tactics have exacerbated the race-class divide in mass incarceration).

[533] Morrison, supra note 358, at 501, 509–10.

[534] Id. at 501–02.

[535] See John H. Blume & Rebecca K. Helm, The Unexonerated: Factually Innocent Defendants Who Plead Guilty, 100 Corn. L. Rev. 157, 157 (2014) ("Innocent defendants plead guilty most often, but not always, in three sets of cases: first, low level offenses where a quick guilty plea provides the key to the cellblock door; second, cases where defendants have been wrongfully convicted, prevail on appeal, and are then offered a plea bargain that

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

Accordingly, those left out of Morrison's proposal aren't just those who have actually joined dangerous criminal groups. His proposal also excludes people who *say* that they join criminal groups to avoid facing harsher penalties at trial *even if they didn't* join criminal groups. So, too, does Morrison's proposal exclude people who are convicted notwithstanding their factual innocence after a (rare) trial because of conspiracy's pro-prosecutorial evidentiary and procedural structures.

For another reformist approach, consider Andrew Ingram's intervention, which is directed at the "ill of petty conspiracies."[536] Ingram shares Morrison's concern with limiting conspiracy's scope to only those groups that really do produce distinct evils. But his understanding of those evils differs, and his proposed reforms are thus differently structured.

Ingram contends that some group crimes that are prosecuted as conspiracies are "petty," not in the sense that the crimes aren't dangerous or harmful but in the sense that the group component doesn't add any danger or harm.[537] They are petty as conspiracies, "lack[ing] the element of preparation and organization that makes conspiracy a separate menace from both the object crime itself and other offenses like aiding and abetting, attempt, or solicitation."[538] Such group crimes, Ingram urges, should not be prosecuted as conspiracies because they do not implicate the concern that justifies conspiracy in the first place. They do nothing but give prosecutors plea-bargaining leverage. Ingram proposes incorporating new planning and organization requirements into conspiracy, either by judicial reinterpretation of the agreement element or by statutory amendment.[539]

Ingram's reform proposal performs so much legitimating work for existing conspiracy criminalization that it risks being counterproductive. He lends support to the leading justification for conspiracy—group dangerousness—by uncritically accepting Katyal's case for dangerousness and positioning his own proposal as "maintaining those features of conspiracy law that its chief defender, Neil Katyal, values

will assure their immediate or imminent release; and third, where defendants are threatened with harsh alternative punishments if they do not plead guilty.").

[536] Andrew Ingram, Conspiracy, Really?, 110 Iowa L. Rev. 1203, 1227 (2025).

[537] See id. at 1207.

[538] Id. at 1228.

[539] Id. at 1234–35.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

most highly."[540] Those features include extracting information from suspects, inducing them to snitch, and coercing them into pleading guilty. Ingram does not outright say that he values these features. But he leaves readers with the impression that the basic justification for conspiracy is sound and implies that we can cure what ails conspiracy while still giving its defenders everything that they want.

Reformist proposals like Morrison's and Ingram's *might* make it marginally more difficult for a few people to be criminalized through conspiracy. But the limits of these proposals are instructive. Any piecemeal reform would be difficult to achieve, and it would leave harmful structures in place. And as Ingram demonstrates, it is quite easy for the reformer to prop those structures up.

It is thus necessary to insist that those structures that make conspiracy distinctive are those that make conspiracy harmful. Conspiracy isn't an isolated rule against group crime that is interpreted and enforced, prosecuted and punished, in roughly the same way as other offenses. It's a cluster of systems, component parts of which include strong joint-trial preferences, hearsay exceptions, minimal act requirements, and capacious conceptions of unlawfulness that do not distinguish between dangerous and non-dangerous crimes. Specify that the conspired-for crime must be among some set of particularly heinous acts of physical violence, provide that conspiracy must merge with the conspired-for crime, require substantial planning and organization elements, and we might eventually end up with something worth preserving. We could call that something "conspiracy." But we would have changed the conceptual referent of the term in a way that could fairly be characterized as abolition through redefinition.

B. "What About White-Collar Crime?"

What Michael Serota has observed in the context of strict liability offenses finds an analogue in conspiracy criminalization—a concern on the political left that conspiracy "is really just a problem for the wealthy corporate actors."[541] As with strict liability crimes, we have good reason to believe that conspiracy has an unjustified disparate impact on poor people of color. And even if it were desirable to micro-target elite

[540] Id. at 1247.

[541] See Michael Serota, Strict Liability Abolition, 98 N.Y.U. L. Rev. 112, 180 (2023).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

malefactors for carceral treatment, pro-conspiracy literature hasn't so much as sketched a way to do this.

G. Ben Cohen, Justin D. Levinson, and Koichi Hioki have explored racial disparities in felony murder cases and contextualized these disparities by drawing upon psychological research on "entitativity"—"the circumstances under which people are perceived as being group members as opposed to individuals."[542] This research is highly relevant to conspiracy criminalization. The higher the entitativity, the more cohesive a group is perceived to be.[543] Racial disparities in perceptions of group cohesion threaten to produce disparate carceral outcomes in the context of group crime.

In a study of jury-eligible citizens, the authors found that "[p]articipants were significantly more likely to quickly group together Black and Latino names with words associated with groups, such as 'group, pack, crew, them, crowd, folks, bunch,' and white faces with individuality, such as 'individual, self, one, solo, single, somebody, character,'" and that racialized group associations predicted liability verdicts.[544] Although their focus is on felony murder, the authors make a connection between racialized perceptions of group cohesion and conspiracy criminalization. Conspiracy, and group liability more generally, "has emerged as a powerful tool of criminal law, [by] . . . holding an individual responsible for the actions of others."[545]

The DOJ doesn't regularly release detailed statistics, so there aren't many empirical studies of conspiracy prosecutions. In 2012, Jordan Blair Woods constructed a database of gang-related RICO cases using four sources: major local and national newspapers, Westlaw, Google, and the DOJ's website.[546] He then obtained electronic copies of the indictments.[547] In a sample of 160 cases from 2001 through 2011, Woods found that approximately eighty-six percent of the prosecution cases involved gangs that were affiliated with at least one racial

[542] G. Ben Cohen, Justin D. Levinson & Koichi Hioki, Racial Bias, Accomplice Liability, and the Felony Murder Rule: A National Empirical Study, 101 Denv. L. Rev. 65, 101 (2023).

[543] Id. at 102.

[544] Id. at 108, 111.

[545] Id. at 82.

[546] Jordan Blair Woods, Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs, 17 Mich. J. Race & L. 303, 325 (2012).

[547] Id.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

minority group.[548] Woods cautions that his findings "should not be applied to support generalizations involving the application of RICO in other contexts or the application of different federal statutes to criminal street and prison gangs."[549] They do, however, "cast[] doubt over whether the application of RICO to prosecute gangs is a racially unbiased process."[550]

Gang policing is notorious for racial disparities. Studies suggest that ninety percent of people added to gang databases are Black or Latino, even though at least twenty-five percent of gang members are White.[551] Keegan Stephan highlights the particularly egregious example of Mississippi, in which "one-hundred percent of the people arrested under the State's gang law from 2010 through 2017 were Black, despite Mississippi's own Association of Gang Investigators saying that fifty-three percent of 'verified gang members' are white."[552] These database disparities lend themselves to disparate surveillance and in turn to a greater probability of being included in "sweeping conspiracy and RICO indictments."[553]

Low-income people of color are more likely to be subjects of drug enforcement and prosecution.[554] Joseph J. Avery and Joel Cooper find that federal prosecutors are less likely to offer Black people plea bargains, less likely to reduce their charge offers, and more likely to offer bargains that require imprisonment.[555] Emilie Kurth observes that conspiracy's favorable-to-the-prosecution liability and evidentiary rules make it easier for prosecutors to extract plea bargains, not only from the same race-class marginalized people who might otherwise be arrested, charged, and prosecuted for drug crimes but "even the most tenuously

[548] Id. at 325, 328–29.

[549] Id. at 327.

[550] Id. at 352.

[551] See K. Babe Howell, Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing, 5 U. Denv. Crim. L. Rev. 1, 16–17, 17 n.101 (2015).

[552] Stephan, supra note 441, at 995.

[553] Id. at 1020.

[554] See Sharon Dolovich & Alexandra Natapoff, Introduction: Mapping the New Criminal Justice Thinking, *in* The New Criminal Justice Thinking 1, 6 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (explaining that until the practice of stop-and-frisk was challenged in New York, young men of color were disproportionately stopped and "racially inflected policing ensured that ['young men of color in certain neighborhoods'] were marked and brought into the system").

[555] Joseph J. Avery & Joel Cooper, Racial Bias in Post-Arrest and Pretrial Decision Making: The Problem and a Solution, 29 Corn. J.L. & Pub. Pol'y 257, 265 (2019).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

connected individuals."[556] Women of color in particular have been criminalized through drug conspiracy; they're more likely than men to be incarcerated even though they are less likely to play major conspiratorial roles.[557]

Might conspiracy criminalization still be worth it? Few would be willing to decriminalize murder on the ground that its investigation, arrest, prosecution, and punishment have a disparate impact on poor people of color. Similar concerns could be raised about the above costs. Might they build a case against conspiracy that demands more decriminalization across the board than most consider acceptable?

The above costs are *not* just those of criminalization. The prosecution of a single racialized person for murder doesn't present the same risks of guilt by association as a joint trial of dozens of racialized people for conspiracy to commit murder. It's more likely that there will be such a trial, because the prosecution will have less leverage to extract a plea. The prosecution will be less likely to chill speech because speech is likely to play less of an evidentiary role. Out-of-court statements by unavailable witnesses will generally be excluded.

But if indeed conspiracy's costs invite inquiry into broader questions about whether and to what extent to criminalize—so be it. The prospects of decriminalizing conspiracy today are bleaker than those which Johnson perceived in 1973. I'm not trying to advance a case for conspiracy abolition that will persuade a congressional supermajority. My goal has been to convince you that conspiracy abolition is normatively desirable. I regard the risk of association with broader abolitionist arguments that are still more unlikely to become the object of a national consensus as worth taking because there's little plausibility to lose from that association.

[556] Kurth, supra note 371, at 1227.

[557] See Nekima Levy-Pounds, Beaten by the System and Down for the Count: Why Poor Women of Color and Children Don't Stand a Chance Against U.S. Drug-Sentencing Policy, 3 U. St. Thomas L.J. 462, 467–70 (2006) (describing the case of Kemba Smith to illustrate how women have become targets of drug prosecution and incarceration, regardless of "their actual level of involvement in drug-trafficking activity").

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

C. "What About the Real Gangsters?"

On January 17, 2024, a federal jury convicted six reputed members of the Chicago-based Black Disciples' "O-Block"[558] faction of the murder of Carlton Weekly, a Chicago drill rapper[559] known as FBG Duck.[560] Weekly was affiliated with the STL faction of the Gangster Disciples, a rival Chicago street gang.[561] In 2020, Weekly was involved in a personal

[558] O-Block is both a place and a gang affiliation. See Frank Main, 'O Block': The Most Dangerous Block in Chicago, Once Home to Michelle Obama, Chi. Sun-Times (Nov. 2, 2014, at 07:00 ET), https://chicago.suntimes.com/2014/11/2/18458059/o-block-most-dangerous-block-in-chicago-michelle-obama-chief-keef-parkway-gardens-south-king-drive [https://perma.cc/4JJE-KT68]. No one contends that everyone who lives on or around the Parkway Gardens housing complex on the 6400 block of South Dr. Martin Luther King Jr. Drive is a member of the O-Block faction of the Black Disciples. But O-Block members named the 6400 block for slain twenty-year-old gang member Odee Perry, and conspiracy's wide net and legacy of guilt by association make the possibility of conflation disconcerting. See also King Von, "Armed and Dangerous," Genius (Oct. 30, 2020), https://genius.com/King-von-armed-and-dangerous-lyrics [https://perma.cc/7KYJ-KUAP] ("2011 August 11th R.I.P. Odee (Damn) / August 9th two days before I turned seventeen (Damn)"). It's worth noting that Parkway Gardens' fearsome reputation is in part a product of a steady stream of misinformation generated through social media and hip-hop gossip blogs. See Mark Braboy, Matt Chapman & The TRiiBE, Hip-Hop Blogs Spread Fake News About O-Block, Chi. Reader (Sep. 29, 2022), https://chicagoreader.com/news-politics/hip-hop-blogs-spread-fake-news-about-o-block/ [https://perma.cc/37NU-FZG9] (quoting Alderperson Jeanette Taylor as stating that the misinformation is hurtful because it encourages disinvestment and residents "already go through enough and they have enough going on").

[559] On drill, see S.Y., Drill Rap Is One of Hip-Hop's Most Misunderstood Genres, Bleu (Aug. 1, 2023, at 18:04 ET), https://bleumag.com/music/what-is-a-drill-rap/ [https://perma.cc/4B45-PHEH] ("The genre emerged in the early 2010s in Chicago, birthed from the city's tumultuous gang culture and social challenges. The term 'drill' refers to the use of automatic weapons in gang warfare, a subject that often makes a prominent appearance in the genre's lyrics."). Drill lyrics are violent—really violent, even by the standards of gangster rap that is part of drill's DNA—and the ominous and repetitive production makes them all the more menacing. See Forrest Stuart, Ballad of the Bullet: Gangs, Drill Music, and the Power of Online Infamy 3 (2020) (describing drill as "hyperviolent, hyperlocal DIY-style gangsta rap that claims to document street life" and through which drill rappers seek to "prove that they're more ruthless, more delinquent, and more authentic than their competitors").

[560] See 6 Alleged Gang Members Convicted of Killing Chicago Rapper FBG Duck in 2020, Associated Press, https://apnews.com/article/rapper-fbg-duck-killed-trial-chicago-1a5606f5c1f7d525f8dd3be0c44b0268 [https://perma.cc/26H5-5KT5] (last updated Jan. 18, 2024, at 12:49 ET).

[561] 6 O Block Street Gang Members Convicted in 2020 Gold Coast Shooting Death of Chicago Rapper FBG Duck, Sun-Times Media Wire (Jan. 17, 2024), https://abc7chicago.com/post/fbg-duck-death-verdict-o-block-street-gang-chicago-shooting/14333501/ [https://perma.cc/74ZE-EFUU]; John Eligon, Bored, Broke and Armed: Clues to Chicago's Gang Violence, N.Y. Times (Dec. 22, 2016), https://www.nytimes.com/2016/12/22/us/chicago-gang-violence.html.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

feud with fellow rapper Dayvon Bennett, known as King Von.[562] Prosecutors claimed that Weekly was shopping for his son's birthday present when he was spotted by O-Block member Ralph Turpin.[563] Turpin then called fellow gang members to Chicago's upscale Gold Coast neighborhood to shoot Weekly in broad daylight.[564] Bennett was murdered several months later in Atlanta at the Monaco Hookah Lounge, a week after the release of his first studio album *Welcome to O-Block*.[565]

At the time of his death, the twenty-six-year-old Bennett's preternatural lyrical skills, charisma, and good looks had made him a rising star.[566] He was also facing attempted murder charges in Fulton

[562] See Tom Schuba, Entertainment or Evidence of Criminal Enterprise? Drill Rap, King Von Take Center Stage in FBG Duck Murder Trial, Chi. Sun-Times (Nov. 20, 2023, at 21:28 ET), https://chicago.suntimes.com/2023/11/20/23970351/fbg-duck-king-von-lil-durk-oblock-tookaville-black-disciples-gangster-disciples-chicago-gangs [https://perma.cc/27FF-LBHG]; Tom Schuba, After a Trial Lasting Nearly 3 Months, Jury Set to Get Case of Brazen Gold Coast Slaying of Rapper FBG Duck, Chi. Sun-Times (Jan. 2, 2024, at 17:24 ET), https://chicago.suntimes.com/2024/1/2/24022988/fbg-duck-king-von-lil-durk-oblock-tookaville-black-disciples-gangster-chicago-gangs [https://perma.cc/G7SY-K7SJ].

[563] Tom Schuba, Trial Begins in Gold Coast Slaying of Rapper, 'They Had One Mission—to Kill Duck,' Chi. Sun-Times (Nov. 7, 2023, at 19:00 ET), https://chicago.suntimes.com/2023/11/7/23949632/fbg-duck-king-von-drill-rap-carlton-weekly-oblock-chicago-gang-violence-parkway-gardens [https://perma.cc/62DD-4ZV3].

[564] Tom Schuba, FBG Duck's Ex-Girlfriend Says Defendant Sent Her 3 Laughing Emojis After Allegedly Summoning Rapper's Killers, Chi. Sun-Times (Dec. 13, 2023, at 19:54 ET), https://chicago.suntimes.com/2023/12/13/24000697/fbg-duck-king-von-lil-durk-oblock-chicago-gangs-girlfriend-emoji [https://perma.cc/WG83-AB49].

[565] Six people were shot after an altercation, and two of them, including Bennett and Mark Blakely, were killed. See Rebekah Riess & Steve Almasy, Rapper King Von Shot and Killed Outside Atlanta Nightclub, CNN (Nov. 6, 2020, at 21:47 ET), https://www.cnn.com/2020/11/06/us/atlanta-king-von-killed-in-shootout/index.html [https://perma.cc/U46V-42GF]. Another rapper, Timothy Leeks ("Lul Tim"), was charged with Bennett's murder. See Joe Price, King Von Murder Case: Charges Against Lul Tim Dropped, Asian Doll Reacts, Complex (Aug. 21, 2023), https://www.complex.com/music/a/backwoodsaltar/king-von-murder-case-charges-against-lul-tim-dropped [https://perma.cc/479N-88FG]. The charges against Leeks were ultimately dropped for reasons that remain the subject of a rumor. Shawn Grant, Lul Timm's Attorney Confirms His Charges Were Dropped for King Von's Murder, The Source (Aug. 21, 2023), https://thesource.com/2023/08/21/lul-timms-attorney-confirms-his-charges-were-dropped-for-king-vons-murder/ [https://perma.cc/TJ7B-WWBZ].

[566] See Leor Galil, Chicago Drill Star in the Making King Von Dropped His Third Album a Week Before His Untimely Death, Chi. Reader (Nov. 13, 2020), https://chicagoreader.com/music/chicago-drill-star-in-the-making-king-von-dropped-his-third-album-a-week-before-his-untimely-death/ [https://perma.cc/9CY7-PXL4]. For a sampling of what made Von unique, see King Von, King Von - Armed & Dangerous (Official Video) (YouTube, Jan. 11, 2021), https://www.youtube.com/watch?v=tBKYI3-3lMg [https://perma.cc/X8MT-FWBJ]. If

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

County, Georgia, along with fellow driller Durk Banks ("Lil Durk").[567] Prosecutors alleged that Bennett and Banks planned to rob twenty-three-year-old Alexander Witherspoon and shot to kill him when he resisted and fled.[568]

Two years after Bennett's murder, English YouTuber Trap Lore Ross released a four-hour-long documentary on YouTube, which sought to connect Bennett to at least ten gang-related assassinations.[569] Johnny Cash didn't shoot a man in Reno just to watch him die, and you don't need to know a lot about country music to know it. But those who watch "Rap's First Serial Killer" may have difficulty listening to King Von without wondering whether at least some of it refers to real crimes.

In October 2024, the DOJ charged Bennett's close friend, Durk Banks, with conspiring to kill Bennett's killer.[570] One of the world's most celebrated drill rappers, "Lil Durk" has released seven albums that have cracked Billboard's top ten within a week of their release.[571] According to federal prosecutors, he is also the leader of a violent RICO enterprise. His rap collective, "Only The Family" ("OTF"), and his

you've read this far, take two minutes and come back. It'll make all of this much less abstract.

[567] See Balen Mautone, King Von Would've Been Indicted in 2019 Shooting, Fulton County DA Says, HotNewHipHop (Oct. 25, 2022), https://www.hotnewhiphop.com/443859-king-von-wouldve-been-indicted-in-2019-shooting-fulton-county-da-says [https://perma.cc/Q3U3-JDMM]. The charges against Banks were later dropped. See id.

[568] Judge Rules Case Against Rappers Lil Durk, Von King Can Move Forward, Fox 5 Atlanta (June 15, 2019, at 15:50 ET), fox5atlanta.com/news/judge-rules-case-against-rappers-lil-durk-von-king-can-move-forward [https://perma.cc/352X-QSGE]; see also Angelina Velasquez, Lil Durk Cleared of Charges in Connection to 2019 Shooting in Atlanta, Revolt (Oct. 23, 2022), https://www.revolt.tv/article/2022-10-23/246965/lil-durk-cleared-of-charges-in-connection-to-2019-incident [https://perma.cc/TE7Z-4RU8].

[569] See Preezy Brown, 'King Von: Rap's First Serial Killer' Documentary Back on YouTube, Vibe (Apr. 10, 2023, at 17:05 ET), https://www.vibe.com/news/entertainment/king-von-raps-first-serial-killer-documentary-removed-youtube-1234747803/ [https://perma.cc/GWC8-9WJN]; see also Trap Lore Ross, King Von: Rap's First Serial Killer (YouTube, Apr. 11, 2023), https://www.youtube.com/watch?v=mAfwToVGh1s [https://perma.cc/MEG9-7RAV]. Comprehensive though it is in cataloguing Bennett's longstanding connections to gang activity, the video is sensationalist throughout (chapter titles include "Von Becomes a Demon"), and its case for Bennett being a shooter relies to a considerable extent upon Bennett's claims about himself on social media and in his songs. As we'll see, there are good reasons not to take such claims at face value.

[570] Associated Press, Grammy-Winning Rapper Lil Durk Is Charged in Murder-for-Hire Conspiracy, NPR (Oct. 26, 2024 at 12:09 ET), https://www.npr.org/2024/10/26/nx-s1-5166079/lil-durk-charged-murder-conspiracy-la [https://perma.cc/5L4Q-CKEW].

[571] See Lil Durk, Music Charts Archive, https://www.musicchartsarchive.com/artists/lil-durk [https://perma.cc/CBS2-JSSJ] (last visited Feb. 25, 2026).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

leadership role in it, is described in the October indictment in ways that resemble Georgia prosecutors' account of YSL under Jeffery Williams's leadership: "an association-in-fact of individuals who engage in violence . . . at the direction of BANKS and to maintain their status in OTF."[572]

The October indictment alleges that Durk used OTF resources to purchase ski masks, flights, and hotel rooms for other coconspirators to whom he offered a bounty to murder "T.B."[573] T.B. is Tyquian Bowman, who raps as "Quando Rondo" and with whom Banks was feuding in August 2022 when would-be assassins fired at least eighteen shots at Bowman at a Los Angeles gas station.[574] Bowman survived; his cousin, Saviay'a Robinson, did not.[575]

The Banks-Bowman feud took place in part through rap lyrics. In November 2024, a superseding indictment, which named Banks as a lead defendant and added two additional charges, claimed that Banks described the steps that he took to kill Bowman on Babyface Ray's song "Wonderful Wayne & Jackie Boy."[576] The song was released several months after the murder.[577] In it, Banks raps, "Told me they got an addy (go, go) / Got location (go, go) / Green light (go, go, go, go, go) / Look on the news and see your son, / You screamin', 'No, no' (p---y)."[578] As with the rap lyrics in Jeffery Williams's indictment, they are indistinguishable from comparable works in the genre, and Banks's lawyers responded by stating that "when you see an artist's rap lyrics quoted as 'evidence' against them, it is a glaring indication that there is no real evidence against that person."[579]

[572] See Criminal Complaint at 2, United States v. Banks, No. 24-mj-06503 (C.D. Cal. Oct. 24, 2024).

[573] Id. at 3–4.

[574] See id. at 5.

[575] Id.

[576] See Babyface Ray, Wonderful Wayne & Jackie Boy (Official Visualiser) ft. Lil Durk, (YouTube, Dec. 2, 2022), https://www.youtube.com/watch?v=GNfRQveq7iQ [https://perma.cc/MYE5-7RGW].

[577] See First Superseding Indictment at 3, United States v. Banks, No. 24-cr-00621 (C.D. Cal. Nov. 7, 2024).

[578] Id.

[579] See Lil Durk's Attorneys Go After Fed Allegation He Described Murder-for-Hire in Rap Lyrics, TMZ (Dec. 5, 2024, at 16:32 ET), https://www.tmz.com/2024/12/05/lil-durk-attorneys-dispute-federal-allegation-rap-lyrics-describe-murder-for-hire/ [https://perma.cc/LHD4-AJ4K].

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

Bennett, Banks, O-Block, and the Chicago drill scene seem to present a hard case for conspiracy abolition and against the exclusion of rap lyrics from conspiracy prosecutions. Carlton Weekly's murder was organized by a dangerous-by-any-definition group that operated together to do something that it is doubtful O-Block's members would have done on their own. If the allegations are proven against Banks, we could say the same of OTF. Why *not* use whatever tools are available to take down O-Block and OTF? If the effect is to chill *those* kinds of associations and *that* kind of speech, so be it.

First, what was true of gangster rap when it emerged in the 1990s is true of drill through the present day: you can't believe everything you hear. Forrest Stuart documents in an invaluable ethnography of Chicago drill how carefully aspiring and established drillers curate their images.[580] Most of them are not real "shooters." What the outside world sees is often the product of painstaking efforts to fake it convincingly.[581]

This isn't the place to elaborate a comprehensive theory of the justifiable uses (if any) of rap lyrics as evidence in criminal prosecutions. My specific concern with the use of rap lyrics in conspiracy prosecutions is driven by a more general concern with the

[580] See generally Stuart, supra note 559 (describing the role of drill music in Chicago).

[581] See, e.g., id. at 76–78. In *Ballad of the Bullet*, the author Forrest Stuart describes his "unexpectedly close friendship with AJ—a young man whose intimidating online profile had become a regular topic of conversation among youngsters in my after-school program." Id. at 76. Stuart noticed that "AJ always grew quiet when I asked him about his involvement in local gang violence." Id. at 77. Turns out, "the young man had likely never fired a single bullet at a rival" and had to be instructed about how to hold a gun in a music video in order to avoid ridicule. Id. at 77–78. Of course, Stuart's account makes clear that AJ was instructed by someone who did know how to hold a gun, and Stuart finds that this isn't unusual. See id. at 93 (describing how "shooters" "make good on the violence that drillers are so fond of flaunting on social media," including through drive-bys and robberies—but cautioning "that even a cursory look at official crime statistics shows that even the most prolific shooters engage in far less violence that the daily scores of antagonistic songs and videos indicate"). And Bennett may have been the exceptional driller who is also a shooter. See id. at 94 (recounting how the drillers whom Stuart studied "typically considered taking matters into their own hands . . . only when they were completely unable to muster their triggermen"); Jayson Buford, King Von Was a Shooter, Tablet (Aug. 15, 2023), https://www.tabletmag.com/sections/arts-letters/articles/king-von-was-a-shooter [https://perma.cc/7W73-V3H4] (summarizing the Trap Lore Ross video and describing Bennett as "an eager and gleeful gang member, as well as a cold murderer, an abuser of women, and someone who tweeted out his crimes with . . . irreverence"). But it doesn't follow that parsing his lyrics or tweets would have been a good way to adjudicate his case. If your reaction to "Back Again" was along the lines of "something must be wrong with this person," that is sufficient to illustrate the probability of prejudice outweighing probative value.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

use in conspiracy prosecutions of culturally specific forms of expression—particularly by racialized speakers—that are easily misunderstood by those unfamiliar with the culture. Conspiracy's broad liability rules and prosecutor-friendly procedures make this use comparatively easy. It is more difficult to prove that music lyrics, tweets, or Instagram photos that are said to indicate gang affiliation are relevant and nonprejudicial in a murder trial than in a conspiracy trial.

Far from illustrating the need for conspiracy criminalization, O-Block, Bennett, and Banks provide additional grounds for doubts about conspiracy's purported benefits. There's no reason to believe that the prosecution of Weekly's killers would have failed without the crime of conspiracy. Charles Liggins, Kenneth Roberson, Tacarlos Offerd, Christopher Thomas, Ralph Turpin, and Marcus Smart were alleged to have worked together to intentionally kill Carlton Weekly.[582] They were all convicted of murder *along with* conspiracy to commit murder.[583] If conspiracy wasn't necessary for them, neither was it sufficient for Bennett or Banks. If Bennett was in fact a shooter, he wasn't deterred from engaging in psychopathic violence for roughly a decade and was never legally punished for it.[584] Nor, if the prosecution's allegations are true, was Banks deterred from organizing the murder of Bowman in retaliation.

No one should diminish the horrors of gang violence. But conspiracy certainly hasn't stopped it. Those who would contend that conspiracy *reduces* it have their work cut out for them. And conspiracy's structures make it vanishingly unlikely that uneasy questions raised by the use of

[582] See 6 Alleged Gang Members Convicted of Killing Chicago Rapper FBG Duck in 2020, supra note 560.

[583] Id.

[584] To anticipate a response: yes, other people might be deterred or successfully prosecuted, and conspiracy might make it somewhat more probable that Bennett and Banks would be deterred or prosecuted. But if Bennett was and Banks is a real gangster and conspiracy didn't stop their violence, that's reason to question the benefits of conspiracy when it comes to precisely those people who are said to justify its existence in the first place. For a similar point regarding the "dangerous few," the existence of whom is said to justify using prisons to keep the rest of us safe, see Thomas Ward Frampton, The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics, 135 Harv. L. Rev. 2013, 2049, 2051 (2022) (stating that "[d]espite a voluminous legal literature on policing and victims' rights, criminal law scholars rarely address the fact that police are not particularly effective at solving crimes and apprehending suspected criminals" and that "in all likelihood, we have all already shared a bus, a classroom, a pew, or an office with a member of 'the dangerous few'").

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

rap lyrics and other forms of culturally specific expression in criminal prosecutions will ever receive the careful treatment that they require.

D. "What About White Supremacy?"

We've seen that the late nineteenth-century rise of statutory conspiracy was in part a response to White supremacist violence. The use of what was once termed the "Ku Klux Klan Act" to prosecute President Trump for conspiring to violate the right to vote in Georgia fits hand-in-glove with the original functions of the Act. The Enforcement Act of 1871 was designed to put down violent efforts to suppress voting rights and disable governance in the former Confederacy.[585] It seems appropriately applied to a former President who courted the support of White supremacists and encouraged angry mobs of supporters to violently attack the seat of the national government to keep him in office after losing an election.

Conspiracy does provide police and prosecutors with weapons to wield against White supremacists. And those weapons have on occasion been wielded effectively. The first several years' worth of the DOJ's use of the Enforcement Act expressed a federal commitment to civil rights and was remarkably successful in "secur[ing] the personal safety and enforc[ing] the fundamental rights of American citizens."[586]

But this enforcement period was "short-lived" and didn't produce many convictions or lasting security.[587] "About three-quarters of the Ku Klux Klan prosecutions remained untried throughout the South at the end of 1871," and "[b]y the end of 1871, Grant's Attorney General was forced to acknowledge the utter inadequacy of the federal courts to protect citizens from Klan violence."[588] By 1875, "white supremacists [had] destroyed the power of the Republican Party in the South and reduced Southern blacks to their control through organized violence."[589] It would be nearly a century before the federal government again

[585] See generally Ku Klux Klan Act, ch. 22, § 2, 17 Stat. 13, 13–14 (1871) (stating that "if two or more persons . . . shall conspire together" to prevent individuals from exercising their right to vote due to "force, intimidation, or threat," then such persons will be adjudicated as guilty for their crimes).

[586] See Kaczorowski, supra note 140, at 158.

[587] Id.

[588] Id. at 176, 178.

[589] Id. at 186.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

approximated the efforts of the Grant Administration to secure civil rights in the former Confederate states.

Conspiracy played a role in those later efforts. The state of Alabama tried Klan members Collie Leroy Wilkins, William Orville Eaton, and Eugene Thomas for the murder of White civil rights worker Viola Liuzzo in two separate cases, without success.[590] Only when the DOJ tried the three men for conspiracy to deprive Liuzzo of her civil rights were Wilkins, Eaton, and Thomas convicted and sentenced to the maximum penalty of ten years in prison.[591]

We've seen, however, that conspiracy was also used during this time to repress Black freedom movements. The FBI's counterintelligence programs were calculated to "expose[,] disrupt and otherwise neutralize" the Black Panther Party no less than the Ku Klux Klan.[592] From 1967 to 1971, a "Black Nationalist/Hate Group" program operated alongside the FBI's "White Hate Group" program.[593] Aleena Aspervil observes that this program "included organizations that weren't characterized as black nationalist, but were primarily black."[594] Thus, not only the Deacons for Defense and Justice Nation of Islam but the Southern Christian Leadership Conference, Congress of Racial Equality, and the Student Nonviolent Coordinating Committee were targeted due to a "propensity for violence and civil disorder."[595] None, however, attracted more attention than the Panthers, which the FBI infiltrated, sought to provoke into a war with other Black political groups, and outright assassinated.[596]

[590] See James P. Turner, Selma and the Liuzzo Murder Trials: The First Modern Civil Rights Convictions 89 (2018) (explaining that despite the state of Alabama's failure to convict the three Klansmen, the DOJ proceeded with trying its federal conspiracy case against Wilkins, Eaton, and Thomas).

[591] Id.

[592] Aleena Aspervil, Comment, If the Feds Watching: The FBI's Use of a "Black Identity Extremist" Domestic Terrorism Designation to Target Black Activists & Violate Equal Protection, 62 How. L.J. 907, 912 (2019).

[593] Id. at 913–14.

[594] Id. at 914.

[595] Id. (quoting S. Rep. No. 94-755, bk. 3, at 71 (1976)).

[596] See Joshua Bloom & Waldo E. Martin, Jr., Black Against Empire: The History and Politics of the Black Panther Party 5–6 (2016) ("They fed defamatory stories to the press. They wire-tapped Panther offices around the country. They hired dozens of informants to infiltrate Panther chapters. Often, they put aside all pretense and simply raided Panther establishments, guns blazing. . . . FBI operatives forged documents and paid provocateurs to promote violent conflicts between Black Panther leaders—as well as between the Party and other black nationalist organizations—and congratulated themselves when these conflicts

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

Even civil conspiracy may be less effective than a few high-profile victories suggest. The Southern Poverty Law Center, founded in 1971 in Montgomery, Alabama, by Morris Dees and Joe Levin, used civil-conspiracy lawsuits to bankrupt several White supremacist groups.[597] For example, the SPLC showed that two Klansmen had conspired with a higher-ranking member of the United Klans of America ("UKA") to abduct, beat, and strangle to death nineteen-year-old Michael Donald.[598] The result was a seven million dollar verdict that destroyed the UKA's operational capacity.[599] But Bret Garland and Pete Simi have raised doubts about the continued viability of this strategy.

Garland and Simi point to the results of the SPLC's litigation against the Aryan Nations in 2000.[600] The immediate fallout appeared to be positive; Aryan Nations founder Richard Butler declared bankruptcy and forfeited the compound that served as an annual site for an Aryan world congress.[601] But White supremacists were still able to meet in backyards, restaurants, and—most importantly—online, where "key figures in the modern White supremacist movement are highly vocal and visible," and you can find "access to a wide array of White supremacist websites, which contain race-centered manuals for homeschooling and videogames for children, White power music and videos, and racially conscious social networking sites."[602] Whatever financial resources are lost to White supremacists through lawsuits may be exceeded by psychological resources that are gained through them. Lawsuits can contribute to a victimization narrative, which "can lead to increased violence and a stronger sense of collective supremacist identity."[603] Attempting to diminish White supremacy's influence by bankrupting the most tightly structured organizations within the White supremacist

yielded the killing of Panthers."). See generally Jeffrey Haas, The Assassination of Fred Hampton: How the FBI and the Chicago Police Murdered a Black Panther (2019) (describing the murder of Fred Hampton and the legacy of the Black Panthers).

[597] Brett Garland & Peter Simi, A Critique of Using Civil Litigation to Suppress White Supremacist Violence, 36 Crim. Just. Rev. 498, 499 (2011).

[598] Id. at 500.

[599] Desiré Edwards, Decentralizing Hate: The Use of Tort Litigation in Combating Organized Hate, 82 N.C. L. Rev. 1132, 1134 (2004).

[600] Garland & Simi, supra note 597, at 500.

[601] Id. at 501–02.

[602] Id. at 502.

[603] Id. at 505.

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

movement can strengthen the commitments of existing members and help recruit others.[604]

The Georgia prosecution of Trump under the Enforcement Act encountered numerous difficulties that prevented it from concluding before Trump's November 2024 reelection to the presidency. In March, Fulton County Superior Court Judge Scott McAfee quashed six charges for lack of specificity and forced Fani Willis to recuse herself because of a conflict of interest arising from her romantic relationship with special prosecutor Nathan Wade.[605] By comparison, federal prosecution of far-right groups who attempted to obstruct the 2020 presidential election at first seems to be a success story. Approximately sixty individuals were charged by the DOJ with conspiracy—some with seditious conspiracy, most with conspiracy to obstruct an official proceeding.[606] The overwhelming majority were convicted, including former Proud Boys leader Enrique Tarrio, who was convicted and sentenced to twenty-two years in prison.[607]

Garland and Simi wrote nearly a decade before the Capitol insurrection. But the doubts that they raise about the efficacy of civil conspiracy suggest caution about celebrating the results of the Capitol riot prosecutions—particularly when one expands the frame to include Trump's reelection. Republican loyalty to Donald Trump increased over time, thanks in part to a baseless theory that the riot was instigated by—of all things—the FBI.[608] Trump was reelected with larger popular and

[604] See id. at 505–06 (stating that "research on terrorism has identified few deterrent effects from formal responses to terroristic groups" and that "deterrence policies and measures may engender backlashes and raise consciousness within broader movement culture").

[605] See Sam Gringlas, Judge in Georgia Election Interference Case Quashes Some Charges Against Trump, NPR (Mar. 13, 2024, at 10:35 ET), https://www.npr.org/2024/03/13/1238260873/georgia-trump-case-solicitation-counts-dropped [https://perma.cc/K9W9-DQ5N]; Josh Gerstein & Kyle Cheney, Fani Willis Is Disqualified from Prosecuting Trump Election Case in Georgia, Appeals Court Rules, Politico (Dec. 19, 2024, at 11:10 ET), https://www.politico.com/news/2024/12/19/fani-willis-is-disqualified-from-prosecuting-trump-election-case-appeals-court-rules-00195323 [https://perma.cc/DQM8-RWN8].

[606] See Mark Denbeaux & Donna Crawley, Seton Hall Univ. Sch. L., Ctr. for Pol'y & Rsch., The January 6 Insurrectionists: Who They Are and What They Did 6 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4512381 [https://perma.cc/3M6M-Q5A5].

[607] Id. at 41.

[608] Rachel Weiner, Scott Clement & Emily Guskin, Republican Loyalty to Trump, Rioters Climbs in 3 Years After Jan. 6 Attack, Wash. Post (Jan. 2, 2024), https://www.washingtonpost.com/dc-md-va/2024/01/02/jan-6-poll-post-trump; Tom Jackman, Scott Clement, Emily Guskin & Spencer S. Hsu, A Quarter of Americans Believe FBI Instigated Jan. 6, Post-UMD

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

electoral majorities than he was able to capture in 2016, despite unwavering support for the Capitol rioters, whom he called "hostages."[609] And Trump's first acts upon assuming the presidency again in 2025 were to commute Tarrio's sentence and those of fourteen other convicted seditionists, as well as to pardon some 1,500 other people convicted of crimes associated with their participation in the Capitol riot.[610]

E. "What's the Alternative?"

I haven't proposed new systems for targeting group crime or reassured readers that existing systems can fill any gap left by conspiracy abolition. In this regard I depart from Johnson, who stressed the availability of complicity and attempt prosecutions. Indeed, conspiracy was on his account unnecessary and fit for abolition in part *because* we don't need it to get the gangsters.[611] Similarly, Ingram urges that abolition "would not be as drastic as it seems" because "[o]ther inchoate crimes—solicitation, attempt, and aiding and abetting—could take up the slack."[612]

I don't disagree that complicity, attempt, and solicitation capture a great deal of criminal activity that falls within conspiracy's scope. But I'm not confident that complicity, attempt, and solicitation are more or less in good shape. So even if other systems could be used to target all of the activity that now falls within conspiracy's domain, I couldn't urge anyone to take comfort in this.

Poll Finds, Wash. Post (Jan. 4, 2024 at 06:00 ET), https://www.washingtonpost.com/dc-md-va/2024/01/04/fbi-conspiracy-jan-6-attack-misinformation/; A Year After Capitol Attack, Familiar Falsehoods Persist, Associated Press (Jan. 6, 2022, at 17:48 ET), https://apnews.com/article/fact-checking-928706165913 [https://perma.cc/8ML9-4LDE] (describing how Trump supporters have deflected blame to "FBI operatives, members of the anti-fascist movement antifa or a mixture of other groups besides Trump backers").

[609] See Alanna Durkin Richer & Michael Kunzelman, Trump Grants Sweeping Pardon of Jan. 6 Defendants, Including Rioters Who Violently Attacked Police, Associated Press, https://apnews.com/article/capitol-jan-6-pardons-trump-justice-department-8ce8b2a8f8cb602d5eaf85ac7b969606 [https://perma.cc/H29G-QBC2] (last updated Jan. 21, 2025, at 06:12 ET).

[610] Id.

[611] See Johnson, supra note 307, at 1153 ("[M]any of the greatest triumphs of organized crime prosecution have been achieved without the use of a conspiracy charge.").

[612] Ingram, supra note 536, at 1222; see also Larry Alexander & Kimberly D. Kessler, Mens Rea and Inchoate Crimes, 87 J. Crim. L. & Criminology 1138, 1178–81 (1997) (contending that conspiracy should be eliminated but solicitation should be expanded to fill the gap).

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

For similar reasons, I haven't emphasized that conspiracy is unusual outside of common law systems. George Fletcher considers it "one of the mysteries of the common law tradition of punishing crime" that anyone would "ever say that an agreement . . . is itself a criminal act."[613] Civil law systems don't generally criminalize conspiracy as an independent offense, and when they do, the differences quickly overwhelm the similarities.[614]

Thus, section 30(2) of the German penal code provides for the punishment of criminal agreements.[615] But it does so only for agreements to commit felonies, and the offense of conspiracy merges with the predicate crime once it has been either attempted or completed.[616] Further, participation in a criminal agreement is considered to be less culpable than participation in the commission of the predicate crime.[617]

A defender of conspiracy might respond that civil law systems do many things differently than common law systems, not all of which we ought to be jealous. They could further contend that even if conspiracy is not a condition of functioning governance, it is required in the United States to reach activity not covered by complicity and attempt.

Even if complicity and attempt don't cover everything which conspiracy covers, we should abolish conspiracy. It would still be unjustified in view of how little we know about its benefits and how much we know about its costs. Those who would create other systems with more favorable cost-benefit balances or shift conspiracy's work onto existing ones should show the rest of us how it can be done.

CONCLUSION

Conspiracy in the United States is a distinctive cluster of criminal systems. I've argued for its abolition based on specific claims about

[613] George Fletcher, Is Conspiracy Unique to the Common Law?, 43 Am. J. Compar. L. 171 (1995) (book review) ("The notion that an agreement to commit a crime is itself criminal is hard to find in civilian legal cultures.").

[614] See Juliet R. Amenge Okoth, The Crime of Conspiracy in International Criminal Law 77 (2014) (explaining that in "civil law jurisdictions, liability for the criminal agreement only stands if its underlying offence is not executed or even attempted").

[615] Id. at 47.

[616] Id. at 49–51.

[617] Id. at 52 ("One who participates in a criminal agreement under the German criminal law is considered to be less culpable than one who participates in actual commission of the substantive criminal conduct.").

COPYRIGHT © 2026 VIRGINIA LAW REVIEW ASSOCIATION

those systems. Still, the fact that conspiracy has thrived despite profound and glaring flaws in the arguments advanced on its behalf raises difficult questions about criminalization in the United States more generally.

Just how many criminal systems have we built upon superficially plausible cost-benefit claims that have never been rigorously examined? If conspiracy abolition seems hopelessly idealistic, how can we avoid ending up in nonideal places in the future? In places where harmful systems that were once criticized and resisted with just cause are now entrenched beyond any reasonable prospect of dislodgment?

We could start by listening. Listening to the people who are most directly impacted by that criminalization. Even if you're inclined to think that they aren't competent to evaluate criminalization because they don't satisfy your criteria for expertise. Amna Akbar, Sameer Ashar, and Jocelyn Simonson write that the study of social movements can illuminate "alternative arcs of history, often ignored in legal discourse, of people collectively generating ideas and struggling to build and practice alternative possibilities: from the bottom up, often at great risk to their own safety."[618] Had radical critiques of conspiracy been taken more seriously by the academy, bar, and bench rather than being diluted into tepid skepticism, perhaps the arc would have bent away from Cop City.

Or perhaps not. It takes considerable imagination to envision conditions in which those critiques might have been taken more seriously. Perhaps the best that could reasonably have been hoped for during the relevant time periods from legal elites *was* tepid conspiracy skepticism instead of outright acceptance. We cannot run the counterfactuals.

We can and should recognize that there was movement resistance from the beginning, and that those who contributed to it have been more than vindicated. Seemingly sophisticated arguments that were produced later by legal elites in defense of the status quo proved flimsy, even on their own consequentialist terms. We should update our perceptions of criminalization expertise accordingly. Only so can we increase our chances of successfully combatting a future conspiracy.

[618] See Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, Movement Law, 73 Stan. L. Rev. 821, 859–60 (2021).