Confronting the "See What Sticks and Who Flips"[1] Perils of Federal Conspiracy Law

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For almost as long as the concept of the crime of conspiracy has existed, there have been judges who were concerned about how such laws might be unfairly wielded in the hands of prosecutors. In 1925, Justice Learned Hand called conspiracy the "darling of the modern prosecutor's nursery."[2] In 1949, Justice Jackson explained that the crime of conspiracy "is so vague that it almost defies definition…."[3] And, in 1990, Judge Frank H. Easterbrook of the Seventh Circuit noted that "prosecutors seem to have conspiracy on their word processors as Count I; rare is the case omitting such a charge."[4] Defense lawyers have also been criticizing federal conspiracy laws for decades, recognizing that these laws often ensnare people with very little knowledge or direct involvement in criminal wrongdoing.[5] Despite these criticisms, a majority of federal judges, however, have historically been tolerant of increasingly broad uses of conspiracy.

The dissents in the recent *Ocasio*[6] decision give hope that such tolerance might be starting to wane. While the majority opinion reads as a depressing dissertation on all the things that a prosecutor need *not* prove before someone is convicted of conspiracy, three members of the Supreme Court criticized the application of the Court's conspiracy doctrine — at least in a specific Hobbs Act context — and dissented. Chief Justice Roberts and Justice Sotomayor lamented that "conspiracy has long been criticized as vague and elastic, fitting whatever a prosecutor needs in a given case."[7] Citing to a much older decision, they expressed disapproval of the Court's broken promise to "view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions."[8] Perhaps most enlightening was their statement that the majority's decision "rais[es] the specter" that federal prosecutors will "charg[e] everybody with conspiracy and see[] what sticks and who flips."[9] Such candor from the Court regarding what prosecutors can do with unlimited discretion is refreshing.

So what can be done to rein in the problem? Certain states have adopted reforms that curtail overly broad conspiracy laws. It is time for efforts to revise federal conspiracy laws to find some momentum. Here are three much-needed reforms to get us back on track.

But First, A Primer…

There are multiple federal statutes that criminalize conspiracies, but when someone is referring to *the* federal conspiracy statute, they mean 18 U.S.C. § 371. Section 371 reads, in part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined … or imprisoned … or both….

Decades of case law have made clear that none of conspiracy's legal elements must be proven by direct evidence and can all be inferred from circumstantial evidence.[10] Unfortunately, such evidence often includes the use of statements of an alleged co-conspirator, which are admissible for their truth *despite* the fact that they are hearsay.[11] Agreements to conspire need not be explicit; they, too, can be inferred.[12] Long-standing legal precedent requires at least one "overt act" by a conspirator for a conspiracy to occur,[13] but, surprisingly, the overt act need not be illegal. It can actually be legal conduct,[14] or worse, it can even involve constitutionally protected conduct.[15] It can be trivial or minor conduct and can even be an act that "has no tendency to accomplish" the conspiracy.[16] A defendant is vicariously liable for all criminal acts performed by co-conspirators

in furtherance of the conspiracy.[17] In fact, a person even becomes liable for actions anyone in the conspiracy took *before* joining the conspiracy.[18] A person is liable for all these criminal acts even if they did not know the acts took place.[19]

I. All Federal Conspiracy Laws Should Require That Someone Actually *Did* Something

While the main federal conspiracy statute, 18 U.S.C. § 371, requires an "overt act" within the conspiracy to occur before a prosecution should proceed, other federal conspiracy statutes, unfortunately, do not. To prevent unfairness and in support of more uniform law-making, all conspiracy laws should include this element.

For example, a drug conspiracy under 21 U.S.C. § 846 criminalizes many different kinds of drug conspiracies under the Controlled Substances Act, including the conspiracy to distribute, the conspiracy to manufacture, and the conspiracy to possess.[20] *No* conspiracy charge under 21 U.S.C. § 846 requires an overt act.[21] In a different part of the federal code, 18 U.S.C. § 2339B criminalizes conspiring to "provide material support or resources to a foreign terrorist organization."[22] No overt act is needed to prove this conspiracy either.[23] The Racketeer-Influenced and Corrupt Organizations Act (RICO), at 18 U.S.C. § 1962, was originally adopted to make possible the prosecution of mobsters engaged in a widespread criminal enterprise, but now increasingly is used in a much broader manner involving all types of conduct. It also allows prosecution for conspiracy to perform any of the hundreds of actions that fall under the definition of "racketeering" enumerated in § 1961. RICO also fails to require prosecutors to prove an overt act.[24]

In the white collar context, 18 U.S.C. § 1956 covers a wide array of conduct that constitutes the crime of money laundering. The Supreme Court has held that no overt act is required to prosecute a conspiracy to violate § 1956, [25] thus opening the door for the conviction of a person who has agreed with another to do something that constitutes money laundering, but who fails to actually do it.

The legislative adoption of several substantive federal conspiracy laws – from the drug context to the white collar context – without an "overt act" requirement was ill-conceived and should be corrected. All federal conspiracy laws should require that someone actually *did something* before they can be convicted of conspiracy.

To be meaningful, the overt act should consist of a "real and substantial step toward accomplishment of the conspiratorial objective."[26] In addition, the overt act should be accompanied by a specific intent to commit the conspiratorial objective. "This element is all too often discounted or even ignored."[27] The overt act requirement should actually require conduct, not mere speech.[28] Lastly, constitutionally protected speech or conduct should definitely not be permitted to satisfy the overt act requirement.[29] Surely, if a criminal conspiracy did occur, the government can identify *one* overt act that comprises actual conduct and that is not constitutionally protected.

II. Federal Conspiracy Laws Should Not Convict Someone for Something Someone Else Did, That They Might Not Even Have Known About

In 1946, the Supreme Court created a vast new theory of criminal conspiracy liability.[30] In *Pinkerton v. United States*, the defendant was charged with conspiracy to defraud the Internal Revenue Service, even though he was in jail at the time for another crime, and even though it was his brother who actually perpetrated the fraud. A member of a conspiracy may be responsible for "substantive offense[s] . . . committed by one of the conspirators in furtherance of the conspiracy," the Court ruled, even if "there [i]s *no evidence that [he] counseled, advised or had knowledge of those particular acts or offenses.*"[31] In essence, the Court ruled that Daniel Pinkerton was guilty of conspiracy because he and his brother had initially agreed to commit the fraud, thus making Daniel criminally responsible for the acts of his brother even if he did not participate in those acts, or even know they occurred. The only limitations on this theory of liability are that the crime must be "reasonably foreseeable" and "in furtherance of the conspiracy" – elements that are routinely satisfied despite attenuated circumstances.

For over two hundred years, federal courts have rejected common law theories of criminal liability, and when the Court created a new liability for substantive crimes of a co-conspirator, the so-called "*Pinkerton* Rule" created one of the only exceptions to this time-honored bar against judicial law-making.[32] As scholars and defense lawyers have explained, "[t]his is an exceptional assault on the principle of separation of powers, and one that a future Supreme Court could revisit."[33] The unfairly broad extension of criminal liability under *Pinkerton* should be eliminated entirely from the federal

law – either by the Supreme Court or by Congress – as it provides a very powerful tool for potential prosecutorial overreaching. For those reticent to support the abolition of *Pinkerton* liability, they should be comforted by the fact that accomplice liability – the ability to find one person criminally liable for the acts of another –would still exist pursuant to 18 U.S.C. § 2.[34]

III. Federal Conspiracy Laws Should Not Allow Prosecutors to Charge, Juries to Convict, or Judges to Sentence Someone For Two Conspiracies, When Only One, In Fact, Exists

While prosecuting a conspiracy charge, as well as prosecuting a completed substantive crime, may be justifiable because a defendant who both conspires and commits a substantive crime in fact commits two separate crimes, the prosecution of two conspiracies from what amounts to the same set of conspiratorial facts, objectives, members, and intent is unfair.

In *Albernaz v. United States*, the Supreme Court reviewed the conviction of defendants on two conspiracy counts. One count was a conspiracy to import marijuana and the second count was a conspiracy to distribute marijuana.[35] Although the Court recognized that the defendants only actually entered into *one* singular conspiracy, which encompassed both counts,[36] the Court upheld defendants' convictions. They also upheld the consecutive sentences each defendant received, despite the fact that the length of their combined sentences exceeded the maximum that could have been imposed for either conspiracy conviction individually.[37] Two consecutive jail sentences arising from one singular criminal act is excessive. Congress should mandate the merger of multiple conspiracy counts where only one agreement-in-fact exists.[38]

In Sum

Reforms like the three discussed here would not prevent all overreaching or unfairness in the conspiracy law context, but they would make a huge impact on who is charged and for what conduct. Conspiracy laws should not be used to unfairly punish someone with jail time for selling drugs that someone else sold or for writing an email that someone else wrote. Lawmakers need to realize that the "prosecutor's darling" does not help lead us to an accurate or fair outcome, but instead is a powerful dragnet that federal prosecutors use to play the "see what sticks and who flips" game.

Notes

1. *Ocasio v. United States*, 136 S. Ct. 1423, 1445 (2016) (Sotomayor, J., dissenting).

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

3. *Krulewitch v. United States*, 336 U.S. 440, 446-47 (1949) (Jackson, J., concurring).

4. *United States v. Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990).

5. Erin Fuchs, *The Disturbing Reason 97% Of Federal Drug Defendants Plead Guilty*, Business Insider, Dec. 6, 2013, https://www.businessinsider.com.au/human-rights-watch-report-on-plea-agreements-2013-12.

6. *Ocasio,* 136 S. Ct. at 1438.

7. *Id.* at 1445.

8. *Id.* at 1446 (citing *Grunewald v. United States*, 353 U.S. 391, 404 (1957)).

9. *Id.* at 1445.

10. *E.g.*, *United States v. Schmick*, 904 F.2d 936 (5th Cir. 1990).

11. Fed. R. Evid. 801(d)(2)(E). In addition to the other reforms mentioned here, judges should hold hearings to determine conspiracy membership before trial so that they can then determine the admissibility of an alleged co-conspirator's statements under Fed. R. Evid. 801(d)(2)(E). Typically, membership in a conspiracy is determined during trial, *after* the alleged co-conspirator's statement have already been conditionally admitted.

12. *E.g.*, *United States v. Murphy*, 957 F.2d 550 (8th Cir. 1992); *United States v. Boone*, 951 F.2d 1526 (9th Cir. 1991).

13. *Ocasio,* 136 S. Ct. at 1432 n.5.

14. *United States v. Tzolov*, 642 F.3d 314, 320 (2d Cir. 2011).

15. *See* Elizabeth Shumejda, *The Use of Rap Music Lyrics as Criminal Evidence*, 25 NYSBA Entertainment, Arts and Sports Law Journal 3 (2014). In *United States v. Moore*, a video of the defendant rapping about the drug trade was used as evidence to convict him of a drug conspiracy, despite the fact that no drugs were actually seized. 639 F.3d 443, 445, 446-48 (8th Cir. 2011).

16. *Hall v. United States*, 109 F.2d 976 (10th Cir. 1940).

17. *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946).

18. *United States v. Stewart*, 104 F.3d 1377, 1382 (D.C. Cir. 1997).

19. *Id.*

20. 21 U.S.C. § 841(a)(1) (2015).

21. *E.g.*, *United States v. Shabani*, 513 U.S. 10, 16 (1994).

22. 18 U.S.C. § 2339B(a)(1) (2015).

23. *United States v. Abdi*, 498 F.Supp.2d 1048, 1064 (S.D. Ohio 2007).

24. *Salinas v. United States*, 522 U.S. 52, 63 (1997).

25. *Whitfield v. United States*, 543 U.S. 209 (2005).

26. *Resolution of the Board of Directors of the National Association of Criminal Defense Lawyers Concerning Adoption of a Conspiracy Law Policy,* Apr. 19, 2015, https://www.nacdl.org/resolutions/2015sm02/.

27. Ellen C. Brotman, John Cline, Matt Kaiser, Lisa Mathewson, Caleigh Milton, & Steven R. Morrison, *Criminal Conspiracy: Position Paper and Proposals for Reform* April 19, 2015: www.nacdl.org/ConspiracyPositionPaper/, at 33.

28. *Compare United States v. Donner*, 497 F.2d 184, 192 (7th Cir. 1974) ("While that which occurred at the November 20th press conference constituted words rather than action, constitutionally protected speech may nevertheless be an overt act in a conspiracy charge.") *with* Kaitlin Ek, *Conspiracy and the Fantasy Defense: The Strange Case of the Cannibal Cop*, 64 DUKE L.J. 901 (2015) (suggesting that a strengthened overt-act requirement mitigates against the use of pure speech as the actus reus in criminal conspiracy cases).

29. *See* Steven R. Morrison, *Conspiracy Law's Threat to Free Speech*, 15 U. PA. J. CONST. L. 865 (2013).

30. *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946).

31. *Id.* at 646-47; 651 (emphasis added).

32. Bruce A. Antkowiak, *The Pinkerton Problem*, 115 PENN ST. L. REV. 607, 618 (2011); Michael Manning, *A Common Law Crime Analysis of* Pinkerton v. United States: *Sixty Years of Impermissible Judicially-Created Criminal Liability*, 67 MONT. L. REV. (2006), available at http://scholarship.law.umt.edu/mlr/vol67/iss1/4.

33. *See* Position Paper, note 27, *supra*, at 21.

34. 18 U.S.C. § 2 provides that:

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

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

35. 450 U.S. 333, 335 (1981).

36. *Id.* at 336.

37. *Id.* at 335, 342-43.

38. For example, if Defendant 1 and Defendant 2 are charged with (1) conspiracy to import marijuana, (2) conspiracy to distribute marijuana, (3) possession of marijuana with intent to distribute, and (4) distribution of marijuana, and the Defendants only had one agreement to obtain and sell marijuana, then counts (1) and (2) should merge, and both Defendants would only be charged with (and sentenced to) one count of conspiracy. In addition, both Defendants could also be charged with (and sentenced to) the two substantive counts — possession and distribution.

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