

CRIMINAL CONSPIRACY AS FREE EXPRESSION

Martin H. Redish & Michael J.T. Downey***

I. INTRODUCTION

There are a variety of expressive forms or subjects that have never been thought to implicate the First Amendment's guarantee of free expression.¹ For example, no serious scholar has suggested that speech involved in the creation or implementation of a scheme to defraud consumers or to engage in an antitrust violation is deserving of even the slightest constitutional protection.² The same is true for perjury, blackmail, espionage, and a host of other activities, which seem to involve the use of language and communication.³ Simply as a matter of common sense, it would seem, both the scholarly and judicial worlds have chosen summarily to exclude these categories of communication from the First Amendment's protective scope. They have, instead, been relegated to the category of "low value speech."⁴ It is important, however, to

* Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University School of Law. J.D., Harvard Law School, *magna cum laude*; A.B., University of Pennsylvania.

** J.D. Candidate, Northwestern University School of Law, 2013; B.A., Northwestern University.

¹ U.S. CONST. amend. I; see Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1765 (2004) ("Although the First Amendment refers to freedom of 'speech,' much speech remains totally untouched by it.").

² See generally Schauer, *supra* note 1, at 1768, 1771, 1781 (discussing the coverage of the First Amendment and several areas which are untouched by the protection of the First Amendment).

³ See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2546 (2012) (discussing the reasons perjury is unprotected by the First Amendment); *United States v. Kim*, 808 F. Supp. 2d 44, 56 (D.C. Cir. 2011) (stating courts have held the First Amendment gives no protection to the communication of national defense information to those not entitled to receive it, regardless of the fact that it is speech); *Posner v. Lewis*, 965 N.E.2d 949, 953 (N.Y. 2012) ("[I]t has been consistently held that blackmail and extortion are not protected speech.").

⁴ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. . . . [S]uch utterances are no essential part of any exposition of ideas, and are of such *slight social value* as a step to truth

temper these “intuitionist”⁵ insights with the humility that should come from the fact that at least two types of expression, which historically resided in the very same constitutional oblivion—defamation and commercial speech—have, in modern times, been accorded substantial constitutional protection.⁶ These two First Amendment success stories represent victories for principled analysis over intuition in constitutional law. In light of these important First Amendment transformations, it is worth thinking about whether any other areas of expression that have been tossed on the junk heap of First Amendment doctrine simply as an intuitive matter deserve thoughtful reconsideration through the lens of principled constitutional analysis.⁷

In this article, we attempt to do just that for one of those areas of communication: criminal conspiracy. By ignoring the negative intuitionist response to criminal conspiracy on the part of both courts and scholars and instead reasoning in a principled manner from both core premises of free speech theory and analogous applications of First Amendment doctrine, we seek to establish that at least certain expressive elements of traditional criminal conspiracy are, in fact, deserving of substantial constitutional protection. This does not mean that criminal conspiracies should be rendered constitutionally immune from governmental regulation or punishment. It does mean, however, that government should be

that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” (emphasis added); see discussion *infra* Part III.F.

⁵ See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define . . . [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it”); *Dennis v. United States*, 341 U.S. 494, 572, 574 (1951) (Jackson, J., concurring) (presuming the validity of the common law of criminal conspiracy as a means of justifying his intuition that it could not be in conflict with the First Amendment); see also Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1639–56 (1987) (relying on a quasi-intuitionist form of “practical reason” while rejecting rationalist arguments in favor of commercial speech protections).

⁶ Compare *Valentine v. Chrestensen*, 316 U.S. 52, 54–55 (1942) (finding that commercial advertising is not protected by the First Amendment), and *Beauharnais v. Illinois*, 343 U.S. 250, 255–56 (1952) (“[T]he prevention and punishment of [libel has] . . . never been thought to raise any Constitutional problem.” (quoting *Chaplinsky*, 315 U.S. at 571–72)), with *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 268–76 (1964) (including libel within the scope of the First Amendment), and *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–62, 770 (1976) (applying the First Amendment to commercial advertisement).

⁷ See generally Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 96–106 (2007) (criticizing the “intuitionist” approach to First Amendment interpretation, particularly in the context of commercial speech).

required to alter its treatment of criminal conspiracies to accommodate what should be seen as important free speech interests intertwined in the average conspiracy. We believe that in order for criminal conspiracies to lose the First Amendment protection normally afforded to communication, they must involve a distinct, non-expressive, overt act which is intertwined with the communication. Once such an overt act takes place, the communication is appropriately viewed as part and parcel of the act, and therefore no longer appropriately conceptualized as pure expression.⁸ However, absent proof of such an overt act, government should be constitutionally precluded from punishing what is nothing more than pure communication between individuals.

The likely reflexive response of many to our suggested approach to conspiracy is that there could not possibly be any First Amendment value in speech designed to plan a criminal act, and even if there were such a value, the obvious societal harm inevitably flowing from such speech categorically outweighs any such benefit. It is certainly possible to set up a constitutional structure that would reach this conclusion. However, it is not the one our society has adopted in shaping First Amendment law. For example, the Supreme Court has extended significant constitutional protection to expression openly advocating criminal acts,⁹ and it is widely accepted, both that speakers may defame public figures with full constitutional protection and that self-styled Nazis possess a First Amendment right to march in full regalia down the streets of a town populated by concentration camp survivors.¹⁰ From a narrow, purely intuitive perspective, we suppose, both of these conclusions may be questioned. However, the courts have reached these conclusions not by use of reflexive intuitionism, but rather by resort to a more thoughtful and reasoned intellectualized approach, grounded in a commitment to free expression, which goes beyond emotional reflex to consider whether protecting the expression in question furthers more long range constitutional values. By use of a

⁸ See discussion *infra* Part IV.

⁹ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam) (extending First Amendment protection to speech advocating crime unless it is “directed to inciting or producing imminent lawless action” and “likely to incite or produce such action”).

¹⁰ See, e.g., *Collin v. Smith*, 578 F.2d 1197, 1199, 1207 (7th Cir. 1978) (upholding the right of the National Socialist Party of America to hold a public demonstration in Skokie, Illinois, a Chicago suburb with a large Jewish population including several Holocaust survivors).

similar resort to principled analysis, we believe, one should reach the very same conclusion concerning the level of First Amendment protection appropriately extended to criminal conspiracies when they are unaccompanied by an overt non-expressive act.

In the first section of this article we briefly describe the history and doctrine of criminal conspiracy, pointing out problems which have been recognized with conspiracy law wholly unrelated to free speech concerns.¹¹ In the next section, we examine the foundational argument against First Amendment protection for conspiracy, originally fashioned by Professor Kent Greenawalt, that such activity is appropriately conceptualized as pure conduct, rather than expression.¹² We explain the key fallacies in this argument, demonstrating why conspiracies unaccompanied by non-expressive overt acts are as much pure communication as are many categories of fully protected expression.¹³ The following sections explore alternative bases on which to categorically exclude criminal conspiracies from First Amendment protection, including arguments grounded in the inherently private nature of the expression, the communication's inherent worthlessness, its often non-political nature, its danger of causing harm, and the original understanding of the words "freedom of speech" at the time of the First Amendment's framing.¹⁴ The next section applies relevant First Amendment doctrine—specifically, the clear-and-present danger test and its progeny—finding that many conspiracies which could be criminally punished under current law actually merit substantial constitutional protection.¹⁵ We then articulate how we believe the First Amendment should be applied to criminal conspiracies in order to reconcile the need to protect what we deem the legitimate expressive value in this form of communication with society's legitimate interests in preventing criminal acts.¹⁶ The final section briefly concludes.

II. THE LAW OF CRIMINAL CONSPIRACY: HISTORY, DOCTRINE, AND THEORY

The crime of conspiracy is a powerful weapon in the prosecution's

¹¹ See discussion *infra* Part II.A–D.

¹² See discussion *infra* Part III.A–B.

¹³ See discussion *infra* Part III.B.

¹⁴ See discussion *infra* Parts III.C–G.

¹⁵ See discussion *infra* Part IV.

¹⁶ See discussion *infra* Part V.

arsenal that continues to enjoy widespread use throughout the United States.¹⁷ Most states and the federal government have criminalized conspiracy, either by statute or at the common law. Many jurisdictions have different laws against conspiring to commit different crimes. For instance, some make it illegal to conspire to distribute illegal drugs, and others provide blanket prohibitions on conspiring to commit any crime. The generally accepted common law definition of a criminal conspiracy is “an agreement between two or more persons to commit an unlawful act or to commit a lawful act by unlawful means.”¹⁸ As an inchoate offense, conspiracy permits the government to indict groups of confederates who have not yet committed any crime apart from merely agreeing to break the law at some future time.¹⁹ Despite its long history, criminal conspiracy is notably vague and has been the subject of much scholarly and judicial criticism.²⁰ Nevertheless, courts have consistently upheld the use of conspiracy as a cornerstone of criminal law.²¹

A. *Evolution of Modern Conspiracy Law*

The law of criminal conspiracy originated near the turn of the thirteenth century.²² Originally, it essentially functioned as a precursor to modern actions for malicious prosecution, only criminalizing those agreements made to initiate or maintain a false lawsuit.²³ Criminal procedure at the time created a setting in which

¹⁷ Criminal conspiracy law provides such an advantage to the government that Judge Learned Hand once referred to it as “that darling of the modern prosecutor’s nursery.” *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).

¹⁸ 4 CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* § 678 (15th ed. 1996) (footnote omitted).

¹⁹ See *Iannelli v. United States*, 420 U.S. 770, 777 (1975).

²⁰ Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 393 (1922).

²¹ See, e.g., *United States v. Shabani*, 513 U.S. 10, 16 (1994) (indicating that in a criminal conspiracy, the *actus reus* is the criminal agreement); *Iannelli*, 420 U.S. at 777–78 (explaining that the conspiracy and carrying out the crime do not merge and warrant separate sentencing); *Braverman v. United States*, 317 U.S. 49, 53 (holding that one agreement cannot be charged for more than one conspiracy, even if the agreement seeks to violate more than one statute).

²² See Sayre, *supra* note 20, at 394. For a discussion of the history and development of conspiracy law, see *id.* at 394–409.

²³ Under the original definition of conspiracy in medieval England:

Conspirators be they that do confeder or bind themselves by Oath, Covenant, or other Alliance, that every of them shall aid and support the Enterprise of [sic] each other falsely and maliciously to indict, or cause to be indicted [or falsely to acquit people] [sic] or falsely to move or maintain Pleas; and also such as cause Children within Age to appeal Men of Felony, whereby they are imprisoned and sore grieved; and such as retain Men with their

false accusations could be brought more safely and effectively by a group working together than by an individual working alone.²⁴ As a result, in order to combat malicious indictments most effectively the law was fashioned to collectively punish all those who worked together to bring about such a false accusation and the law of criminal conspiracy was born.²⁵ Conspiracy arose not as a common law crime against agreements for any criminal purpose, but rather as a statutory offense to remedy the specific criminal objective of false accusation brought about through collaboration.²⁶ As originally formulated, a conspiracy could not be prosecuted unless the falsely accused was indicted and subsequently acquitted.²⁷ In other words, conspiracy was not initially an inchoate offense at all, since no one could be charged with it until the criminal objective, which was the conspiracy's aim, had been fully realized.

While the law of criminal conspiracy began as a statutory offense punishing only those groups that had successfully completed one of a narrowly defined list of offenses,²⁸ it did not remain that way for long. Eventually, the requirement that a conspiracy must not be punished until it had achieved its criminal objective was relaxed.²⁹ By permitting prosecutions for conspiracies, which had not yet broken any law in pursuit of their objective, the emphasis shifted from punishment of the object of the conspiracy to punishment of

Liveries or Fees for to maintain their malicious Enterprises
Id. at 396 (alteration in original) (quoting An Ordinance Concerning Conspirators, 33 Edw. I (1305) (providing the original definition of conspiracy)); see also 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 228 (Routledge/Thoemmes Press reprint 1996) (1883) (explaining the early meaning of conspiracy).

²⁴ For a discussion of those procedures and their role in the early development of criminal conspiracy law, see Sayre, *supra* note 20, at 394–96.

²⁵ See *id.* at 396.

²⁶ [T]he offense of conspiracy did not originate as a general offense at common law . . . but in a series of statutes dating from the time of Edward I, enacted to remedy a specific abuse. The statutes themselves make clear how narrow and restricted was the early offense of conspiracy. The offense admitted of no broad common-law generalizations; it was limited to offenses against the administration of justice, and was strictly confined to the precise and definite language of the statutes. Combinations only to procure false indictments or to bring false appeals or to maintain vexatious suits could constitute conspiracies.

Id.

²⁷ *Id.* at 397.

²⁸ *Id.* at 400.

²⁹ Conspiracy law began its expansion in 1611 with the famous decision by the Court of Star Chamber in *The Poulterers' Case*. *The Poulterers' Case*, 77 Eng. Rep. 813 (1611). The defendants had brought a false accusation of robbery, but the accused was so obviously innocent that the grand jury refused to indict him. *Id.* at 813. In sustaining an action for conspiracy against the defendants, the court held that the essence of the offense was their combination and not the false indictment and subsequent acquittal. *Id.* at 814.

the agreement itself.³⁰ The remaining major expansion of conspiracy was from a small set of specific statutes each of which outlawed agreements with a particular objective, to a common law crime of agreements with any unlawful objective.³¹

Modern criminal conspiracy law is comprised of a combination of both statutes and common law. Most states and the federal government have enacted one or more criminal conspiracy statutes which outlaw agreements to achieve specifically enumerated objectives.³² The language still embraced by the common law today was first articulated in 1832, establishing the requirement that the objective of a criminal conspiracy be “either to do an unlawful act, or a lawful act by unlawful means.”³³ The term “unlawful” in this context was subsequently interpreted broadly to include acts which are not in themselves criminal,³⁴ and today this broad interpretation has actually been codified in the conspiracy statutes of some states.³⁵

B. *The Elements of Criminal Conspiracy*

The commonly accepted definition of a criminal conspiracy is “an agreement between two or more persons to commit an unlawful act or to commit a lawful act by unlawful means,” and an act may be considered unlawful if either it is a crime or “it is dishonest, oppressive, fraudulent, or immoral.”³⁶ The elements of this crime are (1) an *agreement* between two or more persons, (2) an *unlawful objective*, often specified by statute, and (3) *intent* to achieve that objective.³⁷ Many jurisdictions also impose a fourth requirement

³⁰ Sayre, *supra* note 20, at 399.

³¹ *Id.* at 400.

³² See discussion of the objective element of a criminal conspiracy *infra* Part II.B.

³³ See King v. Jones, 110 Eng. Rep. 485, 487 (1832).

³⁴ See State v. Burnham, 15 N.H. 396, 403 (1844) (“When it is said in the books that the means must be unlawful, it is not to be understood that those means must amount to indictable offenses, in order to make the offence of conspiracy complete. It will be enough if they are corrupt, dishonest, fraudulent, immoral, and in that sense illegal, and it is in the combination to make use of such practices that the dangers of this offence consist.” (citation omitted)); see also Commonwealth v. Donoghue, 63 S.W.2d 3, 6 (Ky. 1933) (noting that an agreement may be indicted under the common law of criminal conspiracy if its objectives “have a tendency to injure the public, to violate public policy, or to injure, oppress, or wrongfully prejudice individuals collectively or the public generally.”).

³⁵ See, e.g., CAL. PENAL CODE § 182(a)(5) (West 2012) (“[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.”).

³⁶ See 4 TORCIA, *supra* note 18, § 678.

³⁷ See, e.g., Donoghue, 63 S.W.2d at 5.

that at least one of the conspirators take some *overt action* furthering the conspiracy's objective.³⁸ However, even when applicable, the overt act component is generally considered nothing more than an evidentiary requirement, not a freestanding element of the crime.³⁹ As an inchoate offense, modern conspiracy law does not require the offenders to have successfully realized their objective in order to be held criminally liable for conspiring to achieve it.⁴⁰

The essence of a criminal conspiracy is the agreement to commit an unlawful act.⁴¹ An essential element of every crime is an act, as it is a well-accepted principle of criminal law that no one may be punished for thoughts alone.⁴² For example, people cannot be punished for merely intending to rob a bank. While they may be prosecuted for attempting to go through with their robbery, attempt and other inchoate offenses still require that they first take actions that are substantial steps towards their criminal object. Given this, conspiracy seems to be an aberration of criminal law; without overt acts, those prosecuted for conspiracy have neither committed the crime that was their objective nor taken any actions towards it. In a criminal conspiracy, however, the agreement itself is considered to be the requisite act.⁴³ One court observed that:

[w]hen two agree to carry [an unlawful design] into effect, the very plot is an act in itself. . . . The agreement is an advancement of the intention which each has conceived in his mind; the mind proceeds from a secret intention to the overt act of mutual consultation and agreement.⁴⁴

Conspirators need do very little before they are considered to have made an agreement, but precisely what they must have actually done is frustratingly vague. For example the Supreme Court has stated that “[t]he agreement need not be shown to have been explicit. It can instead be inferred from the facts and

³⁸ See *Commonwealth v. Rippy*, 732 A.2d 1216, 1221 (Pa. Super. Ct. 1999).

³⁹ *State v. Carbone*, 91 A.2d 571, 576 (N.J. 1952).

⁴⁰ See *Sayre*, *supra* note 20, at 398–99; see also *Iannelli v. United States*, 420 U.S. 770, 777 (1975).

⁴¹ See *Braverman v. United States*, 317 U.S. 49, 53 (1942).

⁴² “The mere harboring of an evil thought, such as the intent to engage in criminal conduct, does not constitute a crime; a crime is committed only if the evil thinker becomes an evil doer.” 1 *TORCIA*, *supra* note 18, § 25.

⁴³ See *United States v. Shabani*, 513 U.S. 10, 16 (1994).

⁴⁴ *Carbone*, 91 A.2d at 574.

circumstances of the case.”⁴⁵ While an agreement in a criminal conspiracy “usually consists of words written or spoken,”⁴⁶ courts have noted that “[a]n explicit or formal agreement to commit crimes can seldom, if ever, be proved and it need not be.”⁴⁷ Rather, a “mere tacit understanding will suffice, and there need not be any written statement or even a speaking of words which expressly communicates agreement.”⁴⁸ While individuals are not automatically deemed to have entered into a conspiracy by simply knowing of its existence,⁴⁹ they may be considered to have entered into the criminal agreement even if they did not agree to aid in all parts of the conspiracy,⁵⁰ did not have knowledge of all its details,⁵¹ or joined the conspiracy after its inception.⁵²

The second element of a conspiracy, the objective, is what transforms an otherwise harmless agreement into a crime.⁵³ Most conspiracy statutes apply only to agreements with specifically defined objectives.⁵⁴ However, many jurisdictions also have statutes that target conspiracies more broadly.⁵⁵ For example, one federal

⁴⁵ *Iannelli*, 420 U.S. at 777 n.10 (citing *Direct Sales Co. v. United States*, 319 U.S. 703, 711–13 (1943)).

⁴⁶ *Dennis v. United States*, 341 U.S. 494, 575 (1951) (Jackson, J., concurring).

⁴⁷ *Commonwealth v. Rippy*, 732 A.2d 1216, 1221 (Pa. Super. Ct. 1999) (quoting *Commonwealth v. Johnson*, 719 A.2d 778, 784 (Pa. Super. Ct. 1998) (citations omitted)).

⁴⁸ *State v. Mapp*, 585 N.W.2d 746, 748 (Iowa 1998) (citations omitted).

⁴⁹ *See Cleaver v. United States*, 238 F.2d 766, 771 (10th Cir. 1956) (“Mere knowledge, approval of or acquiescence in the object or purpose of the conspiracy, without an intention and agreement to cooperate in the crime is insufficient to constitute one a conspirator.”) (citing *Thomas v. United States*, 57 F.2d 1039, 1042 (10th Cir. 1932)).

⁵⁰ *See Salinas v. United States*, 522 U.S. 52, 63–65 (1997) (“A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. . . . One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense.”).

⁵¹ *See Blumenthal v. United States*, 332 U.S. 539, 557–58 (1947).

⁵² *See United States v. Burchinal*, 657 F.2d 985, 990 (8th Cir. 1981).

⁵³ *See* 4 TORCIA, *supra* note 18, at § 679.

⁵⁴ *See, e.g.*, 21 U.S.C. § 846 (2006) (addresses conspiracies to commit “any offense” in the corresponding subchapter, which defines various drug offenses).

⁵⁵ *See, e.g.*, ALA. CODE § 13-A-4-3(a) (2012) (“A person is guilty of criminal conspiracy if, with the intent that conduct constituting an offense be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one or more of such persons does an overt act to effect an objective of the agreement.”); CONN. GEN. STAT. ANN. § 53a-48(a) (West 2012) (“A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such a conspiracy.”); N.H. REV. STAT. ANN. § 629:3(I) (2012) (“A person is guilty of conspiracy if, with a purpose that a crime defined by statute be committed, he agrees with one or more persons to commit or cause the commission of such crime, and an overt act is committed by one of the conspirators in furtherance of the conspiracy.”); WASH. REV. CODE ANN. § 9A.28.040(1) (West 2012); MODEL PENAL CODE § 5.03(1) (1985) (“A person is guilty of criminal

conspiracy statute applies to conspiracies “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.”⁵⁶ Other jurisdictions have enacted general conspiracy statutes which make it illegal to conspire to “commit any crime.”⁵⁷ Some states go further still, criminalizing conspiracies whose aims are immoral, even if not illegal.⁵⁸ The constitutionality of such statutes has been questioned,⁵⁹ but they nevertheless persist in some jurisdictions.⁶⁰ At common law, a criminal conspiracy’s objective must be either an unlawful act or a “lawful act by unlawful means.”⁶¹ “Unlawful” in this context “need not be an offense against the criminal law for which an individual could be indicted or convicted.”⁶²

The third requirement of a criminal conspiracy is that the conspirators actually intend to achieve their objective.⁶³ Conspiracy

conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.”).

⁵⁶ 18 U.S.C. § 371 (2006).

⁵⁷ See, e.g., CAL. PENAL CODE § 182(a)(1) (West 2012) (conspiracy statute).

⁵⁸ See, e.g., *id.* § 182(a)(5) (“[I]t is illegal to 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.”).

⁵⁹ In *Musser v. Utah*, a group of defendants were tried for conspiring to “counsel, advise, and practice polygamous or plural marriage” under a Utah statute, which prohibited conspiracies “[t]o commit . . . act[s] injurious to . . . public morals.” *Musser v. Utah*, 333 U.S. 95, 96 (1948) (quoting UTAH CODE ANN. § 103-11-1 (1943)). Justice Jackson, writing for the majority, remarked of this statute that “[s]tanding by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order.” *Id.* at 97. After noting that this statute might be overbroad and otherwise violate due process, the Court remanded the case to the Supreme Court of Utah in part to clarify the meaning of this language. *Id.* at 98.

⁶⁰ See, e.g., CAL. PENAL CODE § 182(a)(5).

⁶¹ See 4 TORCIA, *supra* note 18, at § 678 (citing *United States v. Hirsch*, 100 U.S. 33, 34 (1879)).

⁶² *Commonwealth v. Donoghue*, 63 S.W.2d 3, 5 (Ky. 1933) (holding that while “unlawful” is not interpreted so narrowly as to require that the objective be a crime, neither is it interpreted so broadly as to include any act which violates the legal rights of another). “The proper rule undoubtedly is that all such acts as have the necessary tendency to prejudice the public or to injure or oppress individuals by unjustly subjecting them to the power of the conspirators are sufficiently tainted with the quality of unlawfulness to satisfy the requirements as to conspiracy.” *Id.* (quoting 5 RULING CASE LAW § 8, at 1069 (William M. McKinney & Burdett A. Rich eds., 1914)). In *Donoghue*, the court held that two “loan sharks” could be indicted for common law criminal conspiracy for confederating to give high-interest, short-term, predatory loans to the poor. *Donoghue*, 63 S.W.2d at 3–4, 9.

⁶³ See, e.g., *United States v. Gallishaw*, 428 F.2d 760, 762, 764 (2d Cir. 1970) (finding improper jury instructions that allowed conviction of a defendant who supplied a gun to his alleged co-conspirators when the defendant had only general knowledge that they would “use the gun to violate the law”). The conspirator must intend by his agreement to bring about a

has been characterized as a “specific intent” crime,⁶⁴ and thus it generally requires that the conspirators have the purpose of achieving their agreement’s objective.⁶⁵ Moreover, it has sometimes been held that conspirators must not only intend to achieve a certain objective, but that they are aware that it is unlawful.⁶⁶ Some jurisdictions have rejected this so-called “corrupt motive” doctrine, holding that intent to take an action prohibited by law is sufficient to convict without requiring knowledge that the action is illegal.⁶⁷

According to common law, no act need be taken by any member of a conspiracy in pursuit of its objective beyond entering into the agreement itself.⁶⁸ However, many conspiracy statutes (notably including the general federal conspiracy statute) require the performance of an “overt act” in pursuit of the conspiracy’s objective.⁶⁹ Typically, these statutes authorize the prosecution of

particular *type* of unlawful conduct, but he need not have in mind the time, place, victim, or other specific circumstances. *See, e.g., id.* at 763 (quoting *Ingram v. United States*, 360 U.S. 672, 678 (1959)) (citations omitted).

⁶⁴ *See, e.g., United States v. Childress*, 58 F.3d 693, 709 (D.C. Cir. 1995) (finding that the district court erred in instructing the jury that conspiracy is a general intent crime); Albert J. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 636 (1941) (“That a specific intent must be proved is clear. It is not the agreement in conspiracy that causes the mischief; it is what the agreement portends.” (citing *People v. Cohn*, 193 N.E. 150 (1934))).

⁶⁵ *See, e.g., MODEL PENAL CODE § 5.03(1)* (1985). When the unlawful objective is itself criminal, the Supreme Court has declared that a “[c]onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself.” *Ingram*, 360 U.S. at 678 (1959) (quoting *Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 920, 939 (1959)) (citing *Pettibone v. United States*, 148 U.S. 197, 204–05 (1893); *Fulbright v. United States*, 91 F.2d 210, 212 (8th Cir. 1937)).

⁶⁶ *See People v. Powell*, 63 N.Y. 88, 92 (1875). “The confederation must be corrupt. The agreement must have been entered into with an evil purpose, as distinguished from a purpose to do the act prohibited in ignorance of the prohibition.” *Id.* (citations omitted).

⁶⁷ *See, e.g., United States v. Cohen*, 260 F.3d 68, 71–73 (2d Cir. 2001) (citing *United States v. Feola*, 420 U.S. 671, 692 (1975)) (rejecting the holding of the New York Court of Appeals in *Powell*).

⁶⁸ *See United States v. Shabani*, 513 U.S. 10, 16 (1994). In *Shabani*, Justice O’Connor wrote for a unanimous court, holding that the drug conspiracy statute, 21 U.S.C. § 846 (2006), does not require the government to prove that a conspirator has committed an overt act in furtherance of the conspiracy. *Id.* at 13. The Court reasoned that, absent specific statutory language to the contrary, Congress intended to adopt the common law definition of conspiracy which has no overt act requirement beyond the agreement itself. *Id.* at 13–14 (citing *Collins v. Hardyman*, 341 U.S. 651, 659 (1951); *Nash v. United States*, 229 U.S. 373, 378 (1913); *Bannon v. United States*, 156 U.S. 464, 468 (1895)); *see* 4 TORCIA, *supra* note 18, at 542.

⁶⁹ *See, e.g., 18 U.S.C. § 371* (2006) (requiring that at least one conspirator perform “any act to effect the object of the conspiracy”); ALA. CODE § 13A-4-3(a) (2012) (requiring “an overt act to effect an objective of the agreement”). Compare CAL. PENAL CODE § 184 (West 2012) (stating that in addition to the agreement itself, the statute requires an act within the state to effect the object of the conspiracy), with ARIZ. REV. STAT. ANN. § 13-1003(A) (2012) (“A

every member of a conspiracy once an overt action has been taken by any one of the conspirators.⁷⁰ In other words, only one member of a conspiracy need take any action after entering the agreement before every member of the conspiracy may be punished. Where a statute is silent on whether an overt act is required, the Supreme Court has held that the common law controls and thus no act must be proven beyond the agreement itself.⁷¹ The overt act need not itself be unlawful;⁷² rather, it may be anything that demonstrates the existence of the conspiracy.⁷³ In *Yates v. United States*, for example, the Supreme Court held that a speech at a Communist Party meeting constituted an overt act of a conspiracy.⁷⁴ Other relatively minimal or purely expressive activities, such as conversing with co-conspirators over the phone⁷⁵ or mailing a

person commits conspiracy if, with the intent to promote or aid the commission of an offense, such person agrees with one or more persons that at least one of them or another person will engage in conduct constituting the offense and one of the parties commits an overt act in furtherance of the offense, except that an overt act shall not be required if the object of the conspiracy was to commit any felony upon the person of another, or to commit an offense under 13-1508 or 13-1704.”). *But see* FLA. STAT. § 777.04(3) (2012) (requiring no overt action beyond the agreement itself).

⁷⁰ *See, e.g.*, 18 U.S.C. § 371 (2006) (stating that all parties to the conspiracy will be fined or imprisoned if “one or more of such persons do any act to effect the object of the conspiracy”); ALA. CODE § 13A-4-3(a) (2012) (“A person is guilty of criminal conspiracy if, with the intent that conduct constituting an offense be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one or more of such persons does an overt act to effect an objective of the agreement.”).

⁷¹ *See Shabani*, 513 U.S. at 13–15 (citing *Collins*, 341 U.S. at 659; *Nash*, 229 U.S. at 378; *Bannon*, 156 U.S. at 468) (construing 21 U.S.C. § 846 (2006)).

⁷² *See United States v. Rabinowich*, 238 U.S. 78, 86 (1915) (citing *United States v. Holte*, 236 U.S. 140, 144 (1915) (stating that for there to be a conspiracy, “[t]here must be an overt act; but this need not be of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy.”); *Joplin Mercantile Co. v. United States*, 236 U.S. 531, 535–36 (1915)); *see also Braverman v. United States*, 317 U.S. 49, 53 (1942) (citing *Bannon*, 156 U.S. at 468–69 (1895); *Joplin Mercantile Co.*, 236 U.S. at 535–36; *Rabinowich*, 238 U.S. at 86; *Pierce v. United States*, 252 U.S. 239, 244 (1920)) (finding that “[t]he overt act . . . need not itself be a crime.”).

⁷³ *See Yates v. United States*, 354 U.S. 298, 334 (1957) (“The function of the overt act in a conspiracy prosecution is simply to manifest ‘that the conspiracy is at work,’ . . . and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence.” (internal citations omitted)).

⁷⁴ *See id.* at 333–34.

⁷⁵ *See United States v. Fellabaum*, 408 F.2d 220, 223–24 (7th Cir. 1969) (calling a coconspirator and instructing him to come to Chicago was sufficient to show an agreement to commit the crime of interstate travel in aid of racketeering); *People v. Weaver*, 550 N.Y.S.2d 467, 469 (App. Div. 3d Dep’t 1990) (rejecting the argument that “telephone conversations are mere words . . . not independent acts”). In *Weaver*, the court stated that the conversations between the defendants involving their plan to procure cocaine in Florida “were not ‘mere discussions’ to form a conspiracy, but were acts to carry out the conspiracy, i.e., the continuing operation of a drug network involving repeated sales of drugs.” *Id.* (citations omitted).

letter,⁷⁶ have been deemed similarly sufficient. Thus, virtually any act is capable of satisfying the overt act requirement; even the concept of an “act” can be defined quite broadly.⁷⁷

Before moving past the doctrinal elements of criminal conspiracy, it is useful to mention some of the procedural peculiarities which characterize this area of the law. Specifically, the admissibility and common use of hearsay and circumstantial evidence are both features of the crime of conspiracy. Criminal conspiracy is an exception to the general rule that hearsay is inadmissible in criminal trials, and consequently any act or declaration by one conspirator related to a conspiracy is admissible against each co-conspirator.⁷⁸ Such acts or declarations are admissible even if made by uncharged coconspirators,⁷⁹ though they must be made during the duration of the conspiracy.⁸⁰ The rationale commonly provided for this exception is that each conspirator is an agent of all of the others.⁸¹ Another procedural peculiarity relating to the standards of evidence in conspiracy trials is the prevalent use of circumstantial evidence. “[M]ost conspiracy convictions are based upon circumstantial evidence.”⁸² Furthermore, courts often admit such evidence according to very lax standards of relevance: “In a conspiracy case, wide latitude is allowed in presenting evidence, and it is within the discretion of the trial court to admit evidence which even remotely tends to establish the conspiracy charged.”⁸³ The Supreme Court has suggested that the secrecy inherent to conspiracies makes their existence much more difficult for the prosecution to establish, and therefore necessitates the extensive

⁷⁶ See *Hyde v. United States*, 225 U.S. 347, 360 (1912).

⁷⁷ See *State v. Stewart*, 643 N.W.2d 281, 297 (Minn. 2002) (“An overt act can be the slightest action on the part of a conspirator.”); see also *State v. Miller*, 677 P.2d 1129, 1132 (Utah 1984) (“If the overt act is done to effect the object of the conspiracy, it does not matter how remote the act may be from accomplishing its object.”).

⁷⁸ See, e.g., FED. R. EVID. 801(d)(2)(E) (creating an exception to the hearsay rule for co-conspirators’ statements “made . . . during and in furtherance of the conspiracy”).

⁷⁹ See *Bigelow v. State*, 768 P.2d 558, 562–63 (Wyo. 1989).

⁸⁰ See FED. R. EVID. 801(d)(2)(E); *Krulewitch v. United States*, 336 U.S. 440, 442–43 (1949) (rendering inadmissible statements made after the conspiracy had expired).

⁸¹ See *Anderson v. United States*, 417 U.S. 211, 218 n.6 (1974) (“The rationale for both the hearsay-conspiracy exception and its limitations is the notion that conspirators are partners in crime. As such, the law deems them agents of one another.” (citations omitted)).

⁸² See *United States v. Iriarte-Ortega*, 113 F.3d 1022, 1024 (9th Cir. 1997); see also *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975) (“The agreement need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of the case.” (citations omitted)).

⁸³ *Nye & Nissen v. United States*, 168 F.2d 846, 857 (9th Cir. 1948) (citations omitted).

use of circumstantial evidence to convict wrongdoers.⁸⁴

C. *The Theory of Criminal Conspiracy*

The crime of conspiracy serves two commonly accepted functions: preventing the “specific object” of the conspiracy from being realized, and stemming the “general danger” incident to group activity with criminal purpose.⁸⁵ According to the “specific object” justification, conspiracy functions as an inchoate offense, permitting the government to prophylactically prevent and punish a crime before it happens.⁸⁶ However, conspiracy law does not require that the conspirators have taken any substantial steps towards their objective,⁸⁷ and thus criminal liability attaches much earlier in the genesis of a crime than it does in other inchoate offenses like attempt. In theory, this earlier prosecution is justified because the act of combining with others both makes the criminal objective more likely to be attained and the criminal intent more clearly manifested than it would be for a defendant acting alone in his attempt to commit a crime.⁸⁸

Also offered as a justification for criminalizing conspiracy is what is assumed to be the general danger of groups of people acting in concert towards a criminal purpose.⁸⁹ According to this rationale, when people work together they are capable of much greater accomplishments than any of them acting individually, for good or ill.⁹⁰ Once a conspiracy has been set into motion, the fear is that even if an individual conspirator backs out, the criminal objective may yet be realized by their remaining co-conspirators.⁹¹

⁸⁴ In *Blumenthal v. United States*, the Court suggested:

Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity.

Blumenthal v. United States, 332 U.S. 539, 557 (1947) (footnotes omitted).

⁸⁵ See *Developments in the Law—Criminal Conspiracy*, *supra* note 65, at 922–25.

⁸⁶ *Id.* at 925.

⁸⁷ Even jurisdictions requiring that some overt act have been committed in furtherance of the conspiracy do not require that such an act bring its objective within reach. See discussion *supra* Part II.B.

⁸⁸ See *Developments in the Law—Criminal Conspiracy*, *supra* note 65, at 924.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

Furthermore, courts have observed that once a group has formed with a particular criminal objective, this confederacy may not long confine itself to this single enterprise, but may pursue other criminal endeavors as well.⁹² The Supreme Court has repeatedly noted that the significant dangers posed by criminal organizations more than justify the use of conspiracy law to protect society.⁹³

D. Criticism of Criminal Conspiracy Law

The law of criminal conspiracy has been the subject of much criticism.⁹⁴ Justice Jackson, a noted critic of conspiracy law,⁹⁵

⁹² See, e.g., *Iannelli v. United States*, 420 U.S. 770, 778 (1975) (“[T]he danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.”) (quoting *Callanan v. United States*, 364 U.S. 587, 593–94 (1961) (internal quotation marks omitted); see also *Developments in the Law: Criminal Conspiracy*, *supra* note 65, at 924–25 (“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))).

⁹³ See, e.g., *Iannelli*, 420 U.S. at 778 (“This Court repeatedly has recognized that a conspiracy poses distinct dangers quite apart from those of the substantive offense. . . . [C]riminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. 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.” (quoting *Callanan v. United States*, 364 U.S. 587, 593–94 (1961))); *Krulewitch v. United States*, 336 U.S. 440, 448 (1949) (Jackson, J., concurring) (“Conspiratorial movements do indeed lie back of the political assassination, the *coup d’etat*, the *putsch*, the revolution, and seizures of power in modern times, as they have in all history.” (footnote omitted)); *United States v. Rabinowich*, 238 U.S. 78, 88 (1915) (“For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.”).

⁹⁴ See, e.g., Sayre, *supra* note 20, at 427 (referring to criminal conspiracy as “the evil genius of our law”). See generally Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1138 (1973) (“The overbreadth of conspiracy and its potential for abuse have been extensively discussed. . . . [A]dvantages which conspiracy provides the prosecution are seen as disadvantages for the defendant so serious that they may lead to unfair punishment unfairly determined.” (citing *Krulewitch*, 336 U.S. at 449–58 (Jackson, J., concurring))).

⁹⁵ See also *Iannelli v. United States*, 420 U.S. 770, 778 (1975) (“Mr. Justice Jackson, [is] no

warned against the abuses of this doctrine in his well-known concurrence in *Krulewitch v. United States*.⁹⁶ He warned that its expansive application “constitutes a serious threat to fairness in our administration of justice.”⁹⁷ He has also referred to criminal conspiracy as “a dragnet device capable of perversion into an instrument of injustice in the hands of a partisan or complacent judiciary.”⁹⁸ Jackson accepted the assumption that a group of persons working together are more dangerous than a lone wrongdoer, and acknowledged the threat to society posed by political conspiracies, both historic and modern.⁹⁹ However, he felt that conspiracy prosecutions should be confined to only the most serious criminal enterprises, and that the extension of it to offenses less severe than large scale organized crime trivializes conspiracy law¹⁰⁰ and unnecessarily expands “the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges.”¹⁰¹

The vagueness inherent in the crime of conspiracy has been the subject of much criticism,¹⁰² leading one commentator to suggest that, “[i]n the long category of crimes there is none . . . more difficult to confine within the boundaries of definitive statement than conspiracy.”¹⁰³ This vagueness stems largely from the uncertainty surrounding what precisely constitutes an “unlawful” objective which will give rise to culpability for conspiracy, often including objectives which are not in themselves criminal.¹⁰⁴ More ambiguities plague the questions of what constitutes an agreement,¹⁰⁵ the defendants’ mental state,¹⁰⁶ as well as the loose

friend of the law of conspiracy.” (citing *Krulewitch*, 336 U.S. at 445 (1949) (Jackson, J., concurring)).

⁹⁶ *Krulewitch*, 336 U.S. at 446 (Jackson, J., concurring).

⁹⁷ *Id.*

⁹⁸ *Dennis v. United States*, 341 U.S. 494, 572 (1951) (Jackson, J., concurring).

⁹⁹ See *Krulewitch*, 336 U.S. at 448–49 (Jackson, J., concurring).

¹⁰⁰ *Id.* at 449 (“[T]he conspiracy concept also is superimposed upon many concerted crimes having no political motivation. . . . [Its unpleasant connotations] may be trivialized, as here, where the conspiracy consists of the concert of a loathsome panderer and a prostitute to go from New York to Florida to ply their trade.” (citations omitted)).

¹⁰¹ See *id.* at 457.

¹⁰² See *id.* at 446–47 (“The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid.” (citations omitted)).

¹⁰³ See Harno, *supra* note 64, at 624.

¹⁰⁴ See discussion *supra* Part II.B.

¹⁰⁵ See discussion *supra* Part II.B.

¹⁰⁶ See discussion *supra* Part II.B; *Developments in the Law: Criminal Conspiracy*, *supra*

evidentiary practices used to prove these elements.¹⁰⁷ Compounding the impact of these ambiguities is the doctrine of civil conspiracy, for which courts may approve even more relaxed interpretations of these standards and, as Justice Jackson pointed out, subsequently import those lax standards into criminal proceedings.¹⁰⁸ The potential for abuse arising from the state of the law led one commentator to note that “[a] doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought.”¹⁰⁹

The hearsay exception for criminal conspiracy has also been criticized. While in theory the existence of a conspiracy must be established before hearsay evidence is admitted, the Supreme Court has declared that the government may use the co-conspirators’ statements to help demonstrate the existence of the conspiracy as well as any particular defendant’s participation in it.¹¹⁰ This logic is circular, admitting hearsay evidence only because it is related to a conspiracy while at the same time only demonstrating the existence of that conspiracy because of that same hearsay evidence. Courts have on occasion sought to limit the potential for abuse through jury instruction, admitting evidence under the hearsay exception only for use against some of the conspirators and instructing the jury to disregard that evidence with respect to the remaining defendants.¹¹¹ Justice Jackson criticized this practice and the hearsay exception in general, reasoning that “a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction.”¹¹²

note 65, at 935–36 (it would be difficult “to conceive of any crime in which the intent is less specific.”).

¹⁰⁷ See discussion *supra* Part II.B (prevalence of circumstantial evidence in criminal conspiracy trials).

¹⁰⁸ See *Krulewitch*, 336 U.S. 440, 451–52 (1949) (Jackson, J., concurring).

¹⁰⁹ Sayre, *supra* note 20, at 393.

¹¹⁰ See *Bourjaily v. United States*, 483 U.S. 171, 180–81 (1987). The Court admitted hearsay evidence to help establish that the defendant was a member of a conspiracy, though, due to the existence of some evidence independent of the hearsay, reserved the question of whether hearsay alone could be used to establish the existence of and participation in a conspiracy. *Id.*

¹¹¹ See, e.g., *Parente v. United States*, 249 F.2d 752, 754–55 (9th Cir. 1957).

¹¹² See *Krulewitch*, 336 U.S. at 453 (1949) (Jackson, J., concurring) (citations omitted).

III. CRIMINAL CONSPIRACY AND FREE EXPRESSION

A. *Treatment of the First Amendment in Criminal Conspiracy*

Virtually never have courts devoted serious consideration to the extent that the First Amendment protects the communicative aspects of a criminal conspiracy. The only occasions on which courts have done so are situations in which the goal of the conspiracy is speech itself. For example, in *Dennis v. United States*, the Court's focus centered on the question of whether the First Amendment protects the right of an individual to advocate the overthrow of the government,¹¹³ advocacy which allegedly was the object of the criminal conspiracy subject to prosecution.¹¹⁴ The speech involved in the act of entering into the conspiracy itself—the agreement—has remained largely free from judicial commentary. Courts that have reached this issue have for the most part summarily assumed that agreements are distinct from speech.

In *Brown v. Hartlage*,¹¹⁵ the Supreme Court briefly discussed whether agreements fall within the ambit of the First Amendment. Justice Brennan wrote for the Court:

Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech.¹¹⁶

While this language seems to suggest a categorical exclusion of unlawful agreements from constitutional protection, there are several reasons to distinguish the subject of this passage from conspiratorial agreements. *Brown* was not about conspiracy at all, but rather about a statute prohibiting politicians running for office

¹¹³ *Dennis v. United States*, 341 U.S. 494, 502–03 (1951) (“[T]eaching and advocacy of the overthrow of the Government . . . contains an element of speech. For this reason, we must pay special heed to the demands of the First Amendment.”).

¹¹⁴ *Id.* at 497 (“The indictment charged the petitioners with wilfully [sic] and knowingly conspiring . . . to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence.”).

¹¹⁵ *Brown v. Hartlage*, 456 U.S. 45 (1982).

¹¹⁶ *Id.* at 55.

from agreeing to compensate constituents in exchange for votes.¹¹⁷ The Court rested its opinion on the premise that “a State may surely prohibit a candidate from buying votes,” and therefore that it must also be able to prohibit one from entering into an agreement to do so.¹¹⁸ Thus, what appears at first to be a general exclusion of unlawful agreements from the First Amendment’s protection, when put in context, is nothing more than a specific condemnation of election fraud.

There appears to be no comprehensive scholarly First Amendment analysis of conspiratorial agreements. However, the First Amendment has on occasion been used by scholars to criticize the application of criminal conspiracy law to conspiracies whose objective is speech.¹¹⁹ For example, one commentator suggested that when the underlying criminal objective is speech, then the usual justifications for criminalizing that speech are no longer sufficient to justify its punishment, and therefore that the prosecution of a criminal in those situations is inappropriate.¹²⁰ In other words, punishing people for conspiring to speak may run afoul of the First Amendment even if the speech which they planned to give would not. As compelling as this criticism may be, it takes aim at only the narrow subset of criminal conspiracies whose unlawful objective is itself speech—in other words, conspiracies to speak. Our First Amendment attack on conspiracy law is much broader. We believe that the First Amendment is implicated both by the agreement itself, and the communication leading up to it. This is so, even if the purpose of the agreement is purely non-expressive. Since agreements are a necessary element common to all conspiracies regardless of their objective, our analysis is therefore applicable to all criminal conspiracies.

B. Agreements as Speech

A threshold issue that must be addressed before any serious application of the First Amendment to conspiracy may be undertaken is whether the communication involved in the creation of conspiratorial agreements should be considered speech in the

¹¹⁷ See *id.* at 54.

¹¹⁸ *Id.* at 54–55.

¹¹⁹ See David B. Filvaroff, *Conspiracy and the First Amendment*, 121 U. PA. L. REV. 189, 189–90 (1972).

¹²⁰ See *id.*

first place. Of course, if such communication is appropriately characterized as conduct rather than expression, the First Amendment would have no applicability to the communication involved in a conspiracy. Even if agreements were viewed as a mixture of expression and conduct, the constitutionality of their regulation by government would be judged under the relatively permissive standard of review first articulated in *United States v. O'Brien*,¹²¹ and ultimately upheld.¹²² It is our position, however, that at least when not intertwined with non-expressive overt acts, the communications involved in an agreement are appropriately characterized as pure expression, much the way that interpersonal communications are generally viewed. This does not necessarily mean that every agreement should be deemed constitutionally insulated from regulation or suppression. Rather, it means merely that agreements should not be categorically excluded from the First Amendment's protective scope.

In his important work on the intersection of speech and crime, Kent Greenawalt argued that a conspiratorial agreement should be considered conduct, rather than speech, because in a conspiracy parties entering into an agreement create a mutual obligation to act, and the formation of this obligation is therefore appropriately characterized as an act, not expression, despite the fact that words are used to create it.¹²³ In Greenawalt's words, an agreement is viewed as conduct rather than speech because it changes the "normative relations" between the parties.¹²⁴ Essentially, he argues that when an agreement actively changes something about a relationship by creating an obligation to act, it more closely resembles action than speech, rendering the First Amendment inapplicable.¹²⁵

Greenawalt acknowledges that not all agreements create this normative shift, and therefore that not all agreements are automatically removed from First Amendment protection.¹²⁶ He draws a distinction between two types of agreements: "strong" agreements, in which "new commitments have unambiguously been undertaken" and therefore to which the First Amendment would not

¹²¹ *United States v. O'Brien*, 391 U.S. 367 (1968).

¹²² *See id.* at 376–77.

¹²³ Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, 743 (1980).

¹²⁴ *Id.*

¹²⁵ *See id.*

¹²⁶ *See id.* at 743–44.

apply, and “weak” agreements, in which the “sense of commitment is present but highly attenuated” and thus should be treated as statements of individual intentions which fall under the umbrella of the freedom of speech.¹²⁷ A “weak” agreement, according to Greenawalt, is one in which the individual’s decision of whether or not to carry out his end of the bargain is more heavily influenced by factors other than the agreement itself.¹²⁸ For example, an agreement made at a political meeting organized to encourage the attendees to dodge the draft, he believes, would likely have less of an impact on each attendee’s individual decision of whether to submit to the draft than would other factors in their respective lives.¹²⁹ Where the normative shift created by an agreement is weak or nonexistent, as in this example, Greenawalt believes, so too is the reason for excluding that agreement from First Amendment protection.¹³⁰

Greenawalt’s agreement-as-conduct argument is simply wrong. To be sure, some agreements are appropriately characterized as conduct.¹³¹ This category includes those agreements which (1) have immediate legal force and/or by their very existence automatically bring about a change in legal rights or relations (for example, a legally enforceable contract),¹³² or (2) are sufficiently intertwined with non-expressive conduct as to render them an element of that conduct (for example, conspiracies intertwined with affirmative acts of preparation).¹³³ However, agreements which do no more than impose on the participants a moral obligation to act in a manner which they are legally allowed to ignore are no more appropriately characterized as conduct than are any other moral obligations induced by expression.¹³⁴ For example, imagine a dying mother who pleads with her son to attend law school and the son reluctantly agrees so she can die happy. In this instance, the moral obligation to act imposed by the communication is as strong as that imposed by any unenforceable agreement, yet we seriously doubt that

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 744.

¹³⁰ *Id.*

¹³¹ *Id.* at 750–51 (discussing the views of Thomas Emerson).

¹³² *Id.* at 680 (discussing the legal implications of the verbalization of marriage vows).

¹³³ *Id.* at 683, 750–51 (asserting that certain speech has a significant effect on the listener, such that it can cause the listener to act).

¹³⁴ *Id.* at 664, 755 (discussing morality’s impact on criminal acts and the views of Benjamin Du Val).

Greenawalt would, for that reason, treat it as conduct; if conduct is to flow from the communication, it will be solely because the recipient of that communication makes the separate choice to do so. Hence, non-enforceable agreements bear far more similarity to situations in which expression induces conduct than they do to situations in which words are appropriately characterized themselves as conduct rather than speech.¹³⁵ The simple reality is that words may induce conduct;¹³⁶ indeed, that is often their very purpose. As Holmes said, “[e]very idea is an incitement.”¹³⁷ He acknowledged that not all agreements—hence not all conspiracies—give rise to the same normative shift.¹³⁸ If the presence of an obligation to act is what takes an agreement outside the realm of speech, then logically the only conspiracies which should be considered conduct would be ones in which the existence of such an obligation is actually demonstrated. Even if strong obligations were generally created by most agreements (a fact which, *ex ante*, can hardly be established), that this is not *necessarily* the case for all criminal agreements makes it insufficient grounds for justifying the *categorical* exclusion of all conspiracies from constitutional protection without first examining whether they have given rise to so strong an obligation *in the individual case*.

Even by its own terms, Greenawalt’s theory cannot justify the categorical exclusion of conspiracies from the First Amendment’s protective scope. Since Greenawalt’s theory cannot logically support the categorical exclusion of all agreements from the definition of speech but instead only those characterized by “strong” agreements,¹³⁹ his theory would require a case-by-case analysis to determine whether the particular agreement in each conspiracy prosecution created the obligation to act necessary to take the conspiracy beyond the First Amendment’s protections. Determining whether the participants in a conspiracy actually felt a genuine obligation to carry out their agreement could present courts with substantial difficulties.¹⁴⁰

¹³⁵ *Id.* at 683 (discussing criminal solicitation).

¹³⁶ *See generally id.* at 680–86 (discussing utterances as action-inducing).

¹³⁷ *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

¹³⁸ *Id.*

¹³⁹ Greenawalt, *supra* note 123, at 744.

¹⁴⁰ *See id.* (noting the difficulties with case-by-case analyses, saying that juries should not determine whether any given conspiracy is strong because that is “hardly an appropriate approach to an important constitutional demarcation” and this determination would instead need to be based upon an objective standard.).

C. Criminal Conspiracy and Originalist Interpretation of the First Amendment

Originalism posits that wherever possible, a constitutional provision's words should be interpreted to mean what they meant at the time of the provision's adoption.¹⁴¹ It is conceivable that an argument grounded in originalism could be fashioned to support categorical exclusion of criminal conspiracies from the First Amendment's scope. If the words "freedom of speech" were not understood in 1791 to include the communications involved in criminal conspiracies, then from an originalist perspective the amendment would not reach those communications.

For three reasons, the argument grounded in originalism fails. First, it is by no means clear that originalism constitutes an appropriate theory of constitutional interpretation.¹⁴² Strong arguments against originalism have been fashioned,¹⁴³ and if one rejects originalism as the controlling interpretive mode, all questions concerning its implication for criminal conspiracy are of course mooted. Second, even if we were to assume originalism's controlling force, it is simply unclear what the words of the First Amendment meant at the time, so originalism is incapable of answering interpretive questions. It is no doubt for this reason that Supreme Court holdings have only rarely relied on originalist understandings and even one of the founders of the originalist movement categorically rejected historical inquiry as a proper mode of First Amendment interpretation.¹⁴⁴ Third, the modern law of

¹⁴¹ See Frederick Schauer, *Defining Originalism*, 19 HARV. J.L. & PUB. POL'Y 343 (1996).

¹⁴² See, e.g., *id.* at 345 (noting that originalism may or may not be the preferable way to understand the Constitution).

¹⁴³ See, e.g., Frank Guliuzza III, *The Practical Perils of an Original Intent-Based Judicial Philosophy: Originalism and the Church-State Test Case*, 42 DRAKE L. REV. 343 (1993) (exploring the deficiencies in originalist methods through application to a test case); see also Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 728 (2009) (criticizing the various originalist approaches taken by Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas, specifically noting that their respective "interpretations of the Establishment Clause are remarkably indifferent to the original purposes of that clause.").

¹⁴⁴ See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971) ("The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject. . . . We are, then, forced to construct our own theory of the constitutional protection of speech. We cannot solve our problems simply by reference to the text or to its history."); see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting) (arguing that history alone is insufficient for proper interpretation of the freedom of speech).

criminal conspiracy did not even exist at the time of the framing.¹⁴⁵

D. Political Speech, Criminal Conspiracy, and the First Amendment

A number of leading First Amendment scholars have taken the position that the only speech worthy of protection is expression related to the political process.¹⁴⁶ This view is based on the premise that the First Amendment is meant to secure the free debate which is necessary for effective political decision-making. The leading proponent of this theory was Alexander Meiklejohn, who argued that the democratic process can lead to wise governing decisions only in the voting booth if the citizens are well informed.¹⁴⁷ He drew an analogy between the sphere of political discourse and a town hall meeting, asserting that the freedom of speech includes that which would contribute to the citizens' informed opinions on the public issues before them.¹⁴⁸ Consequently he felt that "[t]he primary purpose of the First Amendment is . . . that all the citizens shall, so far as possible, understand the issues which bear upon our common life."¹⁴⁹ While the analogy of a New England town hall meeting to the modern sphere of discourse has been questioned as a valid basis for determining free speech protection,¹⁵⁰ Meiklejohn's democratic theory of free expression retains broad appeal.¹⁵¹ However, this narrow construction of the First Amendment would only protect speech that contributes to the listener's actual understanding of political issues.¹⁵² Since an agreement to commit

¹⁴⁵ The common law definition of conspiracy was not articulated until 1832. *See* *Rex v. Jones*, 110 Eng. Rep. 485, 487 (1832).

¹⁴⁶ *See, e.g.*, ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 75 (reprint 1960) (hereinafter *MEIKLEJOHN, POLITICAL FREEDOM*) (noting that the primary purpose of the First Amendment is to enable all citizens to understand common issues so as to allow for full participation in self-government); Bork, *supra* note 144, at 20 ("Constitutional protection should be accorded only to speech that is explicitly political.").

¹⁴⁷ *See generally* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25–26 (Lawbook Exchange, Ltd. 2000) (1948) (hereinafter *MEIKLEJOHN, FREE SPEECH*).

¹⁴⁸ *See* *MEIKLEJOHN, POLITICAL FREEDOM, supra* note 146, at 24.

¹⁴⁹ *Id.* at 75.

¹⁵⁰ *See* Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CALIF. L. REV. 267, 291–92 (1991) (arguing that the New England town meeting is an inapt analogy to modern society).

¹⁵¹ *See, e.g.*, Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567, 1577–78 (2009) ("Meiklejohn's theory has been extremely influential on the Supreme Court and the academy.").

¹⁵² *See* Redish & Lippman, *supra* note 150, at 291.

a crime does not seem like the sort of speech which would have a place at a town hall meeting or otherwise contribute to a political debate, this theory may suggest that conspiracies should be excluded from constitutional protection.

One basic problem with placing criminal conspiracies outside the scope of the First Amendment because they do not constitute political speech is that conspiracies can, in fact, be political. For example, the conspiracy alleged in *Dennis v. United States* was to organize the Communist Party of the United States in order to bring about social change.¹⁵³ While the level of constitutional protection owed to that speech may be debated, the assertion that that speech was political in nature can hardly be contested.¹⁵⁴ Once a given speech has been recognized to concern the public welfare, Meiklejohn's democratic theory of the First Amendment would condemn any suppression or punishment of that speech.¹⁵⁵ Thus, even under this rather restrictive view of free speech, current conspiracy law would lead to convictions for political expression which ought to be protected. Thus, a theory of free expression premised on either the supremacy or exclusivity of political speech does not automatically exclude the communication involved in criminal conspiracies from the First Amendment's protective reach. Rather, such communication would logically be treated in exactly the same manner as other expressive categories: communication related to the political process is to be protected, while all other communications are not.¹⁵⁶ Whatever other reasons there might be to justify the categorical exclusion of criminal conspiracies from the First Amendment's scope, a constitutional preference for political

¹⁵³ See *id.*; *Dennis v. United States*, 341 U.S. 494, 497 (1951).

¹⁵⁴ For a discussion of how the conspiracy prosecuted in *Dennis* could properly be considered protected political speech, see Martin H. Redish, *Unlawful Advocacy and Free Speech Theory: Rethinking the Lessons of the McCarthy Era*, 73 U. CIN. L. REV. 9, 44–45 (2004).

¹⁵⁵ Meiklejohn posited:

If, then, on any occasion in the United States it is allowable to say that the Constitution is a good document it is equally allowable, in that situation, to say that the Constitution is a bad document. . . . These conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant. If they are responsibly entertained by anyone, we, the voters, need to hear them. When a question of policy is 'before the house,' free men choose to meet it not with their eyes shut, but with their eyes open. To be afraid of ideas, any idea, is to be unfit for self-government. *Any such suppression of ideas about the common good, the First Amendment condemns with its absolute disapproval.* The freedom of ideas shall not be abridged.

MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 146, at 27–28 (emphasis added).

¹⁵⁶ See Bork, *supra* note 144, at 20.

speech does not logically support such a conclusion.

In any event, finding the boundary of political speech is difficult because speech can combine political and non-political content. In the words of a leading commentator:

Certain speech, of course, is clearly and obviously recognizable as substantively relevant to democratic self-government. Most speech about public officials falls into this category. But it does not follow from this fact that speech less easily recognizable can with confidence be ruled out as irrelevant to matters of public concern.¹⁵⁷

For example, an advertisement promoting a product because it is friendly to the environment clearly combines elements of political speech with commercial speech directed towards private financial gain. Meiklejohn attempted to draw this distinction based on the intent of the speaker, arguing that the First Amendment “offers defense to men who plan and advocate and incite toward corporate action for the common good,”¹⁵⁸ and not to “men . . . engaged . . . in argument, or inquiry, or advocacy, or incitement which is directed toward [their] private interests, private privileges, private possessions”¹⁵⁹ However, even he noted that public and private interests are “curiously intermingled.”¹⁶⁰ Of particular concern is that even if distinguishing public speech is possible it will need to be done by a government actor.¹⁶¹ This represents a fundamental flaw in Meiklejohn’s theory because “[t]he state lacks ‘moderators’ who can be trusted to know when ‘everything worth saying’ has been said, and the legislature lacks the capacity to write laws that will tell a moderator when to make such a ruling.”¹⁶² Hence a strong argument may be fashioned that a protective dichotomy grounded in the political nature of the expression is unworkable, and therefore improper, wholly apart from its implications for the protection of criminal conspiracies.

¹⁵⁷ Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 670–71 (1990).

¹⁵⁸ MEIKLEJOHN, FREE SPEECH, *supra* note 147, at 46.

¹⁵⁹ *Id.* at 94.

¹⁶⁰ *Id.* at 40.

¹⁶¹ See Kenneth L. Karst, *Equality and the First Amendment*, 43 U. CHI. L. REV. 20, 40 (1975).

¹⁶² *Id.*

E. Public Discourse, Private Speech, and the First Amendment

A number of respected scholars have argued that the First Amendment's focus should be primarily, if not exclusively, on communication which is part of the so-called "public discourse," which refers to the public exchange of information, opinion, and debate. The implication of this theory would be not that conspiracies should be excluded based on their *content*, but rather on the *context* of speech as public or private. The scholar most identified with the public discourse theory is Robert Post. Post agrees with Meiklejohn that the primary purpose of the freedom of speech guaranteed by the First Amendment is to protect democratic self-government.¹⁶³ However, Post believes that this goal is best achieved by securing individuals "warranted conviction that they are engaged in the process of deciding their own fate."¹⁶⁴ In other words, Post recognizes that it is important for each individual to be able to contribute to the forging of "a common will . . . [through] the political public sphere."¹⁶⁵ Unlike Meiklejohn, Post recognizes that it is important for each individual to be able to speak, not merely that everyone hears everything worth hearing.¹⁶⁶ When individuals have the freedom to contribute to the public discourse, they secure their confidence in democratic self-government through their participation in it.¹⁶⁷ Recognizing that individuals may contribute to public discourse in many ways, Post rejects the notion of limiting protection of speech only to those subjects which are of "public concern."¹⁶⁸ However, the emphasis in Post's theory is always on securing speech in the "public realm,"¹⁶⁹ with little or no mention of the value of speech made outside of this realm. Thus, private non-public speech appears implicitly to be excluded from the scope of protected speech because it does not foster a collective sense of participatory democracy.¹⁷⁰ Because conspiracies are invariably conducted privately, hidden from the public realm, they would

¹⁶³ See Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1521 (1997).

¹⁶⁴ *Id.* at 1523.

¹⁶⁵ See Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 LOY. L.A. L. REV. 169, 176 (2007) (quoting 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 81 (Thomas McCarthy trans., Beacon Press 1987) (1981)) (internal quotation marks omitted).

¹⁶⁶ See *id.*

¹⁶⁷ *Id.*

¹⁶⁸ See Post, *supra* note 157, at 634–37.

¹⁶⁹ See *id.* at 667.

¹⁷⁰ See Post, *supra* note 165, at 176.

appear not to fall within the category of public discourse deserving of constitutional protection under this theory.

Wholly apart from its implication for criminal conspiracies, the public discourse approach is plagued by numerous problems and should be rejected, at least for exclusionary purposes. Distinguishing between protected and unprotected speech based on whether it is public (communicated in a way that its content can become known to the public) or private (communicated to a group that is sufficiently small, carefully selected, and confidential enough to avoid the probability of public exposure) is problematic at best.¹⁷¹ When exposed to any significant scrutiny, this theory collapses under its own weight. Since public speech on a political topic clearly must be protected under any theory of the First Amendment, to say that that the very same speech would lose its protection because it was spoken in the privacy of one's home should be immediately suspect. The incoherency of this position becomes apparent when considering a political activist who would have the right to say whatever he wanted during a speech, but presumably would not have the right to privately discuss the same issues with his friends and fellow activists beforehand. How can individuals be expected to achieve self-realization or cultivate their own political views without having the freedom to express their opinions freely among their private circle of acquaintances? If the government has the power to regulate and suppress private discussions among its citizens, then no one could seriously argue that those citizens enjoyed any great degree of expressive or intellectual autonomy, regardless of their freedom to discuss matters in public.

Moreover, while private speech theoretically fails to reach as wide an audience as public speech, thus having less of an impact on the democratic process, it can have a much greater influence on the political decision making of those who do hear it. For example, a private political discussion among close friends may have a much more profound impact on their collective political views than hearing a speech from a stranger on those same issues. Even though their discussion happened behind closed doors or the views expressed were solidified through an agreement to break the law, it cannot be said that their speech did not influence their "common

¹⁷¹ These definitions of public speech and private speech were suggested by Greenawalt as the best means of drawing a principled distinction between the two, though even he acknowledged that such a distinction was difficult to draw. See Greenawalt, *supra* note 123, at 765–66.

will.” Thus, even if the First Amendment is assumed to protect only speech which permits individuals to believe they have made a substantial impact on the political process, this could not justify a categorical exclusion of private speech (and therefore private conspiracies) from constitutional protection because even private speech may have such an impact.

F. Low-Value Speech and the First Amendment

Several scholars and jurists have suggested that all expression may be placed into one of two categories: high-value and low-value speech, with the latter category deserving little or no protection under the First Amendment. If such a distinction were to be drawn, it should come as no surprise that criminal conspiracies would fall into the low-value category. Cass Sunstein pointed to four factors which tend to determine the value of a given category of speech:

First, the speech must be far afield from the central concern of the first amendment, which, broadly speaking, is effective popular control of public affairs. Speech that concerns governmental processes is entitled to the highest level of protection; speech that has little or nothing to do with public affairs may be accorded less protection. Second, a distinction is drawn between cognitive and noncognitive aspects of speech. Speech that has purely noncognitive appeal will be entitled to less constitutional protection. Third, the purpose of the speaker is relevant: if the speaker is seeking to communicate a message, he will be treated more favorably than if he is not. Fourth, the various classes of low-value speech reflect judgments that in certain areas, government is unlikely to be acting for constitutionally impermissible reasons or producing constitutionally troublesome harms.¹⁷²

There are, however, numerous theoretical problems with this approach.¹⁷³ First, the dichotomy between high and low value speech fails to categorically exclude conspiracies from First Amendment protection because they sometimes consist of political

¹⁷² Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 603–04 (1986) (footnotes omitted).

¹⁷³ For a thorough criticism of each of these four factors as a means of distinguishing speech with high-value from speech with little or no value, see Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547, 551–54 (1989).

speech (such as the organization of the communist movement or any other political party) which under Sunstein's test would be accorded the highest level of protection. At best, this theory would exclude conspiracies on a case-by-case basis after determination that they have little value. However, allowing agents of the government to usurp the individual's function of determining the value of expression strikes at the heart of liberal democracy and indeed, at the heart of the foundation underlying the nation's commitment to free expression.¹⁷⁴ To be sure, we have accepted the judiciary's ability to exclude speech from protection because it gives rise to immediate danger of illegal harm.¹⁷⁵ But *danger* is not the same as *low-value*.¹⁷⁶ Thus, while it would probably be safe to predict that criminal conspiracies would frequently fall within the unprotected low-value category, the high-low value dichotomy has no role to play in a proper analysis of the First Amendment.

G. Traditional Exclusion of Conspiracy: Tradition as a First Amendment Command

One objection to the proposition that criminal conspiracies should be protected by the freedom of speech is that they never have been protected before.¹⁷⁷ It is curious how the Court, which has been interpreting both conspiracy law and the First Amendment for a long time, could have neglected to resolve or even recognize a conflict between the two—that is, if one in fact existed. Since the Court has never spoken at any length on this issue,¹⁷⁸

¹⁷⁴ See *id.* at 553.

¹⁷⁵ See *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (per curiam). For a discussion of the applicability of the clear-and-present danger doctrine to criminal conspiracy, see *infra* Part IV.

¹⁷⁶ See Alexander, *supra* note 173, at 549–50.

¹⁷⁷ Cf. Note, *Conspiracy and the First Amendment*, 79 YALE L.J. 872, 878 (1970) (noting that the Supreme Court has not recognized any First Amendment problems in using conspiracy law “to attack associations engaged in expression”).

¹⁷⁸ Justice Jackson briefly noted the potential conflict between the First Amendment and criminal conspiracy law in his concurring opinion in *Dennis v. United States*, in which he voted to uphold the conviction of communist party organizers over First Amendment objections on the grounds that the defendants' conviction was for criminal conspiracy, and that the First Amendment does not apply to conspiracy law. *Dennis v. United States*, 341 U.S. 494, 572–77 (1951) (Jackson, J., concurring). Justice Jackson acknowledged that the actions charged to the accused were essentially speech, and that criminal conspiracies are generally comprised of speech: “Communication is the essence of every conspiracy, for only by its common purpose and concert of action can be brought about or be proved.” *Id.* at 575. However, despite recognizing that it was essentially speech which was being punished, he found that the First Amendment was not implicated because “[s]uch an expansive

commentators are left to conjecture as to the underlying rationale for its continued silence on the matter. Many types of speech are routinely punished without regard to the First Amendment for unspoken reasons not grounded in any doctrinal or conceptual rationale.¹⁷⁹ But mindless reliance on tradition offers no principled justification for the continued wholesale exclusion of a category of expression from the First Amendment's protective reach. Particularly in light of the fact that other traditionally neglected areas of expression—for example, defamation and commercial speech—have come to be recognized as within the scope of the First Amendment,¹⁸⁰ this theory fails to provide an adequate answer to our thesis that such constitutional analysis should be extended to criminal conspiracy as well.

Professor Frederick Schauer, in undertaking an exploration of the types of speech which have and have not been recognized by the First Amendment, pointed out that the law of conspiracy is one of many legal doctrines which have traditionally regulated speech based on its content without raising free speech concerns:

“Speech” is what we use to enter into contracts, make wills, sell securities, warrant the quality of the goods we sell, fix prices, place bets, bid at auctions, *enter into conspiracies*, commit blackmail, threaten, give evidence at trials, and do most of the other things that occupy our days and occupy the courts.¹⁸¹

Upon close examination, so many categories of speech have been routinely regulated without regard for the First Amendment that it appears that subjecting such regulations to constitutional scrutiny is actually the exception rather than the rule.¹⁸² Schauer suggested that no single unifying principle exists which explains the disparate treatment received by these different types of speech; rather, the current state of affairs has evolved from “the political, sociological, cultural, historical, psychological, and economic milieu in which the

interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against . . . agreements and conspiracies deemed injurious to society.” *Id.* at 575–76 (citation omitted). Presuming the validity of conspiracy law, he therefore dismissed the contention that the First Amendment was applicable at all. *Id.* at 572. In so doing, he effectively used the common law to trump the First Amendment. *Id.*

¹⁷⁹ See Schauer, *supra* note 1, at 1772.

¹⁸⁰ *Id.* at 1775–77.

¹⁸¹ *Id.* at 1773 (emphasis added).

¹⁸² *Id.* at 1768.

First Amendment exists and out of which it has developed.”¹⁸³

Ultimately Schauer’s argument does not really provide support for the continued exclusion of conspiracy from First Amendment jurisprudence. Instead it points out several indicators which seem to correlate to those types of speech which, like conspiracy, have remained unprotected thus far. To this end he identifies four factors that contribute to the Court’s willingness to apply constitutional scrutiny to speech:

When . . . speech is public rather than face-to-face, when it is inspired by the speaker’s desire for social change rather than for private gain, when it relates to something general rather than to a specific transaction, and when it is normative rather than informational in content, the First Amendment plainly appears to be implicated. Conversely, therefore, when speech is face-to-face, informational, particular, and for private gain, the implication would be that the First Amendment is irrelevant.¹⁸⁴

Since most conspiracies are agreements made in person which involve the sharing of information about a particular crime for private gain,¹⁸⁵ it should come as no surprise that the Court has not been overly eager to consider whether conspiracies fall within the scope of the First Amendment.

While this may provide an explanation for why the law of criminal conspiracy has not yet received First Amendment protection, it supplies no justification for why conspiracies should not receive such protection. In fact, Schauer recognizes that the First Amendment’s protective scope has been expanding over time, slowly acknowledging new categories of expression previously thought unrelated to the First Amendment.¹⁸⁶ For example, commercial speech was long thought to lie outside the scope of the First Amendment, but now has been recognized to fall within it.¹⁸⁷

¹⁸³ *Id.* at 1787.

¹⁸⁴ *Id.* at 1801 (footnote omitted).

¹⁸⁵ Of course some may be politically motivated and designed to promote a general ideology without regard for the conspirator’s personal gain. *See, e.g.,* *Dennis v. United States*, 341 U.S. 494, 497 (1951) (conspiracy to promote the Communist Party and its ideology). However, Schauer’s contention is not that criminal conspiracies should not receive constitutional protection because they are face-to-face particular and privately motivated, but because most conspiracies have these characteristics, courts are less likely to recognize that conspiracy law in general implicates the First Amendment. *See* Schauer, *supra* note 1, at 1802–03.

¹⁸⁶ *See* Schauer, *supra* note 1, at 1800.

¹⁸⁷ *See* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1978).

Thus, this theory leaves the door open to the possible inclusion of traditionally excluded categories of speech, such as conspiracy, in the future. Furthermore, Schauer analyzes several cases in which the Court has been willing to apply the First Amendment to certain traditionally neglected types of speech, identifying several common factual characteristics that he argues will make the Court more likely to expand the scope of free speech.¹⁸⁸ Specifically, he suggests that if a constitutional challenge is brought by sympathetic litigants¹⁸⁹ based on facts which resemble a domain of speech already protected by the First Amendment,¹⁹⁰ preferably in an area of the law ungoverned by an extensive regulatory scheme,¹⁹¹ the courts may be more willing to accept it. He concludes that “ultimately, the most significant factor in determining the shape of the First Amendment may be the ability of advocates to place their First Amendment-sounding claims on the public agenda.”¹⁹²

It should now be clear that the mere fact that criminal conspiracy has never received First Amendment protection does not imply that it can or should not receive that protection in the future.¹⁹³ The law of criminal conspiracy has been criticized by scholars for many years,¹⁹⁴ so adding free speech rhetoric could easily rekindle the old debates on the validity of criminal conspiracy, returning it to public scrutiny.¹⁹⁵ Thus, should a sympathetic defendant stand accused in a conspiracy case for an agreement which otherwise resembles speech to which First Amendment protections already applied, courts may be willing to take the first step towards extending constitutional protection to this type of speech which has been traditionally ignored.

IV. CRIMINAL CONSPIRACY AND CLEAR-AND-PRESENT DANGER

One could, we suppose, concede that criminal conspiracy (at least when untied to overt acts) involves solely pure communication, yet nevertheless instinctively want to deny protection to criminal

¹⁸⁸ See Schauer, *supra* note 1, at 1800–07.

¹⁸⁹ See *id.* at 1803–05.

¹⁹⁰ See *id.* at 1805.

¹⁹¹ See *id.* at 1805–07.

¹⁹² *Id.* at 1807.

¹⁹³ See discussion *supra* Part III.

¹⁹⁴ See *supra* Part II.D for a discussion of the criticisms of conspiracy law.

¹⁹⁵ Cf. Schauer, *supra* note 1, at 1807 (arguing that the “magnetism” of the First Amendment may bring issues to the forefront of “public and media attention” once a potential free speech violation has been raised).

conspiracy simply because the speech gives rise to a real danger of criminal behavior. We readily concede that criminal conspiracy may well lead to actual criminal conduct. Yet as the long doctrinal history of the First Amendment's application to advocacy of unlawful conduct strikingly demonstrates, the mere possibility of criminal conduct does not justify the suppression of speech. Though the history of the clear-and-present danger test reveals something of a roller coaster ride,¹⁹⁶ under the currently controlling constitutional test for the suppression of unlawful advocacy established in *Brandenburg v. Ohio*,¹⁹⁷ speech openly advocating criminal conduct may be constitutionally suppressed only when "such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action."¹⁹⁸ Thus, for speech *openly and publicly advocating crime*, government is constitutionally prohibited from suppressing or punishing it when there is only a mere possibility of criminal behavior, or even when there is a likelihood of criminal behavior in the near future.¹⁹⁹ Rather, it is solely when the danger of criminal acts is "imminent" that constitutional protection is lost.²⁰⁰ While a surprising amount of ambiguity exists about the meaning of that word,²⁰¹ surely the test must require at least some showing of temporal imminence, lest the word be rendered linguistically incoherent.

In contrast, no showing of temporal imminence is required for criminal conspiracy to be excluded from the First Amendment's

¹⁹⁶ For a description of this doctrinal history, see MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 173–86 (1984).

¹⁹⁷ *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam). See also *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam) (applying the *Brandenburg* test).

¹⁹⁸ *Brandenburg*, 395 U.S. at 447 (emphasis added).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ The traditional scholarly view is that *Brandenburg's* "imminence" test "produce[d] its clearest and most protective standard [for unlawful advocacy protection] under the first amendment." Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754 (1975); see also Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 829 (2001) ("*Brandenburg* clearly implies that the probability that speech may bring about an unlawful act is not a sufficient constitutional basis for criminalizing it, unless the speech is so closely, immediately, and intentionally engaged with a particular unlawful act that the speech is itself part and parcel of that act, or an attempt [in the criminal law sense of the word] to bring it about."). But see *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 246 (4th Cir. 1997), cert. denied, 523 U.S. 1074 (1998) (constructing "imminence" in *Brandenburg* test narrowly). For more detailed discussion of the issue, see MARTIN H. REDISH, *THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA* 103–06 (2005).

protective reach.²⁰² It is difficult to understand such starkly different treatment between criminal conspiracy and unlawful advocacy. Is it because one is more “valuable” than the other? The answer appears to be no: both are steps toward criminal behavior. Is it because criminal conspiracies are more likely to give rise to criminal harm than is advocacy of unlawful conduct? Once again, the answer seems to be no—at least as long as the focus is on criminal conspiracies not intertwined with non-expressive overt acts and *Brandenburg*’s “imminence” requirement is construed to require some sort of meaningful temporal showing.²⁰³ Is it because one involves political speech while the other does not? Again, the answer appears to be no. Nothing in the *Brandenburg* test appears to limit its protections to politically motivated advocacy. In any event, were we to assume that the protective version of clear-and-present-danger is implicitly confined to unlawful advocacy that is politically motivated, we could just as easily provide protection solely to similarly motivated criminal conspiracies. Yet under current doctrine absolutely no criminal conspiracies receive First Amendment protection.

The only even arguably inherent difference between criminal advocacy and criminal conspiracies is the public nature of the criminal advocacy protected under the First Amendment. In contrast, criminal conspiracies are by their nature secret. But we have already demonstrated the inherent flaws in the “public discourse” model of free speech theory.²⁰⁴ Private speech can be as important to the protection of First Amendment values as public discourse. Indeed, in many ways public advocacy of unlawful conduct can be far more harmful than criminal conspiracies, even if it never actually leads to criminal conduct, because of the intimidation to potential victims to which it will often give rise. Consider, for example, speech publicly advocating the assassination of abortion doctors. Such speech can have a seriously harmful impact—both in terms of the infliction of mental distress and the chilling of behavior—on its intended victims, even when it does not lead to actual assassination attempts.²⁰⁵

²⁰² See discussion *supra* Part II.B.

²⁰³ *Brandenburg*, 395 U.S. at 447.

²⁰⁴ See discussion *supra* Part III.E.

²⁰⁵ Kenneth J. Brown, *Assessing the Legitimacy of Governmental Regulation of Modern Speech Aimed at Social Reform: The Importance of Hindsight and Causation*, 10 WM. & MARY BILL RTS. J. 459, 478–79 (2002).

V. WHEN SHOULD CRIMINAL CONSPIRACY *NOT* RECEIVE FIRST AMENDMENT PROTECTION?

The preceding discussion of the contrast between criminal conspiracies and unlawful advocacy lays the groundwork for our proposed test to determine the level of First Amendment protection to be extended to criminal conspiracies. We proceed on the assumption that the First Amendment protects acts of pure communication, regardless of how offensive or worthless society deems that communication to be. What the First Amendment does *not* protect, however, is conduct, even when speech is intertwined with that conduct.²⁰⁶ Thus, the modern law of criminal conspiracy would probably not need major revision in order to satisfy our First Amendment concerns. All we would require in order to exclude criminal conspiracy from the First Amendment's scope is proof of overt, non-expressive acts intertwined with the expression involved in that conspiracy. Thus, we would not extend protection to the communication between a bank robber and the driver of his get-away car about where to meet after the robbery; such "speech" is so intertwined with the criminal acts involved that it takes on the quality of the physical acts themselves. We would not even require a formal attempt. All we would require is demonstration that the conspiracy has extended beyond the stage of pure thought. As noted previously, many criminal conspiracy statutes already require the demonstration of an overt act.²⁰⁷ However, many do not, and even when such a requirement is imposed it can often be satisfied by what amounts either to purely expressive acts (for example, the making of a telephone call) or acts essential to the communication (for example, renting a room for a meeting).

Our suggested approach would not tolerate such an unduly broad definition of "overt acts." It is only when purely non-expressive acts effectively transform the communication into nothing more than an element of the non-expressive behavior that we believe criminal conspiracy should be deemed to lose its First Amendment protection.

²⁰⁶ See REDISH, *supra* note 201, at 119.

²⁰⁷ See, e.g., 18 U.S.C. § 371 (2006); ALA. CODE § 13A-4-3(a) (2012); CAL. PENAL CODE § 184 (West 2012); ARIZ. REV. STAT. ANN. § 13-1003(A) (2011).

VI. CONCLUSION: WHY SHOULD WE CARE ABOUT CRIMINAL CONSPIRACY?

When the dust settles, many may still ask the simple question, “so what?” What is lost if we continue to categorically exclude criminal conspiracies from the First Amendment’s protective reach? The answer is three-fold. Initially, we employ criminal conspiracy as a means of underscoring the inherently irrational intuitionist approach too often used by both courts and scholars to the determination of the First Amendment’s scope.²⁰⁸ We have demonstrated that there is absolutely no principled basis on which to distinguish criminal conspiracy from numerous other forms and categories of expression which have traditionally been extended a significant level of First Amendment protection—and that includes speech that is both arguably worthless and dangerous. An intuitionist approach to the First Amendment is dangerous, because it is so unpredictable and so subject to *sub rosa* ideological manipulation.²⁰⁹ Criminal conspiracy is an all-too-vivid illustration of how modern First Amendment jurisprudence withers under principled critique.

Secondly, we believe that there is something harmful to our constitutional democracy when government is permitted to suppress pure speech for no reason other than it deems it worthless. Absent a showing of compelling interest in preventing a temporally immediate danger, a democratic government should not be allowed to punish or suppress *any* expression, regardless of how bereft of value the rest of us may deem it. That is simply not a way government should act in a liberal democracy which places value on the dignity, integrity, and self-development of the individual citizen. Individuals need to be permitted to say things to each other in private, without fear of governmental punishment under laws as manipulable as conspiracy statutes. Finally, as the disastrous decision in *Dennis v. United States*²¹⁰ so clearly demonstrates,²¹¹ the

²⁰⁸ See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); *Dennis v. United States*, 341 U.S. 494, 572 (1951) (Jackson, J., concurring); Farber & Frickey, *supra* note 5, at 1639–56.

²⁰⁹ See generally Redish, *supra* note 7, at 96–106 (criticizing the “intuitionist” approach to First Amendment interpretation, particularly in the context of commercial speech).

²¹⁰ *Dennis v. United States*, 341 U.S. 494, 516–17 (1951). As one of us has previously written, “*Dennis* has traditionally been viewed as the liberals’ poster child for the evils and suppression of the Cold War period.” Redish, *supra* note 154, at 56.

²¹¹ See Schauer, *supra* note 1, at 1788.

law of criminal conspiracy can easily be perverted to punish unpopular political viewpoints. As Justice Jackson's concurrence in *Dennis* so vividly demonstrates,²¹² such suppression may be shielded by invocation of the "conspiracy" mantra and important First Amendment values are dangerously undermined as a result.

The point of our analysis is not to suggest either that criminal conspirators are upstanding citizens or that the substance of their communications will make the world a better place. But it is uncontroversial to suggest that the First Amendment should be construed to protect dumb, vile, or even dangerous statements. This foundational precept of free speech theory has somehow become lost in the summary exclusion of conspiracies from the First Amendment's scope. Our goal here has been to reconsider that unduly hasty exclusion, much as the Supreme Court has so wisely reconsidered the all-too-hasty exclusions of defamation and commercial speech from the First Amendment's protective reach over the last fifty years.

²¹² *Dennis*, 341 U.S. at 561 (Jackson, J., concurring).