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MULTIPLE OBJECTIVE CONSPIRACIES: THE EFFECT OF *STROMBERG V. CALIFORNIA*

INTRODUCTION

American prosecutors have frequently relied on the well-established law of conspiracy¹ to punish incipient criminal activity.²

1. Conspiracy is defined as an agreement between two or more people to achieve an unlawful objective or a lawful objective by unlawful means. *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 123 (1842); *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 922 (1959) [hereinafter cited as *Developments*]. The defendant is charged with agreeing to achieve at least one objective, 18 U.S.C. § 371 (1976), and performing an overt act in furtherance of that objective. *Developments, supra*, at 945-49; see *Parr v. United States*, 363 U.S. 370, 378 & n.12 (1960); *Yates v. United States*, 354 U.S. 293, 301-02 & n.1 (1957); *United States v. Rabinowich*, 238 U.S. 78, 84 (1915); *Hyde v. United States*, 225 U.S. 347, 367 (1912); *United States v. Wedelstedt*, 589 F.2d 339, 340 (8th Cir. 1978), *cert. denied*, 442 U.S. 916 (1979); *United States v. James*, 528 F.2d 999, 1003 (5th Cir.), *cert. denied*, 429 U.S. 959 (1976); *United States v. Goodwin*, 455 F.2d 710, 714 (10th Cir.), *cert. denied*, 409 U.S. 859 (1972); *United States v. Driscoll*, 449 F.2d 894, 896 (1st Cir. 1971), *cert. denied*, 405 U.S. 920 (1972); *Horwitz v. United States*, 5 F.2d 129, 130-31 (1st Cir. 1925). Unlike most offenses in which the commission of an act is the crime, conspiracy is an inchoate offense. W. LaFave & A. Scott, *Handbook on Criminal Law* § 61, at 459 (1972); Johnson, *The Unnecessary Crime of Conspiracy*, 61 Cal. L. Rev. 1137, 1157-64 (1973); Lecture by Hon. Grover Moscovitz, before the Section on Federal Practice of the Association of the Bar of the City of New York (Mar. 14, 1944), *reprinted in* 3 F.R.D. 380, 392 (1944). The activity proscribed is the agreement among the co-conspirators. *Developments, supra*, at 926; see *American Tobacco Co. v. United States*, 328 U.S. 781, 810-11 (1946); *Pinkerton v. United States*, 328 U.S. 640, 643-44 (1946); *United States v. Falcone*, 311 U.S. 205, 210 (1940); *United States v. Rabinowich*, 238 U.S. 78, 85-86 (1915); *United States v. Murray*, 527 F.2d 401, 408-09 (5th Cir. 1976); Cousens, *Agreement as an Element in Conspiracy*, 23 Va. L. Rev. 898 (1937). Thus, conspiracy is considered to be a crime, separate from the substantive offense. See *Pinkerton v. United States*, 328 U.S. 640, 644 (1946); *United States v. Vastine*, 363 F.2d 853, 854 (3d Cir. 1966); *Allen v. United States*, 89 F.2d 954, 955-56 (4th Cir. 1937). Conspiracy is usually charged under 18 U.S.C. § 371 (1976), the general conspiracy statute. Several other federal statutes have their own conspiracy provisions. *E.g.*, 7 U.S.C. § 2303 (1976) (engage in unfair trade practices affecting producers of agricultural products); 10 U.S.C. § 881 (1976) (commit offenses against the Uniform Code of Military Justice); 15 U.S.C. §§ 1-2 (1976) (restrain or monopolize trade); 16 U.S.C. § 831t (1976) (defraud TVA); 18 U.S.C. § 241 (1976) (injure or oppress citizens in enjoyment of their civil rights); 18 U.S.C. § 286 (1976) (file false claims against the United States); 18 U.S.C. § 351 (1976) (assassinate or kidnap members of Congress); 18 U.S.C. § 372 (1976) (injure or impede any government official in the discharge of his duties); 18 U.S.C. §§ 793-794 (1976) (commit espionage); 18 U.S.C. § 894 (1976) (collect extensions of credit by extortion); 18 U.S.C. § 956 (1976) (injure property of a foreign government); 18 U.S.C. § 1201 (1976) (kidnap); 18 U.S.C. § 1511 (1976) (obstruct enforcement of state or local gambling laws); 18 U.S.C. § 1751 (1976) (kill or kidnap of the President or Vice President of the United States); 18 U.S.C. §§ 2153-2155 (1976) (sabotage war materials or produce defective war materials); 18 U.S.C. § 2192 (1976) (incite seamen to mutiny); 18 U.S.C. §§ 2384-2385 (1976) (advocate the overthrow of the government). Conspiracy requires proof of elements different from the substantive crime. *Developments, supra*, at 925-53.

2. In addition to punishing group criminality, conspiracy reaches preparatory

The issues in conspiracy trials and appeals, however, can be amorphous³ and complicated.⁴ Although conspiracy is usually related to commission of a substantive crime,⁵ the extent to which a conviction of conspiracy depends on a conviction of the underlying crime is

conduct at an earlier point than attempt. Model Penal Code § 5.03, Comment, at 96-97 (Tent. Draft No. 10, 1960); W. LaFave & A. Scott, *supra* note 1, at 459; *Developments, supra* note 1, at 922.

3. 1 National Comm'n on Reform of Federal Criminal Laws, Working Papers 381 (1970) (Report of L. Schwartz and G. Blakey on Conspiracy and Organized Crime).

4. Johnson, *supra* note 1, at 1139-40 (conspiracy is confusing and complex); Zumwalt, *The Conspiracy Confusion*, Trial, Jul./Aug. 1974, at 26, 26-27 (same); *Developments, supra* note 1, at 925-56 (discussing the elements of conspiracy).

5. Callanan v. United States, 364 U.S. 587, 587-88 (1961); Pinkerton v. United States, 328 U.S. 640, 641 (1946); United States v. Head, Nos. 79-5293, 79-5303, 80-6727, slip op. at 4-5 (4th Cir. Feb. 9, 1981); United States v. Anzalone, 626 F.2d 239, 240-41 (2d Cir. 1980); United States v. Wilkinson, 601 F.2d 791, 793 (5th Cir. 1979); United States v. Carman, 577 F.2d 556, 560 (9th Cir. 1978); United States v. Gallagher, 576 F.2d 1028, 1031 (3d Cir. 1978); United States v. Mangan, 575 F.2d 32, 37 (2d Cir.), *cert. denied*, 439 U.S. 931 (1978); United States v. Dansker, 537 F.2d 40, 44 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); United States v. Papadakis, 510 F.2d 287, 289-90 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); United States v. Honneus, 508 F.2d 566, 569 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); United States v. Baranski, 484 F.2d 556, 558 (7th Cir. 1973); United States v. Goodwin, 455 F.2d 710, 711, 714 (10th Cir.), *cert. denied*, 409 U.S. 859 (1972); United States v. Driscoll, 449 F.2d 894, 895 (1st Cir. 1971), *cert. denied*, 405 U.S. 920 (1972); United States v. Peltz, 433 F.2d 48, 49 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971); United States v. Bottone, 365 F.2d 389, 391 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966); see W. LaFave & A. Scott, *supra* note 1, § 62, at 494; 8 J. Moore, Federal Practice ¶ 8.06[2], at 8-32 to 8-37 (2d ed. 1980); Johnson, *supra* note 1, at 1143; Klein, *Conspiracy—The Prosecutor's Darling*, 24 Brooklyn L. Rev. 1, 2 (1957). See generally *Developments, supra* note 1. Charging conspiracy in addition to the substantive crime provides the government with another chance to convict defendants. "[C]onspiracy is useful to supplement the generally restrictive law of attempts," Johnson, *supra* note 1, at 1137, and "to make it easier to impose criminal punishment on members of groups that plot forbidden activity." *Id.* at 1139. Conspiracy law also provides that co-conspirators are liable for every reasonably foreseeable crime committed by members of the group. See Model Penal Code § 5.03, Comment, at 96 (Tent. Draft No. 10, 1960); Johnson, *supra* note 1, at 1146-50; Klein, *supra*, at 8-9. A conspiracy charge also gives the prosecution an important evidentiary advantage in that proof of almost any overt act will satisfy the conspiracy statute. Yates v. United States, 354 U.S. 298, 334 (1957); Braverman v. United States, 317 U.S. 49, 53 (1942); United States v. Barrera, 547 F.2d 1250, 1257 (5th Cir. 1977); United States v. Scallion, 533 F.2d 903, 911 (5th Cir. 1976); Smith v. United States, 92 F.2d 460, 460 (9th Cir. 1937); Kaplan v. United States, 7 F.2d 594, 596 (2d Cir.), *cert. denied*, 269 U.S. 582 (1925); Model Penal Code § 5.03(5), Comment, at 140 (Tent. Draft No. 10, 1960); Pollack, *Common Law Conspiracy*, 35 Geo. L.J. 328, 338 (1947); *Developments, supra* note 1, at 945-46; Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 Harv. L. Rev. 276, 278-80 (1948) [hereinafter cited as *Conspiracy Dilemma*]. The only requirement is that the overt act must be separate from the formation of the agreement. *Developments, supra* note 1, at 946 & n.172. Prosecutors also gain

unclear.⁶ When the substantive crime with which a defendant is charged is alleged as the objective of the conspiracy, some elements of conspiracy are identical to the elements of the substantive crime. The *mens rea* of the conspiracy and the substantive crime, for example, are nearly indistinguishable.⁷ Yet, conspiracy requires proof that the defendants intended to agree and to commit the substantive crime.⁸ Moreover, a substantive crime can be alleged as an objective or as an overt act⁹ in furtherance of the conspiracy. As the objective of the conspiracy, the crime need not be accomplished. The overt act, however, must be performed.¹⁰ Because courts have failed to make this distinction, they have confused the role of the substantive crime in the conspiracy conviction.¹¹

The effect of this confusion is readily apparent when a conspiracy conviction is appealed. Under the federal conspiracy statute,¹² defen-

numerous procedural advantages by charging conspiracy. Members of a conspiracy can be joined for trial; venue is proper in any jurisdiction in which an overt act was committed as well as the jurisdiction in which the agreement was made; the statute of limitations does not begin to run until the conspiracy is abandoned or successfully accomplished; and out-of-court statements made in furtherance of the conspiracy are not hearsay. Fed. R. Evid. 801(d)(2)(E); W. LaFave & A. Scott, *supra* note 1, § 61, at 455-59; Johnson, *supra* note 1, at 1166-68; Klein, *supra* note 5, at 9-10; *Conspiracy Dilemma*, *supra* note 5, at 282-83. Much authority, however, states that conspiracy prosecutions overly prejudice defendants. *Krulewitch v. United States*, 336 U.S. 440, 448-49 (1949) (Jackson, J., concurring); Arens, *Conspiracy Revisited*, 3 Buffalo L. Rev. 242, 263-68 (1954); Johnson, *supra* note 1, at 1139, 1144; Klein, *supra* note 5, at 4; *Conspiracy Dilemma*, *supra* note 5, at 277-84.

6. At common law, conspiracy merged with the completed substantive offense so that defendants could be convicted of either the completed crime or conspiracy, but not both. *Callanan v. United States*, 364 U.S. 587, 589 (1961); W. LaFave & A. Scott, *supra* note 1, § 63, at 494; Johnson, *supra* note 1, at 1150. The modern rule, followed in both the federal system, *e.g.*, *Callanan v. United States*, 364 U.S. 587, 589-90 (1961); *Pinkerton v. United States*, 328 U.S. 640, 643 (1946), and in the vast majority of the states, 66 Va. L. Rev. 241, 248 & n.57 (1980), is that conspiracy is a crime separate from the substantive offense, *Pinkerton v. United States*, 328 U.S. 640, 643 (1946), and the defendant can receive consecutive sentences for both offenses if the legislature evinces such an intent. *Callanan v. United States*, 364 U.S. 587, 597 (1961).

7. *Developments*, *supra* note 1, at 935. Conspiracy has been criticized as a crime consisting of intent only. W. LaFave & A. Scott, *supra* note 1, § 61, at 460; *Developments*, *supra* note 1, at 925 & n.29.

8. W. LaFave & A. Scott, *supra* note 1, § 61, at 464-65; Harno, *Intent in Criminal Conspiracy*, 89 U. Pa. L. Rev. 624 (1941); Zumwalt, *supra* note 4, at 27; *Developments*, *supra* note 1, at 935-37.

9. *E.g.*, *Indictment at 3, 6, 7, United States v. Anzalone*, 626 F.2d 239 (2d Cir. 1980); *United States v. Tarnopol*, 561 F.2d 466, 476 (3d Cir. 1977); *United States v. Goodwin*, 455 F.2d 710, 714 (10th Cir.), *cert. denied*, 409 U.S. 859 (1972); *cf. United States v. Driscoll*, 449 F.2d 894, 897 n.3 (1st Cir. 1971) (attempt to smuggle aliens could have been a sufficient overt act), *cert. denied*, 405 U.S. 920 (1972).

10. *See* note 1 *supra*.

11. W. LaFave & A. Scott, *supra* note 1, § 62, at 477; *see United States v. Tarnopol*, 561 F.2d 466, 474 (3d Cir. 1977).

12. The general conspiracy statute, 18 U.S.C. § 371 (1976), prohibits agreements

dants are frequently convicted of more than one substantive crime and of conspiracy to commit those crimes.¹³ The circuits are divided on whether the conspiracy conviction should stand if one of the substantive counts is overturned on appeal.¹⁴ The First, Third, Fourth, Fifth, and Ninth Circuits reverse the conspiracy conviction,¹⁵ holding that the jury may have convicted defendants on an invalid basis.¹⁶ The Second, Sixth, and Eighth Circuits, on the other hand, uphold the conspiracy conviction if it could have been based on any of the

"to commit any offense against the United States, or to defraud the United States . . . in any manner or for any purpose." United States criminal law does not punish a group of individuals unless it is clear that they intended to do something contrary to law. See note 1 *supra*. The objective of defrauding the United States has been held to include not only fraud, *United States v. Woll*, 157 F. Supp. 704, 708-09 (E.D. Pa. 1957), but also impairing, obstructing, or defeating the lawful function of any governmental department, *Haas v. Henkel*, 216 U.S. 462, 479 (1910); *accord*, *Dennis v. United States*, 384 U.S. 855, 861 (1966); *United States v. Johnson*, 383 U.S. 169, 172 (1966); *United States v. Woll*, 157 F. Supp. 704, 709 (E.D. Pa. 1957), by deceit, craft or trickery, or at least by dishonest means. *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924); *United States v. Peltz*, 433 F.2d 48, 51-52 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971). Because this portion of the statute encompasses agreements in which the conduct is not chargeable under a separate statute, see Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, 414-44 (1959), it is beyond the scope of this Note. This analysis will be limited to cases brought under the first part of the statute.

13. *E.g.*, *Frohwerk v. United States*, 249 U.S. 204, 208-09 (1919); *Rowan v. United States*, 281 F. 137, 139 (5th Cir.), *cert. denied*, 260 U.S. 721 (1922); *Anderson v. United States*, 269 F. 65, 76 (9th Cir. 1920), *cert. denied*, 255 U.S. 576 (1921).

14. *Compare* Petition for Certiorari at 13-18, *Wedelstedt v. United States*, 442 U.S. 916 (1979) (certiorari denied) *with* Brief for the United States in Opposition at 5-8, *Wedelstedt v. United States*, 442 U.S. 916 (1979) (certiorari denied).

15. *United States v. Head*, Nos. 79-5293, 79-5303, 80-6727, slip op. at 8-12 (4th Cir. Feb. 9, 1981); *United States v. Brown*, 583 F.2d 659, 669-70 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); *United States v. Carman*, 577 F.2d 556, 566-68 (9th Cir. 1978); *United States v. Gallagher*, 576 F.2d 1028, 1046 (3d Cir. 1978); *United States v. Tarnopol*, 561 F.2d 466, 475-77 (3d Cir. 1977); *United States v. Dansker*, 537 F.2d 40, 51 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *United States v. Driscoll*, 449 F.2d 894, 898 (1st Cir. 1971), *cert. denied*, 405 U.S. 920 (1972); *Van Liew v. United States*, 321 F.2d 664, 672 (5th Cir. 1963).

16. "[I]t is not an offense to conspire to do an act that, if completed, would not be a crime." *United States v. McInnis*, 601 F.2d 1319, 1323 (5th Cir. 1979) (footnote omitted), *cert. denied*, 445 U.S. 962 (1980); *accord*, *Pettibone v. United States*, 148 U.S. 197, 203 (1893); *United States v. Fine*, 413 F. Supp. 728, 730-32 (W.D. Wis. 1976). The term "failure to state a crime" encompasses three general categories. A count may fail to state a crime because the statute under which it is charged has been held unconstitutional, *e.g.*, *United States v. Baranski*, 484 F.2d 556, 566-70 (7th Cir. 1973), or if the statute has been interpreted unconstitutionally. *United States v. Dansker*, 537 F.2d 40, 48-49 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). A count may also fail to state a crime when the jury is incorrectly instructed. *Yates v. United States*, 354 U.S. 298, 303-10 (1957); *Samuel v. United States*, 169 F.2d 787, 792-95, 797 (9th Cir. 1948). Moreover, a count fails to state a crime if it does not clearly set forth the nature and elements of the offense. See *United States v. Tarnopol*, 561 F.2d 466, 473-74 (3d Cir. 1977); *United States v. Adcock*, 447 F.2d

remaining valid criminal objectives.¹⁷ Moreover, the decisions of the Seventh Circuit appear to be in conflict on the question.¹⁸

This Note examines conspiracy convictions that are challenged because one of the underlying substantive counts has been reversed. Part I discusses the general rule governing convictions based on more than one ground, as stated in *Stromberg v. California*¹⁹ and its progeny. Part II analyzes cases that follow *Stromberg*, those that do not

1337, 1338 (2d Cir.) (per curiam), *cert. denied*, 404 U.S. 939 (1971); *Van Liew v. United States*, 321 F.2d 664, 672-73 (5th Cir. 1963); *United States v. Balistrieri*, 346 F. Supp. 341, 347-49 (E.D. Wis. 1972). The indictment must clearly set forth the nature and elements of the offense charged, Fed. R. Crim. P. 7(c)(1), so that the defendant can prepare his defense and plead double jeopardy in case of a subsequent prosecution. *Russell v. United States*, 369 U.S. 749, 763-64 (1962); 8 J. Moore, *supra* note 5, ¶ 7.04, at 7-16. A count may also fail to state a crime if it does not state a federal offense. *United States v. McInnis*, 601 F.2d 1319, 1326-27 (5th Cir. 1979), *cert. denied*, 445 U.S. 962 (1980); *O'Kelley v. United States*, 116 F.2d 966, 968 (8th Cir. 1941). *But see Kaneshiro v. United States*, 445 F.2d 1266, 1269 (9th Cir.), *cert. denied*, 404 U.S. 992 (1971). Substantive convictions obtained in these circumstances are routinely overturned on appeal. *United States v. Wedelstedt*, 589 F.2d 339, 341 (8th Cir. 1978), *cert. denied*, 442 U.S. 916 (1979); *United States v. Tanner*, 471 F.2d 128, 141 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972). The federal conspiracy statute prohibits "conspir[ing] . . . to commit any offense against the United States." 18 U.S.C. § 371 (1976). Federal courts cannot prosecute a conspiracy to achieve an objective that is not an offense against the United States. *United States v. Birchfield*, 486 F. Supp. 137, 139-40 (M.D. Tenn. 1980). In *United States v. Giese*, 597 F.2d 1170 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979), some of the objectives alleged in the conspiracy count were not federal offenses. The court, however, upheld the conspiracy conviction, but with the qualification that the jury must be instructed to find an agreement to commit at least one of the federal offenses. *Id.* at 1178-79; *accord*, *United States v. Gallishaw*, 428 F.2d 760, 763 (2d Cir. 1970). Courts sometimes overturn conspiracy convictions when the substantive crime has been reversed for lack of evidence. *United States v. Brown*, 583 F.2d 659, 666, 669 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979). Acquittal on a substantive charge does not require acquittal on the conspiracy charge because the evidence for each crime is different. In *United States v. Tarnopol*, 561 F.2d 466 (3d Cir. 1977), however, the court overturned the conspiracy conviction because the government did not introduce evidence to show the requisite intent to defraud the United States. *Id.* at 474-75. Both intent to commit the crime and intent to agree to do so are required for a conspiracy conviction. *Developments, supra* note 1, at 935.

17. *E.g.*, *United States v. Wedelstedt*, 589 F.2d 339, 342 (8th Cir. 1978), *cert. denied*, 442 U.S. 916 (1979); *United States v. Dixon*, 536 F.2d 1388, 1401-02 (2d Cir. 1976); *United States v. Frank*, 520 F.2d 1287, 1293 (2d Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Bottomo*, 365 F.2d 389, 394-95 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966); *Moss v. United States*, 132 F.2d 875, 878 (6th Cir. 1943); *United States v. Mack*, 112 F.2d 290, 291 (2d Cir. 1940).

18. *Compare United States v. Donner*, 497 F.2d 184, 189-91 (7th Cir.), *cert. denied*, 419 U.S. 1047 (1974) and *United States v. Tanner*, 471 F.2d 128, 139-40 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972) with *United States v. Baranski*, 484 F.2d 556, 559-62 (7th Cir. 1973).

19. 283 U.S. 359 (1931).

apply its rule, and the problems caused by each approach. Finally, this Note provides a test to determine whether to reverse or uphold conspiracy convictions when one of the underlying substantive counts is reversed.

I. CONVICTIONS BASED ON MORE THAN ONE GROUND

The basic tenet of criminal justice is that a defendant will be punished only for committing an unlawful act.²⁰ Correlatively, when a conviction is based on any one of several grounds, each ground must constitute an unlawful activity.²¹ In *Stromberg v. California*,²² the Supreme Court ruled that considerations of fairness require a reversal of a general verdict of guilty when any of the bases of the verdict is constitutionally invalid.²³ *Stromberg* involved a state statute that prohibited the display of a red flag for any of three purposes.²⁴ The Court found that one of the prohibitions was unconstitutionally overbroad²⁵ and, therefore, did not "constitute a lawful foundation for a criminal prosecution."²⁶ Because it was impossible to determine from the trial record that the defendant had not been

20. 1 B. Schwartz, A Commentary on the Constitution of the United States (pt. III), § 373, at 87 (1968). "The substantive criminal law is that law which, for the purpose of preventing harm to society, (a) declares what conduct is criminal, and (b) prescribes the punishment to be imposed for such conduct. It includes the definition of specific offenses and general principles of liability Thus the definition of a particular crime will spell out what act (or omission) and what mental state is required for its commission. . . . [C]onduct cannot be called 'criminal' unless a punishment is prescribed therefor." W. LaFare & A. Scott, *supra* note 1, § 2, at 5-6 (footnote omitted); *accord*, President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 125 (1967).

21. *Leary v. United States*, 395 U.S. 6, 31-32 (1969); *Street v. New York*, 394 U.S. 576, 588-89 (1969); *Terminiello v. Chicago*, 337 U.S. 1, 5-6 (1949); *Cramer v. United States*, 325 U.S. 1, 36 n.45 (1945); *Thomas v. Collins*, 323 U.S. 516, 528-29, 540-41 (1945); *Williams v. North Carolina*, 317 U.S. 287, 292 (1942); *United States v. Natelli*, 527 F.2d 311, 324-25, 328 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *United States v. Adcock*, 447 F.2d 1337, 1339 (2d Cir.) (*per curiam*), *cert. denied*, 404 U.S. 939 (1971); *United States v. Robbins*, 354 F.2d 741, 742-43 (2d Cir. 1965); *Beck v. United States*, 298 F.2d 622, 631 (9th Cir.), *cert. denied*, 370 U.S. 919 (1962).

22. 283 U.S. 359 (1931).

23. *Id.* at 368.

24. *Id.* at 361. The parties stipulated to the facts and the Court summarized them briefly. Appellant was a member of the Young Communist League. She worked as a supervisor in a children's summer camp, teaching history and economics. The charge against her concerned a daily ritual at which the children saluted a red flag under her direction. *Id.* at 362-63.

25. *Id.* at 368-70.

26. *Id.* at 368.

found guilty under the invalidated clause alone,²⁷ the conviction was reversed.²⁸

Although the conclusion in *Stromberg* was drawn "from the manner in which the case was sent to the jury,"²⁹ the rule has been applied more broadly in subsequent cases.³⁰ In *Thomas v. Collins*³¹ and *Street v. New York*,³² the Court overturned convictions because it found that the valid bases and the invalid bases were inextricably entwined.³³ The Court concluded in both instances that "[t]he judg-

27. The Court was convinced that "it cannot be determined upon this record that the appellant was not convicted under [the invalid] clause." *Id.* at 368. The jury was instructed that the defendant need only have violated one clause of the statute; in fact, the state's attorney argued that the jury could convict based on a violation of the invalid clause alone. *Id.* "[T]he necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld." *Id.*

28. *Id.* In a separate opinion in *People v. Mintz*, 62 Cal. App. 788, 290 P. 93 (1930), *rev'd sub nom.* *Stromberg v. California*, 283 U.S. 359 (1931), Judge Marks expressed the belief that the first clause of the statute was of doubtful constitutionality because it could be construed to outlaw peaceful opposition to the political party in power. *Id.* at 794, 797, 290 P. at 97, 99 (Marks, J., concurring in part, dissenting in part). Because the clause could be removed from the section without materially changing its purposes, however, the court considered the statute to be constitutional, *id.* at 797, 290 P. at 99 (Marks, J., concurring in part, dissenting in part), and upheld the conviction under the remaining valid clauses. *Id.* at 792, 290 P. at 96. *Stromberg's* principle has been consistently reaffirmed. *Leary v. United States*, 395 U.S. 6, 31-32 (1969); *Street v. New York*, 394 U.S. 576, 588-89 (1969); *Terminiello v. Chicago*, 337 U.S. 1, 5-6 (1949); *Cramer v. United States*, 325 U.S. 1, 36 n.45 (1945); *Thomas v. Collins*, 323 U.S. 516, 528-29, 540-41 (1945); *Williams v. North Carolina*, 317 U.S. 287, 292 (1942); *United States v. Natelli*, 527 F.2d 311, 324-25, 328 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *United States v. Adcock*, 447 F.2d 1337, 1339 (2d Cir.) (*per curiam*), *cert. denied*, 404 U.S. 939 (1971); *United States v. Robbins*, 354 F.2d 741, 742-43 (2d Cir. 1965); *Beck v. United States*, 298 F.2d 622, 631 (9th Cir.), *cert. denied*, 370 U.S. 919 (1962).

29. 283 U.S. at 368.

30. *Street v. New York*, 394 U.S. 576, 588 (1969); *Thomas v. Collins*, 323 U.S. 516, 529 (1945).

31. 323 U.S. 516 (1945).

32. 394 U.S. 576 (1969).

33. *Id.* at 588; *Thomas v. Collins*, 323 U.S. 516, 528-29 (1945). The analysis of the relationship between valid and invalid charges in *Thomas* and *Street* suggests that the Court was concerned that the evidence relating to the invalid count unduly influenced the jury to find defendants guilty. Courts are also concerned that invalid counts might cause the jury to find defendants guilty on the conspiracy count. *See United States v. Anzalone*, 626 F.2d 239, 244-47 & n.7 (2d Cir. 1980); *United States v. Wedelstedt*, 589 F.2d 339, 343 n.4 (8th Cir. 1978), *cert. denied*, 442 U.S. 916 (1979); *United States v. Brown*, 583 F.2d 659, 669 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); *United States v. Mackey*, 571 F.2d 376, 387 n.14 (7th Cir. 1978); *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *Samuel v. United States*, 169 F.2d 787, 798 (9th Cir. 1948). The possibility that the invalid charge prejudices the defendants is difficult to disprove. Fed. R. Evid. 606(b) provides that a juror may not testify as to anything that influenced his, or any other juror's, deliberations, except that he may testify as to extraneous in-

ment . . . must be affirmed as to both or as to neither."³⁴ This interpretation of *Stromberg* has been used to overturn convictions whenever they might have been based on both valid and invalid grounds.³⁵

Although *Stromberg* did not involve a conspiracy, its rule has been applied to conspiracy cases.³⁶ When parties agree to achieve an objective that is not punishable under federal law, it is impossible³⁷

formation improperly brought to the jury's attention. Courts, therefore, do not attempt to evaluate the effect that possibly prejudicial counts or evidence may have had on the jury's deliberations. See, e.g., *Street v. New York*, 394 U.S. 576, 588 (1969); *Thomas v. Collins*, 323 U.S. 516, 528-29 (1945); *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir.), cert. denied, 421 U.S. 950 (1975); *United States v. Postma*, 242 F.2d 488, 497 (2d Cir.), cert. denied, 354 U.S. 922 (1957); cf. *United States v. Groves*, 122 F.2d 87, 91-92 (2d Cir.) (evidence improperly admitted against defendant as to all frauds was prejudicial because no foundation was laid that it was relevant to more than one), cert. denied, 314 U.S. 670 (1941). Evidence can be sufficiently separable so that the jury, properly instructed, would not consider it together with any other charges. *United States v. Anzalone*, 626 F.2d 239, 246-47 (2d Cir. 1980); *United States v. Wedelstedt*, 589 F.2d 339, 342 (8th Cir. 1978), cert. denied, 442 U.S. 916 (1979); *United States v. Brown*, 583 F.2d 659, 669 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979); cf. *Selvester v. United States*, 170 U.S. 262, 268 (1898) (offenses retained their separate character to such an extent that error or failure as to one had no essential influence on the other). The possibility always remains, however, that the multiplicity of counts increased the jury's willingness to convict defendants. *United States v. Smith*, 112 F.2d 83, 85 (2d Cir. 1940) ("[E]ven when cautioned, juries are apt to regard with a more jaundiced eye a person charged with two crimes than a person charged with one.").

34. *Thomas v. Collins*, 323 U.S. 516, 529 (1945); accord, *Street v. New York*, 394 U.S. 576, 588 (1969) (quoting *Thomas v. Collins*, 323 U.S. at 529).

35. *United States v. Head*, Nos. 79-5293, 79-5303, 80-6727, slip op. at 10 (4th Cir. Feb. 9, 1981); *United States v. Carman*, 577 F.2d 556, 567-68 (9th Cir. 1978); *United States v. Gallagher*, 576 F.2d 1028, 1046 (3d Cir. 1978); *United States v. Driscoll*, 449 F.2d 894, 898 (1st Cir. 1971), cert. denied, 405 U.S. 920 (1972).

36. In *Yates v. United States*, 354 U.S. 298 (1957), the Court, following *Stromberg*, reversed a conspiracy conviction because it was impossible to determine that the jury had not convicted the defendants for conspiring to commit a substantive crime that was barred by the statute of limitations. *Id.* at 311-12. The indictment in this case charged defendants with conspiring "(1) to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) to organize, as the Communist Party of the United States, a society of persons who so advocate and teach, all with the intent of causing the overthrow of the Government by force and violence." *Id.* at 300. The Court held that the statute of limitations had run on the second objective, *id.* at 310-12, requiring withdrawal of that charge from the jury's consideration. *Id.* at 312. The jury was asked only for a general verdict. *Id.* at 311-12 & n.17.

37. See note 12 *supra*.

38. In *Parr v. United States*, 363 U.S. 370 (1960), the Court ruled that if the substantive count did not state a crime, the conspiracy count could not be sustained. *Id.* at 393. Defendants were charged with mail fraud and conspiracy to commit mail fraud. *Id.* at 374-78. The Supreme Court held as a matter of law that defendants had not used the mails for the purpose of executing the scheme to defraud, and, therefore, the indictment did not charge a federal offense. *Id.* at 391. Circuit courts have

for them to be guilty of criminal conspiracy.³⁹ If one of several objectives does not state a crime,³⁹ defendants are being charged with a conspiracy to commit acts, only some of which are illegal.⁴⁰ In such cases, a general verdict of guilty on the conspiracy count is of questionable validity because defendants may be convicted solely on the basis of their agreement to achieve the lawful objective.

Common evidentiary and procedural characteristics of conspiracy prosecutions cause this uncertainty. Because criminal agreements are made in secret, they are difficult to prove by direct evidence.⁴¹

recognized that a conspiracy conviction requires the allegation of a valid federal offense. *United States v. Anzalone*, 626 F.2d 239, 246-47 (2d Cir. 1980); *United States v. Wilkinson*, 601 F.2d 791, 796 (5th Cir. 1979); *United States v. Wedelstedt*, 589 F.2d 339, 341-42 (8th Cir. 1978), *cert. denied*, 442 U.S. 916 (1979); *United States v. Brown*, 583 F.2d 659, 669-70 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); *United States v. Carman*, 577 F.2d 556, 566-68 (9th Cir. 1978); *United States v. Gallagher*, 576 F.2d 1028, 1046-47 (3d Cir. 1978); *United States v. Tarnopol*, 561 F.2d 466, 475 (3d Cir. 1977); *United States v. Dansker*, 537 F.2d 40, 51 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *United States v. Dixon*, 536 F.2d 1388, 1401-02 (2d Cir. 1976); *United States v. James*, 528 F.2d 999, 1014 (5th Cir.), *cert. denied*, 429 U.S. 959 (1976); *United States v. Frank*, 520 F.2d 1287, 1290 (2d Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Donner*, 497 F.2d 184, 189-91 (7th Cir.), *cert. denied*, 419 U.S. 1047 (1974); *United States v. Clay*, 495 F.2d 700, 710 (7th Cir.), *cert. denied*, 419 U.S. 937 (1974); *United States v. Baranski*, 484 F.2d 556, 559-60 (7th Cir. 1973); *United States v. Jacobs*, 475 F.2d 270, 283 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973); *United States v. Haskell*, 327 F.2d 281, 283-84 (2d Cir.), *cert. denied*, 377 U.S. 945 (1964); *Van Liew v. United States*, 321 F.2d 664, 670-72 (5th Cir. 1963); *Samuel v. United States*, 169 F.2d 787, 794-95 (9th Cir. 1948); *Moss v. United States*, 132 F.2d 875, 878 (6th Cir. 1943); *United States v. Mack*, 112 F.2d 290, 292-93 (2d Cir. 1940); *Bailey v. United States*, 5 F.2d 437, 438 (5th Cir.), *cert. dismissed*, 269 U.S. 589 (1925); *Kepl v. United States*, 299 F. 590, 591 (9th Cir.), *cert. denied*, 266 U.S. 617 (1924). In contrast to a legally impossible objective, a factually impossible objective is widely recognized not to affect the validity of the conspiracy conviction. Thus, even if the group fails to accomplish its objective through mistake or frustration, or the purpose is impossible to achieve, the mere existence of an antisocial combination is a danger to society because more complex or more difficult criminal acts are more likely to be undertaken. *Craven v. United States*, 22 F.2d 605, 609 (1st Cir. 1927); *Developments, supra* note 1, at 944-45. See generally 15 Wash. & Lee L. Rev. 122 (1958). This logic has been employed to rationalize conspiracy prosecutions that are brought against dissident political and economic groups. See generally Arens, *supra* note 5; Filvaroff, *Conspiracy and the First Amendment*, 121 U. Pa. L. Rev. 189 (1972); Johnson, *supra* note 1, at 1139; Note, *Conspiracy and the First Amendment*, 79 Yale L.J. 872 (1970).

39. See note 16 *supra* and accompanying text.

40. *Yates v. United States*, 354 U.S. 298, 311-12 (1957); *Ventimiglia v. United States*, 242 F.2d 620, 626 (4th Cir. 1957); see note 15 *supra*.

41. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Goodson*, 502 F.2d 1303, 1305 (5th Cir. 1974); *United States v. Monticello*, 264 F.2d 47, 49 (3d Cir. 1959); *United States v. Morris*, 225 F.2d 91, 92-93 (7th Cir.), *cert. denied*, 350 U.S. 901 (1955); *Williams v. United States*, 218 F.2d 276, 278 (4th Cir. 1954); *Dodson v. United States*, 215 F.2d 196, 198 (6th Cir. 1954); *Prichard v. United States*, 181 F.2d 326, 331 (6th Cir.), *aff'd per curiam*, 339 U.S. 974 (1950); *Nye & Nissen v. United States*, 168 F.2d 846, 852 (9th Cir. 1948), *aff'd*, 336 U.S. 613

Therefore, circumstantial evidence of the agreement is permitted.⁴² Because this type of evidence is susceptible of more than one interpretation,⁴³ however, it is difficult to determine which objective the defendants sought to achieve. Moreover, the structure of the indictment contributes to the confusion. A conspiracy charge is almost always brought in a single count,⁴⁴ regardless of the number of objectives alleged.⁴⁵ Guilt may be established by proof of an agreement to

(1949); *Blumenthal v. United States*, 158 F.2d 883, 889 (9th Cir. 1946), *aff'd*, 332 U.S. 539 (1947); *Joyce v. United States*, 153 F.2d 364, 366 (8th Cir.), *cert. denied*, 328 U.S. 860 (1946); *Williams v. Cuyler*, 491 F. Supp. 272, 275-76 (E.D. Pa. 1980); *United States v. Haskins*, 40 F. Supp. 219, 221 (W.D. Mo. 1941); *see Cousins*, *supra* note 1, at 910; *Developments*, *supra* note 1, at 933-35.

42. *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975); *Hamling v. United States*, 418 U.S. 87, 124 (1974); *United States v. Barrentine*, 591 F.2d 1069, 1093 (5th Cir.), *cert. denied*, 444 U.S. 990 (1979); *United States v. Bobo*, 586 F.2d 355, 368 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979); *Developments*, *supra* note 1, at 933-35.

43. If the exact objective is uncertain, defendants may argue that the jury may not have been in agreement as to which objective defendants conspired to commit. *United States v. Friedman*, 445 F.2d 1076, 1083 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971). Defendants may also argue that the jury could have based the conviction on an objective that did not state a crime. *Yates v. United States*, 354 U.S. 298, 311-12 (1957); *United States v. Carman*, 577 F.2d 556, 566 (9th Cir. 1978); *United States v. Tarnopol*, 561 F.2d 466, 474-75 (3d Cir. 1977); *United States v. Dansker*, 537 F.2d 40, 51 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *United States v. Baranski*, 484 F.2d 556, 560 (7th Cir. 1973); *McCutcheon v. Estelle*, 483 F.2d 256, 261 (5th Cir. 1973); *Van Liew v. United States*, 321 F.2d 664, 671-72 (5th Cir. 1963); *Samuel v. United States*, 169 F.2d 787, 794-95 (9th Cir. 1948).

44. *Frohwerk v. United States*, 249 U.S. 204, 209 (1919); *United States v. DeLillo*, 620 F.2d 939, 948 (2d Cir.), *cert. denied*, 101 S. Ct. 108 (1980); *Rowan v. United States* 281 F. 137, 139 (5th Cir.), *cert. denied*, 260 U.S. 721 (1922); *Anderson v. United States*, 269 F. 65, 76 (9th Cir. 1920), *cert. denied*, 255 U.S. 576 (1921); *United States v. Bloom*, 78 F.R.D. 591, 601 (E.D. Pa. 1977). A single count may allege any crime and that defendant committed it by one or more means. Fed. R. Crim. P. 7(c)(1); 8 J. Moore, *supra* note 5, ¶ 7.04, at 7-24; *see United States v. Gipson*, 553 F.2d 453, 458 (5th Cir. 1977); *United States v. Natelli*, 527 F.2d 311, 325 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *Vitello v. United States*, 425 F.2d 416, 418 (9th Cir.), *cert. denied*, 400 U.S. 822 (1970); *United States v. Goldstein*, 168 F.2d 666, 671 (2d Cir. 1948).

45. *Callanan v. United States*, 364 U.S. 587, 587-88 (1961); *Pinkerton v. United States*, 328 U.S. 640, 641 (1946); *United States v. Head*, Nos. 79-5293, 79-5303, 80-6727, slip op. at 4-5 (4th Cir. Feb. 9, 1981); *United States v. Anzalone*, 626 F.2d 239, 240-41 (2d Cir. 1980); *United States v. Wilkinson*, 601 F.2d 791, 793 (5th Cir. 1979); *United States v. Carman*, 577 F.2d 556, 560 (9th Cir. 1978); *United States v. Gallagher*, 576 F.2d 1028, 1031 (3d Cir. 1978); *United States v. Mangan*, 575 F.2d 32, 37 (2d Cir.), *cert. denied*, 439 U.S. 931 (1978); *United States v. Dansker*, 537 F.2d 40, 44 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *United States v. Papadakis*, 510 F.2d 287, 289-90 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Honneus*, 508 F.2d 566, 569 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); *United States v. Baranski*, 484 F.2d 556, 558 (7th Cir. 1973); *United States v. Goodwin*, 455 F.2d 710, 711, 714 (10th Cir.), *cert. denied*, 409 U.S. 859 (1972); *United States v. Driscoll*, 449 F.2d 894, 895 (1st Cir. 1971), *cert. denied*, 405 U.S.

achieve any one of the objectives.⁴⁶ The practical effect of charging conspiracy in a single count is that the jury need not be unanimous as to which objective the defendants agreed to commit.⁴⁷ If, however, the conspiracy were charged in several different counts, each alleging one objective, the prosecutor would be required to convince all the jurors regarding at least one of the objectives.⁴⁸

These problems are compounded by the use of general verdicts in conspiracy cases.⁴⁹ The prosecutor, therefore, need only convince

920 (1972); *United States v. Peltz*, 433 F.2d 48, 49 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971); *United States v. Bottone*, 365 F.2d 389, 391 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966).

46. *United States v. Wilkinson*, 601 F.2d 791, 796 (5th Cir. 1979); *United States v. Bolts*, 558 F.2d 316, 325-26 (5th Cir.), *cert. denied*, 439 U.S. 898 (1978); *United States v. Mackey*, 571 F.2d 376, 387 (7th Cir. 1978); *United States v. James*, 528 F.2d 999, 1014 (5th Cir.), *cert. denied*, 429 U.S. 959 (1976); *United States v. Frank*, 520 F.2d 1287, 1293 (2d Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Grizaffi*, 471 F.2d 69, 73 (7th Cir. 1972), *cert. denied*, 411 U.S. 964 (1973); *United States v. Friedman*, 445 F.2d 1076, 1084-85 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971); *McWhorter v. United States*, 62 F.2d 829, 830 (5th Cir. 1933); *Kepl v. United States*, 299 F. 590, 591 (9th Cir.), *cert. denied*, 266 U.S. 617 (1924).

47. *See United States v. Wilkinson*, 601 F.2d 791, 796 (5th Cir. 1979); *United States v. Mackey*, 571 F.2d 376, 387 (7th Cir. 1978); *United States v. Bolts*, 558 F.2d 316, 325-26 (5th Cir. 1977), *cert. denied*, 439 U.S. 898 (1978); *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Grizaffi*, 471 F.2d 69, 73 (7th Cir. 1972), *cert. denied*, 411 U.S. 964 (1973). In *United States v. Friedman*, 445 F.2d 1076 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971), the defendant argued that, because the judge did not require a unanimous jury to find that all the conspirators agreed on at least one unlawful object, "we cannot know whether the jury unanimously agreed on whether a conspiracy to commit a specific offense did in fact exist." *Id.* at 1084. The Ninth Circuit held that the instruction that the jury must find a conspiracy to commit at least one of the offenses unequivocally required unanimity. *Id.*

48. *United States v. Honneus*, 508 F.2d 566, 570 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

49. 8A J. Moore, *supra* note 5, ¶ 31.02[3], at 31-6. There are exceptions, however. When one object of a conspiracy is a felony and another a misdemeanor, special verdicts are proper. *United States v. Haim*, 218 F. Supp. 922, 928 (S.D.N.Y. 1963); 8A J. Moore, *supra* note 5, ¶ 31.02[3], at 31-8 to 31-9. Several circuits have implied that there are other situations when special verdicts are proper. *United States v. Frezzo Bros.*, 602 F.2d 1123, 1129-30 (3d Cir. 1979) (when appellate court must assess the sufficiency of the evidence or decide between statutory penalties), *cert. denied*, 444 U.S. 1074 (1980); *United States v. Stassi*, 544 F.2d 579, 583 (2d Cir. 1976) (when an appellate court must determine when a defendant was a member of a conspiracy for statute of limitations and sentencing purposes), *cert. denied*, 430 U.S. 907 (1977); *United States v. Jackson*, 542 F.2d 403, 412 (7th Cir. 1976) (when special verdicts will serve a necessary purpose, as when the instruction of the court does not adequately cover the issue); *Heald v. Mullaney*, 505 F.2d 1241, 1245-46 (1st Cir. 1974) (when it is necessary to determine the value of stolen property, whether the death penalty should be imposed, and liability in bastardy proceedings), *cert. denied*, 420 U.S. 955 (1975).

the jury that a single illegal agreement existed.⁵⁰ Consequently, it is difficult to discover which objective the jury believed the defendants agreed to achieve.⁵¹ Special verdicts,⁵² on the other hand, would

50. *E.g.*, *United States v. Bolts*, 558 F.2d 316, 325-26 (5th Cir. 1977), *cert. denied*, 439 U.S. 898 (1978); *United States v. Friedman*, 445 F.2d 1076, 1083-84 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971). *But see* *United States v. Honneus*, 508 F.2d 566, 570 (1st Cir. 1974) (government can request special verdicts for practical reasons, as when sentences for various objectives differ), *cert. denied*, 421 U.S. 948 (1975).

51. Model Penal Code § 5.03, Comment, at 122 (Tent. Draft No. 10, 1960); see note 1 *supra* and accompanying text.

52. The Constitution gives defendants the right to clear and unambiguous jury verdicts. U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI; see *Patterson v. United States*, 15 U.S. (2 Wheat.) 221, 225 (1817); 8 J. Wigmore, *Evidence* § 2350, at 693 (rev. ed. J. McNaughton 1961). Due process requires that all material issues be found beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361 (1970); *United States v. Hayward*, 420 F.2d 142, 144 (D.C. Cir. 1969); *United States ex rel. Johnson v. Hatrak*, 417 F. Supp. 316, 319 (D.N.J. 1976), *aff'd*, 564 F.2d 90 (3d Cir. 1977), *cert. denied*, 435 U.S. 906 (1978). Special verdicts, therefore, can be advantageous to criminal defendants. In *United States v. O'Looney*, 544 F.2d 385 (9th Cir.), *cert. denied*, 429 U.S. 1023 (1976), the court, with counsels' agreement, allowed the jury to find defendants guilty or not guilty as to each objective separately, with the result that defendants were found guilty as to one and not guilty as to the other. *Id.* at 391-92. In *Bisno v. United States*, 299 F.2d 711 (9th Cir. 1961), *cert. denied*, 370 U.S. 952 (1962), "[t]he jury was instructed that a guilty verdict could be returned only if unanimous agreement were reached that Bisno concealed at least one of the items of property mentioned in the indictment." *Id.* at 723. Under this instruction, the jury could have disagreed as to which item was concealed and still found defendant guilty. In *United States v. Ogull*, 149 F. Supp. 272 (S.D.N.Y. 1957), *aff'd sub nom. United States v. Gernie*, 252 F.2d 664 (2d Cir.), *cert. denied*, 356 U.S. 968 (1958), the court held that, although special interrogatories might "infringe on [the jury's] power to deliberate free from legal fetters," *id.* at 276, there were precedents for the procedure in common law jurisdictions, *id.* at 276-78, and that the instant case required their application. *Id.* at 278-79. See also 8A J. Moore, *supra* note 5, ¶ 31.02[3], at 31-7; 8 J. Wigmore, *supra*, at 693. Another reason why special verdicts are advantageous for defendants is that they ameliorate the harshness of collateral consequences of convictions. The parole commission rates the severity of a conspiracy conviction according to the conduct forming the underlying offense if such behavior is consummated. Paroling Policy Guidelines, 28 C.F.R. § 2.20, at 88 (1980). In *United States v. Anzalone*, 626 F.2d 239 (2d Cir. 1980), defendants were convicted of a conspiracy embracing two separate counterfeiting transactions, one involving \$1000 in currency and one involving over \$900,000 in Armory Bonds. *Id.* at 240-41. The Armory Bond counterfeiting charge was found not to state a crime and was reversed, while the conspiracy conviction was upheld. The currency violation was considered to be of "Low Moderate" severity, 28 C.F.R. § 2.20, at 83 (1980), whereas the lowest possible severity rating for the Bonds violation was "Very High." *Id.* at 84. If the conduct can be classified under more than one category, the most serious applicable category is to be used. *Id.* Therefore, Anzalone would have been considered for parole under guidelines applying to the conviction that was overturned. See *Petition for Rehearing and Suggestion for Rehearing In Banc* at 10-12, *United States v. Anzalone*, Nos. 79-1424, 79-1425 (2d Cir. Oct. 1, 1980).

lessen the chance of ambiguity.⁵³ Requiring the jury to determine whether the defendants conspired to commit each objective is the equivalent of charging conspiracy in separate counts, and would compel the prosecution to prove each individual objective.⁵⁴ Special verdicts and interrogatories, however, are disfavored in criminal prosecutions⁵⁵ because the judge's formulation of the questions⁵⁶ can pressure juries to convict.⁵⁷

53. On the other hand, the defendant might prefer verdicts to be as ambiguous as possible. Because the Constitution guarantees clear and unambiguous jury verdicts, *see* note 52 *supra*, an appellate court must reverse a verdict if there is doubt as to its validity. *Leary v. United States*, 395 U.S. 6, 31-32 (1969); *Mills v. United States*, 164 U.S. 644, 649 (1897); *Government of V.I. v. Richards*, 618 F.2d 242, 244 (3d Cir. 1980); *United States v. Gallagher*, 576 F.2d 1028, 1046 (3d Cir. 1978); *United States v. Hayward*, 420 F.2d 142, 144 (D.C. Cir. 1969); *Smith v. United States*, 230 F.2d 935, 938-39 (6th Cir. 1956); *Frank v. United States*, 220 F.2d 559, 565 (10th Cir. 1955); *Samuel v. United States*, 169 F.2d 787, 798 (9th Cir. 1948); *Nicola v. United States*, 72 F.2d 780, 787 (3d Cir. 1934). Some courts have cited *Stromberg* for the principle that an invalid jury instruction requires reversal of the conviction, *Terminiello v. Chicago*, 337 U.S. 1, 5-6 (1949), even if the proper instruction was also given. *Beck v. United States*, 298 F.2d 622, 631 (9th Cir.), *cert. denied*, 370 U.S. 919 (1962). The same rule should apply if the jury is permitted to convict defendants for conspiring to achieve a goal that is not an offense.

54. *United States v. Honneus*, 508 F.2d 566, 570 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

55. *United States v. Frezzo Bros.*, 602 F.2d 1123, 1129 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); *United States v. Stassi*, 544 F.2d 579, 583 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977); *United States v. O'Looney*, 544 F.2d 385, 392 (9th Cir.), *cert. denied*, 429 U.S. 1023 (1976); *United States v. Jackson*, 542 F.2d 403, 412 (7th Cir. 1976); *United States v. Bosch*, 505 F.2d 78, 81-82 (5th Cir. 1974); *Bisno v. United States*, 299 F.2d 711, 722-23 (9th Cir. 1961), *cert. denied*, 370 U.S. 952 (1962). *But see* note 49 *supra* and accompanying text. There is no provision in the Federal Rules of Criminal Procedure for special verdicts or special interrogatories in criminal trials except for trials before a judge. Fed. R. Crim. P. 23(c). The only possible basis for special verdicts is the provision allowing procedures not specifically proscribed by rule when the procedures are lawful and not inconsistent with the rules or any applicable statute. Fed. R. Crim. P. 57(b). There is, however, no per se rule that special verdicts are absolutely forbidden. *United States v. O'Looney*, 544 F.2d 385, 392 (9th Cir.), *cert. denied*, 429 U.S. 1023 (1976). Special verdicts may be requested when there is no danger that the jury will be pressured by the court to reach a certain decision. *Id.* Special verdicts have been held proper under limited circumstances. *See* note 49 *supra* and accompanying text. More complete findings in all criminal cases serve the interests of judicial economy and those of prosecutors and defendants. For example, the use of special findings might preserve convictions when one of several theories submitted is subsequently rejected. *See Williams v. North Carolina*, 317 U.S. 287, 292 (1942); *Stromberg v. California*, 283 U.S. 359, 368-69 (1931); *Beck v. United States*, 298 F.2d 622, 630-31 (9th Cir.), *cert. denied*, 370 U.S. 919 (1962); 8A J. Moore, *supra* note 5, ¶ 31.02[3], at 31-7.

56. *United States v. Spock*, 416 F.2d 165, 183 (1st Cir. 1969); *accord, Williams v. Florida*, 399 U.S. 78, 100 (1970).

57. *Stein v. New York*, 346 U.S. 156, 177-78 (1953); *United States v. Honneus*, 508 F.2d 566, 570 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); *United States v. Gallishaw*, 428 F.2d 760, 765 (2d Cir. 1970); *United States v. Spock*, 416 F.2d 165,

The unavailability of special verdicts does not ordinarily pose a problem on appeal of conspiracy convictions.⁵⁵ As long as there was an overt act in furtherance of an agreement to accomplish an illegal end, the defendants may be convicted of conspiracy.⁵⁹ When one of several substantive counts fails to state a crime, however, there is doubt as to whether there was an overt act in furtherance of an illegal end.⁶⁰ Because the possibility arises that defendants were convicted for conspiracy to achieve what is not a crime, it becomes necessary to determine which objective the jury believed defendants conspired to commit.

II. MULTIPLE OBJECTIVE CONSPIRACY CASES

A. Automatic Retention of Convictions—Stromberg Ignored

Conspiracy convictions are often retained despite reversal of one of the underlying crimes charged as an objective.⁶¹ Without mentioning *Stromberg*,⁶² some courts hold that the invalid objective is unnecessary to support the conviction because other, valid objectives are present.⁶³ Regardless of the rationale, however, the possibility that the jury may have based the conspiracy conviction solely on the invalid ground is not considered.⁶⁴

Several courts have followed precedents that held that conspiracy convictions are valid even if the government fails to prove the entire

180-83 (1st Cir. 1969); *Gray v. United States*, 174 F.2d 919, 923 (8th Cir.), *cert. denied*, 338 U.S. 848 (1949); *United States v. Ogull*, 149 F. Supp. 272, 276-77 (S.D.N.Y. 1957), *aff'd sub nom. United States v. Gernie*, 252 F.2d 644 (2d Cir.), *cert. denied*, 356 U.S. 968 (1958).

58. *Mogoll v. United States*, 158 F.2d 792, 793 (5th Cir. 1946), *rev'd on other grounds*, 333 U.S. 424 (1948); *United States v. Albers*, 115 F.2d 833, 836 (2d Cir. 1940); *United States v. Klosterman*, 147 F. Supp. 843, 846 (E.D. Pa.), *rev'd on other grounds*, 248 F.2d 191 (3d Cir. 1957).

59. See note 5 *supra*.

60. See notes 15-16 *supra* and accompanying text.

61. See note 17 *supra* and accompanying text.

62. *E.g.*, *United States v. Frank*, 520 F.2d 1287, 1293 (2d Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Bottone*, 365 F.2d 389, 394-95 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966); *Moss v. United States*, 132 F.2d 875, 878 (6th Cir. 1943); *United States v. Mack*, 112 F.2d 290, 291 (2d Cir. 1940).

63. *United States v. Frank*, 520 F.2d 1287, 1293 (2d Cir. 1975) ("Evidence of accomplishment of one of the objectives of a conspiracy is enough to support the conspiracy conviction." (citations omitted)), *cert. denied*, 423 U.S. 1087 (1976); *United States v. Tanner*, 471 F.2d 128, 139-40 (7th Cir.) ("However valid appellants' claim is, [that one of the objectives alleged is not within federal jurisdiction], it does not affect their convictions on the conspiracy count so long as any one of the objects of the conspiracy is unchallenged."), *cert. denied*, 409 U.S. 949 (1972).

64. See note 63 *supra* and accompanying text.

conspiracy as originally charged.⁶⁵ These cases, however, actually concerned situations in which the government charged a conspiracy with certain characteristics and proved a conspiracy with different characteristics. For example, when fewer conspirators were shown to be involved, or were involved for a shorter time,⁶⁶ the variation was not fatal as long as what was proven was included within what was charged.⁶⁷ Thus, the rule developed that a charge of conspiracy to commit several offenses against the United States may be upheld if the government has proven a conspiracy to commit any one of the objectives.⁶⁸

This rule is sensible⁶⁹ because a criminal conspiracy is an agreement to commit an unlawful act.⁷⁰ Consequently, proof of only one objective is required.⁷¹ When a conviction may have been based on

65. *E.g.*, *McWhorter v. United States*, 62 F.2d 829, 830 (5th Cir. 1933); *Christiansen v. United States*, 52 F.2d 950, 951 (5th Cir. 1931); *Anstess v. United States*, 22 F.2d 594, 594-95 (7th Cir. 1927); *Kepl v. United States*, 299 F. 590, 591 (9th Cir.), *cert. denied*, 266 U.S. 617 (1924); *Remus v. United States*, 291 F. 501, 505-06 (6th Cir. 1923), *cert. denied*, 263 U.S. 717 (1924).

66. *United States v. Goodson*, 502 F.2d 1303, 1306 (5th Cir. 1974); *Christiansen v. United States*, 52 F.2d 950, 951 (5th Cir. 1931); *Anstess v. United States*, 22 F.2d 594, 594-95 (7th Cir. 1927); *Kepl v. United States*, 299 F. 590, 591 (9th Cir.), *cert. denied*, 266 U.S. 617 (1924); *Remus v. United States*, 291 F. 501, 505 (6th Cir. 1923), *cert. denied*, 263 U.S. 717 (1924).

67. *See Moss v. United States*, 132 F.2d 875, 878 (6th Cir. 1943) ("Though proof fails to show the full sweep of the conspiracy charged in the indictment, [if] what is shown comes within its scope, there is no error in submission of it to the jury nor infirmity in a verdict of guilty."); *Ventimiglio v. United States*, 61 F.2d 619, 620 (6th Cir. 1932) (evidence failed to show defendant took part in conspiracy he was charged with, though it showed his participation in a different conspiracy); *Wyatt v. United States*, 23 F.2d 791, 792 (3d Cir. 1928) (proof of a different conspiracy from the one charged is fatal), *cert. denied*, 277 U.S. 588 (1928). One variation in the proof that is usually held fatal to a conviction is proof of more than one conspiracy when only one was charged. In *Kotteakos v. United States*, 328 U.S. 750 (1946), the evidence showed eight different conspiracies instead of the single conspiracy charged. *Id.* at 755. The Court held that the dangers of transference of guilt from one defendant to another across the line separating the conspiracies were so great that no one could say there was no prejudice to substantial rights. *Id.* at 774; *see W. LaFave & A. Scott, supra* note 1, at 478 & n.110; *cf. United States v. Thomas*, 586 F.2d 123, 131-32 (9th Cir. 1978) (court properly charged distinction between single and multiple conspiracies).

68. *See United States v. Birchfield*, 486 F. Supp. 137, 139 (M.D. Tenn. 1980); note 63 *supra*.

69. *Vitello v. United States*, 425 F.2d 416, 422-23 (9th Cir.), *cert. denied*, 400 U.S. 822 (1970). "[S]ince verdicts of juries must be viewed as the work of ordinary intelligent and reasoning beings, judges will not presume that a jury would find guilt upon an item not proved but that they would find guilt upon an item well proved." *Samuel v. United States*, 169 F.2d 787, 796 (9th Cir. 1948).

70. *United States v. Drawdy*, 288 F. 567, 570 (S.D. Fla. 1923).

71. *Bergen v. United States*, 295 U.S. 78, 81-84 (1935); *United States v. Kirby*, 587 F.2d 876, 884 (7th Cir. 1978); *United States v. Frank*, 520 F.2d 1287, 1293 (2d Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); *United States v. Grizaffi*, 471 F.2d 69, 73 (7th Cir. 1972), *cert. denied*, 411 U.S. 964 (1973); *McWhorter v. United States*,

the act that is not criminal, however, application of the rule can result in injustice⁷² because the question whether there is sufficient proof of an agreement to commit a valid objective is ignored. Thus, citing authority that states a rule of sufficiency of evidence without analyzing the evidence of an agreement to achieve a valid objective is unfair to defendants in a conspiracy case in which one of the objectives may not be an offense.

Retaining conspiracy convictions when one of the substantive counts has been reversed has also been justified by characterizing the invalidated objective as surplusage.⁷³ Surplusage, superficial or immaterial averments in an indictment that do not charge a crime,⁷⁴ is not fatal to the conviction if the other material in the indictment is sufficient to charge a crime.⁷⁵ Because only one valid objective is

62 F.2d 829, 830 (5th Cir. 1933); *Christiansen v. United States*, 52 F.2d 950, 950-51 (5th Cir. 1931); *Kepl v. United States*, 299 F. 590, 591 (9th Cir.), *cert. denied*, 266 U.S. 617 (1924); *United States v. Birchfield*, 486 F. Supp. 137, 139 (M.D. Tenn. 1980).

72. *Yates v. United States*, 354 U.S. 298, 311-12 (1957).

73. *United States v. Giese*, 597 F.2d 1170, 1178-79 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979); *United States v. Lyman*, 592 F.2d 496, 500-01 (9th Cir. 1978), *cert. denied*, 442 U.S. 931 (1979); *United States v. Strauss*, 283 F.2d 155, 159 (5th Cir. 1960); *United States v. Zirpolo*, 288 F. Supp. 993, 1010-11 (D.N.J. 1968), *rev'd on other grounds*, 450 F.2d 424 (3d Cir. 1971); *United States v. Pope*, 189 F. Supp. 12, 25-26 (S.D.N.Y. 1960); *see United States v. James*, 528 F.2d 999, 1014 (5th Cir.), *cert. denied*, 429 U.S. 959 (1976); *Christiansen v. United States*, 52 F.2d 950, 951 (5th Cir. 1931).

74. *Ford v. United States*, 273 U.S. 593, 602 (1927); *United States v. Giese*, 597 F.2d 1170, 1178-79 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979); *United States v. Lyman*, 592 F.2d 496, 500-01 (9th Cir. 1978), *cert. denied*, 442 U.S. 931 (1979); *United States v. Root*, 366 F.2d 377, 379-81 (9th Cir. 1966), *cert. denied*, 386 U.S. 912 (1967); *Bailey v. United States*, 5 F.2d 437, 438 (5th Cir.), *cert. dismissed*, 269 U.S. 589 (1925); *United States v. Zirpolo*, 288 F. Supp. 993, 1010-11 (D.N.J. 1968), *rev'd on other grounds*, 450 F.2d 424 (3d Cir. 1971); *United States v. B. Goedde & Co.*, 40 F. Supp. 523, 529 (E.D. Ill. 1941); *United States v. Drawdy*, 288 F. 567, 570 (S.D. Fla. 1923); *see Fed. R. Crim. P. 7(d)*; *cf. United States v. Campanale*, 518 F.2d 352, 359-60 (9th Cir. 1975) (court found indictment did not contain surplusage), *cert. denied*, 423 U.S. 1050 (1976).

75. *United States v. Root*, 366 F.2d 377, 380-81 (9th Cir. 1966), *cert. denied*, 386, U.S. 912 (1967); *United States v. Vazquez*, 319 F.2d 381, 384-85 (3d Cir. 1963); *United States v. Strauss*, 283 F.2d 155, 159 (5th Cir. 1960); *Sasser v. United States*, 29 F.2d 76, 77-78 (5th Cir. 1928), *cert. denied*, 279 U.S. 836 (1929); *United States v. Zirpolo*, 288 F. Supp. 993, 1010-11 (D.N.J. 1968), *rev'd on other grounds*, 450 F.2d 424 (3d Cir. 1971); *United States v. Drawdy*, 288 F. 567, 570 (S.D. Fla. 1923); *cf. United States v. B. Goedde & Co.*, 40 F. Supp. 523, 529 (E.D. Ill. 1941) (surplus averment may prejudice the defendant). Although "convictions are no longer reversed because of minor and technical deficiencies which do not prejudice the accused," *Russell v. United States*, 369 U.S. 749, 763 (1962), when an indictment contains legally insufficient language, *see Fed. R. Crim. P. 7(c)*, defendants may challenge it as not charging an offense. A conviction upon an indictment, part of which does not state a crime, would be unsupportable under the *Stromberg* rule, but courts have characterized the language as surplusage and upheld the convictions.

required to convict the defendant,⁷⁶ some courts reason that the conspiracy conviction could be upheld even if one of the objectives was invalid.⁷⁷ The use of this rationale is questionable, however, in light of *Stromberg*. Although the California District Court of Appeals had considered the invalid clause in the statute superfluous,⁷⁸ the Su-

Ford v. United States, 273 U.S. 593, 602 (1927); *Bailey v. United States*, 5 F.2d 437, 438 (5th Cir.), *cert. dismissed*, 269 U.S. 589 (1925); *United States v. Drawdy*, 288 F. 567, 570 (S.D. Fla. 1923). *Compare* *United States v. Dansker*, 537 F.2d 40, 48-49 (3d Cir. 1976) (person being bribed must agree to use his influence as a public official or have the appearance of the ability to do so), *cert. denied*, 429 U.S. 1038 (1977) *with* *United States v. Zirpolo*, 288 F. Supp. 993, 1010-11 (D.N.J. 1968) (material in indictment as to status of person being bribed is surplusage), *rev'd on other grounds*, 450 F.2d 424 (3d Cir. 1971).

76. *United States v. Giese*, 597 F.2d 1170, 1178-79 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979); *United States v. Lyman*, 592 F.2d 496, 500-01 (9th Cir. 1978), *cert. denied*, 442 U.S. 931 (1979); *United States v. Strauss*, 283 F.2d 155, 158-59 (5th Cir. 1960); *United States v. Zirpolo*, 288 F. Supp. 993, 1010-11 (D.N.J. 1968), *rev'd on other grounds*, 450 F.2d 424 (3d Cir. 1971); *United States v. Pope*, 189 F. Supp. 12, 25-26 (S.D.N.Y. 1960).

77. *United States v. Zirpolo*, 288 F. Supp. 993 (D.N.J. 1968), *rev'd on other grounds*, 450 F.2d 424 (3d Cir. 1971), was a prosecution for using interstate commerce facilities to violate a New Jersey statute that prohibited the bribing of any person to obtain any benefit from an office of the government. This statute has been construed to reach only bribery of a public official or a person who gives the appearance of possessing the ability to influence official conduct. *United States v. Dansker*, 537 F.2d 40, 48 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Nevertheless, the court in *Zirpolo* held that, although material describing recipients of the bribes as public officials was not incorporated into the charges, this material was surplusage because it could be deleted without impairing the government's case. 288 F. Supp. at 1010-11. If the government could successfully prosecute the offense without proving those allegations, they might infringe on defendants' first amendment rights to approach persons with no official status and pay them to lobby in the legislature. *United States v. Dansker*, 537 F.2d at 48-49; *see* *United States v. Giese*, 597 F.2d 1170, 1174-76 (9th Cir.) (in indictment for conspiracy to damage government property, allegation of damage to private property incorporated into the conspiracy charge by reference held superfluous and harmless), *cert. denied*, 444 U.S. 979 (1979); *United States v. Strauss*, 283 F.2d 155, 159 (5th Cir. 1960) ("so long as the remaining portions of the indictment adequately charge a crime, the presence of the surplusage will not justify dismissal of the entire indictment"); *United States v. Pope*, 189 F. Supp. 12, 25-26 (S.D.N.Y. 1960) (the words "among other things" held surplusage and stricken from indictment; words also dangerous because the government could have used them to enlarge the substantive charges by a bill of particulars).

78. The analysis of language as surplusage is very similar to the excision the state court in *Stromberg* performed on the California statute. *People v. Mintz*, 62 Cal. App. 788, 794-97, 290 P. 93, 97-99 (1930) (Marks, J., concurring in part, dissenting in part), *rev'd sub nom. Stromberg v. California*, 283 U.S. 359 (1931). That court held that the words "of opposition to organized government" were superfluous and did not add anything to the statute. Therefore, the statute could be treated as though it did not contain those words. *Id.* at 797, 290 P. at 99 (Marks, J., concurring in part, dissenting in part). The information closely followed the wording of the statute. *Stromberg v. California*, 283 U.S. 359, 361 (1931). Therefore, the Court's characterization of language in the statute as superfluous was, in effect, a characterization of the language in the indictment as surplusage, and unnecessary for the conviction.

preme Court overturned the conviction because the jury could have based its verdict on that clause.⁷⁹ It appears that, after *Stromberg*, language in a statute or in an indictment that does not state a crime could not be dismissed in an appellate proceeding as superfluous without an analysis of how it had been presented to the jury in the indictment, information, argument, and instruction.⁸⁰

Thus, courts that have upheld multi-objective conspiracy convictions⁸¹ have used faulty reasoning. Although the results in these cases are not necessarily incorrect, this type of analysis is inconsistent with the *Stromberg* Court's concern about ambiguous general verdicts based on valid and invalid counts.

B. Automatic Reversal of Convictions— A Misapplication of *Stromberg*

At the other end of the spectrum, some courts summarily overturn conspiracy convictions when a substantive count embodying an objec-

79. *Stromberg v. California*, 283 U.S. 359, 368 (1931).

80. See note 77 *supra* and accompanying text.

81. One commentator has indicated that courts respond to conspiracy prosecutions in an automatic way instead of carefully considering the policies involved. Johnson, *supra* note 1, at 1139-40 (the presence of a conspiracy charge in an indictment automatically resolves certain issues); *id.* at 1144 (conspirators are liable for all the crimes committed by any co-conspirators in furtherance of the common enterprise); *id.* at 1166-75 (joinder is proper); *id.* at 1175-80 (venue is proper in any district in which an overt act was committed); *id.* at 1183-88 (out-of-court declarations of co-conspirators are not hearsay). See also Sayre, *supra* note 1, at 405. Courts sometimes cite no authority to support the retention of the conspiracy conviction. See *United States v. Tanner*, 471 F.2d 128, 140 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972); *Moss v. United States*, 132 F.2d 875, 878 (6th Cir. 1943). *Tanner* has been cited as authority in *United States v. Kirby*, 587 F.2d 876, 884 (7th Cir. 1978); *United States v. Dixon*, 536 F.2d 1388, 1402 (2d Cir. 1976); *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Donner*, 497 F.2d 184, 190-91 (7th Cir.), *cert. denied*, 419 U.S. 1047 (1974); and *United States v. Grizaffi*, 471 F.2d 69, 73 (7th Cir. 1972), *cert. denied*, 411 U.S. 964 (1973). Other courts cite some cases that hold that proof of only one of the objectives is required for a valid conspiracy conviction. *United States v. Mack*, 112 F.2d 290, 291 (2d Cir. 1940); see *United States v. James*, 528 F.2d 999, 1014 (5th Cir.), *cert. denied*, 429 U.S. 959 (1976). The *James* court cited two different types of cases: those in which the objective has failed for lack of proof, *United States v. Frank*, 520 F.2d 1287, 1289-91 (2d Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); *Christiansen v. United States*, 52 F.2d 950, 951 (5th Cir. 1931), as well as cases in which an objective has been invalidated for legal insufficiency instead of lack of proof. *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *Hogan v. United States*, 48 F.2d 516, 517 (5th Cir.), *cert. denied*, 284 U.S. 668 (1931). Courts also uphold the conspiracy conviction by characterizing the invalidity of the substantive charge as failure of proof. *United States v. Dixon*, 536 F.2d 1388, 1398-401 (2d Cir. 1976); *United States v. Goodwin*, 455 F.2d 710, 713 (10th Cir.), *cert. denied*, 409 U.S. 859 (1972); *United States v. Mack*, 112 F.2d 290, 291 (2d Cir. 1940).

tive is reversed.⁸² In so doing, however, they apply *Stromberg* without analyzing all the factors upon which the conspiracy conviction could have been based.⁸³ They believe that *Stromberg* and its progeny require an appellate court, before sustaining the conspiracy,⁸⁴ to determine that the jury did not base the conspiracy conviction, in whole or in part, on an impermissible ground.

This is an incorrect application of *Stromberg*. When the case is applied in this manner, there is no distinction between the factual situation in *Stromberg* and that of conspiracy cases involving several substantive crimes that form the objectives of the conspiracy. In *Stromberg*, the defendant was charged with one count of displaying a red flag for any one of three illegal purposes.⁸⁵ Because one of the three purposes was unconstitutional, and there was no indication in the trial record of which one the jury based its general verdict upon, the Court viewed the conviction as incurably ambiguous.⁸⁶ *Stromberg*, however, does not require reversal whenever a general verdict might be based on an impermissible ground. Reversal is warranted only "if it is *impossible* to ascertain whether the defendant has been punished for noncriminal conduct."⁸⁷

Substantive charges that function as the objectives of the conspiracy provide inferences by which an appellate court can determine the objective that the jury believed the defendants conspired to commit.⁸⁸ A general verdict on a conspiracy count charged in con-

82. *E.g.*, *United States v. Head*, Nos. 79-5293, 79-5303, 80-6727, slip op. at 5-12 (4th Cir. Feb. 9, 1981); *United States v. Brown*, 583 F.2d 659, 669 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); *United States v. Carman*, 577 F.2d 556, 566-68 (9th Cir. 1978); *United States v. Gallagher*, 576 F.2d 1028, 1046 (3d Cir. 1978); *United States v. Tarnopol*, 561 F.2d 466, 475 (3d Cir. 1977); *United States v. Dansker*, 537 F.2d 40, 51 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *United States v. Driscoll*, 449 F.2d 894, 898 (1st Cir. 1971), *cert. denied*, 404 U.S. 920 (1972); *Van Liew v. United States*, 321 F.2d 664, 672 (5th Cir. 1963).

83. *United States v. Head*, Nos. 79-5293, 79-5303, 80-6727, slip op. at 10 (4th Cir. Feb. 9, 1981); *United States v. Carman*, 577 F.2d 556, 567-68 (9th Cir. 1978); *United States v. Gallagher*, 576 F.2d 1028, 1046 (3d Cir. 1978); *United States v. Driscoll*, 449 F.2d 894, 898 (1st Cir. 1971), *cert. denied*, 405 U.S. 920 (1972).

84. *See* note 33 *supra* and accompanying text.

85. *See* note 24 *supra* and accompanying text.

86. *See* notes 24-28 *supra* and accompanying text.

87. *Chiarella v. United States*, 445 U.S. 222, 237 n.21 (1980) (citing *United States v. Gallagher*, 576 F.2d 1028, 1046 (3d Cir. 1978); *Leary v. United States*, 395 U.S. 6, 31-32 (1969); *Stromberg v. California*, 283 U.S. 359, 369-70 (1931)) (emphasis added). In *United States v. Anzalone*, 626 F.2d 239 (2d Cir. 1980), the court stated that "the first question is whether Anzalone and Rios would have been convicted of a properly described conspiracy to violate the statute by counterfeiting *only* currency. We note that Anzalone was convicted on four substantive counts involving currency and that the evidence concerning Rios . . . involved *only* currency. In our view the jury necessarily would have found Anzalone and Rios guilty of a narrower, currency-related conspiracy." *Id.* at 246.

88. *See United States v. Anzalone*, 626 F.2d 239, 246 (2d Cir. 1980).

junction with substantive crimes is not as opaque as a general verdict on any other type of crime because many elements are common to both the substantive crimes and conspiracy.⁸⁹ Conviction on a valid substantive charge indicates that the jury found all the elements essential to a conviction on the conspiracy charge,⁹⁰ except the agreement among the parties. Therefore, applying *Stromberg* to conspiracy cases without analyzing inferences that can be drawn from a guilty verdict on the substantive counts can result in invalidating a conviction that could have been retained.

C. A Proposed Standard of Analysis

Considerations of judicial economy militate against overturning a conviction if there is a clear and valid basis for sustaining it.⁹¹ An appellate court should sustain a conspiracy conviction when one of the objectives is invalid, if it can determine that the jury convicted defendants of conspiracy to commit one of the remaining valid objectives.⁹² This determination can be made⁹³ by engaging in a two

89. See notes 5-11 *supra* and accompanying text.

90. The Supreme Court, in *Street v. New York*, 394 U.S. 576 (1969), recognized that when a defendant is charged with separate counts, the jury must find guilt or innocence as to each count. *Id.* at 588. Such verdicts provide positive evidence that the trier of fact considered each count on its own merits. *Id.* When the other counts embody the objectives of the conspiracy, the jury considers each of the objectives separately and makes explicit findings as to each. These findings thus indicate some of the jury's beliefs about each of the objectives.

91. In a criminal appeal, the burden of proof is on the defendant to show error in the trial and that he was prejudiced. *Beck v. Washington*, 369 U.S. 541, 557-58 (1962); *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 461-62 (1956); *United States v. Lipscomb*, 435 F.2d 795, 803 (5th Cir. 1970), *cert. denied*, 401 U.S. 930 (1971); *Hanna v. United States*, 404 F.2d 405, 406 (5th Cir. 1968), *cert. denied*, 394 U.S. 1015 (1969); *Evalt v. United States*, 359 F.2d 534, 544 (9th Cir. 1966); *Sica v. United States*, 325 F.2d 831, 836 (9th Cir. 1963); *Grady v. Iowa State Penitentiary*, 346 F. Supp. 681, 683 (N.D. Iowa 1972). Similarly, when the issue is whether there was sufficient evidence to support a verdict, the verdict will be upheld unless no reasonable jury could have found defendant guilty. *United States v. Glover*, 514 F.2d 390, 391 (9th Cir.), *cert. denied*, 423 U.S. 857 (1975); *United States v. Cho Po Sun*, 409 F.2d 489, 491 (2d Cir.), *cert. denied*, 396 U.S. 864 (1969); *Figueroa v. United States*, 352 F.2d 587, 592 (9th Cir. 1965); *Rua v. United States*, 321 F.2d 140, 143 (5th Cir. 1963), *cert. denied*, 377 U.S. 969 (1964); *People v. Cutierrez*, 35 Cal. 2d 721, 727, 221 P.2d 22, 25-26 (1950) (en banc).

92. See notes 85-90 *supra* and accompanying text.

93. The function of an appeals judge is not to read the jury's mind, *Beck v. United States*, 298 F.2d 622, 630 (9th Cir.), *cert. denied*, 370 U.S. 919 (1962), and a criminal sanction may not rest on what the appellate court thinks the jury would have done had the issues been framed differently. *United States v. Carman*, 577 F.2d 556, 568 (9th Cir. 1978). Courts, however, have examined the record to decide whether it is possible to determine the basis of a verdict. *E.g.*, *Street v. New York*, 394 U.S. 576, 589-90 (1969) (court examined information and statutes to determine

step analysis. First, the court must find that the remaining substantive crime can form the basis of a valid objective⁹⁴ and constitute an overt act.⁹⁵ Second, evidence of the defendants' conduct must indicate that it was impossible for the substantive crime validly charged to have been committed except by an agreement.⁹⁶

The first step is necessary because it is the only way to know that the jury believed the defendants intended to achieve the valid objective.⁹⁷ In conspiracy cases in which there are also substantive charges, verdicts on the underlying counts are equivalent to special findings on several elements of a conspiracy conviction.⁹⁸ Because most counts in an indictment are answered by a general verdict,⁹⁹ an

basis of verdict); *Yates v. United States*, 354 U.S. 298, 311-12 & n.17 (1957) (not clear that instruction required both objectives to be found, and the overt acts proven concerned the invalid objective); *Thomas v. Collins*, 323 U.S. 516, 528-29, 540-41 (1945) (neither petition for contempt order nor contempt citation distinguished between valid and invalid bases); *Williams v. North Carolina*, 317 U.S. 287, 291-93 (1942) (clear that the state based its prosecution on a case the Court overruled); *United States v. Brown*, 583 F.2d 659, 664 (3d Cir. 1978) (court examined indictment, evidence, and jury instruction to determine if mailings were in furtherance of a scheme to defraud), *cert. denied*, 440 U.S. 909 (1979); *United States v. Baranski*, 484 F.2d 556, 566-70 (7th Cir. 1973) (court examined difference between wording of the conspiracy count and the substantive count); *Williams v. Cuyler*, 491 F. Supp. 272, 275-76 (E.D. Pa. 1980) (court examined evidence to determine if overt acts showed a conspiracy to rob).

94. *E.g.*, *United States v. Wedelstedt*, 589 F.2d 339, 340-41 (8th Cir. 1978), *cert. denied*, 442 U.S. 916 (1979); *United States v. Dixon*, 536 F.2d 1388, 1402 (2d Cir. 1976); *United States v. Papadakis*, 510 F.2d 287, 289-90, 297 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Donner*, 497 F.2d 184, 187 (7th Cir.), *cert. denied*, 419 U.S. 1047 (1974); *United States v. Tanner*, 471 F.2d 128, 131 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972); *United States v. Friedman*, 445 F.2d 1076, 1078 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971). When the objectives are not charged as substantive counts, there is no independent way to ascertain what the jury believed about any of the objectives. Consequently, if one of the objectives is held invalid for any reason, and the verdict is general, the conspiracy charge must fall. *See United States v. Baranski*, 484 F.2d 556, 566-68 (7th Cir. 1973).

95. *United States v. Driscoll*, 449 F.2d 894, 897 n.3 (1st Cir. 1971), *cert. denied*, 405 U.S. 920 (1972).

96. *See United States v. Wedelstedt*, 589 F.2d 339, 344-45 (8th Cir. 1978), *cert. denied*, 442 U.S. 916 (1979); *United States v. Papadakis*, 510 F.2d 287, 290 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Goodson*, 502 F.2d 1303, 1305-06 (5th Cir. 1974); *United States v. Driscoll*, 449 F.2d 894, 897 n.3 (1st Cir. 1971), *cert. denied*, 405 U.S. 920 (1972). In *United States v. Donner*, 497 F.2d 184 (7th Cir.), *cert. denied*, 419 U.S. 1047 (1974), for example, the court commented that because the substantive violations were found to have existed, it was obvious that the defendants had agreed to commit the crimes. *Id.* at 190 (comparing *United States v. Baranski*, 484 F.2d 556, 566-68 (7th Cir. 1973)).

97. *See* notes 5-11, 88-90 *supra* and accompanying text.

98. The lack of any indication of the basis for the jury's verdicts was the deciding factor in *Street v. New York*, 394 U.S. 576, 588 (1969), *Yates v. United States*, 354 U.S. 298, 311-12 (1957), and *Stromberg v. California*, 283 U.S. 359, 367-68 (1931).

99. *See* note 49 *supra* and accompanying text.

acquittal will never indicate why the jury believed the defendants were innocent.¹⁰⁰ If defendants were found guilty on the substantive count, however, the jury must have found the intent to commit the objective¹⁰¹ and an overt act.¹⁰²

The agreement to commit the crime is the only element of conspiracy not proven by a substantive conviction. The second step in the proposed analysis requires that there be some evidence indicating that the agreement actually contemplated the commission of the valid objective.¹⁰³ Because most agreements are made in secret, however, the only proof as to which objective defendants conspired to commit is the behavior of the defendants,¹⁰⁴ which may indicate an agreement to achieve the invalid objective, the valid objective, or both objectives.¹⁰⁵

In the rare case when the defendants' acts demonstrate that they conspired only to commit the invalid objective, the conspiracy conviction must be reversed.¹⁰⁶ For example, in a conspiracy case in which the defendants are validly charged with advocating the violent overthrow of the government and invalidly charged with organizing the Communist Party, attendance at promotional meetings "unmarked by any advocacy" constitutes an overt act in furtherance of the invalid objective.¹⁰⁷ Retention of the conspiracy conviction under these cir-

100. The jury could have acquitted defendants of the substantive crime because defendants had failed to accomplish the purpose, but could have convicted defendants for conspiracy to accomplish the objective. See note 58 *supra* and accompanying text.

101. *Developments, supra* note 1, at 936-37.

102. *Id.* at 946.

103. *United States v. Anzalone*, 626 F.2d 239, 240-41, 246 (2d Cir. 1980) (a defendant was convicted of conspiracy and the only evidence relating to him concerned the valid counterfeiting charge); *United States v. Wedelstedt*, 589 F.2d 339, 342, 345 (8th Cir. 1978) (defendant was convicted of valid substantive crime even though he was not present at its commission), *cert. denied*, 442 U.S. 916 (1979); *United States v. Dixon*, 536 F.2d 1388, 1392-94 (2d Cir. 1976) (gravamen of prosecution was securities violations, which were well proven; invalid count charged that defendant used mail to commit the securities violation); *United States v. Driscoll*, 449 F.2d 894, 895-96 (1st Cir. 1971) (defendant was convicted of attempt to smuggle although he wasn't present at its commission), *cert. denied*, 405 U.S. 920 (1972); *cf. Yates v. United States*, 354 U.S. 298, 312 & n.17 (1957) (overt acts could not be determined to have furthered the valid objective).

104. See notes 41-43 *supra* and accompanying text.

105. *United States v. Campanale*, 518 F.2d 352, 357-58 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *Williams v. Cuyler*, 491 F. Supp. 272, 275-76 (E.D. Pa. 1980). In *Yates v. United States*, 354 U.S. 298 (1957), the Court reviewed the evidence and found that the overt acts proved could not be determined to have furthered the valid objective. *Id.* at 312 & n.17. This determination by the Supreme Court supports analyzing the overt acts to determine which objective they furthered.

106. *Yates v. United States*, 354 U.S. 298, 311-12 (1957).

107. *Id.* at 311-12 & n.17.

cumstances would defeat the underlying purposes of the *Stromberg* rule.

When numerous defendants are convicted upon a valid substantive count and upon a conspiracy charge alleging the substantive offense as one of its objectives, an overt act, clearly in furtherance of the valid objective,¹⁰⁸ indicates that the defendants were conspiring toward that objective.¹⁰⁹ For example, in a conspiracy case in which the defendants are validly charged with conspiring to pass counterfeit currency and invalidly charged with conspiring to pass counterfeit government bonds, a defendant's conversation with a potential purchaser of the currency constitutes an overt act in furtherance of the valid objective.¹¹⁰ In such a situation, failure of any other substantive count should not affect the conspiracy conviction.¹¹¹

When the evidence indicates that the defendants conspired toward both the valid and invalid objectives, two alternative situations can arise. In the first situation, the valid substantive charge arises from a transaction different from the one that forms the basis of the invalid count.¹¹² In such cases, the jury would find the proof easily separable, and their finding on the valid charge would be free from any suspicion of prejudice caused by introduction of evidence relating to the invalid charge.¹¹³ In the second situation, the substantive charges

108. *United States v. Anzalone*, 626 F.2d 239, 246 (2d Cir. 1980) (one defendant convicted of conspiracy but the only evidence relating to him was in regard to the valid substantive charge); *United States v. Wedelstedt*, 589 F.2d 339, 244-45 (8th Cir. 1978) (defendant convicted of substantive crime although he was not present at its commission), *cert. denied*, 442 U.S. 916 (1979); *United States v. Driscoll*, 449 F.2d 894, 897 n.3 (1st Cir. 1971) (court recognized that the conviction of defendant for substantive count although he was not present at its commission could indicate jury believed defendant was part of the conspiracy), *cert. denied*, 405 U.S. 920 (1972).

109. In *Yates v. United States*, 354 U.S. 298 (1957), the Court characterized the overt acts as being in furtherance of only one of the objectives. *Id.* at 311-12 & n.17. In *Williams v. Cuyler*, 491 F. Supp. 272 (E.D. Pa. 1980), the court examined the relationship between the defendants and the circumstances surrounding the crime in an attempt to determine if the overt acts showed a conspiracy to rob. *Id.* at 275-76.

110. *United States v. Anzalone*, 626 F.2d 239, 246 (2d Cir. 1980).

111. *Id.*

112. *E.g.*, *id.* at 241-42; *United States v. Wedelstedt*, 589 F.2d 339, 342 (8th Cir. 1978), *cert. denied*, 442 U.S. 916 (1979); *United States v. Brown*, 583 F.2d 659, 669 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); *United States v. Papadakis*, 510 F.2d 287, 289-90, 297 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Tanner*, 471 F.2d 128, 142 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972); *Christiansen v. United States*, 52 F.2d 950, 950 (5th Cir. 1931).

113. *United States v. Anzalone*, 626 F.2d 239, 246-47 (2d Cir. 1980) (evidence of Armory Bond counterfeiting tainted neither currency conviction nor conviction for conspiracy to counterfeit currency); *United States v. Wedelstedt*, 589 F.2d 339, 342 (8th Cir. 1978) (evidence of two thefts separate and distinct; valid objective formed sufficient basis for the conspiracy allegations), *cert. denied*, 442 U.S. 916 (1979); *United States v. Brown*, 583 F.2d 659, 669 (3d Cir. 1978) (evidence relating to credit

may be so closely intertwined that if the jury found all the elements of the invalid count, it would necessarily have found all the elements of the valid count.¹¹⁴ In these cases, even if the jury had convicted defendants of conspiracy to commit the invalid objective, it would necessarily have found a conspiracy to commit the valid objective.¹¹⁵ Thus, the conspiracy conviction would be sustained.

Under this analysis, many of the cases that uphold conspiracy convictions, although one of the objectives does not state a crime,¹¹⁶ follow the wrong reasoning but reach the proper result.¹¹⁷ In most

collection by extortion distinct from evidence relating to mail fraud), *cert. denied*, 440 U.S. 909 (1979); *United States v. Papadakis*, 510 F.2d 287, 289-90, 297 (2d Cir.) (narcotics offenses and obstructing communication of information to federal officer; court does not point out that this evidence is separable but instead admits it because it is relevant on the charge of obstructing justice), *cert. denied*, 421 U.S. 950 (1975); *United States v. Tanner*, 471 F.2d 128, 142 (7th Cir.) (transporting explosives in interstate commerce easily separable from evidence relating to exploding ship), *cert. denied*, 409 U.S. 949 (1972).

114. *E.g.*, *United States v. Dixon*, 536 F.2d 1388, 1392-93 (2d Cir. 1976) (if the jury convicted for conspiracy to commit mail fraud, it would have found every element necessary for a violation of securities laws because defendant violated securities laws through use of mail); *United States v. Goodwin*, 455 F.2d 710, 714 (10th Cir.) (intent that counterfeit money pass as genuine, would arguably include intent to defraud, which is sufficient to convict on the valid charge), *cert. denied*, 409 U.S. 859 (1972); *United States v. Mack*, 112 F.2d 290, 291 (2d Cir. 1940) (if the jury convicted defendant for conspiracy to harbor and conceal an illegal alien, they would have convicted for failure to register the alien); *Bailey v. United States*, 5 F.2d 437, 437-38 (5th Cir.) (if defendant was convicted for conspiracy to sell liquor at wholesale without paying the tax, then he also conspired to sell liquor at wholesale in violation of the eighteenth amendment), *cert. dismissed*, 269 U.S. 589 (1925). In *United States v. Driscoll*, 449 F.2d 894 (1st Cir. 1971), *cert. denied*, 405 U.S. 920 (1972), the court commented that in finding defendant guilty of an attempt to smuggle illegal aliens, the jury must have found him guilty of a conspiracy to smuggle because he clearly was not present when the attempt was made. *Id.* at 897 n.3. This analysis of the elements of the crime has precedent in other circuit court decisions. *See United States v. Reid*, 517 F.2d 953, 965 (2d Cir. 1975); *United States v. Jacobs*, 475 F.2d 270, 283-84 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973).

115. *See* note 114 *supra*.

116. *E.g.*, *United States v. Wedelstedt*, 589 F.2d 339, 342 (8th Cir. 1978), *cert. denied*, 442 U.S. 916 (1979); *United States v. Dixon*, 536 F.2d 1388, 1401-02 (2d Cir. 1976); *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Bottone*, 365 F.2d 389, 394-95 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966); *Moss v. United States*, 132 F.2d 875, 878 (6th Cir. 1943); *United States v. Mack*, 112 F.2d 290, 291 (2d Cir. 1940).

117. In *United States v. Dixon*, 536 F.2d 1388 (2d Cir. 1976), the Second Circuit overturned a mail fraud conviction because defendants' plan did not constitute a scheme to defraud. *Id.* at 1401. The court could properly have upheld the conspiracy conviction because, even had the jury convicted defendants of conspiracy to commit mail fraud, defendants' conduct could only have been mail fraud because they used the mail to consummate the securities fraud. *See* note 114 *supra* and accompanying text. The court, however, upheld the conspiracy conviction solely because defendant was convicted of the valid objective. 536 F.2d at 1401-02. Similarly, in *United States*

cases, there will be evidence of overt acts directed to the accomplishment of a valid objective.¹¹⁸ There is no reason for the conspiracy conviction to be overturned, as in cases that follow *Stromberg* strictly,¹¹⁹ when it can logically be determined that the jury believed the defendants conspired to commit one of the other crimes with which they are charged.¹²⁰ The analysis proposed in this Note permits retention of these conspiracy convictions by appellate courts while protecting defendants from ambiguous general verdicts based on invalid counts.

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v. Goodwin, 455 F.2d 710 (10th Cir.), *cert. denied*, 409 U.S. 859 (1972), the Tenth Circuit overturned a conviction for violation of a statute prohibiting transfer of counterfeit currency with intent that it pass as genuine because defendants had no plan that the currency would pass as genuine. *Id.* at 713-14. The court could properly have upheld the conspiracy conviction because, even had the jury convicted defendants of conspiracy to transfer counterfeit currency with intent that it pass as genuine, they would arguably have found an intent to defraud, all that is necessary to convict for a conspiracy to achieve the crime with which defendants were validly charged. See note 114 *supra* and accompanying text. The court, however, upheld the conspiracy conviction solely because defendants had been convicted of a valid substantive crime.

118. *United States v. Anzalone*, 626 F.2d 239, 246 (2d Cir. 1980) (telephone conversation relating to currency only); *United States v. Wedelstedt*, 589 F.2d 339, 344-45 (8th Cir. 1978) (telephone conversation that defendants would attempt theft again), *cert. denied*, 442 U.S. 916 (1979); *United States v. Dixon*, 536 F.2d 1388, 1394 (2d Cir. 1976) (proxy statement and 10-K report filed without required indebtedness information); *United States v. Papadakis*, 510 F.2d 287, 291 (2d Cir.) (transfer of heroin to possession of one of the defendants after agreement to keep it), *cert. denied*, 421 U.S. 950 (1975); *United States v. Donner*, 497 F.2d 184, 187, 190 (7th Cir.) (agreement obvious from mutilated records); *cert. denied*, 419 U.S. 1047 (1974); *United States v. Tanner*, 471 F.2d 128, 132 (7th Cir.) (transporting explosives in furtherance of valid bombing charge), *cert. denied*, 409 U.S. 949 (1972).

119. *United States v. Carman*, 577 F.2d 556, 566 (9th Cir. 1978); *United States v. Gallagher*, 576 F.2d 1028, 1046 (3d Cir. 1978); *United States v. Tarnopol*, 561 F.2d 466, 476 (3d Cir. 1977); *United States v. Dansker*, 537 F.2d 40, 51 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *United States v. Driscoll*, 449 F.2d 894, 897 n.3 (1st Cir.), *cert. denied*, 405 U.S. 920 (1972).

120. When it is possible to determine the basis of a jury verdict, the existence of an invalid basis will not cause the conviction to fail. See notes 108-09 *supra*.