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## UNILATERAL CONSPIRACY: THREE CRITICAL PERSPECTIVES

Dierdre A. Burgman\*

*Ms. Burgman asserts that the unilateral conspiracy law proposed by the American Law Institute and adopted by many states is an unnecessary and unwise extension of traditional conspiracy law when applied in the context of singular-defendant-plus-policeman conspiracies. She demonstrates the inadequacy of the new approach from three perspectives: the historical, the theoretical, and the due process. She concludes that the application of the doctrine in such situations is contrary to the historical and theoretical underpinnings of conspiracy law and is potentially abusive of due process.*

Justice Cardozo stated that the history of conspiracy exemplifies "the tendency of a principle to expand itself to the limits of its logic."<sup>1</sup> With the Model Penal Code's "unilateral approach,"<sup>2</sup> adopted by many states,<sup>3</sup> the

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1. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1932).

2. The pertinent section reads:

(1) *Definition of Conspiracy.* A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he

(a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

MODEL PENAL CODE § 5.03 (Proposed Official Draft 1962) [hereinafter cited as MODEL PENAL CODE].

3. Thirty states have adopted statutes that conform to the Model Penal Code provisions on unilateral conspiracy. In some instances the unilateral approach has been embraced by the judiciary. The harmony of statute and case law appears in: CONN. GEN. STAT. ANN. § 53a-48 (West 1972) and *State v. Marra*, 174 Conn. 338 (1978) (only the accused's intent to commit larceny relevant to the conspiracy charge); DEL. CODE ANN. tit. 11, § 511-13 (1974) and *Saienni v. State*, 346 A.2d 152 (Del. 1975) (agent's lack of intent does not preclude conspiracy conviction of defendant who solicited agent to commit murder); IND. CODE ANN. § 35-41-5-2 (Burns 1979) and *Garcia v. State*, \_\_\_ Ind. \_\_\_, 394 N.E.2d 106 (1979) (conspiracy conviction upheld although the only person with whom she conspired was an informant who feigned acquiescence in the scheme); MINN. STAT. ANN. § 609.175 (West 1980 Supp.) and *State v. Happel*, \_\_\_ Minn. \_\_\_, 259 N.W.2d 600 (1977) (defendant can be convicted of conspiracy even if those he agreed with cannot); MONT. CRIM. CODE § 94-4-102 (1973) and MONT. REV. CODE ANN. § 94-4-102 (1973 Special Pamph.) and *State v. Cripps*, 582 P.2d 312 (Mont. 1978) (acquittal of co-defendants on conspiracy conviction did not affect status of remaining defendant's conspiracy conviction); N.Y. PENAL LAW § 105 (McKinney 1975) and *People v. Smith*, 61 A.D.2d 91, 401 N.Y.S.2d 353 (1978) (only intent of defendant is relevant to charge of conspiracy to commit murder).

law of conspiracy has expanded itself beyond those limits. By examining the new crime from three critical perspectives, this article demonstrates that unilateral conspiracy is inconsistent with the historical development and logic of the common law conspiracy doctrine, and that it is potentially abusive of due process guarantees.

The unilateral approach assesses the subjective, individual behavior of a defendant in determining guilt or innocence.<sup>4</sup> Such a determination renders irrelevant the conviction, acquittal, irresponsibility, or immunity of

There is no relevant case law since the enactment of these statutes embracing the unilateral conspiracy concept: ALA. CODE tit. 13A, § 4-3 (1978 Crim. Code); ARIZ. REV. STAT. ANN. § 3-1063 (1978); ARK. STAT. ANN. § 41-707 (1977); HAWAII REV. STAT. § 705-520 (1976); KY. REV. STAT. § 506.040 (1975 Penal Code); ME. REV. STAT. ANN. tit. 17-A, § 151 (1971); MO. ANN. STAT. § 564.016 (Vernon 1979); NEB. REV. STAT. § 28-202 (Supp. 1977); N.H. REV. STAT. ANN. § 629:3 (1974); N.D. CENT. CODE § 12.1.06-04 (1976); OHIO REV. CODE ANN. § 2923.01 (Page 1978 Supp.); OR. REV. STAT. § 161.450 (1977); TEX. PENAL CODE ANN. tit. 4, § 15.02 (Vernon 1974); UTAH CODE ANN. § 76-4-201 (1978); VA. CODE § 18.2-22 (1975 Replacement Vol.); WASH. REV. CODE ANN. § 9A.28.040 (1977).

Some states have adopted the unilateral approach by statute, but their judiciaries do not appear to be following the Model Penal Code approach. Compare COLO. REV. STAT. § 18-2-201 (1973) *with* *People v. Johnson*, 189 Colo. 28, 536 P.2d 44 (1975) (relationship between co-conspirators must involve genuine agreement and confederation); FLA. STAT. ANN. § 777.04 (West 1976) *and* *People v. Wilkinson*, 38 Colo. App. 365, 561 P.2d 347 (1976) (to prove conspiracy, a common design and intent must be proven among all actors) *with* *Ramirez v. State*, 371 So. 2d 1063 (Fla. Dist. Ct. App. 1979) (crime of conspiracy must involve agreement and intention to commit crime among all actors) *and* *Slater v. State*, 356 So. 2d 69 (Fla. Dist. Ct. App. 1978) (criminal intent on part of all actors necessary for conspiracy conviction) *and* *Pearce v. State*, 330 So. 2d 783 (Fla. Dist. Ct. App. 1976) (conspiracy conviction reversed when co-defendants were acquitted of conspiracy charges); ILL. REV. STAT. ch. 38, § 8-2 (1977) *with* *People v. Ambrose*, 28 Ill. App. 3d 627, 329 N.E.2d 11 (1975) (sustained conviction of conspiracy because co-conspirator, turned informer, at one time had necessary intent to commit armed robbery); MICH. COMP. LAWS ANN. § 759.175a (1968) *with* *People v. Berry*, 84 Mich. App. 604, 269 N.W.2d 694 (1978) (no conspiracy if alleged co-conspirators are acquitted); N.J. STAT. ANN. § 2C:5-2 (West 1979) *with* *State v. Mazur*, 158 N.J. Super. 89, 385 A.2d 878 (1978) (conspiracy requires specific intent on the part of at least two persons); N.M. STAT. ANN. § 30-28-2 (1978) *with* *State v. Ross*, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974) (common design and mutual understanding is necessary for conspiracy conviction) *and* *State v. Dressel*, 85 N.M. 450, 513 P.2d 187 (Ct. App. 1973) (common design to accomplish unlawful purpose is essence of conspiracy); 18 PA. CONS. STAT. ANN. § 903 (Purdon 1973) *with* *Commonwealth v. Dolfi*, 396 A.2d 635 (1979) (mutual criminal responsibility and intent required for conspiracy conviction) *and* *Commonwealth v. Henderson*, 249 Pa. Super. Ct. 472, 378 A.2d 193 (1977) (common understanding is essential to conspiracy conviction); WIS. STAT. ANN. § 939.31 (West 1958) *with* *Hawpetoss v. State*, 52 Wis. 2d 71, 187 N.W.2d 823 (1971) (conscious intent of each actor to attain criminal objective is required for criminal conviction).

The unilateral approach is rejected both by the language of the statute and the subsequent cases in many states. See, e.g., KAN. STAT. ANN. § 21-3302 (1974) *and* *State v. Crozier*, 225 Kan. 120, 587 P.2d 331 (1978) (actual agreement and meeting of minds required for conspiracy conviction); GA. CODE ANN. § 26-3201 (1977) *and* *Eberheart v. State*, 232 Ga. 247, 206 S.E.2d 12 (1974), *vacated on other grounds*, 433 U.S. 917 (1977), *modified on other grounds*, 239 Ga. 407, 238 S.E.2d 1 (1977) (agreement and common design are necessary for conspiracy conviction).

4. MODEL PENAL CODE, *supra* note 2, § 5.04(1)(a).

other co-conspirators.<sup>5</sup> To that extent, the new law follows judicial extensions consistent with the theoretical underpinnings of the common law crime.<sup>6</sup> But the application of unilateral conspiracy does not end there. The most unsettling aspect of the crime, and the one to which this article is addressed, arises in the case of a "feigned agreement"—that is, a case in which one of two<sup>7</sup> alleged "conspirators" is, unknown to the defendant, an undercover police agent or a police informant. In such a case the unilateral model statute and the relevant cases it has spawned call for the prosecution of the single defendant based on the defendant's subjective belief that he or she was conspiring.<sup>8</sup>

This approach ignores the historical rationale of the common law crime of conspiracy: the threat to society of two or more persons pursuing crime. When one of two conspirators has no intention of pursuing the criminal objective, the rationale for increased punishment is absent. Therefore, although this latest extension of the law appears logical when viewed alongside its judicial precursors, it actually defies its own reason.<sup>9</sup> While the move may be heralded as a step toward more effective law enforcement, it is not justified because society's interest in punishing such conduct is already met by the charges of solicitation and attempt.<sup>10</sup>

5. See generally W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 488-90 (1972) [hereinafter cited as LAFAVE & SCOTT].

6. Insofar as it eliminates the nullifying effect of an inconsistent verdict, as in *Martinez v. People*, 129 Col. 94, 267 P.2d 654 (1954), or the inability to prosecute another defendant, as in *Rosenthal v. United States*, 45 F.2d 1000 (8th Cir. 1930), the unilateral approach seems a plausible extension of the *Fox* rule. The *Fox* rule obviates the need to dismiss a conspiracy charge against one defendant when a *nolle prosequi* has been filed as to the other defendant. *United States v. Fox*, 130 F.2d 56 (3d Cir. 1942), *cert. denied*, 317 U.S. 666 (1942).

7. Of course, if there are more than two members, there is no problem in finding a legitimate conspiracy, provided more than one member is not knowingly working with the police. See, e.g., *State v. Wilkins*, 34 N.C. App. 392, 238 S.E.2d 659 (1977); *State v. Horton*, 275 N.C. 651, 657, 170 S.E.2d 466, 470 (1969). But see *Beasley v. State*, 360 So. 2d 1275 (Fla. Dist. Ct. App. 1978). In *Beasley*, a lone defendant was convicted for conspiring with two government agents. The court based its decision on the fact that one of the two agents was not authorized to deal in drugs.

8. *State v. St. Christopher*, 305 Minn. 226, 232 N.W.2d 798 (1975); *Saienni v. State*, 346 A.2d 152 (Del. 1975).

9. [T]he criminal law of today, throughout the world, is made up more or less of successive strata of rules, institutions, traditional modes of thought, and legislative provisions representing different and inconsistent ideas of the end of criminal law, the purpose of penal treatment, and the nature of crime. This is true especially in Anglo-American criminal law. With us all stages of development and all theories and all manner of combinations of them are represented in rules and doctrines which the courts are called upon to administer. Indeed, all or many of them may be represented in legislative acts bearing the same date. . . . [O]ur criminal law is not internally consistent, much less homogenous and well organized.

R. POUND, *CRIMINAL JUSTICE IN THE AMERICAN CITY—A SUMMARY* 30-31 (1922), (1967).

10. See *People v. Lanni*, 95 Misc. 2d 4, 7-8, 406 N.Y.S.2d 1011, 1013 (1978). Contrast the determination of a Presidential commission that no new substantive criminal laws are necessary

Moreover, because the crime of unilateral conspiracy inevitably punishes predisposition to commit crime, without the safeguards incorporated in bilateral conspiracy, it opens the door to entrapment. Unfortunately, recent judicial treatment of the entrapment defense has curtailed its effectiveness.<sup>11</sup> Courts that have considered the entrapment issue in the context of unilateral conspiracy cases have dismissed it summarily<sup>12</sup> or, after discussion, have deemed it inapplicable.<sup>13</sup> In addition, the precise elements of the new crime are unclear,<sup>14</sup> as is often the legislative intent concerning the new statutes.<sup>15</sup> Courts, therefore, have had difficulty in rendering consistent interpretation. Resulting problems of due process compel a serious rethinking of the model law.

This article focuses on the model law from three standpoints: the historical, theoretical, and due process perspectives. The first two perspectives demonstrate that unilateral conspiracy is an altogether new crime, explainable only superficially as a logical and necessary form of conspiracy. The final perspective examines the law's potential for oppression and the lack of judicial or legislative safeguards to prevent the miscarriage of justice that the original crime sought to prevent.

#### THE HISTORICAL PERSPECTIVE

Conspiracy originated, ironically, as a preventive remedy for abuse of the legal process. One of the initial statutes was the *Ordinacio de Con-*

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to fight organized crime, as conspiracy law is quite adequate. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 200. This disparity can be resolved only when it is recognized that unilateral conspiracy aims at singular, rather than organized, defendants: it permits the law to trick them into "organizing" and then punishes them for doing so.

11. See, e.g., *Hampton v. United States*, 425 U.S. 484 (1976); *Russell v. United States*, 411 U.S. 423 (1973); *United States v. Graves*, 556 F.2d 1319 (5th Cir. 1977), cert. denied, 435 U.S. 923 (1978); *United States v. Swets*, 563 F.2d 989 (10th Cir. 1977), cert. denied, 434 U.S. 1022 (1978); *People v. Sanchez*, 580 P.2d 1270 (Colo. App. 1978); *State v. Dickinson*, 370 So. 2d 762 (Fla. 1979); *State v. Ziegler*, 19 Wash. App. 119, 575 P.2d 723 (1978). But see *People v. Spahr*, 56 Ill. App. 3d 434, 371 N.E.2d 1261 (1978).

12. See *People v. Lanni*, 95 Misc. 2d 4, 7, 406 N.Y.S.2d 1011, 1013 (1978). Cf. *King v. State*, 104 So.2d 730, 732 (Fla. 1958) (possible entrapment recognized but not used as basis for decision).

13. See *State v. Lavary*, 152 N.J. Super. 413, 419, 377 A.2d 1255, 1258 (1977), rev'd on other grounds, 163 N.J. Super. 576, 395 A.2d 524 (1978).

14. The Code makes no attempt to define its terms. The absence of any definition of "agreement" is particularly troubling. Notwithstanding the absence of a clear statutory statement of the elements of the offense, at least one court has said the elements are the same as those under a bilateral definition. See, e.g., *People v. Schwimmer*, 66 A.D.2d 91, 411 N.Y.S.2d 922, 924 (1978).

15. See, e.g., *Garcia v. State*, \_\_\_Ind.\_\_\_\_, 394 N.E.2d 106 (1979); *People v. Lanni*, 95 Misc. 2d 4, 14-15, 406 N.Y.S.2d 1011, 1017 (1978).

*spiratoribus*.<sup>16</sup> This statute did not precisely define "conspiracy" but was directed against combinations or confederacies for false and malicious promotions of indictments and pleas, embracery, and maintenance.<sup>17</sup> Moreover, rather than creating a substantive crime, the statute created a writ that a party could use as a form of post-trial relief. This early conspiracy law's most striking distinction is its time element. The early statute permitted legal intervention only after the seeker of the writ had been indicted and acquitted,<sup>18</sup> whereas under the modern timing concept of conspiracy the law intervenes before real harm is done.<sup>19</sup> Thus, the requirement of an agreement, which has come to be known as the "gist of the offense,"<sup>20</sup> was originally only one part of the proscribed evil.

The shift of focus to the evil agreement came in 1611 in the *Poulterers' Case*,<sup>21</sup> where the Star Chamber treated conspiracy as a substantive crime rather than a writ. Consequently, conspiracy became punishable once the agreement had been made, and government intervention occurred at a much earlier juncture. In deciding the *Poulterers' Case* in this manner, the Star Chamber created a potent weapon for quelling group activity aimed at subverting justice. That court, however, was not willing to contain its new invention,<sup>22</sup> and it expanded the concept further to include acts that were deemed contrary to public policy or merely "mischievous."<sup>23</sup>

16. The relevant portion of the statute reads:

Conspirators be they that do confeder or bind themselves by oath covenant or other alliance that every one of them shall aid and support the enterprise of each other falsely and maliciously to indict, or cause to be indicted or falsely to acquit people, or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved and such as retain men in the country with liveries and fees for to maintain their malicious enterprises and to suppress the truth; and this extendeth as well to the takers as to the givers. And stewards and bailiffs of great lords, which by their seignory office or power undertake to bear or maintain quarrels, pleas, or debates for other matters than such as touch the estate of their lords or themselves.

A Definition of Conspirators, 33 Edw. I, Stat. 2 (1304).

17. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 625 (1941) [hereinafter cited as Harno].

18. See note 16 *supra*.

19. That is, the law intervenes before the object is completed. It is generally conceded that, as with attempt, the conspiracy itself is a harmful act.

20. See, e.g., *Braverman v. United States*, 317 U.S. 49, 53 (1942); *United States v. Fruehauf Corp.*, 577 F.2d 1038 (6th Cir. 1978); *United States v. Anderson*, 542 F.2d 428 (7th Cir. 1976); *Jordan v. United States*, 370 F.2d 126 (10th Cir. 1966); *People v. Gem Hang*, 131 Cal. App. 2d 69, 280 P.2d 28 (1955); *People v. Brownstein*, 109 Cal. App. 2d 891, 241 P.2d 1056 (1952); *People v. Edwards*, 74 Ill. App. 2d 225, 219 N.E.2d 382 (1966); *State v. Olson*, 249 Iowa 536, 86 N.W.2d 214 (1958); *People v. Wellman*, 6 Mich. App. 573, 149 N.W.2d 908 (1967).

21. 77 Eng. Rep. 813, 814 (K.B. 1611).

22. Harno, *supra* note 17, at 626.

23. W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 382 (1926).

After the Restoration, this concept eventually found its way into the common law courts,<sup>24</sup> although there was some objection.<sup>25</sup> By 1721, the concept had been expanded even further to include agreements to commit acts that were not wrongful in themselves.<sup>26</sup> *Mulcahy v. Regina*<sup>27</sup> articulated a somewhat vague definition of conspiracy that included agreements to accomplish lawful ends by unlawful means.<sup>28</sup> But *Mulcahy* accomplished something even more significant: it made clear that evil intent was not the gravamen of the offense. Rather, the agreement was what posed a threat to society, for in union there was strength.<sup>29</sup>

Even before the *Mulcahy* explication in England, the United States courts had embraced group danger as the proscribed element of conspiracy. *Philadelphia Cordwainers*,<sup>30</sup> believed to have been the first American case of conspiracy, involved a labor strike called by shoemaker apprentices in an effort to raise their wages. While the court could find no agreement to commit a crime, it nevertheless convicted the men, focusing on their concerted actions, stating that "a combination . . . maintaining one another, carrying a particular object . . . is criminal," and that "an act innocent in an individual, is rendered criminal by a confederacy to effect it."<sup>31</sup> Thereafter, American courts, armed with the crime of conspiracy, continued their war on the labor movement until the 1930s.<sup>32</sup> After organized labor was legitimated, communists became the favorite target of conspiracy prosecutions. Interestingly, the defendant-communists were charged with *conspiring to advocate* the forcible overthrow of the government.<sup>33</sup> The crux of this offense was unmistakably further removed from an "act" than were any previous conspiracy offenses;<sup>34</sup> the focus of the crime was on the number of persons involved rather than on the activity in which they were engaged.

Yet the idea of discounting numbers of conspirators, as incorporated in the unilateral conspiracy model, did not arise as a sudden aberration amidst the prosecution of various groups. It has surfaced from time to time throughout the past two centuries.<sup>35</sup> Nevertheless, all singular-defendant American

24. *Starlings Case*, 1 Sid. 174, 82 Eng. Rep. 1039 (1664).

25. *Regina v. Daniell*, 6 Mod. 99, 37 Eng. Rep. 856 (1704).

26. *Rex v. Journeymen Taylors of Cambridge*, 8 Mod. 10, 88 Eng. Rep. 9, (1721).

27. L.R. 3 E. & I. App. 306 (1868).

28. *Id.* at 317.

29. *Id.*

30. 3 COMMONS & GILMORE, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59, cited in Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 413 (1922).

31. *Id.* at 414.

32. See generally R. FERGUSON & A. STOKKE, CONCEPTS OF CRIMINAL LAW 139 (1976) [hereinafter cited as FERGUSON & STOKKE]; J. LANDIS & M. MANOFF, CASES ON LABOR LAW (2d ed. 1942). See also *Commonwealth v. Carlisle, Brightley's N.P. Rep.* (Pa.) 36 (1821) (illustrates fear of organized numbers of persons).

33. See *id.*

34. FERGUSON & STOKKE, *supra* note 32, at 139.

35. A detailed accounting of cases from various English-speaking countries is found in Fridman, *Mens Rea in Conspiracy*, 19 MOD. L. REV. 276 (1956) [hereinafter cited as Fridman]. In

cases involved conspiracies where one defendant was dead,<sup>36</sup> insane,<sup>37</sup> acquitted of the same charge,<sup>38</sup> granted immunity in exchange for testimony,<sup>39</sup> or the like.<sup>40</sup> In none of these cases was the singular defendant a person who had "conspired" with a law officer. In fact, the drafters of the Code provision on unilateral conspiracy cited only a Canadian case<sup>41</sup> in support of their view. The general rule derived from the diverse unilateral cases was that proof of two guilty minds was necessary to maintain a conspiracy prosecution against one defendant.<sup>42</sup> The courts held fast to this rule for many years.

The rule was not without its critics. Some scholars suggested the law was illogical, as the charged defendant did have the specific intent to form a conspiracy.<sup>43</sup> In response to criticisms of the general rule, the American

that article, the author attempted to treat all types of unilateral cases alike. Apparently this was the first time such an analysis was made.

36. See, e.g., *Joyce v. United States*, 153 F.2d 364 (8th Cir.), cert. denied, 328 U.S. 860 (1946); *People v. Nall*, 242 Ill. 284, 89 N.E. 1012 (1909); *State v. Simon*, 101 N.J.L. 11, 127 A. 570 (1924); *People v. Olcott*, 2 Johns Cas. 301 (N.Y. 1801); *State v. Davenport*, 227 N.C. 475, 42 S.E.2d 686 (1947); *State v. Alridge*, 206 N.C. 850, 175 S.E. 191 (1934); *Commonwealth v. Bonnem*, 95 Pa. Super. Ct. 496 (1928).

37. See *Regle v. State*, 9 Md. App. 346, 264 A.2d 119 (1970).

38. See, e.g., *United States v. Postma*, 242 F.2d 488 (2d Cir. 1957); *Worthington v. United States*, 64 F.2d 936 (7th Cir. 1933); *People v. James*, 189 Cal. App. 2d 14, 10 Cal. Rptr. 809 (1961); *Martinez v. People*, 129 Colo. 94, 267 P.2d 654 (1954); *People v. Nathanson*, 389 Ill. 311, 59 N.E.2d 677 (1945); *State v. Lockhart*, 241 Iowa 635, 39 N.W.2d 636 (1949); *Hurwitz v. State*, 200 Md. 578, 92 A.2d 575 (1952); *State v. Raper*, 204 N.C. 503, 168 S.E. 831 (1933).

39. See, e.g., *People v. Gilbert*, 26 Cal. App. 2d 1, 78 P.2d 770 (1938); *People v. Bryant*, 409 Ill. 467, 100 N.E.2d 598 (1951); *Berry v. State*, 202 Ind. 294, 173 N.E. 705 (1930); *Hurwitz v. State*, 200 Md. 578, 92 A.2d 575 (1952).

40. For instance, where the other conspirator was a "person unknown," the prosecution would lie. See, e.g., *Prichard v. United States*, 181 F.2d 326 (6th Cir.), *aff'd per curiam*, 339 U.S. 974 (1950); *People v. Sagehorn*, 140 Cal. App. 2d 138, 294 P.2d 1062 (1956); *State v. Caldwell*, 249 N.C. 56, 105 S.E.2d 189 (1958). Similarly, the prosecution would lie if the co-conspirator had not yet been apprehended. Note, however, that in all these cases the prosecution was required to prove that the defendant had made a conspiratorial agreement with the other person. Both of them had to be shown to have agreed to the plan. See, e.g., *United States v. Lance*, 536 F.2d 1065 (5th Cir. 1976). See also note 6 *supra*.

41. *Rex v. Kotyszyn*, 95 Can. C.C. 261 (1949). Actually, the case did not support the proposition; it merely showed that such a prosecution had at one time been brought. In *Kotyszyn*, a policewoman pretended to be pregnant and sought an abortion from the accused. The court held that the defendant could not be convicted because the crucial element of conspiracy was missing—agreement to commit an unlawful act.

42. See, e.g., *United States v. Chase*, 372 F.2d 453 (4th Cir.), cert. denied, 387 U.S. 907 (1967); *Sears v. United States*, 343 F.2d 139 (5th Cir. 1965); *King v. State*, 104 So.2d 730 (Fla. 1958); *People v. Atley*, 392 Mich. 298, 220 N.W.2d 465 (1974); *Moore v. State*, 290 So.2d 603 (Miss. 1974); *Johnson v. Sheriff, Clark County*, 91 Nev. 161, 532 P.2d 1037 (1975); *State v. Horton*, 275 N.C. 651, 170 S.E.2d 466 (1969); *Delaney v. State*, 164 Tenn. 432, 51 S.W.2d 485 (1932); *Odneal v. State*, 117 Tex. Crim. 97, 34 S.W.2d 595 (1931); *Woodworth v. State*, 20 Tex. Crim. 375 (1886).

43. See generally G. WILLIAMS, CRIMINAL LAW—THE GENERAL PART 672-73 (2d ed. 1961). See also *Fridman*, *supra* note 35, at 282-83. The advocates of the general rule appear to



Law Institute, by a vote of fourteen to eleven, propounded section 5.03, which contains the unilateral approach to conspiracy prosecution.<sup>44</sup> Since its promulgation, many of the states have adopted that section.<sup>45</sup> It is not clear, however, that these states intended the result of conviction in cases involving government agents, as the unilateral theory extends to many other types of situations.<sup>46</sup>

The federal government has not accepted the unilateral theory; the federal statute remains bilateral.<sup>47</sup> The United States Supreme Court has held that

outnumber the critics. See, e.g., R. PERKINS, *CRIMINAL LAW* 546 (2d ed. 1969); F. WHARTON, *CRIMINAL LAW & PROCEDURE* § 83 (12th ed. 1974); Marcus, *Conspiracy: The Criminal Agreement in Theory and Practice*, 65 *Geo. L.J.* 925, 957-62 (1977); Orchard, "Agreement" in *Criminal Conspiracy*, 1974 *CRIM. L. REV.* 297, 298.

44. MODEL PENAL CODE § 5.03, comment 2, at 105 (Tent. Draft No. 10, 1958) [hereinafter cited as MODEL PENAL CODE (Tent. Draft)].

45. See note 3 *supra*. It is questionable whether the courts of the various states could have changed the definition of conspiracy so radically. Without a specific directive from their legislatures, such a move by the courts *sua sponte* would deprive criminal defendants of their rights under the law. An excellent example of such a situation is *Shaw v. D.P.P. (The Ladies Directory Case)*, (1962) A.C. 220 (C.C.A. 1962). In this country, the *ex post facto* clause of the Constitution prevents such judicial activism in criminal cases. *James v. United States*, 366 U.S. 213, 223-25 (1961) (Black, J., concurring in part and dissenting in part).

46. Some states have adopted a "no defense" commentary, such as the following one, to explain their intent:

It is no defense to a prosecution for criminal conspiracy that, because of irresponsibility or other legal incapacity or exemption, or because of unawareness of the criminal nature of the agreement or the conduct contemplated or of the defendant's criminal purpose, or because of other factors precluding the mental state required for commission of the conspiracy or the crime contemplated, one or more of the defendant's co-conspirators could not be guilty of the conspiracy or the crime contemplated.

DEL. CODE ANN. tit. 11, § 523(2) (1974). The Delaware Supreme Court relied upon this statute in *Saienni v. State*, 346 A.2d 152, 154 (Del. 1975), and stated: "Defendant argues that he cannot be guilty of conspiracy with an established police informer and an undercover agent who had no intention of committing the crime. We find no merit in this argument . . . ."

Indiana's "no defense" clause reads:

It is no defense that the person with whom the accused person is alleged to have conspired:

- (1) has not been prosecuted;
- (2) has not been convicted;
- (3) has been acquitted;
- (4) has been convicted of a different crime;
- (5) cannot be prosecuted for any reason; or
- (6) lacked the capacity to commit the crime.

IND. CODE § 35-41-5-2(c) (Burns 1979). This clause was relied upon in *Garcia v. State*, \_\_\_ Ind. \_\_\_, 394 N.E.2d 106, 109 (1979).

47. See 18 U.S.C. § 371 (1976). The federal statute provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

a corrupt agreement between not fewer than two persons, each having the requisite mens rea, is necessary to sustain a conspiracy indictment,<sup>48</sup> and that acquittal of one defendant mandates a dismissal of the other defendant.<sup>49</sup> Congress did, however, recently consider a new, unilateral statute. The proposed Federal Criminal Code Reform Act, which was passed by the Senate,<sup>50</sup> died in the House.<sup>51</sup> The Senate bill textually comprehended the unilateral theory, but the Senate Judiciary Committee stated that the proposed law contemplated no change in the "well-established case law" on the meaning of the terms "conspiracy" and "agreement."<sup>52</sup> Clearly, the "well-established case law" in the federal arena mandates a bilateral definition of conspiracy. This contradiction, coupled with fervent criticism from the American Civil Liberties Union,<sup>53</sup> confronted the House. Thus, the bilateral federal law is not likely to be abrogated so quickly as the bilateral state statutes.

#### THE THEORETICAL PERSPECTIVE

Conspiracy is often defined as an agreement between two or more persons to commit a crime or to do something which is itself not unlawful by unlaw-

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If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

*Id.*

48. *Morrison v. California*, 291 U.S. 82, 92 (1934). In this case, the Court defined "conspiracy" generally although the prosecution was brought under a specific state statute. The Court noted that "[i]t is impossible in the nature of things for a man to conspire with himself. . . . In California as elsewhere, conspiracy imports a corrupt agreement between not less than two with guilty knowledge on the part of each." *Id.* at 92. The holding was cited by the dissent as authority for denying a unilateral approach in *People v. Schwimmer*, 66 A.D.2d 91, 102, 411 N.Y.S.2d 922, 929 (1978) (Titone, J., dissenting).

49. *Morrison v. California*, 291 U.S. at 93.

50. S. 1723, 95th Cong., 1st Sess. (1977). See 124 CONG. REC. 5860 (daily ed. Jan. 30, 1978).

51. 37 CONG. Q. 1899 (Sept. 1, 1979).

52. S. REP. NO. 605, 95th Cong., 1st Sess. 163 (1977).

53. A spokesman for the American Civil Liberties Union (ACLU) testified as follows:

A second important change which S. 1723 makes in current conspiracy law is its adoption of the unilateral approach to the offense. At common law, and under the current federal conspiracy statute (18 U.S.C. § 371), the crime of conspiracy is defined as the situation in which "two or more persons conspire . . ." Thus, an actual agreement is an essential element of the offense and must be established before one is liable for conspiracy. One could not conspire with, for example, an undercover agent. Requiring an actual agreement is consistent with the purpose of conspiracy law, that is, to prevent the formation of dangerous criminal relationships. Separate laws for conspiracy have been justified on the ground that partnership in crime presents a greater danger to society than does an individual acting in isolation. S. 1722 rejects this traditional "true agreement" requirement, and reaches "unilateral" conspiracies. This "unilateral" approach represents an unwarranted departure from current federal conspiracy law, which is consistent with the principles historically invoked to justify separate conspiracy statutes. S. 1723 maintains the bilateral agreement requirement.

ful means.<sup>54</sup> The gist of the crime of conspiracy is the agreement to do an act, rather than the act itself.<sup>55</sup> Underlying the rule is the assumption that collective action toward an antisocial end constitutes a greater threat to society than does individual action:<sup>56</sup> each conspirator increases the other conspirator's probability of successfully committing a crime.<sup>57</sup>

The crime of conspiracy has two dimensions. As an inchoate offense, it permits law enforcement intervention before the planned substantive crime is completed.<sup>58</sup> As a substantive crime in itself, it punishes the special danger presented by criminal confederation.<sup>59</sup> In order to understand the theory of criminal conspiracy it is necessary to analyze the reasoning constructs supporting the idea of inherent risk in group activity. These doctrines will then provide a matrix for analysis of the logic of the unilateral approach.

### *Conspiracy Rationales*

At least five distinct theories have been advanced to justify the charge of conspiracy. Each pointedly addresses the threat inherent in group activity, thereby suggesting the need to treat conspiracy as both an inchoate and a substantive offense. Because each theory recognizes the threat of group ac-

*Hearings on S.1722 and S.1723 Before the Committee on the Judiciary*, 96th Cong., 1st Sess. (1979) (statement of J. Shattuck and D. Landau, ACLU) (hearings unpublished).

In their testimony before the House of Representatives the spokesmen praised the retention, in one proposal, of the bilateral approach. Otherwise, their testimony was nearly identical to that given before the Senate. *Hearings on the Working Draft of the Fed. Crim. Code Revision Before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) (statement of J. Shattuck and D. Landau) (hearings unpublished).

Indeed, the House's own proposal is said to have been drafted to meet the concerns of civil libertarians. 37 CONG. Q. 2017 (Sept. 15, 1979).

54. See, e.g., *United States v. Flynn*, 103 F. Supp. 925 (C.D.N.Y. 1952); *State v. Jennings*, 195 N.W.2d 351 (Iowa 1972); *State v. Oliver*, 268 N.C. 280, 150 N.E.2d 445 (1966).

This was a common law definition of conspiracy, first enunciated in 1832 by Lord Denman in *Rex v. Jones*, 110 Eng. Rep. 485, 487 (1832). Some states retain this standard in case law and statute. Others have limited the offense to criminal objectives. See generally LAFAYE & SCOTT, *supra* note 5, at 454.

55. See *Gebardi v. United States*, 287 U.S. 112, 120 (1932). *Accord*, *United States v. Nims*, 524 F.2d 123, 126 (5th Cir. 1975); *United States v. Carlton*, 475 F.2d 104, 106 (5th Cir. 1973); *United States v. Falcone*, 109 F.2d 579, 581, (2d Cir. 1940); *People v. Welch*, 89 Cal. App. 18, 21, 264 P. 324, 325 (1928).

56. R. PERKINS, *CRIMINAL LAW* 535 (1957); *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 923-24 (1959) [hereinafter cited as *Developments*].

A purely technical result of the conspiracy requirement that there be an agreement between two or more persons was the common law rule that a husband and wife, being "one person," could not be guilty of conspiracy absent a third participant. See, e.g., *Dawson v. United States*, 10 F.2d 106 (9th Cir. 1926). However, the modern trend has been to abandon this principle. See, e.g., *United States v. Dege*, 364 U.S. 51 (1960); *Pegram v. United States*, 361 F.2d 820 (8th Cir. 1966); *People v. Martin*, 4 Ill. 2d 105, 122 N.E.2d 245 (1954).

57. See notes 64, 65, and accompanying text *infra*.

58. See notes 19-29 and accompanying text *supra*.

59. LAFAYE & SCOTT, *supra* note 5, § 61, at 459.

tivity, it is plain that the crime of conspiracy is based on that one foundation.

*Psychological reinforcement.* This is the most frequently cited reason for penalizing conspiracy.<sup>60</sup> It is said that the plurality of members not only solidifies the decision to commit the crime, but also exerts social pressure against an individual's decision to postpone or reject the crime's commission.<sup>61</sup> The group provides moral support.<sup>62</sup> As a result, even if one member withdraws from the conspiracy, other conspirators may still complete the act that the original member helped set in motion.<sup>63</sup>

*Effectiveness.* There is a greater likelihood of accomplishing the crime due to the increased number of participants.<sup>64</sup> This conclusion is drawn from the idea that the existence of numbers facilitates division of labor, which promotes the efficiency with which a given object can be pursued, and so makes possible the attainment of objects more elaborate and ambitious than otherwise would be attainable.<sup>65</sup>

*Degree of harm.* Somewhat related to the rationale of "effectiveness" is the notion that the increase in numbers is likely to result in more harm than that which would be produced by an individual acting alone.<sup>66</sup>

*Focal Point.* The existence of a group for criminal purposes often provides a continuing focal point for further crimes, either related or unrelated to those immediately planned.<sup>67</sup> Conspiracy "involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices."<sup>68</sup>

*Societal apprehensiveness.* In addition to the above-mentioned concerns, all of which involve a certain apprehension of conscious harm, there is also

60. See generally *Developments, supra* note 56.

61. *Iannelli v. United States*, 420 U.S. 770, 778 (1975); *Callanan v. United States*, 364 U.S. 587, 593-94 (1961); Prim, *The Mens Rea Requirement for Conspiracy: The Model Penal Code and the Progressive Law of Judge Learned Hand*, 40 MO. L. REV. 467, 468 (1975) [hereinafter cited as Prim]; *Developments, supra* note 56, at 924.

62. Note, *Criminal Conspiracy: Bearing of Overt Acts upon the Nature of the Crime*, 37 HARV. L. REV. 1121, 1123 (1924).

63. *Developments, supra* note 56, at 924.

64. *Callanan v. United States*, 364 U.S. at 593-94. See also *Iannelli v. United States*, 420 U.S. at 778; Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276, 283-84 (1948) [hereinafter cited as *Conspiracy Dilemma*].

65. *Developments, supra* note 56, at 924. See also *Callanan v. United States*, 364 U.S. at 593-94; *Conspiracy Dilemma, supra* note 64, at 283-84. Accord, *Iannelli v. United States*, 420 U.S. at 778.

66. M. BASSIOUNI, *SUBSTANTIVE CRIMINAL LAW* 213 (1978) [hereinafter cited as BASSIOUNI].

67. See *Iannelli v. United States*, 420 U.S. at 778; *Callanan v. United States*, 364 U.S. at 593-94.

68. *United States v. Rabinowich*, 238 U.S. 78, 88 (1915). This is probably more applicable to "organized crime" than to a two-member conspiracy.

concern for the fear experienced by the public through awareness that conspiracies exist.<sup>69</sup>

In light of these theories, the unilateral approach is inaccurately employed to define as conspiracy the combination of one defendant and one government agent. First, it is highly unlikely that such a combination produces enough psychological reinforcement to bring about the commission of the plotted crime, as the feigning conspirator invariably crushes the plan before any real harm is done. Notwithstanding this objection, the drafters of the Model Penal Code cited the psychological reinforcement rationale as a justification for their unilateral theory, stating that "sharing lends fortitude to purpose."<sup>70</sup> They then remarked that others may be spurred to complete the crime without the feigning party.<sup>71</sup> What this analysis ignores is the fact that the feigning party's encouragement in such a case does not add to the probability that the criminal object will be achieved. The confidence inspired by the decoy is a false confidence that results in failure rather than success. Thus, some courts rejecting a unilateral treatment of such cases have pointed out that rather than to bolster the plan the government agent is there to "frustrate" it.<sup>72</sup>

Of course, the situation is somewhat different where the feigning party is not a government agent but rather is a conspirator-turned-informant. Some psychological support is initially given. Recognizing this, the prosecution in one case<sup>73</sup> argued that a conspiracy did exist because the informer did not take on that role until after the conspiracy<sup>74</sup> was complete.<sup>75</sup> The court

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69. *Developments, supra* note 56, at 925. It has been suggested that due to public awareness some courts impose cumulative sentences for conspiracy in addition to the crime that was the object of the conspiracy. *Id.* The Supreme Court has upheld this practice. *See, e.g., United States v. Feola*, 420 U.S. 671, 693 (1975); *Callanan v. United States*, 364 U.S. at 593-97; *Pinkerton v. United States*, 328 U.S. 640, 643-44 (1946). Indeed, the Court has stated that the penalty for conspiracy may justifiably be greater than the penalty imposed for the accomplished substantive crime. *See Iannelli v. United States*, 420 U.S. at 778; *Clune v. United States*, 159 U.S. 590, 595 (1895). "[L]iability for conspiracy is not taken away by its success." *Asgill v. United States*, 60 F.2d 776, 777 (4th Cir. 1932). On the other hand, attempt is merged with the substantive crime. *United States v. York*, 578 F.2d 1036, 1040 (5th Cir. 1978). The fact that a conspiracy conviction will not merge with a conviction for the substantive offense, which permits possible double punishment, does not violate the prohibition against double jeopardy. *Iannelli v. United States*, 420 U.S. at 782-84.

70. MODEL PENAL CODE (Tent. Draft), *supra* note 44, § 5.03, comments at 97.

71. *Id.*

72. *See, e.g., United States v. Wray*, 8 F.2d 429 (N.D. Ga. 1925); *State v. Mazur*, 158 N.J. Super. 89, 97, 385 A.2d 878, 882-83 (1978).

73. *Moore v. State*, 290 So. 2d 603 (Miss. 1974).

74. It is clear that the court used the word "conspiracy" as synonymous with "agreement." *Id.* at 605.

75. *Id.* The state based its argument on *United States v. Sacco*, 436 F.2d 780, 783 (2d Cir.), *cert. denied*, 404 U.S. 834 (1971), in which the court stated that although one of the conspirators may later become an informer, the character of the conspiracy up to that point is not altered.

found, however, that the party "entered into the conspiracy for the sole purpose of aiding law enforcement officers" by informing. It therefore held that the informer could not be counted in identifying the requisite number of persons for a conspiracy.<sup>76</sup> Regardless of this careful time-of-intent approach, the rationale of "psychological reinforcement" is not met in such a situation. Commission of the planned crime—the evil that "psychological reinforcement" supposedly facilitates—never materializes because the plan is quelled.<sup>77</sup>

A similar result obtains when the factor of "effectiveness" is analyzed. In fact, the American Law Institute noted this shortcoming in its published comments on the proposed draft:

Where the person with whom the defendant conspired secretly intends not to go through with the plan. . . . Under the unilateral approach of the Draft, the culpable party's guilt would not be affected by the fact that the other party's agreement was feigned. . . . True enough, the project's chances of success have not been increased by the agreement; indeed, its doom may have been sealed by this turn of events. But the major basis of conspiratorial liability—the unequivocal evidence of a firm purpose to commit a crime—remains the same.<sup>78</sup>

In actuality, a "firm purpose to commit a crime" is not the keystone of conspiratorial liability. It is essential to the crime of conspiracy that there be more than mere intent; there must be a uniting with another who also intends to carry out the plan. This is the essence of conspiracy,<sup>79</sup> and no

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76. 290 So. 2d at 607.

77. In *People v. Schwimmer*, 66 A.D.2d 91, 411 N.Y.S.2d 922 (1978), the court attempted to use the "psychological reinforcement" rationale to support its approval of the unilateral approach. The court said:

[T]he mere belief that combination has occurred is sufficient to have produced the undesirable effects. Certainly the culpable actor's expectations are aroused and his criminal resolve will be strengthened. The mere appearance of group support may be sufficient to increase the likelihood that the culpable actor will himself attempt to accomplish the criminal objective.

*Id.* at 96, 411 N.Y.S.2d at 926. Further, the court noted that the rationale is particularly appropriate where the individual defendant is the originator of the plan. *Id.* However, the opinion ignored the fact that unilateral prosecution is not limited to such situations.

78. MODEL PENAL CODE (Tent. Draft), *supra* note 44, comments at 104-05. See also *State v. Lavary*, 152 N.J. Super. 413, 377 A.2d 1255 (1977), *rev'd*, 163 N.J. Super. 576, 395 A.2d 524 (1978); *State v. St. Christopher*, 305 Minn. 226, 232 N.W.2d 798 (1975).

79. See *Iannelli v. United States*, 420 U.S. at 777; *United States v. Cantu*, 557 F.2d 1173, 1176 (5th Cir. 1977); *United States v. Van Hee*, 531 F.2d 352, 357 (6th Cir. 1976); *United States v. Butler*, 494 F.2d 1246, 1249 (10th Cir. 1974); *People v. Jayne*, 52 Ill. App. 3d 990, 1004, 368 N.E.2d 422, 432 (1977); *Commonwealth v. Edison*, 249 Pa. Super. Ct. 472, 483, 378 A.2d 393, 398 (1977). Although a common design is necessary, it is not required that each party know the conspiracy's entire scope or all of its details. See, e.g., *United States v. Fuel*, 583 F.2d 978, 981 (8th Cir. 1978); *United States v. Rosenblatt*, 554 F.2d 36, 38 (2d Cir. 1977); *Lefco v. United States*, 74 F.2d 66, 68 (3d Cir. 1934).

amount of legal legerdemain can circumvent it. It is therefore plain that the "effectiveness" rationale is absent in the context of unilateral conspiracy.

Furthermore, the "increased-degree-of-harm" rationale likewise offers no support for the unilateral conspiracy theory. It may be useful here to refer to another unique doctrine of conspiracy law, the Wharton Rule,<sup>80</sup> which states that "when to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession to a crime of such a nature that it is aggravated by a plurality of agents, cannot be maintained."<sup>81</sup> The rule is based on the logic that conspiracy law is not meant to punish a crime that definitionally requires more than one actor, it being unfair to punish as conspiracy conduct which is already punishable as group activity. Hence, while the Wharton Rule is not predicated on a theory of double jeopardy,<sup>82</sup> its purpose nonetheless is to eliminate the opportunity for double punishment—a problem inherent in unilateral conspiracy because the same conduct is often punishable as an attempt or solicitation to commit the substantive offense.<sup>83</sup> Furthermore, the "degree-of-harm" rationale cannot support the treatment as conspiracy of a supposed confederation of one defendant and one government agent, as the government agent does not add to the degree of harm that the single defendant acting alone could accomplish.<sup>84</sup> If an agent subsequently discards a law-enforcement job in favor of crime, the partnership so formed will be a true conspiracy and will be punishable under bilateral standards.

Moreover, a combination comprised of a government agent and a defendant will not be a "continuing focal point" for criminal activity. It seems unlikely that a defendant previously arrested by a decoy-conspirator would be amenable to forming a later conspiracy with unfamiliar persons. In fact, the experience would probably foster a reluctance to form any further conspiracy.

The argument that "societal apprehensiveness" will be reduced by implementation of unilateral conspiracy statutes is also susceptible to attack. The

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80. 2 F. WHARTON, CRIMINAL LAW § 1604 (12th ed. 1974).

81. *Id.* Offenses contemplating such concerted activity include adultery, bigamy, bribery, dueling, and incest. For examples of the rule's application, see *Iannelli v. United States*, 420 U.S. at 779-86; *United States v. Katz*, 271 U.S. 354 (1926); *Norris v. United States*, 34 F.2d 839 (3d Cir. 1929), *rev'd on other grounds*, 281 U.S. 619 (1930); *People v. Wettengel*, 98 Colo. 193, 58 P.2d 279 (1935); *People v. Purcell*, 304 Ill. App. 215, 26 N.E.2d 153 (1940).

The Model Penal Code, with its unilateral approach to criminal liability, expressly rejects the idea embraced by the Wharton Rule. See MODEL PENAL CODE (Tent. Draft), *supra* note 44, § 5.03.

82. *Iannelli v. United States*, 420 U.S. at 782.

83. See generally Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137 (1973) [hereinafter cited as Johnson].

84. If the police agent does contribute to the degree of harm which can be effected, the police conduct has exceeded the bounds of law enforcement and the police agent should be held accountable. Cf. *Hampton v. United States*, 425 U.S. 484 (1976) (Rehnquist, J., commenting on liability of police for outrageous conduct in entrapment cases).

public awareness that law enforcement officers are becoming involved in clandestine criminal activities and are, in effect, helping to create the crime for which another will be prosecuted may itself elicit more negative public reaction than does the awareness of ordinary conspiracies.<sup>85</sup>

Upon observation of the shortcomings of the Model Penal Code's theory of conspiracy in these areas, it is difficult to appreciate the appeal of the unilateral approach. There is, indeed, a serious flaw in the logic underlying the unilateral approach as it applies to the police agent who pretends to cooperate. This logical shortcoming is readily apparent when three models of conspiracy relationships are compared.

### *Model Conspiracies*

- Model I: X and Y agree to commit a crime. Both intend to accomplish the desired result through the activity of their union. Both are punishable by law.
- Model II: X and Z agree to commit a crime. Both intend to accomplish the desired result through the activity of their partnership. X is punishable by law; Z is incompetent to stand trial, but this fact is unknown to X.
- Model III: X and P, a policeman, "agree" to commit a crime. X intends to accomplish the desired result through the activity of their union. P's status as a police officer is unknown to X, and in making the "agreement" P does not intend to accomplish the stated object of their partnership. Instead, P has feigned agreement only to gather evidence against X and to prevent X from actually committing the agreed-to crime.

Evaluating each of these models according to the commonly-articulated rationales of conspiracy, it becomes clear that the rationales apply to Models I and II but not to Model III. All five reasons clearly apply to Model I: (1) X and Y provide each other with moral support; (2) the crime is more readily accomplished because two will work together to achieve it; (3) together, X and Y can do more harm than X could do alone; (4) once the crime is committed, the partnership may continue to commit other crimes; (5) the public is justified in feeling uneasy about the existence of such a confederacy. Similarly, all five considerations apply to Model II. The fact that Z is incompetent does not detract from the appropriateness of conspiracy as the charge, for the proscribed evil came into being at the time of the formation of the partnership.

On the other hand, Model III appears quite unlike Models I and II when scrutinized in light of the standard conspiracy doctrine justifications. Not one of the reasons for punishing conspiracy applies to Model III because, from

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85. See Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951) [hereinafter cited as Donnelly]. It was suggested there that criticism aimed at police should instead be directed at the law itself.



the outset, the Model III facts reveal no true threat of crime facilitation through a conspiracy. What, then, has led the proponents of the unilateral approach to contend that X's activity in Model III should be punished as conspiracy? In order to justify the unilateral approach, the drafters had to find some common element other than the person X in all three types of cases. A careful study of the three models and the Code-based decisions reveals that the common element is the "agreement"—the gravamen of the offense of conspiracy.<sup>86</sup>

### "Agreement"

Because an "agreement" is the gist of the offense of conspiracy, it is unfortunate that the case law has not precisely defined that term.<sup>87</sup> This shortcoming is true of cases arising both before and after enactment of the Code. "Agreement" has been variously defined as "the union of two or more minds;"<sup>88</sup> "an advancement of the intention which each has conceived in his mind;"<sup>89</sup> and "concerted purpose."<sup>90</sup> The cases show that the "agreement" has to be an agreement to work together toward one goal. For instance, in *State v. King*,<sup>91</sup> defendant A was present when B stated he had a grievance with C and intended to beat C. A volunteered that if B did so, B's fine would be paid by A. B answered that he did not want anyone to pay his fine, but he subsequently mentioned to others that he was going to beat C and that A or another would pay his fine for doing so. C was beaten by B, just as both A and B had desired; yet A was acquitted on charges of conspiracy. Notwithstanding that the beating was the result each party had intended, the court, distinguishing a defendant's acquiescence to the act from the requisite "concert of action," held there was no conspiratorial agreement.<sup>92</sup>

The correctness of such a decision becomes apparent when it is recognized that the requisite agreement requires two types of intent.<sup>93</sup> The first type is an intent to enter into the particular agreement,<sup>94</sup> often referred to as a

86. Compare *State v. Happel*, \_\_\_ Minn. \_\_\_, 259 N.W.2d 600 (1977) (per curiam) (Model II type), with *People v. Cardosanto*, 84 Misc. 2d 275, 276, 375 N.Y.S.2d 834, 835 (1975) (Model III type), and *State v. Carbone*, 10 N.J. 329, 337, 91 A.2d 571, 574 (1952) (Model I type).

87. For a lengthy discussion of the "agreement" requirement, see *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969).

88. *Odneal v. State*, 117 Tex. Crim. 97, 101, 34 S.W.2d 595, 597 (1931).

89. *State v. Carbone*, 10 N.J. 329, 337, 91 A.2d 571, 574 (1952).

90. *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938).

91. 104 Iowa 727, 74 N.W. 691 (1898).

92. *Id.* at 729-30, 74 N.W. at 692.

93. See J. HALL, B. GEORGE, JR., & R. FORCE, *CRIMINAL LAW AND PROCEDURE*, 708 (3d ed. 1976). See also *People v. Atley*, 329 Mich. 298, 310-11, 220 N.W.2d 465, 471 (1974); W. CLARK & W. MARSHALL, *LAW OF CRIMES* § 9.01 (7th ed. 1967); 1 WHARTON, *CRIMINAL LAW & PROCEDURE* § 43, at 183-84 (12th ed. 1974); Harno, *supra* note 17, at 631.

94. See, e.g., *Davidson v. United States*, 61 F.2d 250 (8th Cir. 1932).

meeting of the minds.<sup>95</sup> Mere association is not enough.<sup>96</sup> The parties must have a common goal<sup>97</sup> or common purpose.<sup>98</sup> Each person must become "definitely committed to cooperate" toward that end.<sup>99</sup> The second intent is the criminal intent. It is a specific intent, as required for the substantive crime.<sup>100</sup> For instance, intent to permanently deprive an owner of the value or use of the owner's property would be required for conspiracy to commit theft. Therefore, the first inquiry will be whether each person was a party to the agreement; the second inquiry will be whether the object of the agreement carried criminal consequences.<sup>101</sup> In the *King* case, the proposed objective did have a criminal penalty; yet by deciding to act on his own, defendant B negated any intent to agree and thus there was no conspiracy. Similarly, there is no true conspiracy where the other intent element is absent. For example, if A and B agree to perform a legal act that they mistakenly believe to be illegal, they are not liable as conspirators.<sup>102</sup> Both types of intent must be present to constitute conspiratorial agreement. Mere acquiescence does not constitute agreement.<sup>103</sup> More significantly, even actual knowledge is not the equivalent of intent for purposes of finding agreement.<sup>104</sup> Judge Learned Hand attributed confusion of the two to a misunderstanding of the principle that everything done by each conspirator is competent evidence against all of them.<sup>105</sup> That principle, he pointed out, means only that a conspirator is criminally liable for the acts done by others in furtherance of the project as he or she understood it.<sup>106</sup> Thus,

95. See, e.g., *United States v. Trowery*, 542 F.2d 623 (3d Cir. 1976); *United States v. Crocker*, 510 F.2d 1129 (10th Cir. 1975); *Reavis v. United States*, 106 F.2d 982 (10th Cir. 1939); *Hoffman v. United States*, 68 F.2d 101 (10th Cir. 1933); *Solomon v. State*, 168 Tenn. 180, 76 S.W.2d 331 (1934).

96. See, e.g., *United States v. Etlely*, 574 F.2d 850 (5th Cir. 1978); *United States v. Cloughessy*, 572 F.2d 190 (9th Cir. 1977); *People v. Cummings*, 173 Cal. App. 2d 721, 343 P.2d 944 (1959). See also *Commonwealth v. Goodyear*, 235 Pa. Super. Ct. 544, 344 A.2d 672 (1975). Conspiracy has been characterized as a "partnership." See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253 (1940); *Ong Way Jong v. United States*, 245 F.2d 392, 394 n.2 (9th Cir. 1957). Mr. Justice Holmes coined the phrase "a partnership in criminal purpose" in *United States v. Kessel*, 218 U.S. 601, 608 (1910).

97. See, e.g., *United States v. Bastone*, 526 F.2d 971, 980 (7th Cir. 1975).

98. *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969); *Marino v. United States*, 91 F.2d 691, 694 (9th Cir. 1937). *Accord*, *Blodgett v. State*, 310 A.2d 628 (Del. 1973).

99. *United States v. Bostic*, 480 F.2d 965, 968 (6th Cir. 1973).

100. See *United States v. Davis*, 583 F.2d 190 (5th Cir. 1978). Proof of such specific intent is not necessary, however, if such is not required for the substantive charge. *United States v. Feola*, 420 U.S. 671 (1975). *Accord*, *United States v. Squires*, 581 F.2d 408 (4th Cir. 1978).

101. See Harno, *supra* note 17, at 631.

102. See, e.g., *Weniger v. United States*, 47 F.2d 692, 693 (1931).

103. *Hurst v. Commonwealth*, 284 Ky. 599, 145 S.W.2d 520, 522 (1942).

104. *United States v. Manton*, 107 F.2d 834, 848 (2d Cir. 1938).

105. For a detailed explanation of Judge Hand's formative impact on the history of conspiracy law, see Prim, *supra* note 61.

106. See *United States v. Peoni*, 100 F.2d 401, 403 (2d Cir. 1938).

although knowledge is essential,<sup>107</sup> the focus of conspiracy remains on intent.<sup>108</sup>

The distinction between knowledge and intent is particularly important in the resolution of a certain type of conspiracy case. If defendant A agrees to sell liquor to B, knowing that B will, contrary to law, carry it across state lines, has A made a conspiratorial agreement to transport liquor across state lines? One approach to resolution of this issue was the stake-in-the-venture test.<sup>109</sup> This test would require that a defendant have more than a passive attitude toward the conspiracy's object—in short, "a stake in its outcome."<sup>110</sup> Although the test has been abandoned for the most part as too restrictive,<sup>111</sup> it did indicate the direction in which a solution could be found, for it demonstrated that a party to the agreement must positively desire the consequences.<sup>112</sup> That is, the test requires some measure of intent in addition to mere knowledge of the criminal objective.<sup>113</sup> The Model Penal Code apparently approves of such an approach in relation to this type of case: "Under the proposed Draft, the same purpose requirement that governs complicity is essential for conspiracy: the actor must have 'the purpose of promoting or facilitating' the commission of the crime."<sup>114</sup> But the drafters distinguished this from the feigned-agreement situation by characterizing the salesperson-defendant as "a person whose relationship to a criminal plan is essentially peripheral."<sup>115</sup> Therefore, when A assists B in an illegal venture by selling B liquor, there is no conspiracy; but when a police

107. *United States v. Johnson*, 504 F.2d 622 (7th Cir. 1974); *Jacobs v. United States*, 395 F.2d 469 (8th Cir. 1968); *United States v. Gischaltz*, 278 F. Supp. 434, 437 (S.D.N.Y. 1967); *People v. Lee*, 23 Cal. App. 2d 168, 72 P.2d 572 (1937).

108. *See State v. Moretti*, 52 N.J. 182, 187, 244 A.2d 499, 502 (1968). In one interesting unilateral case, *People v. Smyers*, 398 Mich. 635, 248 N.W.2d 156 (1976), the court recognized that intent of the informer was the key issue—an issue of fact, not of law. The jury accordingly was directed to determine whether the informant "was a government informer secretly bent upon frustrating the conspiracy while feigning or pretending to be a co-conspirator, or . . . a willing Party to an illegal venture," the unmistakable implication being that he could not be both simultaneously. The informer-defendant was convicted. *Id.*

109. The test was formulated in *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir. 1940). *See generally Developments, supra* note 56, at 931.

110. *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir. 1940). *See also United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976); *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964); *United States v. Di Re*, 159 F.2d 818, 819 (2d Cir. 1947); *United States v. Cianchetti*, 315 F.2d 584 (2d Cir. 1963).

111. *See United States v. Tramaglino*, 197 F.2d 928, 930 (2d Cir. 1952); *Johns v. United States*, 195 F.2d 77, 79 (5th Cir. 1952). *But see United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976) (defendant's stake in the venture held "relevant" to question of participation).

112. *Developments, supra* note 56, at 931.

113. The Court in *Direct Sales Co. v. United States*, 319 U.S. 703 (1943), indicated that, given a recurrence of sales acts involving a controlled substance (narcotics), intent sufficient to constitute agreement could be inferred.

114. MODEL PENAL CODE (Tent. Draft), *supra* note 44, at comment 2, at 107.

115. *Id.*

agent only pretends to aid B in an illegal venture, actually intending all along to thwart B's plan, there is a conspiracy for which B is criminally liable. The logic of this disparity is not entirely plain.

At any rate, these various articulations of the requirement of intent in the conspiracy's "agreement" demonstrate the inadequacy of calling a police agent's feigned complicity an "agreement." Such feigned complicity is the exact opposite of the intent required for agreement, for it intends defeat, rather than success, for the plan. If mere knowledge would not suffice,<sup>116</sup> then surely feigned agreement should not, as feigned agreement is even further removed from positive intent than is knowledge. The Model Penal Code attempts to circumvent this by discarding the requirement of subjective agreement.<sup>117</sup> As one court noted: "The words 'agrees' and 'agreement' have not been used as words of art denoting a 'meeting of the minds' and 'contract.'" <sup>118</sup> The Code thus alters the common law offense so drastically that the crime is effectively immune from any possible analysis in terms of conspiracy's traditional theory. Under the bilateral approach, subjective (dual-intentional) agreement was the gist of the offense, but under the unilateral view, it is immaterial.<sup>119</sup>

Under the unilateral approach, the only relevant factor—and the drafters conceded this—is that the defendant "has conspired, within the meaning of the definition, in the belief that the other party was with him."<sup>120</sup> Pretermitting the unbridled disregard of the dictionary definition of the word "conspire,"<sup>121</sup> one thing is clear: the unilateral view designates conspiracy as the appropriate charge for "a firm purpose to commit a crime."<sup>122</sup> The "agreement" of unilateral conspiracy is merely a *legal fiction*, a technical way of transforming non-conspiratorial conduct into a prohibited conspiracy. In other words, this new form of conspiracy punishes a criminal predisposition once evidenced. In so doing, it ignores two reasonable alternatives presented by the offenses of solicitation and attempt.

116. See notes 105, 114 and accompanying text *supra*.

117. The vote on this issue was 12 to 10. MODEL PENAL CODE (Tent. Draft), *supra* note 44, at comment 2, at 117.

118. *Garcia v. State*, \_\_\_ Ind. \_\_\_, 394 N.E.2d 106, 110 (1979). Nor, it might be added, have the words been given their plain meaning when the situation is a feigned agreement.

119. MODEL PENAL CODE (Tent. Draft), *supra* note 44, at comment 2, at 104.

120. *Id.* at 105.

121. "(1) to make an agreement with a group and in secret to do some act (as to commit treason or a crime or carry out a treacherous deed); plot together. (2) to concur or work to one end: act in harmony." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 485 (unabr. 1961). Recognizing this disparity, one judge wrote: "In my opinion the . . . [unilateral theory] not only brushes aside fundamental precepts of our criminal law, but also does violence to the common sense meaning of everyday English words in order to enunciate a radically new legal concept." *People v. Schwimmer*, 66 A.D.2d 91, 411 N.Y.S.2d 922 (1978) (Titone, J., dissenting).

122. MODEL PENAL CODE (Tent. Draft), *supra* note 44, at comment 2, at 105.

*Alternative Charges*

Because unilateral conspiracy penalizes demonstrated predisposition, it seems unnecessary to define such conduct as conspiracy when two other charges—solicitation and attempt—are available to the prosecution.<sup>123</sup> Indeed, one court emphatically rejected the Code's result, stating:

If this is the law, we are, in effect, raising the crime of solicitation to a Class B felony when the highest grade given to that crime by the legislature . . . is a Class D felony.<sup>124</sup>

Solicitation and conspiracy are separate and distinct offenses. Conspiracy carries an increased punishment because concerted criminal activities present a greater threat to the public than individual conduct. Where the

123. Compare *Garcia v. State*, \_\_\_ Ind. \_\_\_, 394 N.E.2d 106 (1979) (defendant convicted of conspiracy to commit murder for arranging through intermediary to have husband killed), with *State v. Mandel*, 78 Ariz. 226, 278 P.2d 413 (1954) (defendant convicted of attempted murder under identical set of facts). Not confining his objections to the unilateral stance, one scholar has proposed that in light of the alternative charges all of conspiracy law should be abolished. See Johnson, *supra* note 83, at 1139. The American Civil Liberties Union has made the same suggestion.

Consider the Code's definition of "Criminal Attempt":

A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

MODEL PENAL CODE (Official Draft), *supra* note 2, at § 5.01(1). Following this definition, the Code lists, *inter alia*, as "conduct which may be held to constitute a substantial step under Subsection (1)(c)": "soliciting an innocent agent to engage in conduct constituting an element of the crime." *Id.* § 5.01(2)(g). Depending on the nature of the substantial step performed by the defendant, he or she could be charged with attempted conspiracy or attempt to commit the substantive offense. Generally, "attempted conspiracy" is a concept unknown to the law, and at least one state court has explicitly rejected its being established as a "crime." See *Silvestri v. State*, 332 So. 2d 351 (Fla. Dist. Ct. App.), *aff'd*, 340 So. 2d 928 (Fla. 1976). The notion of attempted unilateral conspiracy as a crime was, however, suggested as "conceivable" in *Developments*, *supra* note 56, at 926-27 n. 35. In some cases, facts that would seem to constitute an attempted conspiracy have resulted in the charge of "solicitation," the defendant being the initiator. See, e.g., *People v. Burt*, 45 Cal. 2d 311, 288 P. 2d 503 (1955); *State v. Blechman*, 135 N.J.L. 99, 50 A.2d 152 (1946).

The Code defines "Criminal Solicitation":

A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

*Id.* § 5.02(1).

124. *People v. Hanley*, 92 Misc. 2d 465, 467-68, 400 N.Y.S.2d 319, 321 (1977), quoting *People v. Teeter*, 86 Misc. 2d 532, 382 N.Y.S. 938 (1976).

agreement of another is simulated and without an intent to perform there is no concerted activity for which the crime of conspiracy, with its increased punishment, was intended.<sup>125</sup>

In the absence of this approach and under the unilateral view, the fate of the defendant hinges on the response of the person whose aid he or she solicits. If the solicited party says "no," the defendant can be charged with solicitation;<sup>126</sup> if the solicited party says "yes," without actually intending agreement, the defendant faces a charge of conspiracy, with its increased punishment.<sup>127</sup> And if it is the defendant whose aid is solicited, he or she is liable for conspiracy even if the person who suggests the plan is a police agent.

Contrasted with this pivotal arrangement should be the logic advanced in the leading unilateral case, *State v. St. Christopher*.<sup>128</sup> The Supreme Court of Minnesota upheld the defendant's conspiracy conviction and rejected the alternative of finding such a defendant guilty of attempted conspiracy. That alternative was deemed undesirable because "it would result in disparate sentences for defendants whose conduct was the same, the length of sentence turning on a fortuity."<sup>129</sup> Referring to the set penalties of its statutes, the court explained:

Thus, if A agreed with B (a policeman who merely feigns agreement) to commit murder, A would be guilty of attempted conspiracy and could receive a maximum of 10 years' imprisonment, whereas if A agreed with C (who does not feign agreement), A could be guilty of conspiracy and receive a maximum of 20 years' imprisonment.<sup>130</sup>

With this tour de force, the court constructed what is tantamount to an equal protection rationale for the unilateral doctrine.<sup>131</sup> What it patently ignored was the fact that the two situations differ considerably: in the first, *none* of the justifications for penalizing conspiracy applies; in the second, *all* the rationales apply. The argument simply makes too much of the idea of "fortuity." If X shoots at Y and misses, while Z shoots Y and kills Y, the criminal jurisprudence does not seek to punish both X and Z equally, even though it is clear that both X and Z have exhibited a dangerous predisposi-

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125. *People v. Hanley*, 92 Misc. 2d 465, 468, 400 N.Y.S.2d 319, 321 (1977).

126. See note 123 *supra*.

127. Penalties for conspiracy vary widely from state to state. See Model Penal Code (Tent. Draft), *supra* note 44, § 503, appendix B. The Code proposes that the conspiracy penalty be equivalent to that of the conspiracy's most serious object-offense, excepting conspiracies to commit capital offenses, which would be punishable to a lesser degree. Model Penal Code, *supra* note 2, § 5.05(1). The same suggestion is made for the crime of attempt. *Id.* Ironically, § 5.05(2) permits a judge to impose a lesser penalty or even to *dismiss the prosecution* if the defendant's conduct is "so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger."

128. 305 Minn. 226, 232 N.W.2d 798 (1975).

129. *Id.* at n.7, 232 N.W.2d at 8 n.7.

130. *Id.*

131. See *id.* at 234-35, 232 N.W.2d at 803-04.

tion.<sup>132</sup> The punishment is commensurate with the harm sustained; this principle is true for both the crime of attempt and the crime of conspiracy.<sup>133</sup> Nevertheless, this misleading "equal treatment" idea appears to be

132. *E.g.*, compare ILL. REV. STAT. ch. 38, § 9-1(b) (maximum sentence for murder is death) with ILL. REV. STAT. ch. 38, §§ 8-4(c)(1), 1005-8-1(3) (West Cum. Supp. 1979) (maximum sentence for attempted murder is 30 years); COLO. REV. STAT. §§ 18-3-102(3), 18-1-105(1) (1973) (maximum sentence for murder is death) with COLO. REV. STAT. §§ 18-2-101(4), 18-1-105(1) (maximum sentence for attempted murder is 50 years); DEL. CODE ANN. tit. 11, §§ 636, 4209(b) (1974) (maximum sentence for murder is death) with DEL. CODE ANN. tit. 11, §§ 535, 4205(b)(1) (mandatory sentence for attempted murder is life imprisonment); FLA. STAT. ANN. §§ 782.04(1)(a), 775.082(1) (West 1976) (maximum sentence for murder is death) with FLA. STAT. ANN. §§ 777.04(1)(4)(a), 782.04(1)(a), 775.082(3)(b) (maximum sentence for attempted murder is 30 years); IND. CODE ANN. §§ 35-42-1-1, 35-50-2-3(b) (Burns 1979) (maximum sentence for murder is death) with IND. CODE ANN. §§ 35-50-2-4, 35-41-5-1(a) (maximum sentence for attempted murder is 50 years if aggravating circumstances are present); N.H. REV. STAT. ANN. §§ 630:1, 630:1-a (Cum. Supp. 1979) (maximum sentence for murder is death) with N.H. REV. STAT. ANN. §§ 629:1(IV), 651:2(II-c) (maximum sentence for attempted murder is 30 years); N.Y. PENAL LAW §§ 125.27, 60.06 (McKinney 1975) (maximum sentence for murder is death) with N.Y. PENAL LAW §§ 125.27, 110.05(1), 60.05(1), 70.00(3)(a)(i) (maximum sentence for attempted murder is 25 years); 18 PA. CONS. STAT. ANN. §§ 2502(a), 1102 (Purdum Cum. Supp. 1979-80) (maximum sentence for murder is death) with 18 PA. CONS. STAT. ANN. §§ 905(a), 1103(2) (Purdum 1973) (maximum sentence for attempted murder is 10 years); WASH. REV. CODE ANN. §§ 9A.32.030(2), 9A.32.040, 9A.32.045, 9A.32.046 (1977) (maximum sentence for murder is life imprisonment unless there are aggravating circumstances for which the death penalty can be imposed) with WASH. REV. CODE ANN. §§ 9A.28.020(3)(a), 9A.20.010(b)(i), 9A.20.020(a) (minimum sentence for attempted murder is 20 years).

133. Compare ILL. REV. STAT. ch. 38, § 9-1(b) (1977) (maximum sentence for murder is death) with ILL. REV. STAT. ch. 38 §§ 8-2, 1005-8-1(5) (West Cum. Supp. 1979) (maximum sentence for conspiracy to commit murder is 7 years). Note that in Illinois, a person may not be convicted of both the inchoate and the principal offense. Compare ILL. REV. STAT. ch. 38, § 8-5.6; COLO. REV. STAT. §§ 18-3-102(3), 18-1-105(1) (1973) (maximum sentence for murder is death) with COLO. REV. STAT. §§ 18-3-102(3), 18-2-206(1), 18-1-105(1) (maximum sentence for conspiracy to commit murder is 50 years); DEL. CODE ANN. tit. 11, 271(2)(b), 636, 4209(b) (1974) (maximum sentence for murder is death); with DEL. CODE ANN. §§ 513, 636, 4205(b)(4) (maximum sentence for conspiracy to commit murder is 10 years); FLA. STAT. ANN. §§ 782.04(1)(a), 775.082(1) (West 1976) (maximum sentence for murder is death) with FLA. STAT. ANN. §§ 782.04(1)(a), 777.04(3)(4)(a), 775.082(3)(b) (maximum sentence for conspiracy to commit murder is 30 years); IND. CODE ANN. §§ 35-42-1-1, 35-50-2-3(b) (Burns 1979) (maximum sentence for murder is death) with IND. CODE ANN. §§ 35-41-5-2(a), 35-50-2-4 (maximum sentence for conspiracy to commit murder is 50 years if aggravating circumstances are present); N.H. REV. STAT. ANN. §§ 630:1, 630:1-a (Cum. Supp. 1979) (maximum sentence for murder is death) with N.H. REV. STAT. ANN. §§ 629:3(IV), 651:2 (II)(a) (1974) (maximum sentence for conspiracy to commit murder is 15 years); N.Y. PENAL LAW §§ 125.27, 60.06 (McKinney 1975) (maximum sentence for murder is death) with N.Y. PENAL LAW §§ 125.27, 105.15, 70.00(2)(b) (maximum sentence for conspiracy to commit murder is 25 years); 18 PA. CONS. STAT. ANN. §§ 2502(a), 1102 (Purdum Cum. Supp. 1979-80) (maximum sentence for murder is death) with PA. CONS. STAT. ANN. §§ 903, 905(a), 1103(2) (Purdum 1973) (maximum sentence for conspiracy to commit murder is 10 years); WASH. REV. STAT. ANN. §§ 9A.32.030(2), 9A.32.040, 9A.32.045, 9A.32.046 (1977) (maximum sentence for murder is life imprisonment unless there are aggravating circumstances for which the death penalty can be imposed) with WASH. REV. STAT. ANN. §§ 9A.28.040(3)(a), 9A.20.020(a) (minimum sentence for conspiracy to commit murder is 20 years).

the thrust of the unilateral doctrine.<sup>134</sup> Although the unilateral doctrine is premised on the necessity of punishing an individual's willingness to enter into a conspiratorial relationship, it is clear that the Code's formulations of criminal attempt and criminal solicitation already provide the means for accomplishing that objective. The Code would punish under solicitation a person who "encourages or requests another person to engage in specific conduct which would constitute [a] crime or an attempt to commit such a crime . . . ." <sup>135</sup> Moreover, criminal attempt under the Code seems almost specially designed to fit the case of the feigned conspiracy agreement, for a person is guilty of attempt if he "purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be . . . ." <sup>136</sup> Certainly these alternative charges define the conduct of a defendant misled to conspire with a government agent. The coexistence of these alternative charges with unilateral conspiracy poses no threat of double punishment because the Code disallows the charging of more than one such offense.<sup>137</sup>

Aside from their ascendancy in theory, the alternative charges are preferable for other reasons which the next "perspective" will reveal. The nebulous concept of "agreement" makes the elements of the conspiracy offense unclear, rendering a meaningful defense virtually impossible. The feigned agreement also suggests a potential for police abuse, because the defendant in such a case cannot commit the conspiracy crime unless the agent does his or her part in making the "agreement." A unilateral-conspiracy defendant thus faces an extremely disadvantageous position in court. These obstacles present questions of due process.

#### THE DUE PROCESS PERSPECTIVE

Commentators have traditionally cautioned that conspiracy's potential for abuse should be vigilantly scrutinized.<sup>138</sup> This warning is even more apt in the context of unilateral conspiracy. Because this new crime is so dependent upon police involvement, its potential for abuse is even greater than that of bilateral conspiracy. In a desire to promote effective law enforcement, legislatures adopting the unilateral approach have created a vehicle that essen-

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134. See generally Fridman, *supra* note 35. This is apparently the first commentary urging a unilateral approach. The author argues that two types of conspiracy, conspiracy determined by the intention of one party and conspiracy determined by the objectively determined intentions of two people, should receive identical treatment.

135. See note 123 *supra*.

136. *Id.*

137. See MODEL PENAL CODE (Official Draft), *supra* note 2, § 5.05(3). Of course, the Code's suggestion is not binding on the states. In *Saienni v. State*, 346 A.2d 152 (Del. 1975), the defendant was convicted of both attempted murder and conspiracy to commit murder.

138. See generally BASSIOUNI, *supra* note 66, at 214; Goldstein, *The Krulwitch Warning: Guilt by Association*, 54 GEO. L.J. 133 (1965); Klein, *Conspiracy—The Prosecutor's Darling*, 24 BROOKLYN L. REV. 1 (1957); *Conspiracy Dilemma*, *supra* note 64; Note, *Mass Demonstrations and Criminal Conspiracies*, 16 HASTINGS L.J. 465 (1965); *Developments*, *supra* note 56, at 920.



tially denies an effective defense. The application of the conspiracy doctrine to the feigned-agreement defendant evinces a societal anxiety about crime—an anxiety greater than the uneasiness over the power of the state.

Naturally, unilateral conspiracy did not arise in a vacuum of legal passivity. Rather, it arose amid and is symptomatic of a growing trend toward legitimating law enforcement, however exercised, and punishing guilt, however evidenced. American judicial deference to covert law-enforcement tactics actually began shortly before the twentieth century, with cases holding that the government is entitled to use decoys and to conceal the identities of its agents.<sup>139</sup> Subsequently, such practices became regarded as "essential" to law enforcement,<sup>140</sup> and the "false friend" received the Supreme Court approval<sup>141</sup> it previously had been denied.<sup>142</sup> These practices have become increasingly frequent in recent bilateral cases, with the government agent playing an important role in the conspiracy.<sup>143</sup> Thus, the idea of government infiltration inherent in the unilateral conspiracy situation can be viewed as an extension of this tolerance.<sup>144</sup> Not surprisingly, a recent uni-

139. *E.g.*, *Andrews v. United States*, 162 U.S. 420 (1896); *Grimm v. United States*, 156 U.S. 604 (1895).

140. In *Sorrells v. United States*, 287 U.S. 435 (1932), Chief Justice Hughes stated:

Artifice and stratagem may be employed to catch those engaged in criminal enterprises . . . . The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law.

*Id.* at 441-42.

141. *See Hoffa v. United States*, 385 U.S. 293 (1966); *On Lee v. United States*, 343 U.S. 747 (1952). *See also Lewis v. United States*, 385 U.S. 206 (1966).

142. *See Gouled v. United States*, 255 U.S. 298 (1921). In *Gouled*, the Court held that the fourth amendment had been violated by a secret and general ransacking, notwithstanding the fact that the initial intrusion was occasioned by a fraudulently obtained invitation rather than by force.

143. *E.g.*, *United States v. Maddox*, 492 F.2d 104 (5th Cir. 1974); *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973); *United States v. Morales*, 477 F.2d 1309 (5th Cir. 1973); *United States v. Groessel*, 440 F.2d 602 (5th Cir. 1971); *United States v. Lefner*, 422 F.2d 1021 (9th Cir. 1970).

144. The greatest extension of such tolerance occurred as technological improvement of electronic surveillance techniques advanced the effectiveness of police proximity with suspected criminals. Prior to this time it was recognized that there was no right to be free from police surveillance, provided the police had reasonable grounds for believing that the law was being violated. *See generally* *Donnelly*, *supra* note 85, at 1096. The Supreme Court, however, significantly decreased even that protection with its "reasonable expectation of privacy" test. *See Katz v. United States*, 389 U.S. 347 (1967) (Harlan, J., concurring). *Katz* focused on the *place* in which conversation was electronically overheard, in order to determine whether an unreasonable search had occurred. Later, in *United States v. White*, 401 U.S. 745 (1971), the Court shifted the focus to the person hearing the conversation, giving approval to the "bugged" agent.

In *Hoffa v. United States*, 385 U.S. 293 (1966), the Court achieved the same result without reliance on electronic apparatus, but left defendants at the mercy of their own trustfulness. In *Hoffa*, a federal agent gained the suspect's confidence, attended meetings with the suspect, and later testified to all he had heard. Although the Court admitted that protections against unreasonable searches and seizures can extend to oral statements, it held that the speaker had

lateral case began with the proposition that the use of agents and decoys is "necessary."<sup>145</sup>

The critical difference between unilateral and bilateral cases, however, is that in a unilateral case the state plays an active role in *creating* the offense. The offense cannot occur without the "agreement" of the government agent. Thus, participation of the state in the unilateral context goes well beyond the "ferreting out" of evidence for use against a defendant already engaged in the commission of an offense. Rather, it provides one-half of what is needed for the commission of the crime. In such cases, the effectiveness of the tactics is exalted over the integrity of the law-enforcement process.<sup>146</sup>

From a jurisprudential standpoint, unilateral conspiracy undermines the legal system because of the necessary role that the state plays in proving the crime that it had earlier aided in creating. The state must rely on police conduct and police testimony for proof of the criminal activity. For this

*intended* the agent to hear the discussion, and thus no right had been violated. *See id.* at 302-03. "Misplaced confidence" in the agent did not constitute a fourth amendment breach; it was more an occupational hazard than anything else.

The rule derived from such cases, and which carries over to the unilateral conspiracy situation, is that the use of trickery in creating misplaced confidence in government agents is fair play in the game of law enforcement.

145. *See State v. Lavary*, 152 N.J. Super. 413, 420, 377 A.2d 1255, 1258 (1977), *rev'd per curiam*, 163 N.J. Super. 576, 395 A.2d 524 (1978).

146. The same type of attitude is mirrored in the recent pivotal case of *Stone v. Powell*, 428 U.S. 465 (1976). In that case the Supreme Court refused habeas corpus relief for defendants convicted in state proceedings in violation of fourth amendment rights. Fourth amendment violations are distinguishable from other constitutional defects, said the Court, for they "do not impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable." *Id.* at 479. Of course, it is noteworthy that the seminal case on the exclusionary doctrine, *Mapp v. Ohio*, 367 U.S. 643 (1961), had spoken of the concept of *judicial* integrity rather than the integrity of fact-finding. *See also United States v. Peltier*, 422 U.S. 531, 536-39 (1975). The *Powell* Court, however, has placed effective law enforcement above this, by contending that the purpose of the exclusionary rule is deterrence, an end which could be served only remotely by the remedy of habeas corpus relief. *See Stone v. Powell*, 428 U.S. at 484.

Viewed in this posture, it is clear that unilateral conspiracy tactics come under the *Stone v. Powell* canopy of judicial tolerance, because unilateral conspiracy (1) is not concerned with restriction of police strategy, and (2) aims at punishing "guilt" without the hindrance of legal rules (here, the traditional definition of conspiracy) which obscure the facts. Both the *Powell* decision and the model unilateral statute can be viewed as shortcuts directed at punishing criminality once it is evidenced. In a backhanded way, if *Stone v. Powell* provides an imprimatur for illegal searches and seizures by police, then the Code's unilateral conspiracy provision gives an outright approval to police-created one-man conspiracies.

In addition, *Stone v. Powell* represents a statement of comity and federalism. Its refusal to disrupt state criminal determinations may also be relevant to the question of whether a unilateral statute would be upheld. In *Morrison v. California*, 291 U.S. 82 (1934), the Court held that conspiracy requires two guilty minds. That decision, however, impliedly was based on interpretation of a bilateral state statute. Taken seriously, the *Morrison* decision would invalidate a conspiracy conviction where the sole other conspirator has been acquitted. The case therefore would extend beyond the feigned-agreement situation to other unilateral prosecutions contemplated by the Code.

reason, it leaves a defendant practically defenseless against an abuse of police power.<sup>147</sup> In proving its case, the state has three prominent avenues. First, the state may introduce evidence obtained by an agent equipped with sound devices to transmit or record conversation.<sup>148</sup> Second, and in addition to the first, the state can use the "conspirator"-agent as its key witness.<sup>149</sup> Finally, the state can argue that the agreement should be inferred from the participants' conduct as it is in bilateral cases.<sup>150</sup> Under the bilateral approach, the requirement of a second true conspirator in addition to the policeman reduces the potential for police-power abuse.

While the abuse potential may be apparent in the abstract, it is difficult to point to the facts of existing unilateral cases as proof of its existence. Many of the cases involved defendants who wanted help in committing murder and actively sought another's assistance.<sup>151</sup> Thus, there may be an emotional reaction in favor of increased criminal liability. The new law must, however, be evaluated in terms of its fairness in all situations in which it can be applied.

Both the form and the substance of the statute are therefore relevant to this inquiry. The questions to be asked include: (1) Does the model law adequately explain to courts, legislatures, and defendants the type of con-

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147. A defendant's position was disadvantageous enough under bilateral standards. Aside from the procedural irregularities, a judicial weakening of the agreement requirement gave the prosecution an added strength. See generally *Developments*, *supra* note 56, at 933-34. To a certain extent, this relaxation of the agreement requirement was necessitated by the nature of the crime itself. Because "secrecy and concealment are essential features of successful conspiracy," *Blumenthal v. United States*, 332 U.S. 539, 557 (1947), convictions under bilateral statutes usually are based upon circumstantial evidence. See generally *LAFAYE & SCOTT*, *supra* note 5, at 457. Moreover, standards of relevance are relaxed to facilitate such proof. *Id.* Perhaps the greatest impact this has had on the agreement aspect of a conspiracy prosecution is the judicial dictate that the agreement may be inferred from the conduct of the parties. See, e.g., *Interstate Circuit v. United States*, 306 U.S. 208, 211 (1939); *United States v. Hearn*, 496 F.2d 236 (6th Cir. 1974); *State v. Estrada*, 27 Ariz. App. 38, 550 P.2d 1080 (1976); *Griffin v. State*, 248 Ark. 1223, 455 S.W.2d 822 (1970); *People v. O'Connor*, 48 Mich. App. 524, 210 N.W.2d 805 (1973). Accordingly, many cases have held that the agreement which must be proved may be either express or implied. See, e.g., *United States v. Georgia*, 210 F.2d 45 (3d Cir. 1954); *United States v. Banks*, 383 F. Supp. 368 (D.S.D. 1974); *Jones v. State*, 8 Md. App. 370, 259 A.2d 807 (1969); *Commonwealth v. Cameron*, 247 Pa. Super. 435, 372 A.2d 904 (1977).

In a unilateral prosecution, it is unlikely that the agreement will have to be inferred, because the "conspirator"-policeman in all likelihood will be available to testify that there was an express agreement.

148. E.g., *Saienni v. State*, 346 A.2d 52 (Del. 1975); *People v. Lanni*, 95 Misc. 2d 4, 406 N.Y.S.2d 1011 (1978).

149. This practice is also possible under the bilateral approach, but in such a case there must be an additional nonpolice conspirator. See *People v. Atley*, 392 Mich. 298, 318, 220 N.W.2d 465, 475 (1974) (Swainson, J., concurring). The judge who wrote this concurrence had his own conspiracy conviction affirmed in *United States v. Swainson*, 548 F.2d 657 (6th Cir.), *cert. denied*, 431 U.S. 937 (1977). An undercover agent played a major role in the case.

150. See note 147 *supra*.

151. See, e.g., *Saienni v. State*, 346 A.2d 152 (Del. 1975); *State v. St. Christopher*, 305 Minn. 226, 232 N.W.2d 798 (1975); *People v. Lanni*, 95 Misc. 2d 4, 406 N.Y.S.2d 1011 (1978).

duct prohibited? (2) What protections exist to insure that this license for police activity will not be abused? Conceivably, there are two protections to prevent mishandling of a unilateral conspiracy prosecution: the requirement of an overt act and the defense of entrapment. Unfortunately, neither is meaningful in the context of unilateral conspiracy.

### *Overt Act*

At common law, the crime of conspiracy was complete and punishable as soon as the agreement was made.<sup>152</sup> Presently, however, approximately one-half of the state conspiracy statutes require an overt act.<sup>153</sup> Such a requirement prescribes that in addition to the agreement there be an act committed by either conspirator in furtherance of the conspiracy.<sup>154</sup> It is not necessary that the act itself be unlawful.<sup>155</sup> The purpose of requiring the overt act was to provide proof that the conspiratorial agreement was meant to be carried out, and thus was a serious threat.<sup>156</sup> Accordingly,

152. *Hogan v. O'Neill*, 255 U.S. 52 (1921). *See, e.g.*, *Thompson v. State*, 106 Ala. 67, 17 So. 512 (1894); *State v. Tebo*, 256 Iowa 449, 127 N.W.2d 646 (1964); *Garland v. State*, 112 Md. 83, 75 A. 631 (1910). *State v. Bacon*, 27 R.I. 252, 61 A. 653 (1905); *King v. Gill*, 106 Eng. Rep. 341 (1818); *The Poulterers' Case*, 77 Eng. Rep. 813 (1611).

153. *See, e.g.*, CAL. PEN. CODE § 184 (West 1970); CONN. GEN. STAT. ANN. § 53A-48 (West 1972); GA. CODE ANN. § 26-3201 (1977); ILL. REV. STAT. ch. 38, § 8-2 (1977); N.Y. PENAL LAW § 105.20 (McKinney 1975); OKLA. STAT. tit. 21 § 423 (1958). *See generally* LAFAVE & SCOTT, *supra* note 5, at 476.

The federal conspiracy law, 18 U.S.C. § 371 (1976), also contains such a requirement.

154. *See* *United States v. Falcone*, 311 U.S. 205, 208 (1940); *United States v. King*, 521 F.2d 61, 63 (10th Cir. 1975); *United States v. Armone*, 363 F.2d 385, 400 (2d Cir. 1966); *United States v. Johnson*, 165 F.2d 42, 45 (3d Cir. 1947); *People v. Zamora*, 18 Cal. 3d 538, 548, 557 P.2d 75, 81, 134 Cal. Rptr. 784, 790 (1976); *State v. Moody*, 223 Kan. 699, 704, 576 P.2d 637, 643 (1978); *State v. Johnson*, 548 S.W.2d 245, 248 (Mo. App. 1977); *State v. Yormark*, 117 N.J. Super. 315, 330, 284 A.2d 549, 556 (1971).

155. *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975); *Braverman v. United States*, 317 U.S. 49, 53 (1942); *United States v. Rabinowich*, 238 U.S. 78, 86 (1915); *United States v. Cooper*, 577 F.2d 1079, 1085 (6th Cir. 1978); *United States v. Sterkel*, 430 F.2d 1262, 1263 (10th Cir. 1970); *People v. Katzman*, 258 Cal. App. 2d 777, 783, 66 Cal. Rptr. 319, 325 (1968); *State v. Rittiner*, 341 So. 2d 307, 317 (La. 1976); *State v. Musser*, 110 Utah 534, 547, 175 P.2d 724, 732 (1946). In fact, the overt act may consist of constitutionally protected speech, *United States v. Donner*, 497 F.2d 184, 192 (7th Cir. 1974), or even silence, if it is planned silence, intended to facilitate the conspiracy. *United States v. Eucker*, 532 F.2d 249, 254 (2d Cir. 1976).

In a case in which two defendants and an undercover police officer all were named as conspirators in the indictment, the court held that even if the policeman could not be counted as a conspirator the indictment could stand, for there remained two conspirators, and their act of giving money to the policeman was the overt act. *See* *People v. Teeter*, 62 A.D.2d 1158, 86 Misc. 2d 532, 404 N.Y.S.2d 210, *aff'd*, 62 A.D.2d 1158, 404 N.Y.S.2d 210 (1978).

156. *See* *Yates v. United States*, 354 U.S. 298, 334 (1957); *State v. Dupuy*, 27 Ariz. App. 187, 522 P.2d 1202, 1203-04 (1976). It also is said that the requirement affords the conspirators a "locus poenitentiae"—a period of time in which they may withdraw from the agreement, and so avoid liability. *See, e.g.*, *People v. Zamora*, 18 Cal. 3d 538, 557 P.2d 75, 134 Cal. Rptr. 784 (1977).

courts interpreting the overt act requirement have often regarded it as necessary evidence of the conspiracy, rather than as an element of the crime.<sup>157</sup>

Ostensibly recognizing the value of the overt act requirement, the drafters of the Model Penal Code incorporated such a requirement, stating that it "affords at least a minimal added assurance, beyond the bare agreement, that a socially dangerous combination exists."<sup>158</sup> Yet to consider this Code requirement a general safeguard is naive. First, an overt act is not required under the Code for first- and second-degree felonies.<sup>159</sup> This was an extensive abrogation of the overt act requirement of many states.<sup>160</sup> The drafters reasoned that "the importance of preventive intervention [in serious felony cases] is pro tanto greater than in less serious offenses."<sup>161</sup> Arguably, the need for early intervention is greater when the contemplated crime is more formidable. The requirement as promulgated, however, disregards the possibility of police instigation of even first- or second-degree felonies in a unilateral context. In such cases, the Code risks punishing a defendant who does not fully intend that the plan be carried out. As a result, some states have retained their overt act requirements for all conspiracy prosecutions although otherwise generally accepting the unilateral approach.<sup>162</sup> Even more significantly, however, the apparent protection is not a safeguard because the Code explicitly allows an overt act to be committed by either member of the conspiracy.<sup>163</sup> Apparently it is no defense that the overt act was done by the police agent. Thus, it appears that an undercover agent may perform an act in furtherance of the alleged conspiracy, and then the state may use as its proof both his or her testimony as to the agreement and the agent's act in furtherance of it.

Notwithstanding the Code's permissiveness as to the perpetrator of the overt act, there may be some judicial protection through a pre-Code common law "essential act" test. This test, although infrequently invoked, concentrates attention on the person who performs the act, rather than automatically attributing the act to both conspirators. Because the possibility of abuse is present in any conspiracy prosecution, courts have, in the past,

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157. *E.g.*, *Yates v. United States*, 354 U.S. 298 (1957); *United States v. Barrett*, 539 F.2d 244 (1st Cir. 1976); *Safarik v. United States*, 62 F.2d 892 (8th Cir. 1933). *Contra*, *Hyde v. United States*, 225 U.S. 347 (1912); *United States v. Cohen*, 583 F.2d 1030 (8th Cir. 1978). In some states the statute specifies that no person shall be convicted of conspiracy unless an act in furtherance of the agreement is alleged and proved. *See, e.g.*, ILL. REV. STAT. ch. 38, § 8-2(a) (1977).

158. MODEL PENAL CODE (Tent. Draft), *supra* note 44, comment 2, at 141.

159. *See* MODEL PENAL CODE (Official Draft), *supra* note 2, § 5.03(5).

160. *See id.* § 5.03 and accompanying text.

161. *Id.*

162. *See* CONN. GEN. STAT. ANN. § 53A-48 (West 1972); GA. CODE ANN. § 26-3201 (1977); ILL. REV. STAT. ch. 38, § 8-2(a) (1977); KAN. STAT. ANN. § 21-3302(1) (1974); MINN. STAT. ANN. § 609.175 (West Supp. 1979); N.Y. PENAL LAW § 105.20 (McKinney 1975).

163. *See* MODEL PENAL CODE (Official Draft), *supra* note 2, § 5.03(5).

drawn a line where what is termed the "essential act" is performed by a law enforcement agent.<sup>164</sup> For example, in *King v. State*,<sup>165</sup> a pre-Code decision, the court held that where "some act essential to the crime charged as the object of the conspiracy" was performed by a government agent in the discharge of his or her duty, a single conspirator-defendant could not be convicted.<sup>166</sup> The court in *King* demonstrated that its position was the judicial treatment unanimously used in such feigned-agreement cases.<sup>167</sup> In one case, absent a unilateral statute, a Michigan court rejected a conspiracy prosecution on sufficiency of the evidence; the concurring opinion concentrated on the police informant's over-involvement. Application of the essential act test is, however, generally limited to conspiracies of only one non-government participant.<sup>168</sup> In another case, the Court of Appeals for the Fifth Circuit held the test inapplicable when there was more than one conspirator-defendant even though the government agent performed an essential act.<sup>169</sup> Despite its limitations, the test can and should be extended to unilateral cases.

The statutory "overt act" requirement and the judicially-created "essential act" test provide safeguards against conspiracy prosecution of non-participating defendants. In the context of unilateral conspiracy, such standards, if used to discount the degree of participation by the government agent, would reduce the impact of prefabrication and overzealous police work. One of the essential act cases has also been explained as based upon a theory of entrapment.<sup>170</sup> Such interpretation is reasonable, as the same sort of overreaching by the executive branch was checked, for many years, by the defense of entrapment.

### *Entrapment*

Because the government plays so prominent a role in unilateral conspiracy, the defense of entrapment seems highly relevant. Unfortunately, how-

164. In *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915), government inspectors induced a man to bring Chinese aliens across the Mexican border. The inspectors explained to him the means by which the Chinese could be brought across the border, the routes they should follow, and the methods by which they could avoid arrest; in short, they planned the crime. The court held that it would contravene public policy to convict the defendant in such circumstances. See note 170 and accompanying text *infra*.

165. 104 So. 2d 730, 732 (Fla. 1958).

166. *Id.* at 732-33.

167. See cases cited in *King v. State*, 104 So. 2d at 733; *Ventimiglia v. United States*, 242 F.2d 620 (4th Cir. 1957); *O'Brien v. United States*, 51 F.2d 674 (7th Cir. 1931); *DeMayo v. United States*, 32 F.2d 472 (8th Cir. 1929); *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915); *State v. Dougherty*, 88 N.J.L. 209, 96 A. 56 (1915).

168. 392 Mich. 298, 317, 220 N.W.2d 465, 474 (1924) (Swainson, J., concurring). The words "essential act" were not used.

169. *United States v. Seelig*, 498 F.2d 109, 112-13 (5th Cir. 1974). See also note 143 *supra*.

170. See *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915), cited in *LAFAVE & SCOTT*, *supra* note 5, at 476. *But cf.* *United States v. Maddox*, 492 F.2d 104 (5th Cir. 1974) (entrapment defense does not extend to inducement by private citizens).

ever, entrapment doctrine offers little reassurance of judicial protection, either against unilateral conspiracy generally or against a unilateral prosecution brought about by overly aggressive police tactics. In fact, the rationale of the entrapment defense is the same as the Code's purpose in imposing criminal liability on the feigned agreement defendant—penalizing predisposition to commit crime.<sup>171</sup> Entrapment is the action of a law-enforcement officer who, for the purpose of obtaining evidence of crime, induces a person to commit a crime which, but for the inducement, that person would not have committed.<sup>172</sup> While this definition appears relatively straightforward, it admits of two distinct interpretations. The first focuses subjectively on the defendant rather than the police. The second focuses on the degree of involvement of the law enforcement agent. A unilateral conspiracy defendant's chance of succeeding with an entrapment defense ultimately depends upon the jurisdiction's interpretation.

The test under the first approach, followed by the majority of states and the federal government, focuses on the defendant's "predisposition"<sup>173</sup> to commit the crime.<sup>174</sup> The clearest articulation of this approach is found in *United States v. Russell*.<sup>175</sup> In that case, an undercover narcotics agent who was investigating the defendants' illicit drug manufacturing enterprise offered them an essential ingredient which was legal, but difficult to obtain. The Supreme Court, in refusing to accept an entrapment defense, held that the agent's contribution to the enterprise was not so extensive as to violate the fundamental fairness guarantee of the due process clause of the fourteenth amendment.<sup>176</sup> The relevant factor to the *Russell* Court was that the defendants were predisposed to commit the offense.<sup>177</sup> This decision

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171. See note 122 and accompanying text *supra*.

172. See generally LAFAVE & SCOTT, *supra* note 5; F. WHARTON, WHARTON'S CRIMINAL LAW & PROCEDURE § 52 (14th ed. 1978).

It is often said that merely presenting the opportunity to commit crime does not constitute entrapment. See, e.g., *Sorrells v. United States*, 287 U.S. 435 (1932); MONT. REV. CODES ANN. § 94-3-111 (1976); ILL. REV. STAT. ch. 38, § 7-14 (1977).

173. The standards of proof of criminal predisposition have been said to be a fault in the new entrapment doctrine. See generally Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 200-16 (1976) [hereinafter cited as Park].

174. See generally LAFAVE & SCOTT, *supra* note 5, at § 48; Hardy, *The Traps of Entrapment*, 3 AM. J. CRIM. LAW 165 (1974); Note, *Entrapment: Time to Take an Objective Look*, 16 WASHBURN L.J. 324, 337 (1976).

175. 411 U.S. 423 (1973). The *Russell* opinion divided defendants into camps of "unwary criminal[s]" and "unwary innocent[s]," distinguished by their criminal predisposition or lack of it. *Id.* at 436. In its historical context, *Russell* seems out of place, coming as it did after the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961).

176. Moreover, the Court said that entrapment was not of constitutional dimension at all. *Id.* at 432. The Court indicated that an entrapment defense based on the degree of government involvement in criminal activity has no constitutional significance. *Id.* at 433. It did say, however, that Congress could "adopt any substantive definition of the defense that it may find desirable." *Id.*

177. *Id.* at 436.

minimized the fact that the crime would not have been committed but for the government agent's action, just as in unilateral conspiracy it cannot be committed absent the government agent's agreement.

Even more significant, for purposes of unilateral conspiracy, is the notion that the entrapment defense is *not* "rooted . . . in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been 'overzealous law enforcement.'" <sup>178</sup> Rather, the defense is based on the idea that the legislature could not have intended criminal punishment for a defendant who was induced by the government to commit crime. <sup>179</sup> Under this theory, the courts are simply legislative interpreters, and entrapment is an implied legislative exception. <sup>180</sup> Considered in this posture, the entrapment defense is less viable in unilateral conspiracy cases: the feigned-agreement offense cannot be challenged as entrapment *per se*, inasmuch as a legislature has declared its intent to punish such a defendant.

It is also doubtful that this majority approach to entrapment would preclude conviction where the police agent-conspirator has planned substantially all of the crime. If the defendant was "predisposed" to commit the crime, a claim of entrapment will be rejected. <sup>181</sup> Predisposition may be shown by, among other things, evidence of the defendant's prior unlawful acts of the same nature. <sup>182</sup> Not only may these acts be introduced to rebut an entrapment defense, once it is raised, <sup>183</sup> they also may be admissible, according to some courts, as a part of the prosecution's case-in-chief if it appears the defendant intends to assert the defense. <sup>184</sup> For this reason, unilateral conspiracy defendants may be easy targets for aggressive police officers. Police may select potential conspirators on the basis of prior convictions, urge them

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178. This was the majority view in *Russell. Id.*

179. *Id.* at 435.

180. Fundamentally, the question is whether the defense, if the facts bear it out, takes the case out of the purview of the statute because it cannot be supposed that Congress intended that the letter of its enactment should be used to support such a gross perversion of its purpose.

*Sorrells v. United States*, 287 U.S. 435, 452 (1932).

181. Under the majority approach, the issue properly is raised by a plea of not guilty, and the entrapment becomes a question of fact for the jury. To the defendant's disadvantage, the jury might consider the evidence of "predisposition" as substantive evidence of commission of the crime. See notes 182 and 184 and accompanying text *infra*.

182. See *Park*, note 173 *supra*.

183. See *Osborn v. United States*, 385 U.S. 323 (1966); *United States v. McCord*, 509 F.2d 891 (7th Cir. 1975); *United States v. Clemons*, 503 F.2d 486 (8th Cir. 1974); *People v. Schrader*, 71 Cal. 2d 761, 457 P.2d 841, 80 Cal. Rptr. 841 (1969); *People v. Price*, 17 Ill. App. 3d 911, 309 N.E.2d 56 (1974); *State v. Van Regenmorter*, 465 S.W.2d 613 (Mo. 1971); *Commonwealth v. Miller*, 361 Mass. 644, 282 N.E.2d 394 (1972); *State v. Kasai*, 27 Utah 2d 326, 495 P.2d 1265 (1972).

184. See *United States v. Cohen*, 489 F.2d 945 (2d Cir. 1973); *United States v. Simon*, 453 F.2d 111 (8th Cir. 1971); *State v. Frates*, 160 Mont. 431, 503 P.2d 47 (1972); *State v. Dolce*, 41 N.J. 422, 197 A.2d 185 (1964).



into "agreement," and testify against them. As long as the currently accepted view stands,<sup>185</sup> entrapment will probably be ineffective as a defense.

The second approach to entrapment would afford a more likely defense, for it concerns itself with the government's conduct, emphasizing the quality or nature of the police involvement.<sup>186</sup> If the police tactics create a substantial risk that a law-abiding person might succumb to the inducement, the prosecution is precluded.<sup>187</sup> This minority approach reflects two public policy considerations: first, government should not "create" criminals,<sup>188</sup> and second, recognition of the defense by the courts will deter reprehensible police conduct.<sup>189</sup> Clearly, application of this theory of entrapment makes sense when the crime charged is unilateral conspiracy. In a very real sense, the agreeing government agent has "created" the crime. Furthermore, an entrapment doctrine which seeks to deter unreasonable police activity is imperative if the potential for abuse is to be curtailed.

The drafters of the Code recognized that the unilateral approach presented serious problems of entrapment,<sup>190</sup> and, accordingly, they proposed the minority view as the Code's theory of entrapment.<sup>191</sup> Unfortunately,

185. Justices Stewart, Brennan, and Marshall have consistently taken the minority position, dissenting in *United States v. Russell*, 411 U.S. 423 (1973), and *Hampton v. United States*, 425 U.S. 484 (1976). In *Hampton*, they first stated their preference for the "objective" entrapment test which focuses on the police conduct; they suggested that even under the "subjective" test, entrapment should be recognized where the government agent "deliberately sets up" the accused. *Id.* at 496-99 (Brennan, J., dissenting).

Further, notwithstanding the definiteness of the decree in *Russell*, the majority there added that an extreme case might compel it to nullify a conviction: "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell*, 411 U.S. at 431-32.

186. See generally LAFAYE & SCOTT, *supra* note 5, at ch. 5, § 48.

187. See, e.g., COLO. REV. STAT. § 18-1-709 (1973).

188. See *United States v. Healy*, 202 F. 349, 350 (D. Mont. 1913).

189. See *Carbajal-Portillo v. United States*, 396 F.2d 944, 948 (9th Cir. 1968).

190. See Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, (pts. 1 & 2) 61 COLUM. L. REV. 571, 957, 966 (1961). Professor Wechsler of the Columbia Law School was Chief Reporter for the Model Penal Code.

191. It reads:

(1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:

(a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

(b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

(2) Except as provided in Subsection (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the Court in the absence of the jury.

the Code was proposed *before* the Supreme Court's weakening of the entrapment defense.<sup>192</sup> Moreover, the drafters did not propose the adoption of both the conspiracy and entrapment sections jointly, nor did they suggest that the provisions should be read *in pari materia*. Hence, the conspiracy section has been widely adopted,<sup>193</sup> yet the majority of states continue to follow the Supreme Court's "predisposition"-oriented theory of entrapment.

Because the entrapment provisions of the Code have not generally been enacted, the defense is usually unavailable in prosecutions based on the Code theory of conspiracy. Entrapment has not been addressed in many of the decisions; this is perhaps explained by the fact that in most of the cases, predisposition was apparent.<sup>194</sup> Thus, one court, relying on the predisposition analysis, dismissed an entrapment defense summarily,<sup>195</sup> while another conceded that entrapment could be a problem generally, without addressing the issue directly.<sup>196</sup> A third court declined to accept a defendant's argument that no predisposition had been shown to counter her defense of entrapment by declaring that "predisposition is evidenced by previous conviction of crime, reputation for criminal activity, ready compliance with minimal inducement, or easy yielding to the opportunity to commit the offense."<sup>197</sup> This statement reflects the underlying fault of applying the "predisposition" test in this context: because the offense is committed by agreement, the test is instantly satisfied; the defendant's compliance with a government agent's plan will be regarded as proof that the defendant was not entrapped. "Predisposition" both justifies the statute and denies a defense under it.

To assert the defense of entrapment is to admit, necessarily, that the charged offense was committed.<sup>198</sup> Therefore, entrapment should be distin-

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(3) The defense afforded by this Section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.

MODEL PENAL CODE (Official Draft), *supra* note 2, § 2.13 (formerly § 2.10).

192. The Code was proposed in 1962. *Russell and Hampton*, which indicate the broad interpretation of "predisposition," were both decided more than 10 years later.

193. *See* note 3 *supra*.

194. For instance, in *Garcia v. State*, \_\_\_ Ind. \_\_\_, 394 N.E.2d 106 (1979), the defendant previously had indicated her desire to have her husband killed.

195. *See* *People v. Lanni*, 95 Misc. 2d 4, 8, 406 N.Y.S.2d 1011, 1013 (1978). *Cf.* *King v. State*, 104 So. 2d 730, 732 (Fla. 1958) (possible entrapment recognized but not used as basis for decision).

196. *See* *People v. Schwimmer*, 66 A.D.2d 91, 95, 411 N.Y.S.2d 922, 925 (1978).

197. *State v. Lavary*, 152 N.J. Super. 413, 420, 377 A.2d 1255, 1258 (1977), *rev'd per curiam on other grounds*, 163 N.J. Super. 576, 395 A.2d 524 (1978), *citing* *State v. Talbot*, 71 N.J. 160, 167, 364 A.2d 9, 13 (1976).

198. *See, e.g.,* *United States v. Rodriguez*, 433 F.2d 760 (1st Cir. 1970); *Brown v. State*, 248 Ark. 561, 453 S.W.2d 50 (1970); *Zinn v. State*, 134 Ga. App. 51, 213 S.E.2d 156 (1975); *People v. Pugh*, 48 Mich. App. 242, 210 N.W.2d 376 (1973); *State v. Williams*, 84 S.D. 547, 173 N.W.2d 889 (1970). *But see* *United States v. Demma*, 523 F.2d 981 (9th Cir. 1975) (overruling earlier cases); *State v. Nelsen*, 228 N.W.2d 143 (S.D. 1975).

guished from the defense than an essential element of the crime is absent.<sup>199</sup> The obvious difference is that under the latter theory the state has no case at all. This distinction is especially important in unilateral conspiracy, because the "essential elements" are said to be the same as those in bilateral conspiracy,<sup>200</sup> yet the element of "agreement" is altogether different. Because of the confusion as to the crime's essential elements, a defense is difficult to prepare.

### *Statutory Interpretation*

Although conspiracy is an offense both at common law and under statute, nearly all law defining the traditional crime has been a product of the courts.<sup>201</sup> Recognizing this, the drafters of the Code set out to create a complete statutory definition of the scope and components of the new crime. Yet the replacement of nearly 700 years' worth of judicial explication is not a simple task, and judicial interpretation has not been eliminated. By adopting section 5.03 of the Model Penal Code, a legislature ostensibly preempts the former bilateral definition of conspiracy.<sup>202</sup> Nevertheless, the question whether the new offense is a "conspiracy," legally punishable as such, has been raised in every reported unilateral case since the Code. The courts' answers have not been uniform.

This disparity, or confusion, is occasioned by three factors. The first is the failure of the Code to define its terms: the definition of conspiracy in the Code leaves much to be inferred. For instance, the Code does not define

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This idea is attacked in Groot, *The Serpent Beguiled Me and I (Without Scierter) Did Eat—Denial of Crime and the Entrapment Defense*, 1973 U. ILL. L.F. 254, 278.

199. The distinction arises in cases where the absence of a victim's consent is an essential element of the offense. So, for instance, if the "victim" (possibly an undercover policeman) is not deceived, the defendant cannot be guilty of obtaining money by false pretenses. *See, e.g., People v. Schroeder*, 132 Cal. App. 2d 1, 281 P.2d 297 (1955). Sometimes, under such circumstances, a conviction for attempt will be upheld. *See, e.g., State v. Peterson*, 109 Wash. 25, 186 P. 264 (1919).

200. *See Note, Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1136 (1975) [hereinafter cited as *Conspiracy*].

201. MODEL PENAL CODE (Tent. Draft), *supra* note 44, comment 2, at 96.

202. A legislature is free to change the common law defining crime. *Gilbert v. United States*, 370 U.S. 650, 655 (1962) (definition of forgery). When a legislature does change the common law definition, that statutory definition prevails over the common law definition. *See People v. Pociask*, 14 Cal.2d 679, 96 P.2d 788 (1939); *State v. Coomes*, 170 Neb. 298, 102 N.W.2d 454 (1960); *Traxler v. State*, 96 Okla. Crim. 231, 251 P.2d 815 (1952). Consequently, courts have held that where a criminal offense is created and defined statutorily, its previous common law is abrogated and cannot be resorted to in order to add or detract from the effect of the statutory language. *See, e.g., State v. DiPaglia*, 247 Iowa 79, 71 N.W.2d 601 (1955); *Bentley v. Commonwealth*, 269 S.W.2d 253 (Ky. 1954). Some states, however, indulge a presumption that the legislature did not intend to alter the common law unless such an intention is clearly expressed. *See, e.g., Bloomfield v. Brown*, 67 R.I. 452, 25 A.2d 354 (1942). Such rules inevitably will affect judicial handling of state-adopted versions of the Code.

203. *See United States v. Brandenberg*, 144 F.2d 656 (3d Cir. 1944); *Jones v. State*, 101 Ga. App. 851, 115 S.E.2d 576 (1960).

the word "agrees," even though this is unmistakably the key element of guilt. Where a statute creating or describing a criminal offense uses an undefined term, the general practice is to give the term its common law meaning.<sup>203</sup> Thus, it is only natural that courts should refer to common law for the definition of agreement. But the common law requires specific intent on the part of at least *two* persons.<sup>204</sup> So when the common law is employed to elucidate the statute, the statutory meaning is abrogated. The drastic alteration the Code seeks to effect in suggesting that a government agent can be counted as a conspirator augments the confusion. Under common law, the result in such a case was a unanimous judicial veto.<sup>205</sup> Because that result is so deeply ingrained in our legal tradition, certain courts have been unwilling to ascribe a contrary intent to the legislators.<sup>206</sup>

Second, lack of clarity in legislative history fosters and supports such judicial reluctance. When a legislature mentions that it does not mean to change the well-established law, it doubles the confusion.<sup>207</sup> In both New York and New Jersey, decisions existed with opposite holdings.<sup>208</sup> Those states have recently resolved their inner conflicts,<sup>209</sup> but reached opposite results.<sup>210</sup> New Jersey, in fact, decided against the unilateral approach by distinguishing the wording of its unilateral statute from the wording of New York's unilateral statute and quoting an Illinois case.<sup>211</sup> Ironically, the drafters of

204. See note 79 and accompanying text *supra*.

205. See, e.g., *State v. Dougherty*, 88 N.J.L. 209, 96 A. 56 (1915); *Delaney v. State*, 164 Tenn. 432, 51 S.W.2d 485 (1932); *Weathered v. State*, 128 Tex. Crim. 263, 81 S.W.2d 91 (1935); *Odneal v. State*, 117 Tex. Crim. 97, 34 S.W.2d 595 (1931); *Woodworth v. State*, 20 Tex. App. 375 (1947).

206. E.g., *State v. Mazur*, 158 N.J. Super. 89, 99, 385 A.2d 878, 884 (1978); *People v. Hanley*, 92 Misc. 2d 465, 467-68, 400 N.Y.S.2d 319, 321 (County Ct. Special Term 1977).

207. See, e.g., *Garcia v. State*, \_\_\_ Ind. \_\_\_, 394 N.E.2d 106 (1979).

208. See *State v. Mazur*, 158 N.J. Super. 89, 385 A.2d 878 (1978); *State v. Lavary*, 152 N.J. Super. 413, 377 A.2d 1255 (1977), *rev'd per curiam*, 163 N.J. Super. 576, 395 A.2d 524 (1978); *People v. Lanni*, 95 Misc. 2d 4, 406 N.Y.S.2d 1011 (1978); *People v. DiDominick*, 94 Misc. 2d 392, 406 N.Y.S.2d 420 (1978); *People v. Teeter*, 86 Misc. 2d 532, 382 N.Y.S.2d 938 (1976); *People v. Cardosanto*, 84 Misc. 2d 275, 375 N.Y.S.2d 834 (1975); *People v. Hanley*, 92 Misc. 2d 465, 400 N.Y.S.2d 319 (County Ct. Special Term 1977).

209. See *State v. Lavary*, 163 N.J. Super. 576, 395 A.2d 524 (1978) (*per curiam*); *People v. Schwimmer*, 66 A.D.2d 91, 411 N.Y.S.2d 922 (1978).

210. New York approved the unilateral approach, *People v. Cardosanto*, 84 Misc. 2d 275, 375 N.Y.S.2d 834 (1974); New Jersey rejected it, *State v. Mazur*, 158 N.J. Super. 89, 385 A.2d 878 (1978).

211. See *State v. Mazur*, 158 N.J. Super. 89, 101, 385 A.2d 878, 884 (1978), *cited with approval* in *State v. Lavary*, 163 N.J. Super. 576, 395 A.2d 524 (1978) (*per curiam*).

Interestingly, the Illinois case relied upon, *People v. Ambrose*, 28 Ill. App. 3d 627, 329 N.E.2d 11 (1975), was not on point, and, inasmuch as the conviction of the Illinois defendant was affirmed, the court's holding on the statutory interpretation amounted only to dicta:

The state would have this court read the conspiracy statute of the Illinois Criminal Code to hold that only the intent of the individual defendant is necessary in a conspiracy case. The state feels that it is not an element of the conspiracy to prove that the co-conspirator . . . needed to have the intent to agree with the defendant and the intent to carry out the scheme. With this we cannot agree. Changes in our

the Code had set out to remedy the vagueness which existed under bilateral conspiracy law.<sup>212</sup>

Third, the Code fails to set out precisely the elements of the new crime. In retrospect the bilateral law was comparatively clear. The traditional crime required the proof of certain elements: the criminal act (agreement), the criminal intent, the object of the conspiracy, and the requisite plurality; in addition, an overt act requirement frequently was imposed.<sup>213</sup> While it is said that the elements of unilateral conspiracy are the same,<sup>214</sup> in actuality, they are not: agreement and intent, as formerly understood, are abrogated; so, except superficially, is the requisite plurality. This leaves only the object of the conspiracy, in addition to the Code's sometime requirement<sup>215</sup> of an overt act, as the elements identical under bilateral law. Because the due process clause protects an accused against conviction except upon proof, beyond a reasonable doubt, of every essential element,<sup>216</sup> unilateral defendants would benefit greatly by a definitive statement of the true elements of the new crime.

Operating in the absence of a precise ruling, unilateral defendants are attempting to defend by using a defense available to defendants in bilateral cases. That is, they continue to argue that a government agent cannot be a "conspirator," and agreement with such a person is not "agreement" for purposes of conspiracy law.<sup>217</sup> But raising such a defense before courts which approve of or acquiesce to the unilateral theory is futile. Most of these

criminal code in recent years provide that the co-conspirators do not have to be prosecuted or even be guilty of an offense in order to convict a defendant of conspiracy. Yet, the older case law requiring two or more people for a conspiracy is still valid. It would be absurd to claim a conspiracy could be entered into by one individual alone. By the terms of our statute the crime of conspiracy involves an agreement. The definition of agreement implies an intent to agree between a minimum of two people. Therefore the state's contention that the intent of a co-conspirator to agree with the defendant to commit armed robbery is unnecessary is fallacious.

*Id.* at 629, 329 N.E.2d at 14. The dicta of *Ambrose* appears to mean that the unilateral approach as it pertains to a policeman-plus-defendant conspiracy has been rejected in Illinois.

The *Mazur* court also distinguished the unilateral cases of *Saienni v. State*, 346 A.2d 152 (Del. 1975); *State v. St. Christopher*, 305 Minn. 226, 232 N.W.2d 798 (1978); and *People v. Cardosanto*, 84 Misc. 2d 275, 375 N.Y.S.2d 834 (1975), stating that in each of those cases, the state statutes had "specifically permitted" the finding of a conspiracy despite the lack of mental state of one alleged conspirator. See *Mazur v. State*, 158 N.J. Super. 89, 101, 385 A.2d 878, 884 (1978).

212. See generally *Conspiracy*, *supra* note 200.

213. For a discussion of these elements generally, see *Developments*, *supra* note 56, at 925-26.

214. See *Conspiracy*, *supra* note 200.

215. See note 153 and accompanying text *supra*.

216. See *In re Winship*, 397 U.S. 358 (1970).

217. See, e.g., *Garcia v. State*, \_\_\_ Ind. \_\_\_, 394 N.E.2d 106 (1979); *Saienni v. State*, 346 A.2d 152 (Del. 1975); *State v. St. Christopher*, 305 Minn. 226, 232 N.W.2d 798 (1975).

courts have simply stated that it is irrelevant that one of the conspirators was only feigning agreement.<sup>218</sup>

Rejection of this defense also has been explained on the ground that such an argument is identical to an argument of factual impossibility,<sup>219</sup> which traditionally has not been a defense to conspiracy.<sup>220</sup> This analogy to the factual-impossibility theory, albeit seductive, is erroneous. Factual impossibility has not been allowed as a defense to conspiracy because the basic justifications for punishing conspiracy—the evils inherent in numbers—are not mitigated by the presence of unknown factors. In the case of a defendant-plus-police-agent conspiracy, however, none of the justifications is applicable. The defense of impossibility is not the same as a claim that there never was a conspiracy.<sup>221</sup>

If the urging of the traditional defense bespeaks a misinterpretation of the model statute and its progeny, a question arises as to why the new law has not been attacked on constitutional grounds. Generally, when a statute does not make clear the conduct which is proscribed, it can be challenged under the void-for-vagueness doctrine.<sup>222</sup> The doctrine will be employed to declare a law unconstitutional, under due process standards, if "men of common intelligence must necessarily guess at its meaning and differ as to its application."<sup>223</sup> In light of the differing results reached by the state courts, it would seem that such a doctrine might find application in the unilateral conspiracy context. The argument, however, would probably fail: the con-

218. *E.g.*, *Garcia v. State*, \_\_\_ Ind. \_\_\_, 394 N.E.2d 106 (1979); *State v. St. Christopher*, 305 Minn. 226, 232 N.W.2d 798 (1975); *People v. Lanni*, 95 Misc. 2d 4, 406 N.Y.S.2d 1011 (1978).

219. *See State v. Lavary*, 152 N.J. Super. 413, 432-33, 377 A.2d 1255, 1265 (1977), *rev'd per curiam*, 163 N.J. Super. 576, 395 A.2d 524 (1978).

220. *See State v. Moretti*, 52 N.J. 182, 187, 244 A.2d 499, 502 (1968). *See generally* LAFAYE & SCOTT, *supra* note 5, at 474-76.

221. This distinction was recognized in the unilateral case of *State v. Mazur*, 158 N.J. Super. 89, 385 A.2d 878 (1978). That court noted that if the *object* of a conspiracy is factually impossible to achieve, the conspiracy is still punishable if two persons intended agreement, for agreement is the essence of conspiracy. *See id.* at 98, 385 A.2d at 883.

222. *See, e.g.*, *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (reversed conviction under law making it a penal offense to be a "gangster"). *See generally* Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205 (1967); Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831 (1923); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

223. *Connally v. General Constr. Co.*, 269 U.S. 385 (1926). *Accord*, *Buckley v. Valeo*, 424 U.S. 1 (1976); *Smith v. Goguen*, 415 U.S. 566 (1974); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961). *See also* *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Jordan v. DeGeorge*, 341 U.S. 223 (1951); *Winters v. New York*, 333 U.S. 507 (1948); *Whitney v. California*, 274 U.S. 357 (1927). It is this principle upon which the *ex post facto* clause is based. *Marks v. United States*, 430 U.S. 188 (1977). *But cf.* *NAACP v. Button*, 371 U.S. 415 (1963):

The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating . . . the existence of a penal statute susceptible of sweeping and improper application.

*Id.* at 432-33.

stitutional claim may be rejected if it appears that the ambiguity is being asserted merely to evade the law.<sup>224</sup> Because a unilateral defendant engages in the proscribed conduct without knowing the other "conspirator" is a government agent, the argument could only be that he or she would not have made the agreement had the identity of the other party been known. Such an argument exposes the specific intent of the accused and would therefore probably be of no avail.

The most effective defense for a unilateral defendant may be the defense of conspiracy against oneself. In a recent case, the defendant was accused of agreeing with a "hit man" to kill several persons, including his former wife and the judge who conducted their divorce hearing.<sup>225</sup> Unknown to the defendant, the "hit man" was actually an FBI informant, and the FBI videotaped and photographed meetings between the two men. Despite the films and the informant's key testimony, the case has resulted in two mistrials because of two hung juries.<sup>225</sup> The once-improbable defense, somewhat effectively urged by this defendant,<sup>226</sup> was that the real conspiracy occurred between the former wife and the FBI—a plan to convict an innocent man; "[t]he jury apparently could not agree on which conspiracy story to believe."<sup>227</sup> With this kind of tactic, the history of conspiracy law has come full-circle—back to conspiracy to abuse the legal process.<sup>228</sup> Police tactics of feigning agreement have demonstrated their self-defeating potential.

The unilateral theory as applied to the conspiracy of a defendant and a police officer has not remedied the shortcomings of the traditional crime. Instead, it has created overwhelming potential for abuse by the state, and, even in the absence of judicial veto through a finding of entrapment, it may ultimately prove self-defeating. If it lends itself to abuse and fosters public distrust of law enforcement, is such a unilateral approach worthwhile? Certainly not, especially because the charges of solicitation and attempt are already available. It has long been recognized that there are enough evils inherent in the charge of conspiracy;<sup>229</sup> it is neither necessary nor wise at this point to add to them.

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224. See, e.g., *United States v. Korpan*, 354 U.S. 271 (1957); *United States v. Five Gambling Devices*, 346 U.S. 441 (1953); *United States v. Kahriger*, 345 U.S. 22 (1952).

225. See *Millionaire Wins Mistrial in Murder-For-Hire Case*, *Chi. Trib.*, Jan. 23, 1979, at 2, col. 1.

226. *Id.*

227. *Id.* In another case, *Beasley v. State*, 360 So. 2d 1275 (Fla. Dist. Ct. App. 1978), the defendant, a lawyer, was approached by a woman—actually a state agent—seeking to purchase marijuana. Allegedly aware of the true identity of another government narcotics agent, the defendant arranged a meeting between the two. By doing this, the defense argued, the lawyer expected to aid in law enforcement; instead, he was charged criminally. The defense was not successful. His conviction was confirmed because the undercover narcotics agent he called upon to meet the prospective buyer was not authorized to sell narcotics in discharge of his duties. *Id.* at 1277.

228. See notes 16-18 and accompanying text *supra*.

229. See *Krulwitch v. United States*, 336 U.S. 440, 449-58 (1949) (Jackson, J., concurring).

## CONCLUSION

"[A] legal principle commands less respect when extended beyond the logic that supports it."<sup>230</sup> What the Model Penal Code proposes as "unilateral" conspiracy bears little resemblance to the traditional crime of conspiracy when applied to the case in which one of the co-conspirators is a police agent or informant merely feigning agreement. Historically, a conspiracy prosecution for this combination would not lie. In such a case, not one of the many rationales for punishing conspiracy is present, for conspiracy is aimed at organized numbers bent on organized criminal activity. What the Code deems a threat sufficient to justify punishment is the defendant's firm disposition to commit a crime with others. Prior to the Code, and unchanged under it, such disposition is punishable by the law of attempt or the law of solicitation once dangerousness is evidenced. For these reasons, the newly created crime makes little sense theoretically.

It also makes little sense because the potentials for abuse in detecting and proving unilateral conspiracy are quite serious: the government agent must play half the role of creating the conspiracy in order to detect it. Further, the chances of miscarriage of justice are heightened by the Supreme Court's virtual elimination of the entrapment defense. Under the prevailing entrapment theory, the focus is on the defendant's "predisposition," rather than on the quality of government involvement. Thus, a defendant who "agrees" with a government agent to commit a crime simultaneously negates an entrapment defense. Because of the absence of judicial protection, and because unilateral conspiracy is such a radical change from the prior law, it is unclear how a defendant, wrongly accused, could possibly defend against such a charge. Most defendants are still unsuccessfully arguing that two guilty minds are needed, but this defense is irrelevant under a unilateral statute. It can succeed only where a court declines to follow the full letter of the unilateral law.

This tendency of the unilateral theory to attract executive-branch abuse may eventually produce public distrust of both law-enforcement activity and the legal process itself.<sup>231</sup> With solicitation and attempt already available to punish the guilty, unilateral conspiracy exacts too high a price from the criminal justice system.

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230. *Iannelli v. United States*, 420 U.S. 770, 786 (1975).

231. Although proposal of the unilateral approach was labelled a reform, common law conspiracy theory is not seen as promoting justice. Moreover, the unilateral approach is not likely to alter that. In recent years there have been a number of well-publicized conspiracy trials, each of them having one thing in common: a refusal of the juries to place credence in the government's case. See, e.g., Caldwell, *Angela Davis Acquitted on All Charges*, N.Y. Times, June 5, 1972, at 1, col. 2; *Berrigan Case a Mistrial On Main Plotting Charge*, N.Y. Times, April 6, 1972, at 1, col. 2; *Chicago Seven Cleared of Plot; 5 Guilty on Second Count*, N.Y. Times, Feb. 19, 1970, at 1, col. 3; *7 Youths Freed in Oakland in 1967 Draft Disorder*, N.Y. Times, Mar. 30, 1969, at 55, col. 1. The result of this perceived abuse of prosecutorial discretion has been a weakening of the credibility of the legal system. BASSIOUINI, *supra* note 66, at 214.



