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Why it Makes Sense to have Harsh Punishments for Conspiracy.

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HERE'S HOW A LAW SCHOOL TEXTBOOK might introduce the elements of traditional conspiracy law: Imagine that Joe and Sandra agree to rob a bank. From the moment of agreement, they can be found guilty of conspiracy even if they never commit the robbery (it's called "inchoate liability"). Even if the bank goes out of business, they can still be liable for the conspiracy ("impossibility" is not a defense). Joe can be liable for other crimes that Sandra commits to further the conspiracy's objective, like hot-wiring a getaway car (that's called Pinkerton liability, after a 1946 Supreme Court case involving tax offenses). He can't evade liability by staying home on the day of the robbery (a conspirator has to take an affirmative step to "withdraw"). And if the bank heist takes place, both Joe and Sandra can be charged with bank robbery and with the separate crime of conspiracy, each of which carries its own punishment (the crime of conspiracy doesn't "merge" with the underlying crime).

Why should conspiracy liability begin at the moment of "agreement," before any crime is committed? Why can a conspirator be charged with both the inchoate offense of conspiracy and the robbery? Why should the law punish conspirators even if it's impossible for them to commit the crime they planned? Why is withdrawal from a conspiracy so difficult? And what about that oddball Pinkerton doctrine?

For more than 50 years, these questions have prompted a series of critiques of conspiracy law. The major scholarly articles and many prominent judges have called the doctrine "unnecessary," "without justification," and much worse. And they've succeeded on important fronts. The Model Penal Code, a blueprint for state law first written by a commission of experts in the early 1950s, rejected many of the traditional features of conspiracy law. The federal sentencing commission similarly has eliminated many of the traditional features of conspiracy law over the last 15 years, so that, in general, it's no longer possible to punish someone both for conspiring to commit a federal crime and for committing it. Since more than a quarter of federal prosecutions currently include conspiracy charges, that change and others have dramatically reduced the penalties many criminals face.

These cutbacks are likely to prove a mistake. In a world full of crime committed by groups, from terrorists to bank robbers to drug gangs to mafia families, traditional conspiracy doctrine plays a vital role in making our society and communities safer. The doctrine deters some people from joining criminal enterprises in the first place. And when conspiracies are hatched, the law gives prosecutors leverage to "flip" defendants and build cases out of their testimony.

For some years now, I've been arguing that realistic models of crime control must incorporate, and sometimes reconcile, economic and psychological reactions to penalties. This is particularly the case with the offense of conspiracy. Psychologists have made many advances in understanding the ways in which people in groups act differently than they do as individuals. So, too, economists have developed sophisticated explanations for why firms promote efficiency. Both sorts of insights can be "reverse engineered"--in other words, used by the government against conspirators.

CONSIDER THE BASIC ECONOMICS OF A conspiracy. Size helps businesses in two ways: It gives a firm purchasing power in the marketplace and it allows employees to specialize. Much mid-20th-century work in economics, particularly Ronald Coase's theory of the firm, focused on these advantages. And they are intuitive: Think about how difficult it is to rob a bank alone. If you have a group, one person can carry the weapons, another can mastermind the attack, and a third can be the driver of the getaway car.

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For a criminal group, economies of scale reduce the chances of detection. Although large drug gangs may be more visible than solo operators, they are also more likely to have the money to be successful bribers. The laws against bribery, which punish small bribes with large penalties, mean that police and prosecutors generally take risks only for large bribes that individuals rarely can afford to pay. Conspirators are also less likely to be caught because they can commit a rash of crimes within a short time in one city or neighborhood, overpowering limited resources for investigation, and because they can assign lookouts to scout for witnesses or police. And their ability to specialize helps shield some members by spreading out responsibility. It can be difficult to prove that a defendant harbored a "criminal intent," as the law requires, when a defendant can plausibly say that he didn't know what the other members of the group were doing.

*45 The trouble with group behavior goes beyond economies of scale. Psychologists have long studied ways in which people in groups act differently than they do as individuals. In a famous experiment from the early 1950s, researchers asked their subjects questions with obvious answers--for example, the length of a line drawn on a board. In a group setting, many people gave answers that matched the outlandish responses they'd heard given by others in the group, who, unbeknownst to the subjects, were in cahoots with the experimenters. The findings confirm an idea that's pretty intuitive: People tend to conform their views to those of the group. Studies also find that group members tend to be more loyal, listen more to each other, and reward each other more than they do those who belong to other groups, even if their group assignments are arbitrary and temporary.

Group membership can also influence people to take bigger risks and express more extreme views. In a leading study done 40 years ago by a graduate student named J. A. S. Stoner, people were asked to make a choice between investing in high-return, risky stocks and low-return, safer ones. Stoner found that individuals were more likely to prefer the safer stocks and groups more likely to prefer the riskier ones. Later work showed that the power of consensus bolsters confidence in other areas as well. For example, French students who liked the post-World War II leader Charles De Gaulle liked him even more after discussing him in a group, and those who did not like Americans liked them even less. These studies have been replicated hundreds of times in different settings.

Recent work by psychologists like Alexander S. Haslam and by the Nobel-prize-winning economist George Akerlof explains how the special social identity that groups create can induce individuals to behave against their self-interest. For this reason, it's particularly hard to get conspirators to cooperate with law enforcement, as doing so threatens their social identity. Groups also are more likely than individuals to have committed or to go on to commit other crimes, even if they don't carry out the particular crime they've been arrested for. That's because once the decision to join a criminal group has been made, people are more likely to make subsequent choices that support it--what psychologists call the "sunk-cost trap." When universities ask their graduating seniors to pledge a small contribution, like \$100 over the next five years, they're hoping that the sunk-cost trap will lead to bigger commitments in the future.

LAWYERS, PROMPTED BY THE UNIVERSITY of Chicago's Cass Sunstein, are just beginning to grapple with the implications of all this research. For criminal policy, the research outlines why conspirators can be more effective--and potentially more dangerous--than lone criminals. And it suggests that police and prosecutors should have substantial leeway to probe the weaknesses of the group that do exist. When two bank robbers conspire, authorities can persuade one of them to implicate the other in exchange for a lighter sentence. The more conspirators, the more witnesses there are to flip--and the more ominous the likely consequences for the conspirator who won't cooperate. Accordingly, the law imposes heavy up-front penalties for joining a conspiracy, and then tries to induce the members of the group to defect by offering them sentencing breaks in exchange for valuable information.

Information shouldn't be the only basis for sentencing: A person's role in the offense is at least as important. But a person who didn't have much to do with carrying out a crime but knew a lot about it should be punished more than someone who played a minor role and lacked information. In other words, it makes moral as well as practical sense to punish conspirators not only for what they do, but also for what they knew and did not reveal. This underappreciated conceptual shift explains why the complaint that sentences for conspiracy are too long is misplaced. And it's the starting point for a defense of the five much-maligned textbook elements of conspiracy doctrine that I mentioned above:

Inchoate Liability. Making conspirators liable from the moment of agreement creates an incentive for members of the group to defect early. As soon as police and prosecutors get wind of a criminal enterprise, they have a charge-- conspiracy--to employ in flipping potential defendants and to prosecute the group before it does anything destructive. From the beginning of its existence, the criminal syndicate has to worry about losing the loyalty of any of its members throughout the planning of a crime.

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To minimize the danger posed by flipping, criminal leaders often move to *46 compartmentalize information and monitor underlings for signs of defection. Yet keeping members in the dark about one another's activities weakens the group. It's inefficient, erodes group trust, and undoubtedly increases the willingness of underlings to become informants. Attaching liability at the moment of agreement can also be justified as a penalty for behavior likely to cause social harm. In the same way that someone who drives drunk deserves punishment, whether or not he has an accident, the conspirator should be held responsible for the risky act of entering into an agreement.

The Exclusion From Merger. What justifies the prosecution of bank robbers for both robbery and conspiracy to commit robbery, each of which carries a separate penalty? After all, a lone bank robber can't be punished both for attempting bank robbery and for actually committing it. Why should conspiracy law tack on an extra sentence of five or even more years in prison? The answer has to do with the additional harm posed by criminal groups. The conspiracy to rob (which targets group behavior) is a different offense than the robbery (which targets the crime itself). When both the conspiracy and robbery have been completed, government should punish both acts. By maintaining separate penalties, the law makes it more difficult for conspirators to recruit others to help carry out their plans.

The two-pronged doctrine offers an additional advantage as well. Setting a fixed penalty for conspiracy gives prosecutors who know only about small-time players the leverage to flip them and attack higher-ups (particularly with the offenses that are most visible to law enforcement, like low-level drug dealing, which may carry small penalties). At the same time, by calibrating an additional punishment to the particular offense, the law gives small-time players an incentive to stay away from big-time crimes.

Impossibility. Traditionally, a defendant can be guilty of conspiracy even when, for reasons outside of his control, it's impossible to carry out the planned crime. This approach recognizes that any agreement to commit crime, including one to do something impossible, helps cement the group's identity, making further crimes more likely.

This term the Supreme Court is reviewing a recent ruling by the Ninth Circuit Court of Appeals that discounted the traditional approach. In *United States v. Recio*, a Nevada police officer stopped two men driving a truck and found \$10 to \$12 million worth of narcotics. One of the men then cooperated with a government sting by calling a pager number, as he'd previously arranged. A caller returned the page and said that someone would come for the truck. A few hours later, Francisco Jimenez Recio drove up to the truck, got into it, and began driving away. Police arrested him.

Recio persuaded the Ninth Circuit to reverse the conspiracy charge on the theory that he couldn't have conspired to distribute the drugs because the government's intervention made it impossible for him to succeed. The Supreme Court should reject that result, which misguidedly says that a conspiracy can be punished only when its object is a possible one.

Pinkerton. The Pinkerton doctrine makes one conspirator liable for any reasonably foreseeable crime that falls within the scope of the conspiracy, even if she herself did not commit it. So if Joe and Sandra conspire to sell a kilogram of cocaine to an undercover cop posing as a buyer, and Sandra pulls out a gun and shoots the cop, Joe can be liable for the shooting even if he and Sandra hadn't agreed to use force. The conventional wisdom scorns Pinkerton for untethering punishment from individual wrongdoing. But without the doctrine, prosecutors would lose vital ammunition for turning small fish into informants. That could open the door to calls for more coercive law enforcement techniques, like intrusive and broad searches, as well as calls to water down other procedural protections.

Pinkerton also adds uncertain risks to any conspiracy. A bank robber isn't just signing on to a robbery and risking the sentence that crime carries; she also could be punished for the shooting that her partner commits on his way out the door. Assuming that criminals know something about the scope of the law, the potential for unanticipated risks will make joining a conspiracy less attractive. It will also make it harder for criminal groups to agree about how much to compensate their members for the legal risk they're taking. Pinkerton forces conspirators to monitor each other, which in turn begets suspicion and thus even more monitoring. Like the rantings of a jealous spouse who suspects his partner of disloyalty, monitoring may itself contribute to a cycle of distrust, eliminating many of the advantages of collaboration in the first place.

Withdrawal. To leave a conspiracy, as federal law puts it, a defendant must show "that he has taken affirmative steps ... to disavow or to defeat the objectives of the conspiracy; and ... that he made a reasonable effort to communicate those acts to his co-conspirators or that he disclosed the scheme to law enforcement."

The last part of the law is particularly valuable for law enforcement because it lowers the sentences of those who talk to

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police and prosecutors. The doctrine nicely tracks the trend toward sentencing based on the amount of information a criminal had: The conspirator is liable not because of what he did, but because of what he knew and didn't reveal. In encouraging conspirators to tell their co-conspirators about the steps they've taken to withdraw, the doctrine can help destabilize the whole group. In the experiment that showed people giving outlandish answers about the length of a line, blind conformity was reduced by 75 percent when even one group member disagreed with the majority's view. One dissenter can encourage others to speak up. And since game theorists have shown that defection from groups is more common when members believe their joint activities are ending, the withdrawal of one member can prompt defection by others.

TRADITIONAL CONSPIRACY LAW HAS adapted to some of the norms of group behavior, but it hasn't done so perfectly. It's possible to sketch out shifts in policy that could make conspiracies even more difficult to assemble and keep together. But they're not the reforms that scholars and judges usually call for or that the Model Penal Code and the federal sentencing commission adopted.

*47 Instead, the commission set penalties for conspiracy that don't align well with the functions of conspiracy law. The federal sentencing guidelines calibrate punishment by looking at the underlying crime committed, reversing the long tradition of giving members of a criminal group an extra penalty for conspiracy. A separate guideline reduces the punishments for minor participants. The guidelines further require sentencing on the basis of "relevant conduct" and explicitly make that conduct narrower than Pinkerton by confining it to criminal activity that a particular defendant agreed to jointly undertake.

Taken together, these changes reject the special danger posed by groups. There is thus a strong case for restoring the traditional features of the law. Prosecutors are under no obligation to bring all of the available charges in a given case, but having the option of threatening to bring them makes it easier for them to extract information. Without a strong separate offense of conspiracy, lawmakers will face pressure to impose high mandatory-minimum- sentence penalties for minor crimes to further information extraction, with grave consequences to those who commit crimes alone.

A second reform would reward conspirators for giving exculpatory information. The current sentencing scheme only rewards defendant-witnesses who direct blame at someone else, but the same logic that undergirds this system applies when witnesses have information suggesting that a suspect or convict did not commit a crime. In a system that trumpets the principle that it's "better to let 10 guilty people go free than to convict one innocent," it's jarring to find no benefit for information that helps show that someone has been wrongly accused or convicted.

The possible drawback here is that the lure of a sentencing break would cause conspirators to hang on to the sought-after information until after they've been arrested. The solution is to reward them more for talking to police and prosecutors earlier. The longer a suspect sits on information, the less good it should do him. To open up lines of communication before conspirators are staring at a prosecutor across a table, police should offer rewards for early and anonymous disclosures, as state "Crime Stoppers" programs do.

The government also needs to do more to broadcast the extra costs that the law imposes on the conspirators and the benefits it offers to those who break ranks. Through advertising, media briefings, and the like, the government can get the message out that many conspirators are taking on big legal risks, and that those who give information are being well rewarded. If conspirators knew that the government has persistently made use of information provided by co- conspirators, they'd be less likely to believe that their own group's bonds will last. Since one of the attractions of conspiracies is the distinct social identity they offer, the government should do whatever it can to dispel that appeal. Teachers, community leaders, and well-known athletes could all play a role here by attacking the social causes of group crime--and by offering examples of alternate, positive identities.

IN ORDER FOR CONSPIRACY LAW TO WORK in the ways that it's designed to, prosecutors have to know what they're doing, and they have to be trustworthy. To flip a conspirator, prosecutors have to suss out what he knows or should know given his role in the group. They have to be adept at assessing which groups cause real harm and which ones sit around talking. And they need to develop relationships of trust with criminals to create rival affections. Rote offerings of lower sentences won't yield the same payoff--in either cooperation rates or crime reduction--that developing a rapport with informants will. When prosecutors handle their sources well, they can bring a criminal back into mainstream society as well as boost their conviction rates.

This kind of dexterity can't be legislated or imposed. Instead, it comes from extensive training and day-to-day attention from the leaders in a D.A.'s or U.S. attorney's office. Review boards that examine how cooperating witnesses are treated may help,

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as may standing teams in prosecutors' offices that review prospective cooperation agreements. And when prosecutors' offices make new hires, they can probe a candidate's interest not only in winning the case in front of her but in reducing crime over the longterm. Ultimately, however, prosecutors have to train and watch each other to make conspiracy law work well and to guard against abuses.

It's still possible that conspiracy charges, like many other aspects of criminal law, can be used by powerful prosecutors to harm small fish unfairly. But that's a larger, systemic problem that we should deal with by paying enough for public defenders, giving defense attorneys broad latitude to cross-examine cooperating witnesses and iron-clad access to inculpatory and exculpatory evidence, and making sure that juries get cautionary instructions to guard against lying by cooperating witnesses. If it turns out that prosecutors can't be trusted with the discretion that conspiracy doctrine gives them, then the dangers posed by unscrupulous prosecutors are even higher than we think.

At the same time, the virtues of the conspiracy doctrine go only so far. The permissive rules make sense in the context of a system with strong constitutional protections for defendants, including the right to counsel, trial by jury, indictment by a grand jury, cross-examination of witnesses, and pretrial access to the prosecution's evidence.

In the wake of September 11, however, the federal government apparently wants to use conspiracy law to detain terrorism suspects indefinitely. Some of these suspects may even be tried for conspiracy in front of military tribunals that offer few of the protections federal and state courts do. The wide latitude that conspiracy doctrine gives prosecutors only works when defense lawyers have the power to probe the government's claims. If conspiracy law is transplanted to a military setting that lacks these procedural rules, America's commitment to justice, as well as truth, will be tainted.

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