



## Why Criminal Conspiracy Prosecutions Can be Unfair – And How to Fix the Problems

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Criminal conspiracy law can be an effective way to prosecute dangerous criminals before they cause serious harm to other people. This approach is both appealing and problematic, because it offers a basis for prosecution *before* the defendant has committed the substantive crime. For a successful federal prosecution of a criminal conspiracy, three elements have to be present and provable. The defendant must agree with one or more other people to commit a crime. Each defendant must have a clear intention both to participate in the agreement and to commit the crime. And at least one conspirator must perform an “overt act” to further the conspiracy.

Prosecution of conspiracies with all three elements may allow law enforcement officials to stop crime before it happens. Furthermore, several individuals who work together may well commit more offenses and cause greater harm than wrongdoers acting alone. These considerations are the primary justifications for conspiracy prosecutions. Nevertheless, my work questions key assumptions and reveals constitutional and evidentiary problems in conspiracy law. I suggest a number of reforms to improve the fairness and reliability of this kind of prosecution.

### Testing Assumptions

A close look at key assumptions underpinning conspiracy law raises important questions.

- **Criminal conspiracies are considered especially dangerous because they undermine individual rational decision making.** People supposedly get “locked in” to a conspiracy; individuals are encouraged to abide by the group goal and tend to become increasingly dedicated to achieving. But this dynamic underpins any group activity, criminal or otherwise. So instead of saying that conspiracies are particularly dangerous, it is more accurate to say that all sorts of groups can create socially reinforcing dynamics.
- **Conspiracies have a number of participants, making their success more likely.** More people involved allows multiple contributions of talent and dedication to pursuit of a criminal goal. But more participants means more possibilities for defections, reports of conspiratorial activities to law enforcement authorities, and infiltration by undercover agents. There is no evidence that conspiracies lead to more successful criminal endeavors.
- **Conspiracies are secretive and therefore more dangerous.** Although conspiracies are often secretive, so too are individual plans to commit crimes. And because conspiracies involve multiple people, they are more likely to be detected.

- **The requirement to prove an overt act ensures that a conspiracy is real.** Existing rules are supposed to prevent prosecutions about simple posturing by conspirators not ready to act. In addition, individuals are supposed to have a chance to avoid criminal liability by backing out before the overt act occurs. In practice, however, overt acts in furtherance of conspiracies can themselves be otherwise legal activities or such minor steps that nearly any action qualifies. For some kinds of conspiracies, moreover, the law does not currently require any overt act to be proved.

## Specific Problems with Conspiracy Law and Prosecutions

Beyond questionable assumptions, conspiracy law raises constitutional questions and suffers from problems of valid evidence.

- Conspiracy law tests the limits of First Amendment rights, because it allows prosecutors to use normally protected acts such as speech, attendance at meetings, and group ties against a defendant. How can we be sure that people are not prosecuted for unpopular ties or talk?
- Evidentiary rules can easily violate the core presumption in U.S. law that individuals are liable only for their own actions. Statements and actions may be attributed to an accused co-conspirator who has not directly said or done the criminal things alleged, because courts tend to be quite liberal in admitting evidence of association. In fact, prosecutors often file conspiracy charges in order to be able to use evidence only loosely connected to a particular defendant.
- Often, it is unclear whether particular defendants in a conspiracy case actually truly intended to commit the crime (or even to conspire with others about the crime). Charges may be pursued against “big talkers” or people who merely express unpopular opinions. Judges often issue instructions to juries that, to the delight of prosecutors, encourage convictions based on things said by defendants that are ambiguous and hard to interpret with certainty.

## Reforms to Improve the Fairness of Conspiracy Law

Conspiracy prosecutions can preserve public safety, yet their inherent flexibility can lead to unfairness. Solutions to this threat are difficult, but the following legal reforms could help.

- **Require that a conspiracy present an actual danger.** For a criminal prosecution, for sentencing, or both, the U.S. Model Penal Code and state codes in Arkansas, Colorado, New Jersey, and Pennsylvania already require evidence that an alleged conspiracy presents an actual danger of crime.
- **Require a substantial overt act.** To be valid, this kind of prosecution should require that prosecutors show a substantial, not trivial, overt act in pursuit of the joint criminal effort.
- **Improve jury instructions.** Typically, instructions from judges tell juries what the prosecution must have proved if the jury is to find the defendant guilty. But in conspiracy cases, judges often tell juries what the prosecution *does not have to prove*. This approach should change, because it can encourage erroneous convictions of some of the individuals who stand trial.

- **State the scope of the conspiracy prior to trial.** At present, prosecutors can re-shape allegations about the scope of the conspiracy as evidence develops, shifting arguments if their case falters. New rules should require prosecutors to make an unchanging specification of the bounds of the alleged conspiracy and who is involved, allowing for a proper defense.

Read more in Steven R. Morrison, "**Requiring Proof of Conspiratorial Dangerousness.**" *Tulane Law Review* 88 (2014); and "**Conspiracy Law's Threat to Free Speech.**" *University of Pennsylvania Journal of Constitutional Law* 15 (2013).