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# Conspiracy as Contract

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*This article considers the central concept of criminal conspiracy — the agreement. It shows how both courts and scholars have almost entirely failed to define it. Even more surprisingly, neither discusses how “agreement” in criminal conspiracy compares with the agreement in contract law. Instead, courts have diluted the agreement requirement by substituting “mutual understanding” or “slight connection,” leading to uncertainty, unfairness, and a profusion of conspiracy convictions for mere presence or association.*

*This article argues courts should define agreement, and do so as an exchange of promises between the conspirators to commit a crime. An exchange of promises meets the very justifications courts recite for conspiracy: it shows the parties are serious, and shows that they are likely to carry out the crime. This definition also supplies juries and courts with a more certain yardstick by which to measure the often circumstantial evidence arising in conspiracy cases. This proposal thus restores conspiracy law to its fundamental premises while helping to limit convictions to those who have genuinely conspired to commit a crime.*

## TABLE OF CONTENTS

INTRODUCTION .....	407
I. CURRENT DEFINITIONS OF “AGREEMENT” .....	414
A. Plain Meaning .....	414
B. Courts .....	417
C. “Meeting of the Minds” .....	420
D. Scholars.....	422
II. “AGREEMENT” AS AN EXCHANGE OF PROMISES .....	424
A. The Agreement Evidences Serious Intent .....	426

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B.	<i>The Agreement Makes the Crime More Likely</i> .....	431
C.	<i>A Concrete Test</i> .....	434
1.	<i>A Yardstick for Circumstantial Evidence</i> .....	434
2.	<i>The Requirement of Communication</i> .....	435
3.	<i>Diluted Definitions</i> .....	437
a.	<i>Mutual Understanding</i> .....	438
b.	<i>Slight Connection Rule</i> .....	440
4.	<i>Mere Presence Cases</i> .....	442
D.	<i>Antitrust</i> .....	445
E.	<i>Neal Katyal and Group Harm</i> .....	446
III.	<i>FREE SPEECH</i> .....	448
A.	<i>The Agreement Is the Act</i> .....	448
B.	<i>Conspiracy and the First Amendment</i> .....	452
IV.	<i>PROFUSION OF SUPPLEMENTAL RULES</i> .....	454
A.	<i>Mens Rea</i> .....	455
B.	<i>Overt Act Requirement</i> .....	457
C.	<i>Buy-Sell Cases</i> .....	458
	<i>CONCLUSION</i> .....	460

## INTRODUCTION

At the core of a criminal conspiracy lies an agreement.<sup>1</sup> It serves both to define the crime and justify it. If A and B agree to distribute drugs, for example, they are at that moment guilty of a crime: federal criminal conspiracy to distribute drugs.<sup>2</sup> Even if they do not actually distribute the drugs, indeed, even if they take no steps to distribute the drugs, they can be prosecuted and convicted of the crime of conspiracy because of the agreement.<sup>3</sup> The law of conspiracy attaches criminal liability far earlier than an attempt, which requires the defendant come dangerously near to committing the crime,<sup>4</sup> or at least take a substantial step toward that crime.<sup>5</sup>

Conspiracy comes close to punishing thoughts and speech alone,<sup>6</sup> unlike most other crimes, which proscribe actual conduct.<sup>7</sup> But courts justify criminal conspiracy on the grounds that the agreement is itself an act.<sup>8</sup> The agreement shows the conspirators are serious,<sup>9</sup> and the

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<sup>1</sup> See, e.g., *Ingram v. United States*, 360 U.S. 672, 677-78 (1959) (“It is fundamental that a conviction for conspiracy . . . cannot be sustained unless there is proof of an agreement.”) (citations omitted); MODEL PENAL CODE § 5.03(1) (AM. LAW INST. 2015).

<sup>2</sup> See 21 U.S.C. § 846 (2012).

<sup>3</sup> *United States v. Shabani*, 513 U.S. 10, 11 (1994) (holding that the drug conspiracy statute, 21 U.S.C. § 846, does not require proof of an overt act); see also *Whitfield v. United States*, 543 U.S. 209, 209 (2005) (same, money laundering). *But see* 18 U.S.C. § 371 (2012) (general federal conspiracy statute does require proof of an overt act). On the other hand, venue or other procedural or evidentiary concerns might require a prosecutor to prove an overt act in furtherance of even a drug conspiracy. See, e.g., *United States v. Santiago*, 83 F.3d 20, 25 (1st Cir. 1996) (finding that the overt act was enough to satisfy the venue question).

<sup>4</sup> See, e.g., *People v. Rizzo*, 246 N.Y. 334, 338 (1927) (“Did the acts come so near the commission of robbery that there was a reasonable likelihood of its accomplishment but for the interference?”).

<sup>5</sup> *United States v. Gladish*, 536 F.3d 646, 648 (7th Cir. 2008).

<sup>6</sup> Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 406 (1959) (“[C]onspiracy doctrine comes closest to making a state of mind the occasion for preventive action against those who threaten society but who have come nowhere near carrying out the threat.”).

<sup>7</sup> See WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 6.1 (2d ed. 2015) (“Bad thoughts alone cannot constitute a crime; there must be an act, or an omission to act where there is a legal duty to act.”). *But see* *Robinson v. California*, 370 U.S. 660, 660-63 (1962) (“A California statute makes it a criminal offense for a person to ‘be addicted to the use of narcotics.’”).

<sup>8</sup> *Shabani*, 513 U.S. at 16 (“The prohibition against criminal conspiracy, however, does not punish mere thought; the criminal agreement itself is the *actus reus* and has been so viewed since *Regina v. Bass*.” (citing *R v. Bass*, (1705) 88 Eng. Rep. 881, 882; 11 Mod. 55)).

agreement itself makes it more likely the conspirators will commit the crime than if one of them simply resolved in his own mind to commit a crime.<sup>10</sup> Sometimes the conspirators fail in their objective, or change their minds; courts still punish them because the agreement itself is the harm and deserves punishment.<sup>11</sup>

Much rests, therefore, upon this agreement. And yet statutes, courts and jury instructions almost never define what constitutes the required agreement.<sup>12</sup> We may at first glance argue that the term “agreement” is clear enough. But when we consider the wide range of meanings the term takes in ordinary English, we discover that our instructions to juries, and our rule of conspiracy law on appeal, create a concept both ambiguous and vague.

For example, “agreement” can essentially mean a contract,<sup>13</sup> entailing an exchange of promises or some kind of commitment or obligation to perform. But “agreement” can also refer to mere harmony of opinion,<sup>14</sup> as when we say, “experts agree smoking causes cancer.” This second meaning of agree involves no obligation or promise between the experts but merely similar beliefs arrived at independently. With these two distinct meanings, the term agreement becomes dangerously ambiguous.

Courts have compounded the uncertainty inherent in the plain meaning of “agreement” in conspiracy cases. On the one hand, many courts say the agreement in a conspiracy differs from that in a contract. These courts say conspiracy does not require a “meeting of

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<sup>9</sup> *United States v. Feola*, 420 U.S. 671, 694 (1975) (demonstrating that the agreement shows that criminal intent has “crystalized”); Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 966 (1961) (discussing how the “agreement” shows “firm purpose”).

<sup>10</sup> *Callanan v. United States*, 364 U.S. 587, 593-94 (1961); Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1321 (2003) (discussing the psychological factors involved in group decision-making).

<sup>11</sup> See, e.g., *Gray v. Commonwealth*, 537 S.E.2d 862, 866 (Va. 2000) (“[W]ithdrawal from the agreement or change of mind is no defense to the crime of conspiracy.”). Many jurisdictions recognize a defense of withdrawal but impose onerous requirements. See, e.g., *United States v. Leslie*, 658 F.3d 140, 143 (2d Cir. 2011).

<sup>12</sup> See *infra* Parts I.A–I.B.

<sup>13</sup> AMERICAN HERITAGE DICTIONARY 35 (4th ed. 2000) (defining “agreement” as “[a] properly executed and legally binding contract”); see also MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 24 (10th ed. 1997).

<sup>14</sup> AMERICAN HERITAGE DICTIONARY, *supra* note 13, at 35 (defining agreement as “[h]armony of opinion”); see also MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 13, at 24.

the minds,”<sup>15</sup> at least strongly suggesting they are rejecting a meaning of agreement based upon promises or obligations. On the other hand, other courts insist that a conspiracy *does* require a “meeting of the minds.”<sup>16</sup> As the Ninth Circuit repeated last year, the “essence of a conspiracy is ‘meeting of the minds.’”<sup>17</sup> Courts leave us somewhat at sea when they disagree over whether a conspiracy requires a “meeting of the minds,” especially when that term itself has been repeatedly criticized.”<sup>18</sup>

Perhaps worse, courts dilute whatever meaning agreement has, often substituting “understanding,”<sup>19</sup> “shared criminal intent,”<sup>20</sup> “common purpose,”<sup>21</sup> or worst of all, “slight connection.”<sup>22</sup> This last test, for determining when a person has joined an existing conspiracy, seems to read “agreement” out of conspiracy statutes entirely.<sup>23</sup> With these unclear and diluted definitions of agreement in hand, juries routinely convict defendants for mere association or presence,<sup>24</sup> such as riding

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<sup>15</sup> *People v. Mass*, 628 N.W.2d 540, 566 (Mich. 2001) (Markman, J., concurring) (“[T]he agreement necessary in a conspiracy is not akin to the ‘meeting of the minds’ premises of traditional contract law.”); *Leyo v. State*, 116 P.3d 1113, 1119 (Wyo. 2005).

<sup>16</sup> *See, e.g., United States v. Arbane*, 446 F.3d 1223, 1229 (11th Cir. 2006) (finding that the “meeting of the minds” requirement is the “crux” of the agreement element of conspiracy); *United States v. Pulido*, 69 F.3d 192, 209 (7th Cir. 1995); *United States v. Dumas*, 688 F.2d 84, 86 (10th Cir. 1982); *State v. Crozier*, 587 P.2d 331, 336 (Kan. 1978) (finding that a conspiracy “agreement, by its very nature, requires a meeting of two minds”).

<sup>17</sup> *United States v. Johnston*, 789 F.3d 934, 943 n.1 (9th Cir. 2015).

<sup>18</sup> 30 WILLISTON ON CONTRACTS § 75:30 (4th ed. 2015) (“The expression ‘meeting of the minds’ has been repeatedly criticized as being obsolete, archaic, and even ludicrous.”).

<sup>19</sup> *See, e.g., United States v. Wise*, 588 F.3d 531, 538 (8th Cir. 2009) (requiring the government to prove that the defendant “reached an agreement or came to an understanding”); *United States v. Conley*, 37 F.3d 970, 976-77 (3d Cir. 1994); *United States v. Caudle*, 758 F.2d 994, 997 (4th Cir. 1985); MICHIGAN NON-STANDARD JURY INSTRUCTIONS, CRIMINAL § 10:1 (2015); PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT § 4.03 (1997).

<sup>20</sup> *Commonwealth v. McCoy*, 69 A.3d 658, 664 (Pa. Super. Ct. 2013).

<sup>21</sup> *See, e.g., United States v. Washington*, No. 09-3216, 2010 WL 4146218, at \*3 (10th Cir. Oct. 22, 2010); *United States v. Daychild*, 357 F.3d 1082, 1097-98 (9th Cir. 2004); *United States v. Nelson*, 383 F.3d 1227, 1229 (10th Cir. 2004); *cf.* PATTERN CRIMINAL JURY INSTRUCTION FOR THE DISTRICT COURTS OF THE SEVENTH CIRCUIT § 5.08(A) (2012).

<sup>22</sup> *United States v. Tran*, 568 F.3d 1156, 1164 (9th Cir. 2009).

<sup>23</sup> *See id.* at 1164-65.

<sup>24</sup> *See United States v. Herrera-Gonzales*, 263 F.3d 1092, 1095-98 (9th Cir. 2001) (surveying cases where “mere presence” was sufficient to warrant a jury conviction).

in a car with others who possess drugs.<sup>25</sup> The rule for conspiracy has migrated from the impressive platitudes of appellate courts — that we may safely punish conspiracy because the agreement is the act — to an effective rule at trial that makes a person guilty of conspiracy for proximity to criminal activity.<sup>26</sup>

Indeed, scholars often attack conspiracy law for punishing mere speech or association.<sup>27</sup> But they have devoted no attention to “agreement” beyond simply identifying that the phrase is vague.<sup>28</sup> Instead, they tend to repeat the same stale formula that the “agreement is the act.”<sup>29</sup> And just like the courts, they often completely disagree with each other whether a conspiracy does require the “meeting of the minds” required in contract law.<sup>30</sup>

This Article tackles the problem with the definition of agreement head-on and argues we should define “agreement” in conspiracy to mean an exchange of promises to commit a crime. More precisely, in the paradigmatic case, the prosecutor should have to prove that the defendant promised to further the criminal goals in exchange for the

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<sup>25</sup> See, e.g., *Tran*, 568 F.3d at 1160, 1164 (discussing presence in a car that led to a jury conviction); *United States v. Esquivel-Ortega*, 484 F.3d 1221, 1223-24 (9th Cir. 2007) (discussing presence in a van); *United States v. Sanchez-Mata*, 925 F.2d 1166, 1167-68 (9th Cir. 1991) (discussing presence in a car).

<sup>26</sup> See David B. Filvaroff, *Conspiracy and the First Amendment*, 121 U. PA. L. REV. 189, 192 (1972) (discussing how “[t]here is substantial danger that any given defendant will become the victim of guilt by association,” especially when they are tried together).

<sup>27</sup> See, e.g., Philip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137, 1139 (1973) (summarizing the freedom of speech and freedom of association critiques of conspiracy); Paul Marcus, *Conspiracy: The Criminal Agreement, in Theory and in Practice*, 65 GEO. L.J. 925, 946 (1977) (discussing “[g]uilt by association is a justified fear”); Martin H. Redish & Michael J.T. Downey, *Criminal Conspiracy as Free Expression*, 76 ALB. L. REV. 697, 698 (2013) (arguing that the First Amendment should protect certain elements of conspiracy).

<sup>28</sup> See e.g., *Krulewitch v. United States*, 336 U.S. 440, 446 (1949) (Jackson, J., concurring); Johnson, *supra* note 27, at 1142 n.17 (“The case law has not been successful in rigorously defining the nature of the forbidden ‘agreement.’”); Redish & Downey, *supra* note 27, at 701.

<sup>29</sup> See, e.g., LAFAVE, *supra* note 7, § 12.2(a) (stating that “the agreement itself is the requisite act”); *Developments in the Law — Criminal Conspiracy*, 72 HARV. L. REV. 922, 926 (1959) (finding that conspiracy is “the act of agreement itself”); Redish & Downey, *supra* note 27, at 704 (“[T]he agreement itself is considered to be the requisite act.”).

<sup>30</sup> See LAFAVE, *supra* note 7, § 12.2(a) (“One might suppose that the agreement necessary for conspiracy is essentially like the agreement or ‘meeting of the minds’ which is critical to a contract, but this is not the case.”); 4 CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW § 679 (15th ed. 2015) (stating that “a meeting of minds is required”).

other's promise to do the same.<sup>31</sup> This exchange of promises creates a sense of obligation,<sup>32</sup> in the eyes of each conspirator, to follow through.

This definition restores meaning to the term while making clear that "harmony of opinion" and other valid plain meaning definitions of agreement do not suffice in this context. My definition follows naturally from the key rationales courts regularly adduce to support recognizing conspiracy as a crime.

First, courts assert the agreement shows the seriousness of the parties' intent.<sup>33</sup> If someone makes a promise, especially in exchange for another promise, that promise shows this serious intent, as contract law makes clear.<sup>34</sup>

Second, courts assert the agreement makes it more likely the conspirators will commit the crime.<sup>35</sup> If the conspirators have exchanged promises, they have committed to following through, making the crime more likely. Each will also follow through to avoid retaliation.

Third, defining agreement as mutual promises eliminates or greatly reduces vagueness and uncertainty. Of course juries may still find implicit agreements, or secret agreements, and they may find these agreements based upon circumstantial evidence.<sup>36</sup> My proposal does not change *how* agreements are proved from an evidentiary point of

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<sup>31</sup> In a unilateral jurisdiction, the prosecutor need only prove that the defendant promised and that he *believed* the other had promised, even if the other is an undercover officer or informant. *See, e.g., State v. Rambousek*, 479 N.W.2d 832, 835 (N.D. 1992) (stating defendant's subjective belief is sufficient).

<sup>32</sup> Most legal scholars and moral philosophers contend that promises create moral obligations. *E.g., CHARLES FRIED, CONTRACT AS PROMISE* 16 (1981); IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 32-33 (Cambridge Univ. Press rev. ed. 2012); Allen Habib, *Promises*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* 1, 1 (2014) ("Promises are . . . generally taken to impose moral obligations."). Even those who question whether all promises create a moral obligation believe that an exchange of promises generally does. *See, e.g., P.S. ATIYAH, PROMISES, MORALS, AND THE LAW* 177 (1981) [hereinafter PROMISES].

<sup>33</sup> *See supra* note 9.

<sup>34</sup> *See Iannelli v. United States*, 420 U.S. 770, 778 (1975); *United States v. Feola*, 420 U.S. 671, 694 (1975) (the agreement shows that criminal intent has "crystallized"); *Callanan v. United States*, 364 U.S. 587, 593 (1961).

<sup>35</sup> *Callanan*, 364 U.S. at 593 (discussing how conspiracy "increases the likelihood that the criminal object will be successfully attained").

<sup>36</sup> *See, e.g., People v. Olmedo*, No. G050307, 2016 WL 270013, at \*5 (Cal. Ct. App. Jan. 21, 2016) (finding that the circumstantial evidence combined with the defendant's statements to police was sufficient evidence to prove conspiracy).

view; rather, it simply clarifies the standard of agreement against which this evidence must be weighed: promises.

Finally, my definition best explains why we may punish criminal conspiracies consistent with the Free Speech Clause of the First Amendment, as explored below.<sup>37</sup>

Despite these straightforward principles of support, my proposal departs quite radically from existing doctrine. Courts do not define agreement in conspiracy as an exchange of promises. In fact, a review of the pattern jury instructions<sup>38</sup> for all 50 states and the federal jurisdictions reveals that courts,<sup>39</sup> in defining conspiracy to juries as an agreement, avoid any use of terms such as promise or obligation.<sup>40</sup> This silence stands in bold contrast to how courts discuss contracts, discussions that are pervaded by notions of agreement,<sup>41</sup> promises,<sup>42</sup> and obligation.<sup>43</sup>

A reader may object that courts treat contracts and conspiracies differently because they *are* different: society seeks to encourage contracts, but deter and punish conspiracies. But on further

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<sup>37</sup> Scholars often assume conspiracy punishes an exchange of promises, roughly, to justify punishment consistent with free speech principles. See KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 80-82 (1989); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 *CORNELL L. REV.* 1277, 1340 (2005) [hereinafter *Speech as Conduct*].

<sup>38</sup> The Westlaw database, "Jury Instructions," supplied most of the state jury instructions for this study, incorporated into a table on file with the author. In addition, the author searched government websites for particular jurisdictions, such as California, where more up-to-date information was available. For federal jury instructions, the Westlaw database, "Federal Jury Practice & Instructions" supplied the instructions, again supplemented from the websites of particular Federal Circuit Courts of Appeal. Note, jurisdictions change jury instructions regularly to keep up with new statutes or appellate case law.

<sup>39</sup> Pattern Jury Instructions are often not themselves law. *People v. Smith*, 337 P.3d 1159, 1166 (Cal. 2014) (quoting *People v. Morales*, 18 P.3d 11, 20 n.7 (Cal. 2001)). But their authors seek to conform them to correct appellate case law, so they represent a rough provisional summary of the law.

<sup>40</sup> See, e.g., ILLINOIS PATTERN JURY INSTRUCTIONS, CRIMINAL § 6.03 (2014).

<sup>41</sup> CAL. CIV. CODE § 1549 (West 2016) ("A contract is an agreement to do or not to do a certain thing."); *West v. Shelby Cty. Healthcare Corp.*, 459 S.W.3d 33, 46 (Tenn. 2014) (stating "a contract is an agreement between two or more parties").

<sup>42</sup> *McInerney v. Charter Golf, Inc.*, 680 N.E.2d 1347, 1350 (Ill. 1997) (stating that "a promise for a promise is, without more, enforceable"); RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 2016) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy . . .").

<sup>43</sup> *Moran v. Standard Oil Co.*, 105 N.E. 217, 220 (N.Y. Ct. App. 1914) ("The very word 'agreement' connotes a mutual obligation."); *Davis v. Frank*, 169 N.Y.S. 482, 483 (App. Term 1918).

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examination many of the same principles apply: we enforce contracts because they are *serious* promises made upon consideration; we punish conspiracies in part because they evidence a defendant's *serious* intent to commit a crime. In both arenas it is the *exchange* of promises that further evidences serious intent. Similarly, in both cases the *parties* want the agreement to succeed, and have entered the agreement with promises or commitments to make that success more likely.

But even if the reader resists defining agreement so concretely — as an exchange of promises — such a definition serves as a crucial thought experiment, a first salvo against which to launch alternative proposed definitions in trying to define “agreement.” If not an exchange of promises, what does agreement mean, and does that definition meet the very justifications for conspiracy courts have identified?

This article does not argue we eliminate the crime of conspiracy, as some have argued.<sup>44</sup> Nor does it claim, on the other hand, that my definition of agreement solves conspiracy's shortcomings. Rather, it argues that if we continue to prosecute thousands of conspiracy cases a year,<sup>45</sup> we must define “agreement” to match its justifications and guard against convictions based on mere presence. Defining agreement as an exchange of promises furthers these goals.

Part I summarizes the current definition of “agreement” in criminal conspiracy law. It shows both its inherent ambiguity and how courts and scholars have essentially ignored the problem. Part II defends my proposal that courts should define agreement in conspiracy as an exchange of promises, both for juries and for themselves on appeal.

Part III argues that my definition of agreement best justifies punishing conspiracy consistent with the Free Speech Clause. It also

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<sup>44</sup> See, e.g., Johnson, *supra* note 27, at 1139 (“The law of criminal conspiracy is not basically sound. It should be abolished, not reformed.”); Redish & Downey, *supra* note 27, at 699 (arguing conspiracy without proof of an overt act should be abolished as violating the First Amendment).

<sup>45</sup> For 2015, Westlaw reported 1,993 federal drug conspiracy cases and 611 general federal conspiracy cases. It reported roughly 2,715 state conspiracy cases. These are reported *opinions*, but a sampling suggests little if any double counting from multiple reported opinions from the same case in the same year. WESTLAW, <http://westlawnext.com> (last visited Sept. 21, 2016). In ALLFEDS, the search terms were: “(21 /s (“usc” “usca”) /s 846) and DA(2015)” and “(18 /s (“usc” “usca”) /s 371) and DA(2015)”. In ALLSTATES, the search term was: “TI(people state commonwealth) and conspiracy and DA(2015)”. Of course, the number of filed or indicted cases would be higher. A very small number of state cases reported are not criminal conspiracies when the name of the party is actually “people,” or “state” but not the government as prosecutor.

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discusses a related issue: the courts' frequent assertion that the conspiracy agreement is the act.

Part IV catalogues the profusion of special legal rules and jury instructions that courts have created just for conspiracy law. This vast superstructure forms a body of law unto itself, created to fix the problems caused by not defining "agreement" rigorously in the first place. My simple definition of agreement as an exchange of promises should eliminate or simplify this structure of *ad hoc* conspiracy rules.

### I. CURRENT DEFINITIONS OF "AGREEMENT"

In assessing how legislatures or courts define "agreement" in conspiracy, we run headlong into a threshold problem: they don't.<sup>46</sup> Statutes, courts, and jury instructions generally let "agree" and "agreement" define themselves. We are thus left to some extent to look to plain meaning. This part does so, before considering how scholars and courts have defined agreement, or, more often, failed to define it.

#### A. Plain Meaning

The plain meaning of conspiracy leads to various possibilities that I break down into two categories. In the first category, agreement involves promises or commitments. If a person orders a taxi for the airport the next day, they have exchanged promises. The driver has promised to show up, and the passenger, to pay. They have entered an agreement. If the driver fails to show up, the passenger has grounds to criticize him (and can likely sue for damages).

Dictionaries support this first category. We see many English dictionaries that define agreement as a contract,<sup>47</sup> which of course involves promises, or some level of commitment or obligation. Law dictionaries define an agreement as very similar to a contract in that it denotes some level of commitment but might not meet certain technical requirements of a contract. Black's Law Dictionary explains that all contracts are a type of agreement but not all agreements are contracts.<sup>48</sup> The Restatement (Second) of Contracts<sup>49</sup> and the Uniform

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<sup>46</sup> See *infra* Part I.B.

<sup>47</sup> See, e.g., AMERICAN HERITAGE DICTIONARY, *supra* note 13, at 35 (defining "agreement" as "[a] properly executed and legally binding contract"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 13, at 24 (defining "agreement" as "a contract duly executed and legally binding").

<sup>48</sup> *Agreement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>49</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 3 cmt. a (AM. LAW INST. 2016)

Commercial Code<sup>50</sup> describe somewhat more complicated relationships between their particular definitions of agreement and contract, but for our purposes the point remains the same: the agreement at issue in these discussions roughly involves promises, obligations or commitments.

English dictionaries also define “agreement” as an “arrangement as to a course of action.”<sup>51</sup> On the surface this definition appears to diverge from the contract definition. But its divergence appears only in its formality; after all, if two people have arranged their future action, it seems they have committed themselves to some extent. Indeed, these same dictionaries put in the same category as “arrangement” the terms “compact” and “treaty.” Nevertheless, a definition of agreement as “arrangement” reinforces its inherent ambiguity as to whether it requires some level of obligation or commitment.

Unlike this first category of agreement, the other three I list below do not involve any sense of promise, commitment, or moral obligation.

Thus, agreement can refer to harmony of opinion.<sup>52</sup> As noted in the introduction, when we say, “experts agree smoking causes cancer,” they have not obligated themselves to each other (or to anyone else); rather, they have independently reached the same conclusion. They need not have communicated with each other in any way.

Agreement can also refer to willingness, a kind of revocable consent. When two persons agree to have sex, they have merely consented for the moment and have not committed or promised that their consent will not be withdrawn.<sup>53</sup> Similarly, if two persons agree to wrestle, either can revoke that consent at any time. These agreements, therefore, involve mutual consent but no obligation or commitment, no promise as to future action.

An agreement can refer to a stipulation.<sup>54</sup> Two parties in court may stipulate a certain fact is true for purposes of the trial by agreeing the

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(“Agreement has in some respects a wider meaning than contract . . .”).

<sup>50</sup> U.C.C. § 1-201(b)(12) (AM. LAW INST. & UNIF. LAW COMM’N 2016) (“‘Contract’ . . . means the total legal obligation resulting from the parties’ agreement . . .”).

<sup>51</sup> MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 13, at 24.

<sup>52</sup> See, e.g., AMERICAN HERITAGE DICTIONARY, *supra* note 13, at 35 (defining “agreement” as “[h]armony of opinion”); MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 13, at 24 (defining “agreement” as “harmony of opinion, action, or character”).

<sup>53</sup> See *In re John Z.*, 60 P.3d 183, 184 (Cal. 2003) (finding that “withdrawal of consent effectively nullifies any earlier consent”).

<sup>54</sup> *United States v. Cruz-Rodriguez*, 570 F.3d 1179, 1184 (10th Cir. 2009) (“A

fact is true.<sup>55</sup> The effect of the agreement is that the trier of fact need not decide the fact but can assume it is true. Stipulations are thus a hybrid between an exchange of promises and harmony of opinion. That is, one could characterize this stipulation as a commitment or obligation that the party will not contest the fact during trial (or in a later proceeding), and it is true that the party is bound by the stipulation.<sup>56</sup> But the primary purpose of this type of agreement is to bring everyone's opinion into harmony for efficiency at trial and not primarily to establish a promise as to future conduct. But this example too reflects the ambiguity.

Finally, in grammar "agreement" describes the correspondence in gender, number, and case between words, such as subject and verb.<sup>57</sup> This category also involves a descriptive harmony rather than a promise or commitment.

Agreement can thus mean either an exchange of promises or harmony of opinion; in deciding a conspiracy case, which version should a jury choose when the court does not define agreement? In some ways, they are free to choose either as a matter of plain language. On the other hand, a shrewd jury might read the term "agreement" in the context of the rest of the definition of conspiracy to infer that the type of agreement at issue in a conspiracy involves some level of promise or commitment. After all, a typical jury instruction defines conspiracy as an agreement "to" commit a crime. An agreement to do something may set it apart from the type of agreement involving harmony of opinion. There's a difference between agreeing *to* do something and agreeing *that* it should be done.<sup>58</sup>

Unfortunately, at least 14 states define conspiracy as an agreement "that" one of them will commit a crime.<sup>59</sup> Texas' criminal conspiracy

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stipulation is an agreement between the parties as to a fact of the case . . .") (quoting *United States v. Hawkins*, 215 F.3d 858, 860 (8th Cir. 2000)).

<sup>55</sup> See, e.g., *State v. Murray* 927 N.E.2d 24, 28 (Ohio Ct. App. 2009) (illustrating how parties are bound by stipulated facts); 83 C.J.S. *Stipulations* § 5 (2016) (defining the parameters and functions of a stipulation).

<sup>56</sup> See *Cruz-Rodriguez*, 570 F.3d at 1184.

<sup>57</sup> AMERICAN HERITAGE DICTIONARY, *supra* note 13, at 35 (defining "agreement" as "[c]orrespondence in gender, number, case, or person between words").

<sup>58</sup> See *Ocasio v. United States*, 136 S. Ct. 1423, 1435-36 (2016) (holding that "mere acquiescence" does not suffice to make a person a conspirator; rather, they must agree to do something to further the crime).

<sup>59</sup> See, e.g., COLO. REV. STAT. § 18-2-201(1) (2016); IOWA CODE ANN. § 706.1(1)(a) (West 2016); N.J. STAT. ANN. § 2C:5-2(a)(1) (West 2016); OHIO REV. CODE ANN. § 2923.01(A)(2) (West 2016); 18 PA. CONS. STAT. § 903(a)(1) (2016); TENN. CODE ANN. § 39-12-103(a) (West 2016); TEX. PENAL CODE ANN. § 15.02(a)(1) (West 2016).

statute, for example, requires that the defendant agree “*that . . . they or one or more of them*” will commit the crime.<sup>60</sup> Its *mens rea* similarly does not envision the defendant must agree that he himself will do anything, instead merely requiring that the defendant agree “with [the] intent that a felony be committed.”<sup>61</sup>

Texas’ formulation runs along very similar lines as “experts agree that.” Read literally at least, Texas’ conspiracy statute leaves open a conviction based on a defendant who essentially says: “yes, I ‘agree’ you will sell drugs tomorrow.” They are in harmony of opinion but few would accept this should count as a conspiracy.

To further drive home the point, take California’s pattern jury instruction for criminal conspiracy;<sup>62</sup> these use the term “agree” in *both* senses, apparently. It instructs juries that a conspiracy consists of an agreement, and that they must find the defendant “did agree.” But in discussing the jury *process*, it notes that the jury itself must “agree” that one of the conspirators committed the overt act. In this latter use of “agree,” the instructions of course mean harmony of opinion and not some stronger version along the lines of a contract.

In the end, my point is not to prove that courts or juries necessarily understand agreement as requiring some level of obligation or as not requiring any type of obligation; rather, I merely seek to show its variety of meanings will likely lead juries, uninstructed on the issue, to form a vague notion in their minds without deciding what agreement really means, and whether it requires promises or some level of commitment. Even courts on appellate review may assess individual cases incorrectly if they fail to decide concretely what agreement requires.

### B. Courts

The courts have created widespread confusion over what “agreement” in criminal conspiracy should mean, so much so that we cannot tell what standard they themselves apply to conspiracy cases. The case law contains signs that point in either direction.

As an initial matter, the vast majority of courts simply leave the term “agreement” undefined and certainly do not include terms such as promises, commitment, or obligation — in striking contrast to how

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<sup>60</sup> TEX. PENAL CODE ANN. § 15.02(a)(1)–(2) (emphasis added).

<sup>61</sup> *Id.* (“A person commits criminal conspiracy if, with intent that a felony be committed: (1) he agrees with one or more persons that they or one or more of them engage in conduct that would constitute the offense; and (2) he or one or more of them performs an overt act in pursuance of the agreement.”).

<sup>62</sup> JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS § 415 (2016).

courts define contracts. The Supreme Court regularly elaborates on how the agreement is the “essence” of a conspiracy, saying the agreement is the act, or is a distinct evil, or shows that serious intent of the parties, or shows that the crime is more likely to occur — all without ever defining “agreement” or saying it involves mutual promises.<sup>63</sup>

Lower appellate courts, in assessing whether particular evidence meets the agreement requirement, likewise do not apply a test that involves defining agreement or using promises.<sup>64</sup> In fact, a review of thousands of conspiracy cases<sup>65</sup> shows that courts almost never<sup>66</sup> use terms such as promise, commitment, obligation, or the like.<sup>67</sup>

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<sup>63</sup> See, e.g., *United States v. Jimenez Recio*, 537 U.S. 270, 270-71 (2003); *United States v. Shabani*, 513 U.S. 10, 16 (1994); *Iannelli v. United States*, 420 U.S. 770, 777-78 (1975).

<sup>64</sup> See, e.g., *United States v. Azmat*, 805 F.3d 1018, 1037-38 (11th Cir. 2015) (affirming drug conspiracy because evidence established “scheme” without any reference to promises or obligations); *State v. Winkler*, 780 S.E.2d 824, 830-31 (N.C. 2015) (affirming conspiracy conviction of person who mailed sixty Oxycodone pills based on circumstantial evidence without mention of promises or obligations); *State v. Larmand*, 780 S.E.2d 892, 896 (S.C. 2016) (affirming conspiracy conviction based on circumstantial evidence of a “common plan or scheme” with no reference to agreement as promises or obligation).

<sup>65</sup> A Westlaw search of all 1,993 reported federal drug conspiracy cases for 2015 revealed the words promise, commitment, or obligation in only 468. Of these, the terms promise, commitment, or obligation appeared almost entirely in connection with plea bargains or other contexts, and not in connection with conspiracies. WESTLAW, <http://westlawnext.com> (last visited Sept. 21, 2016). In ALLFEDS, the search term was: “(21 /s (“usc” “usca”) /s 846) and DA(2015) and (promise commitment obligation)”.

<sup>66</sup> The language of commitment makes a very sporadic showing in the modern case law. See, e.g., *United States v. Paz-Alvarez*, 799 F.3d 12, 29 (1st Cir. 2015) (finding that the defendant’s statements could be construed as a “promise,” which provided evidence of conspiracy); *United States v. Melchor-Lopez*, 627 F.2d 886, 891-92 (9th Cir. 1980) (reversing a defendant’s conspiracy conviction in part because he refused to “commit” himself to the conspiracy). Courts will also occasionally refer to commitments in assessing the scope of a conspiracy. E.g., *United States v. Smith*, 82 F.3d 1261, 1271 (3d Cir. 1995) (discussing that “a conspiracy is defined by the scope of commitment of its participants”); *United States v. Jackson*, 930 F. Supp. 1228, 1237 (N.D. Ill. 1996) (“The scope of the defendant’s agreement to a conspiracy may be determined by the defendant’s level of commitment to acts within that conspiracy as reflected by the defendant’s words or conduct.”) (citing *United States v. Edwards*, 945 F.2d 1387, 1393 (7th Cir. 1991)). This use of “commit” seems not precisely a promise or obligation to do anything but rather having the purpose and desire that the larger enterprise succeed.

<sup>67</sup> *But see* 18 U.S.C. § 1958 (2016) (requiring proof of a “promise or agreement” to pay for a murder to be committed). We can perhaps view contract killing as a hybrid between conspiracy and contract.

Jury instructions, generally drawn from appellate case law, follow this pattern. They define conspiracy using the term “agree” or “agreement,” but leave that term undefined. Arizona, for example, requires proof that the “defendant agreed with one or more persons” to commit a crime.<sup>68</sup> But it leaves “agreed” undefined and makes no mention of promises. Indeed, as mentioned in the introduction, a review of all 50 states and the federal jurisdictions reveals that none mentions promises, commitment, or obligation in defining conspiracy or agreement.<sup>69</sup> By contrast, many mention some kind of promise, commitment or obligation when instructing juries on contract.

For example, California’s pattern jury instructions leave the term “agreement” in conspiracy undefined,<sup>70</sup> but define a contract, in part at least, as a “promise to do something.”<sup>71</sup> Similarly, the pattern jury instructions for Illinois define criminal conspiracy as an “agreement” to commit a crime, without supplying any definition of agreement that involves promises or obligation.<sup>72</sup> But the same source defines a contract as an “exchange of promises or value.”<sup>73</sup>

On the other hand, a small number of older cases, in *justifying* punishing conspiracies, have described the agreement at the center of a conspiracy as mutual promises.<sup>74</sup> The formula appears to begin in the English case, *Mulcahy v. The Queen*.<sup>75</sup> In this 1868 case, the House of Lords addressed why it was fair to punish a conspiracy even though it required no physical act, usually a requirement of the criminal law. The court responded that the agreement is the act. It then elaborated on this agreement, saying that it was: “promise against promise, *actus contra actum*.”

A smattering — I count five<sup>76</sup> — of American courts have repeated this formula and all have done so in a similar context: not so much

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<sup>68</sup> ARIZONA PATTERN JURY INSTRUCTIONS, CRIMINAL § 10.031 (2012).

<sup>69</sup> See *supra* notes 38–40 and accompanying text.

<sup>70</sup> JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS § 415 (2016). Although they do not define “agreement,” the California instructions do tell jurors they may infer agreement from a “common purpose.” *Id.*

<sup>71</sup> JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS § 302 (2015).

<sup>72</sup> ILLINOIS PATTERN JURY INSTRUCTIONS, CRIMINAL § 6.03 (2014).

<sup>73</sup> ILLINOIS PATTERN JURY INSTRUCTIONS, CIVIL § 700.03 (2016).

<sup>74</sup> See, e.g., *State v. Carbone*, 91 A.2d 571, 574 (N.J. 1952) (describing the agreement as a “promise against promise”).

<sup>75</sup> (1868) 3 LRE & I. App 306 (HL) 317 (appeal taken from Ir.).

<sup>76</sup> See *Commonwealth v. Walters*, 266 S.W. 1066, 1068 (Ky. 1924); *Carbone*, 91 A.2d at 574; *State v. Abrams*, 607 A.2d 179, 185 (N.J. Super. Ct. App. Div. 1992); *State v. Mazur*, 385 A.2d 878, 884 (N.J. Super. Ct. App. Div. 1978); *Fife v. Great Atl. & Pac. Tea Co.*, 52 A.2d 24, 27 (Pa. 1947).

defining agreement as describing it with a rhetorical flourish in an effort to justify punishing the agreement as a crime. The high courts of New Jersey,<sup>77</sup> Pennsylvania,<sup>78</sup> and Kentucky,<sup>79</sup> for example, have quoted this language, though in cases that are becoming a bit stale.

But when it comes to *defining* an agreement as a legal test against which to measure evidence in a particular case, whether for juries or at the appellate level, even these jurisdictions do not advert to promises or obligation. Again, this promise language seems no more than a rhetorical formula.

### C. “Meeting of the Minds”

Though courts do not define agreement, they do regularly assert that the agreement at issue in a conspiracy requires proof of a “meeting of the minds” similar to that required for a contract.<sup>80</sup> As recently as last year, the Ninth Circuit asserted that the “essence of a conspiracy is ‘meeting of the minds.’”<sup>81</sup>

Nearly as many courts, however, assert with equal confidence that the agreement in a criminal conspiracy does *not* require a “meeting of the minds.”<sup>82</sup> The Supreme Court of Michigan, for example, asserted that the agreement in a conspiracy is “not akin to the ‘meeting of the minds’ premises of traditional contract law.”<sup>83</sup>

On the surface, these quotes answer our question. The “meeting of the minds” jurisdictions define agreement in conspiracy as an exchange of promises. The anti-“meeting of the minds” jurisdictions do not. But a closer examination shows that the language in these cases really leads nowhere.

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<sup>77</sup> *Carbone*, 91 A.2d at 574 (stating, “promise against promise, Actus contra actum”).

<sup>78</sup> *Fife*, 52 A.2d at 27 (stating, “promise against promise, actus contra actum”).

<sup>79</sup> *Walters*, 266 S.W. at 1068 (using the language “promise against promise, act against act”).

<sup>80</sup> See, e.g., *United States v. Arbane*, 446 F.3d 1223, 1229 (11th Cir. 2006); *United States v. Dumas*, 688 F.2d 84, 86 (10th Cir. 1982) (quoting *United States v. Butler*, 494 F.2d 1246, 1249 (10th Cir. 1974)); *United States v. Ulbricht*, 31 F. Supp. 3d 540, 551 (S.D.N.Y. 2014); *State v. Crozier*, 587 P.2d 331, 336 (Kan. 1978) (finding that a conspiracy “agreement, by its very nature, requires a meeting of two minds; if there is no meeting of the minds, there can be no conspiracy”).

<sup>81</sup> *United States v. Johnston*, 789 F.3d 934, 940 n.1 (9th Cir. 2015).

<sup>82</sup> See, e.g., *People v. Mass*, 628 N.W.2d 540, 566 (Mich. 2001) (Markman, J., concurring); *Leyo v. State*, 116 P.3d 1113, 1119 (Wyo. 2005) (stating a conspiracy agreement “is not the same as the ‘meeting of the minds’ demanded for a contract”).

<sup>83</sup> *Mass*, 628 N.W.2d at 566 (Markman, J., concurring).

First, even in contract law the phrase “meeting of the minds” remains unclear.<sup>84</sup> It once meant a subjective agreement, but now refers to an objective agreement.<sup>85</sup> In this latter sense courts use it not literally, but metaphorically. But when courts use the term in the context of conspiracy, we do not quite know how they mean it. Do they mean a subjective<sup>86</sup> meeting of the minds or an objective one? And more to the point, do they mean a harmony of opinion regarding terms, or do they mean a mutual willingness *to be bound*.

Second, courts themselves do not appear to place much reliance on the formula “meeting of the minds” in criminal conspiracy cases. The phrase seems largely rhetorical. After all, if the term had real meaning, one would expect those jurisdictions that require it to note that other jurisdictions do not. One would expect courts to note the split in opinion and adduce arguments to justify why it chose to require a “meeting of the minds” or rejected it. But courts simply repeat the formula as if conspiracy law inherently did or did not require meeting of the minds.<sup>87</sup>

We can conclude that the courts varying use of “meeting of the minds” does not tell us that agreements require promises in some jurisdictions but not others. And beyond their use of the term “meeting of the minds,” courts do not draw upon or compare criminal conspiracy with contract law in discussing the agreement requirement. Nor do they explain why promises pervade contract law,<sup>88</sup> but play no role in conspiracy.<sup>89</sup>

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<sup>84</sup> See WILLISTON ON CONTRACTS, *supra* note 18, § 75:30.

<sup>85</sup> See E. Allan Farnsworth, “Meaning” in the Law of Contracts, 76 YALE L.J. 939, 945 (1967); Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 427 (2000).

<sup>86</sup> See e.g., Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 376-77 (2007) (arguing courts enforce subjective understandings in contract law absent an exception).

<sup>87</sup> Courts will occasionally use the term to emphasize that the government must prove the defendant agreed to the crime charged in the indictment and not some other crime. See *United States v. Arbane*, 446 F.3d 1223, 1229-30 (11th Cir. 2006). This use emphasizes an important point but sheds little light on whether a conspiracy agreement requires an exchange of promises.

<sup>88</sup> See, e.g., *United States v. Papaleo*, 853 F.2d 16, 19 (1st Cir. 1988) (determining “whether the agreement is an exchange of promises”); *Bethlehem Steel Corp. v. Litton Indus., Inc.*, 488 A.2d 581, 594 (Pa. 1985) (“In the absence of Bethlehem’s payment or promise, a promise by Litton could not create a contract.”).

<sup>89</sup> See *supra* notes 65–66 and accompanying text.

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D. Scholars

Numerous scholars have recognized and complained that the “agreement” at the center of a criminal conspiracy is “vague.”<sup>90</sup> But none have proposed a tighter definition.<sup>91</sup> In fact, few have even considered whether the agreement in a conspiracy parallels or deviates from that same concept in contract law. And those few have come to contradictory conclusions.<sup>92</sup>

On the one hand, Wayne LaFave, in his leading criminal law treatise, concludes that the agreement in a conspiracy does not require mutual promises, or at least hints at this. He says, “one might suppose that the agreement necessary for conspiracy is essentially like the agreement or ‘meeting of the minds’ which is critical to a contract, but this is not the case.”<sup>93</sup> He cites no statutes or cases for this proposition, only another treatise.<sup>94</sup> On the other hand, Wharton’s Criminal Law flatly says that a “meeting of the minds” is required for conspiracy.<sup>95</sup> As with courts, these scholars and treatises seem to recite the “meeting of the minds” language more as a rhetorical adornment than as a concrete test. They merely reflect the confusing landscape painted by the courts.

One scholar, Gerald Orchard, in an English journal, has come closest at least to addressing the question of whether a criminal conspiracy requires the same type of agreement as would lead to enforceable promises in contract law.<sup>96</sup> Prof. Orchard has answered equivocally, however, saying courts likely require a “laxer” concept of

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<sup>90</sup> See, e.g., Marcus, *supra* note 27, at 964 (finding a central issue of conspiracy statutes is their “vagueness”); Redish & Downey, *supra* note 27, at 712 (“More ambiguities plague the questions of what constitutes an agreement . . .”); see also *Krulewitch v. United States*, 336 U.S. 440, 446 (Jackson, J., concurring) (“The modern crime of conspiracy is so vague that it almost defies definition.”).

<sup>91</sup> See Filvaroff, *supra* note 26, at 195 (calling the agreement “no more than shared state of mind” but proposing no alternative definition); see, e.g., Johnson, *supra* note 27, at 1142 n.17. Goldstein makes the situation worse by treating the agreement requirement as simply the “combination” of two persons with simultaneous intent to commit a crime. See Goldstein, *supra* note 6, at 459 n.175.

<sup>92</sup> See LAFAVE, *supra* note 7, § 12.2.

<sup>93</sup> *Id.* at 266.

<sup>94</sup> See *id.* at 266 n.10.

<sup>95</sup> TORCIA, *supra* note 30. The treatise also asserts that a formal agreement is not required; an “understanding” suffices. *Id.* But “understanding” simply raises the same question as “agreement” — does it require proof of promises?

<sup>96</sup> See Gerald Orchard, “Agreement” in *Criminal Conspiracy*—1, 1974 THE CRIM. L. REV. 297, 300-02.

agreement for conspiracy compared to contracts<sup>97</sup> — citing only one scantily reported case from 1775<sup>98</sup> — but also suggesting that in the context of unexecuted conspiracies, the government will need to prove “mutual promises as could create an enforceable contract if the object was lawful.”<sup>99</sup> He leaves these observations almost entirely speculative, however. And Orchard stands as an exception to the dominant thrust of the scholarship today that largely eschews mention of obligations in conspiracy.

Again, by contrast with this dominant view of conspiracy, scholars of contract law routinely invoke notions of promises, obligation, and exchanges of promises in discussing contracts and agreements.<sup>100</sup> P.S. Atiyah, a leading scholar of contract law and the philosophy of law, critiques the Restatement, for example, by failing to sufficiently emphasize that a contract involves an *exchange* of promises.<sup>101</sup> Philosophers who consider agreements in the social realm similarly define them as an exchange of promises.<sup>102</sup> Much of the literature today addresses the more difficult problem of group intention, and this literature provides some helpful contrasts here.<sup>103</sup>

For example, Michael Bratman, a philosopher who focuses on shared agency, says that a group can have joint intention without the mutual obligation of an agreement. When an audience claps at the end of a performance, or when two strangers walking down Fifth Avenue engage and walk together for a short time, they have a group intention.<sup>104</sup> They coordinate both the beginning and end of the activity, but Bratman notes they have not undertaken moral obligations to each other to continue. These and other examples form the core of those seeking to understand how individuals work

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<sup>97</sup> *Id.* at 300.

<sup>98</sup> *See id.* at n.19 (citing Leigh, 1 C. & K. 28n; 174 E.R. 697n (1775)). Orchard does not appear to cite Leigh directly, but rather relies upon treatise writers such as R.S. Wright for its content. *Id.* at nn. 20-21.

<sup>99</sup> *Id.* at 301.

<sup>100</sup> *See, e.g.*, P.S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 1 (3d ed. 1981) [hereinafter LAW OF CONTRACT]; E. ALLAN FARNSWORTH, CONTRACTS 3 (4th ed. 2004); FRIED, *supra* note 32, at 1-6.

<sup>101</sup> *See* ATIYAH, LAW OF CONTRACT, *supra* note 100, at 28-29.

<sup>102</sup> *See* MARGARET GILBERT, LIVING TOGETHER: RATIONALITY, SOCIALITY, AND OBLIGATION 281 (1996) (noting “the standard view of an agreement as an exchange of promises”). Gilbert then rejects this view, in part because she wonders why the offer-promise is not binding if not accepted; this critique seems solved by contract law’s principle that the offer does not become a promise until accepted. *Id.*

<sup>103</sup> *See, e.g.*, MICHAEL E. BRATMAN, SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER 110 (2014).

<sup>104</sup> *See id.* at 100.

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together, and whether we can identify and assess intention *on the group level*.

This view of group intention stands in marked contrast to the goals of criminal law: to assess individual culpability, and to do so via individual intention. Thus, even though we may fruitfully consider intention on the group level to understand the workings of society, those theories must afford us a contrast, not a model, in how we go about punishing individuals. In fairness, writers, such as Bratman, do not argue we should use group intention as a theory of criminal liability.

Thus, Bratman's two examples above show why jurors might convict those who are merely present. If group intention exists, and ordinary people intuitively consider it a real intention, these jurors may view a person who knowingly associates with drug dealers as participating in some kind of group intention, much as audience members might collectively clap. When courts instruct juries they may find an agreement based upon "mutual understanding," we can readily understand why they might do so even in a mere presence case.

Before leaving this section, I should point out that in the separate category of free speech scholarship, several scholars have *assumed* that a conspiracy agreement involves some level of obligation,<sup>105</sup> as discussed in Part III. Kent Greenawalt, for example, has pointed out that "agreement" is ambiguous. It can refer to a commitment to act, or mere "acquiescing"<sup>106</sup> He has successfully identified the potential problem, and argues courts should interpret "agreement" as a commitment to act — supporting my view. But these same scholars, including Greenawalt, have not canvassed conspiracy case law to support such a definition; they assume it in order to show that free speech does not protect most conspiracies.

## II. "AGREEMENT" AS AN EXCHANGE OF PROMISES

I propose we expressly define the "agreement" at the heart of a conspiracy as an exchange of promises to commit a crime or further its ends. Trial courts would instruct juries they must find the defendant made this promise, and appellate courts would apply that definition in assessing conspiracy cases on appeal. The standard would require the defendant *genuinely* promised, meaning the defendant intended to carry out the promise, thus ensuring he has the *mens rea* of intent. For

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<sup>105</sup> See GREENAWALT, *supra* note 37, at 63; Volokh, *Speech as Conduct*, *supra* note 37, at 1278-84.

<sup>106</sup> GREENAWALT, *supra* note 37, at 81.

statutes that punish unilateral conspiracies, the jury, of course, would only need to prove that the defendant's promise was genuine and that the other party's promise *appeared* genuine.<sup>107</sup>

My definition would not, however, require proof of an express agreement,<sup>108</sup> and juries would still be entitled to infer an implicit agreement based upon circumstantial evidence. My definition would merely make clearer the standard against which juries and courts are measuring the circumstantial evidence.

My definition would also not require an agreement as to every term of the conspiracy. But it would require that the parties have promised *generally* to assist, further or promote the crime. Nor would my definition require that a conspirator make promises with third-party conspirators.<sup>109</sup> It only applies where the jurisdiction's conspiracy law requires proof of an agreement.<sup>110</sup>

The use of the term promise, rather than merely agreement, emphasizes that the defendant conspirator has promised *to do something*, and not merely acquiesced. Though courts often fail to emphasize this requirement, the Court this year reaffirmed that to establish a conspiracy, mere “acquiescence, without participation in the unlawful plan, is not sufficient.”<sup>111</sup>

As discussed in the introduction, some readers may resist a formal definition of agreement as an exchange of promises — either because she believes the current definition already requires it or because she believes such a definition goes beyond the more flexible notion of agreement. Even for these readers, my definition would serve as a useful foil by which to assess whether the current definition really contains any useful meaning. For example, do current definitions amount to a lower and unsatisfactory standard? In addition, even if we do not deploy the notion of promise for every conspiracy case, it might prove useful in certain cases — particularly when we must infer an agreement from circumstantial evidence.

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<sup>107</sup> See, e.g., *State v. Rambousek*, 479 N.W.2d 832, 835 (N.D. 1992) (“The unilateral approach requires only that Rambousek believe that he was participating in an agreement . . .”).

<sup>108</sup> See *infra* Part II.C.1.

<sup>109</sup> See MODEL PENAL CODE § 5.03 (AM. LAW INST. 2015). In addressing conspiracies among multiple parties, this provision requires a defendant conspire with at least one person in a larger conspiracy — that is, form an agreement — but once he has, he can be found guilty of conspiring with the others based merely upon proof he knew generally of their existence.

<sup>110</sup> See *infra* Part II.C.3.b.

<sup>111</sup> *Ocasio v. United States*, 136 S. Ct. 1423, 1429 (2016) (quoting and approving jury instructions).

Finally, I use promise in its ordinary sense to refer to a statement (or conduct) in which a person commits to another that he will act a certain way. A promise creates a moral obligation to perform<sup>112</sup> — so much more so when two persons exchange promises.<sup>113</sup> Of course, this commitment does not enjoy the ordinary moral force of an ordinary promise because it is a promise to commit a crime. But from the point of view of the conspirators, the exchange of promises does create an obligation, even if merely a psychological or subjective one.<sup>114</sup>

I begin with the Court's justifications for punishing conspiracy rooted in ordinary criminal principles such as retribution and deterrence. The agreement itself shows the serious intent of the parties and makes far more likely the commission of the target offense. I show that defining agreement as an exchange of promises best fulfills the work that the Court has asked of "agreement." I then address how my definition ameliorates the serious problem of jury confusion that arises from the current definition — or lack of definition.

#### A. *The Agreement Evidences Serious Intent*

The chief danger in punishing conspiracy, particularly inchoate conspiracies, lies in the danger of punishing mere thought or speech,<sup>115</sup> or convicting those who do not seriously intend to commit a crime. This justification lies largely in a retributive theory of justice: a person who does not seriously intend to commit a crime but who merely thinks about it, or expresses a vague interest, does not deserve

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<sup>112</sup> See, e.g., FRIED, *supra* note 32, at 1; KANT, *supra* note 32, at 3; Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 722 (2007) ("[T]ypically, a promisor is morally expected to keep her promise through performance."). Philosophers have devoted sustained attention to promises precisely because they are widely considered to create moral obligations; the question for ethicists becomes why. Luckily we need not answer this second question. *Promises*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2014), <http://plato.stanford.edu/entries/promises/> (last visited Sept. 9, 2016) ("Promises are of special interest to ethical theorists, as they are generally taken to impose moral obligations.").

<sup>113</sup> See e.g., ATIYAH, PROMISES, *supra* note 32, at 31.

<sup>114</sup> See e.g., GREENAWALT, *supra* note 37, at 63 ("Whether or not an agreement to perform an evil act has genuine moral force, the agreement will usually be viewed by the people who have made it as having such force.").

<sup>115</sup> See *United States v. Valle*, 807 F.3d 508, 511 (2d Cir. 2015) (citing *Stanley v. Georgia*, 394 U.S. 557, 565 (1969)); Goldstein, *supra* note 6, at 406 (stating conspiracy comes closest to punishing a "state of mind" of a person who "come[s] nowhere near carrying out the threat").

criminal punishment. Of course, the limit against punishing mere thought or speech lies in free speech principles as well.<sup>116</sup>

In light of this danger of punishing weak intentions, it is no coincidence that in conspiracy cases, a great many criminal defendants assert that their words were “mere talk” or “mere words.”<sup>117</sup> Indeed, prosecutors have sought to introduce defendants’ statements bragging about their criminal activities often enough to have led courts to develop general rules excluding such evidence if it is not otherwise relevant.<sup>118</sup> The First Circuit, for example, has noted that many courts will express doubts about a defendant’s promise to sell drugs in the future, at least absent corroboration.<sup>119</sup>

Conspiracy cases therefore require juries to determine whether a defendant’s words should be viewed as mere talk or exaggeration,<sup>120</sup> suggesting a desire to impress rather than to commit a crime, or as representing a genuine intention to commit a crime. A person might brag about previous violence,<sup>121</sup> or drug deals, or brag about his ability

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<sup>116</sup> See Redish & Downey, *supra* note 27, at 697. See generally GREENAWALT, *supra* note 37 (examining communications for which criminal liability is fixed and attempting to determine whether liability for such communications seriously conflicts with free speech principles).

<sup>117</sup> See, e.g., *United States v. Corrado*, 304 F.3d 593, 615 (6th Cir. 2002); *United States v. Price*, 13 F.3d 711, 729 (3d Cir. 1994) (stating defendant argued “he was convicted for mere words regarding a future drug activity”); *United States v. Stone*, No. 10–20123, 2012 WL 1034937, at \*8 (E.D. Mich. 2012) (stating defendants argued and court agreed that conspiracy rested upon “mere words”); *State v. Jalo*, 796 S.W.2d 91, 92–93 (Mo. Ct. App. 1990).

<sup>118</sup> See, e.g., *United States v. Marquez*, 699 F.3d 556, 559 (1st Cir. 2012) (discussing boasts in the sentencing context); *People v. Keller*, 27 Cal. Rptr. 805, 810 (1963) (“It has long been recognized that such evidence, if it has no other purpose, should be excluded because its probative value is outweighed by its prejudicial effect.”).

<sup>119</sup> See *Marquez*, 699 F.3d at 559 (“Courts in some cases express doubts, where few details are provided, about the reliability of specific boasts as to past sales or promises of future ones.”); see also *United States v. Ruiz*, 932 F.2d 1174, 1184 (7th Cir. 1991). Both *Marquez* and *Ruiz* were in context of sentencing and drug amount. *But see* *United States v. Barnes*, 480 Fed. App’x 77, 79 (2d Cir. 2012) (admitting “boast[s]” of previous possession of 1,000 bags of heroin for sentencing purposes).

<sup>120</sup> *Cf.* *United States v. Gigante*, 982 F. Supp. 140 (E.D.N.Y. 1997) (noting overt act requirement guards against punishment for mere talk, but that RICO conspiracies do not require proof of an overt act).

<sup>121</sup> See *United States v. Case*, 220 F. Supp. 2d 1, 2 (D. Me. 2002) (“[D]efendant boasted about his shipping ‘organization,’ but there is nothing to show it was any more than boasting.”); see also *United States v. Walker*, 710 F.2d 1062, 1065 (5th Cir. 1983). In *Walker*, the defendant bragged about previous violence, including kneecapping, for drug dealers. *Id.* The court admitted these “boasts” as relevant to the creation of a conspiracy to kill a grand jury witness. *Id.*

to secure drugs in the future. In one recent, and controversial, ethnographic account of gang violence in Philadelphia, the embedded author described several young men driving around town looking to murder someone who had killed their friend. She discussed how serious the young men were before clarifying that they were, in fact, just talking to blow off steam and convince the community they took the killing seriously.<sup>122</sup>

Social media exacerbates the problem of determining whether a person seriously intends to commit a crime; many of the recent ISIS-related arrests in the United States have involved pervasive use of Facebook, Twitter, and other platforms.<sup>123</sup>

How do courts respond to these challenges? First, those courts and legislatures that have expressed their worry about punishing mere thoughts, or weak intentions have found or added an overt act requirement to conspiracy to help mitigate the danger of punishing “mere talk.”<sup>124</sup> In many of the domestic ISIS cases, for example, prosecutors highlight the concrete steps the defendants took in addition to their postings, such as visits to Syria, trainings, etc.; indeed, prosecutors have brought many of these cases as attempt cases rather than conspiracy cases.<sup>125</sup> But as discussed below, in many conspiracy cases the overt act requirement has little probative force.<sup>126</sup> And many important classes of conspiracy — including common law conspiracy and federal drug conspiracy — lack any overt act requirement to mitigate the risk.<sup>127</sup>

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<sup>122</sup> See ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* 250, 260-61 (2014). A book reviewer accused Goffman herself of participating in a criminal conspiracy to murder, going so far as to send Goffman’s book chapter to several former and current Philadelphia prosecutors. Steven Lubet, *Ethics on the Run*, *NEW AMERICAN RAMBLER* (2014), <http://newramblerreview.com/book-reviews/law/ethics-on-the-run>. Goffman responded she had no intention to kill anyone, and as for the young men: “Talk of retribution was just that: talk.” Alice Goffman, *A Reply to Professor Lubet’s Critique*, <http://www.ssc.wisc.edu/soc/faculty/docs/goffman/A%20Reply%20to%20Professor%20Lubet.pdf> (last visited Sept. 9, 2016).

<sup>123</sup> See LORENZO VIDINO & SEAMUS HUGHES, *GEORGE WASHINGTON UNIVERSITY PROGRAM ON EXTREMISM, ISIS IN AMERICA: FROM RETWEETS TO RAQQA* 21 (2015). Some of these arrests have led to conspiracy charges. See, e.g., Criminal Complaint at 2, *United States v. Elhuzayel*, 2015 WL 11071779 (C.D. Cal. 2015) (No. SA15-275M).

<sup>124</sup> See *United States v. Valle*, 301 F.R.D. 53, 81 (S.D.N.Y. 2014), *aff’d* 807 F.3d 508 (2d Cir. 2015); *Gigante*, 982 F. Supp. at 158.

<sup>125</sup> E.g., Criminal Complaint at 1, *United States v. Farrokh*, No. 1:16-mj-24 (E.D. Va. Jan. 16, 2016).

<sup>126</sup> See *infra* Part IV.B.

<sup>127</sup> On the other hand, venue or other procedural or evidentiary concerns might require a prosecutor to prove an overt act in furtherance of the conspiracy. See *United*

The chief answer to the concern about punishing mere thoughts, however, runs as follows: courts assert that the agreement shows that the parties seriously intend to commit a crime.<sup>128</sup> As the Supreme Court has said, at the moment the conspirators agree the intent has “crystallized.”<sup>129</sup> This agreement therefore answers the objection that by punishing conspiracy so early we risk punishing people who lack serious intent to commit the crime. Attempt law alleviates this concern by punishing the crime only very near its completion,<sup>130</sup> or after substantial steps that “strongly corroborate” a serious intent.<sup>131</sup> For many courts, the agreement serves this same purpose, evidencing serious intent.<sup>132</sup>

If we accept this assertion that the agreement evidences serious intent, we must identify why. The answer again seems to lie in the exchange of promises that makes up the agreement. After all, if agreement merely means harmony of opinion, or acknowledgment, as in “yes, I heard you,” this version of agreement does not evidence serious intent, or really any intent, upon the part of the acknowledger to further a crime. Indeed, it is hard to see any definition of agreement short of promise that would evidence serious intent.

Contract law and scholarship supply ample support for this straightforward proposition. At bottom, to say a court enforces a contract against a particular defendant is to say it will enforce his promise to another. Of course, “enforce” usually means money damages<sup>133</sup> rather than specific performance, but those damages are measured against what the defendant promised to do. By contrast, courts will not enforce statements that fall short of promises, such as a mere statement of intention<sup>134</sup> or prediction.<sup>135</sup>

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States v. Santiago, 83 F.3d 20, 25 (1st Cir. 1996).

<sup>128</sup> See *Iannelli v. United States*, 420 U.S. 770, 778 (1975); *Callanan v. United States*, 364 U.S. 587, 593 (1961).

<sup>129</sup> *United States v. Feola*, 420 U.S. 671, 694 (1975) (the agreement shows that criminal intent has “crystallized”).

<sup>130</sup> See, e.g., *People v. Rizzo*, 158 N.E. 888, 889 (N.Y. 1927) (“Did the acts come so near the commission of robbery that there was a reasonable likelihood of its accomplishment but for the interference?”).

<sup>131</sup> *United States v. Gladish*, 536 F.3d 646, 648 (7th Cir. 2008).

<sup>132</sup> *Id.* at 649.

<sup>133</sup> ATIYA, *LAW OF CONTRACT*, *supra* note 100, at 28 (“[L]awyers constantly talk about contracts being ‘enforced,’ but strictly speaking this is incorrect. . . . [I]t merely gives a remedy, normally damages . . .”).

<sup>134</sup> *Pappas v. Bever*, 219 N.W.2d 720, 721 (Iowa 1974) (“A mere expression of intention is not a promise.”); *RESTATEMENT (SECOND) OF CONTRACTS* § 2 cmt. e (AM. LAW INST. 2016) (distinguishing “mere statements of intention”).

<sup>135</sup> *RESTATEMENT (SECOND) OF CONTRACTS* § 2 cmt. f (“A promise must be

But courts do not enforce promises unsupported by consideration, and consideration often means an *exchange* of promises.<sup>136</sup> This requirement serves, in part, to ensure that the person making the promise was serious. “The role of the consideration doctrine in screening for serious promises is well understood.”<sup>137</sup> Even beyond contract law, common sense tells us that when two persons exchange promises to do something, we view those promises as serious.

These principles can help us with cases of “mere talk,” or other instances in which we worry about punishing mere thought or weak intentions. In particular, agreement as an exchange of promises helps to ensure that the defendants’ have serious intent to commit a crime.

The Model Penal Code supports this notion that the purpose of the “agreement” within a conspiracy is to evidence the serious intent of the parties. Indeed, the drafters of that code believed that the term “agreement” was “concrete and unambiguous.”<sup>138</sup> They believed that agreement necessarily involved “commitment.” Neither the MPC nor the drafters say that agreement means “mutual promises,” but they do expressly envision a definition of agreement that includes mutual commitments.

It is this commitment, they further argue, that makes the standard of “agreement” more certain than the infinite degrees that occur in attempt law. The commitment likewise ensures that the purpose will be firm,<sup>139</sup> and that the defendant will not be convicted for equivocal behavior.<sup>140</sup> In short, the “agreement” justifies reaching so early in the evolution of the crime.

Indeed, the drafters rejected terms such as combination or partnership in criminal purposes in favor simply of “agreement.” They rejected these other terms because they were subject to such abuse in criminalizing labor union activity and political protests. But the focus on agreement rather than mere combination seems part of an effort to bring in some level of commitment to tighten up the definition.<sup>141</sup>

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distinguished from a statement of opinion or a mere prediction of future events.”).

<sup>136</sup> See, e.g., *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 734 (7th Cir. 2002) (giving an example under Wisconsin law, where “[a] promise for a promise, or the exchange of promises, is adequate consideration to support a bilateral contract”).

<sup>137</sup> Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 113 (1991); see also 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 111 (1963).

<sup>138</sup> Wechsler et al., *supra* note 9, at 958.

<sup>139</sup> *Id.* (stating that purpose must be “relatively firm”).

<sup>140</sup> See *id.* (“The danger that truly equivocal behavior may be misinterpreted as preparation to commit a crime is minimized.”).

<sup>141</sup> *Id.* at 978 (concluding that the Model Penal Code conspiracy provision “rests on the primordial conception of agreement as the core of the conspiracy idea”).

Many contemporary conspiracy statutes draw in part upon the Model Penal Code. Nevertheless, courts have not taken the further step of defining agreement to involve promises or commitment; as a result, even though the drafters of the Model Penal Code may have envisioned an “agreement” involving commitment at its core, this development never occurred. Instead, courts moved in the opposite direction, diluting the term agreement with “understanding” until they drained from conspiracy any notion of promise or obligation.

### B. *The Agreement Makes the Crime More Likely*

The second chief justification for punishing conspiracies runs as follows: when two or more people agree to commit a crime, this agreement makes it more likely that the parties will actually commit the crime. Supreme Court and lower court case law has placed substantial reliance upon this rationale,<sup>142</sup> as have scholars.<sup>143</sup> This feature not only justifies punishing conspiracy after the fact,<sup>144</sup> but also affords police a tool to arrest persons before they commit the target crime.<sup>145</sup>

Though the courts repeat the formula that the agreement makes the crime more likely, they rarely explain how. Perhaps the proposition is self-evident. Whether self-evident or not, a theory of promises helps advance the rationale.

If the agreement involves an exchange of promises, then the promises themselves make it more likely the parties will follow through. After all, a promise represents a moral obligation, subjective

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<sup>142</sup> See *Jeffers v. United States*, 432 U.S. 137, 157 (1977); *Iannelli v. United States*, 420 U.S. 770, 778 (1975); *Callanan v. United States*, 364 U.S. 587, 593 (1961) (“Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality.”); see also *United States v. Feola*, 420 U.S. 671, 694 (1975).

<sup>143</sup> See, e.g., Katyal, *supra* note 10, at 112.

<sup>144</sup> Wechsler et al., *supra* note 9, at 959. Of course, this rationale does not really make sense for successful conspiracies. After all, if the conspirators succeed in committing the crime, why does it matter anymore that the earlier conspiracy made the crime more likely? *Id.* at 960 (“[W]e think it is entirely meaningless to say that the preliminary combination is more dangerous than the forbidden consummation; the measure of its danger is the risk of such a culmination.”). Wechsler et al. note, however, that conspiracies that risk leading to crimes beyond the target crime should be punished separately from the consummated single crime that was the immediate object of the conspiracy. *Id.*

<sup>145</sup> Ronald J. Allen & Larry Laudan, *Deadly Dilemmas III: Some Kind Words for Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 781, 788-89 (2011) (criminalizing conspiracies “enables the police to prevent a harmful act before its occurrence”).

to the parties to be sure, and a person who reneges opens himself to criticism, opprobrium, and perhaps retaliation. Further, when a person *exchanges* promises, and the other person has relied, the moral obligation rises accordingly.

Kent Greenawalt recognized this feature of agreements in discussing conspiracy in terms of reliance, “locking the parties on course,” and other mechanisms that flow from an exchange of promises and its attendant moral obligation.<sup>146</sup>

Contract law again supplies a useful comparison. At the heart of many contracts lies an exchange of promises, and at the heart of contract law lies the premise that these promises make performance more likely.<sup>147</sup> Contract scholars speak expressly of the moral obligation to perform a contract, and root this obligation in the exchange of promises.<sup>148</sup>

Put another way, we enforce an exchange of promises in part because they induce reliance in others;<sup>149</sup> a promise induces reliance because the other believes the promise makes performance more likely.<sup>150</sup> Of course, contract law enforces promises beyond bargains, but does not refer to those contracts as “agreements.”<sup>151</sup>

Now some scholars have argued that the agreement does not make the commission of the crime more likely, or at least not in a sufficiently broad set of cases to justify a *per se* rule punishing all agreements to commit a crime.<sup>152</sup> Even Neal Katyal concedes that

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<sup>146</sup> GREENAWALT, *supra* note 37, at 63 (stating even if the conspirator thinks he has not undertaken a genuine moral obligation, “the fact of agreement renders each vulnerable to counterresponses for failure to act”).

<sup>147</sup> ATIYAH, PROMISES, *supra* note 32, at 30-31; Katyal, *supra* note 10, at 112 (“Contracts scholars have spoken of a moral obligation to fulfill contracts — an obligation that increases the probability of performance. When A agrees to engage in a crime with B, the agreement thus makes the crime more likely.”).

<sup>148</sup> FRIED, *supra* note 32, at 1 (“The promise principle . . . is the moral basis of contract law.”); Katyal, *supra* note 10, at 112.

<sup>149</sup> See, e.g., Melvin Aron Eisenberg, *Principles of Consideration*, 67 CORNELL L. REV. 640, 643 (1982) (“[B]argain promises clearly should be enforceable [because the promisee will usually] have relied upon the promise.”).

<sup>150</sup> See *id.*

<sup>151</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 2016) (enforcing a promise that another reasonably relied upon). See also Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the Invisible Handshake*, 52 U. CHI. L. REV. 903, 921 (1985) (arguing that courts enforce promises that further useful economic activity even absent consideration or reliance).

<sup>152</sup> See, e.g., Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1179 (1997); Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 8 OHIO ST. J. CRIM. L. 751, 755 (2012); Goldstein, *supra*

almost no one has examined whether forming a conspiracy does in fact make the crime more likely.<sup>153</sup> Nevertheless, we can use these arguments to our advantage. Even if agreements do not always make performance more likely, a definition involving an exchange of promises best fosters such a likelihood.

A subset of the argument that the exchange of promises makes the commission of the crime more likely applies to complex crimes or ongoing criminal enterprises. Proponents of conspiracy law, such as Neal Katyal, urge us to consider complex conspiracies and group behavior rather than the individual culpability of a person in a one-off conspiracy of only two persons. Conspiracies permit complex enterprises involving numerous and ongoing criminal objectives. Katyal compares the criminal enterprise to a corporation; the conspiracy allows it to operate more efficiently by division of labor, and it reinforces the criminal purposes to allow it to be ongoing.

But these complex conspiracies also rest upon the premise of a promise. If we analogize to corporations, those certainly rely on a set of contracts.<sup>154</sup> The corporation can become increasingly complex precisely because each step relies on the interlocking set of promises that others will perform. Similarly, a complex conspiracy cannot work unless each player can rely upon the performance of another. The more complex the conspiracy, the more vital others' performance, and the more vital that each player be able to rely on the others; promises make that reliance work. The promise makes more likely performance because of the abstract moral obligation. The promise also makes more likely performance because of a failure to follow through will lead to retribution by others in the group. Put another way, in a criminal enterprise a person cannot be internally punished for failing to perform his role unless he knows he has such a role.

Having discussed how my proposed definition of agreement takes seriously the role it plays in justifying the crime of conspiracy in the first place, I now turn to other important reasons supporting my proposal.

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note 6, at 414; Marcus, *supra* note 27, at 963; Steven R. Morrison, *Requiring Proof of Conspiratorial Dangerousness*, 88 TUL. L. REV. 483, 487 (2014).

<sup>153</sup> Goldstein, *supra* note 6, at 414; Morrison, *supra* note 152, at 487 (arguing courts should require proof of dangerousness beyond the agreement itself).

<sup>154</sup> Larry E. Ribstein, *Writing About and Teaching Corporation Law: Reflections on Corporate Law and Economic Analysis*, 40 EMORY L.J. 509, 512 (1991).

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C. *A Concrete Test*

My definition of agreement as an exchange of promises will afford juries a more certain yardstick against which to measure the often circumstantial and ambiguous evidence provided them. It will also reverse the dangerous trend arising from diluted definitions of “agreement” currently supplied to juries, such as “mutual understanding” or “slight connection.” It will make clear an agreement requires proof of some communication between the conspirators. Finally, it will help arrest another troubling trend: a profusion of convictions for mere presence or association, wrongful convictions that arise in part, I argue, from poor definitions of agreement.

1. *A Yardstick for Circumstantial Evidence*

Many conspiracy cases rely upon circumstantial evidence. Take a recent case:<sup>155</sup> five men driving in a car, slowing down at alleyways, stopping once so three of them can get out and look for something. They are arrested and charged with conspiracy.

One becomes a cooperator and claims he and the others were conspiring to murder an enemy. Another, Olmedo, claims he was not a participant in the conspiracy. Even on the cooperator’s account, Olmedo did not say anything to join the conspiracy, though he listened when another had said, “let’s get a turtle,” *i.e.* a rival gang member.

On these facts,<sup>156</sup> should the jury have convicted? If the test is “mutual understanding,” or “slight connection,” the jury will be more likely to convict than if they are asked whether Olmedo *promised* to help murder the target. Did his presence in the car, plus his getting out and then getting *back into* the car, provide enough for a jury to conclude he promised? Suppose he had asked to be dropped off: could the others have said, no, you agreed, you promised to help us?

In affirming the conviction, the court did not ask any of these questions aimed directly toward whether Olmedo promised or agreed. It did not point to any affirmative response, even a nod. Rather, the court said the evidence above, especially returning to the car, sufficiently established his “connection” to the conspiracy.

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<sup>155</sup> *People v. Olmedo*, No. G050307, 2016 WL 270013, at \*5 (Cal. Ct. App. Jan. 21, 2016).

<sup>156</sup> More facts pointed to guilt: the cooperator had a gun. Olmedo fled from the arrest, throwing away something that was likely a gun. On the other hand, the cooperator received no jail time in exchange for his testimony against the others, and he repeatedly contradicted himself. *See id.* at \*2-\*6.

I tend to think the evidence does not establish a promise to murder, though it might establish Olmedo promised to participate in *some* crime, such as a drug transaction, or an assault. But regardless of the outcome, one can see how my test gives the jury concrete tools to answer the question of whether Olmedo agreed to commit murder; it likewise better protects defendants against convictions based on a mere “connection.”

The Cannibal Cop case<sup>157</sup> presents another illustration of how the promise rule yields a concrete test based on social criticism for a failure to follow through. The government contended that the defendant, Gilberto Valle, agreed online to kidnap and deliver three different women to three different co-conspirators so that they could kill, cook, and eat them. The defendant argued the agreements were not real but fantasy only; the conspiracy took place over a year and yet no one ever kidnapped anyone. The jury convicted Valle of conspiracy, but the trial judge set aside the verdict and entered an acquittal, finding no real agreement.

In finding no conspiracy, the trial judge noted the conspiracy “existed solely in cyberspace.”<sup>158</sup> He also relied upon an obvious fact: the delivery date came and went without any kidnapping or delivery, and yet none of the other co-conspirators said to Valle, in effect, “where is my dinner?” Instead, each of the co-conspirators continued to spin new fantasies.<sup>159</sup>

My definition of agreement, requiring a promise, contains this same test: would B be entitled to complain if A fell through on his part of the agreement? In the *Valle* case, we did not even need to speculate whether a co-conspirator *would have* complained, because we have ample evidence after the kidnapping date that the co-conspirators in fact did not complain.

## 2. The Requirement of Communication

My definition of agreement will lead to an important corollary to help juries sort through circumstantial evidence: an agreement requires communication between the parties. This rule alone will provide juries an extraordinary tool in assessing evidence. Oddly, courts avoid this simple instruction.<sup>160</sup> Perhaps courts fear juries will

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<sup>157</sup> United States v. Valle, 807 F.3d 508, 512 (2d Cir. 2015).

<sup>158</sup> United States v. Valle, 301 F.R.D. 53, 60 (S.D.N.Y. 2014), *aff'd* 807 F.3d 508.

<sup>159</sup> *Id.* (“[M]onths often passed between chats, with the alleged conspirators forgetting what had previously been discussed.”).

<sup>160</sup> See, e.g., O'Malley et al., Federal Jury Practice and Instructions: Criminal

take it to mean they must find evidence of express communication — but of course juries can be reminded that here, as elsewhere, they may rely upon circumstantial evidence to infer that the parties must have communicated.<sup>161</sup>

Again, contract law affords a useful analogy: an acceptance must be communicated to the person making the offer.<sup>162</sup> This acceptance can be proved not only by express words, but can be inferred from the circumstances.<sup>163</sup> Thus, when two parties have a course of conduct involving, say, ongoing payment for services, courts will sometimes infer a contract for future payment for such services.<sup>164</sup> Of course, even in the arena of contract law, courts often struggle to assess whether a statement rose above the level of mere prediction to a promise; despite this difficulty, courts still require proof of a promise to establish a contract.<sup>165</sup>

The Internet age might make my sanguine assertions about communication more complicated because it affords greater and greater opportunities for implicit and secret communication and agreement. The Silk Road case, for example, involved an online trading market where participants could buy and sell things, often drugs, with Bitcoin.<sup>166</sup> A jury found that Ross Ulbricht had created the market as part of a conspiracy to distribute drugs. But where was the agreement? According to an earlier court decision, Ulbricht created the online network and when a user used that network to buy drugs, they were “agreeing” with Ulbricht to further the conspiracy.<sup>167</sup>

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§ 31:04 (6th ed. 2008).

<sup>161</sup> *State v. Winkler*, 780 S.E.2d 824, 831 (N.C. 2015) (discussing how defendant argued there was no evidence of communication between him and co-conspirator in a different state such as phone calls, texts, emails, etc.; court affirmed by pointing to concrete evidence from which jury could have inferred actual communication).

<sup>162</sup> *See, e.g., Triad Transp., Inc. v. Wynne*, 276 P.3d 1013, 1016 (Okla. 2012) (“To constitute acceptance, there must be an expression of the intent to accept the offer, by word, sign, writing or act, communicated or delivered to the person making the offer . . .”).

<sup>163</sup> *Hanlin v. United States*, 316 F.3d 1325, 1328 (Fed. Cir. 2003) (explaining that a contract may be “inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding”); *Spectra-4, LLP v. Uniwest Commercial Realty, Inc.*, 772 S.E.2d 290, 295 (Va. 2015).

<sup>164</sup> *Spectra-4*, 772 S.E.2d at 295.

<sup>165</sup> Farber & Matheson, *supra* note 151, at 915 n.45.

<sup>166</sup> Bitcoin is a virtual, electronic currency that affords those who spend it some degree of anonymity. *See, e.g., S.E.C. v. Shavers*, No. 4:13-CV-416, 2014 WL 4652121 at \*1 (E.D. Tex. Sept. 18, 2014).

<sup>167</sup> *United States v. Ulbricht*, 31 F. Supp. 3d 540, 556 (S.D.N.Y. 2014).

The participants in the network did not communicate directly with Ulbricht, even implicitly. In assessing this question, the court analogized to contract law, holding that when Ulbricht made the Silk Road network available, he essentially made a standing offer that participants accepted when they used it to buy or sell drugs.

The court's analysis was not entirely satisfying, however; the court never identified a true agreement based on mutual promises, even if made at different times, but rather resorted to a lesser test: "work together in some mutually dependent way." But if we insist on my sharper definition of agreement, what did Ulbricht *promise* to do, and what did each participant promise back to Ulbricht? Did they promise to further drug transactions? Not really.

The court failed to appreciate that this is a vendor case traditionally governed by a separate line of Supreme Court cases<sup>168</sup> that *Ulbricht* did not consider in this connection. Of course the participants promised and agreed with Ulbricht to pay him for use of the market and abide by its terms. But these agreements would be the same whether the participant was buying drugs or soap. What matters is whether the parties agreed to distribute drugs. Did Ulbricht promise not merely to provide a network for trade but promise to provide a network for drug trade, a promise the participants accepted by using it? The Court ought to have focused on this promise by considering factors set forth in *United States v. Falcone*, *Direct Sales Co. v. United States*, and other cases.<sup>169</sup> Under these cases, mere knowledge that some will use the network for drug distribution is likely insufficient.

The Silk Road case will keep commentators busy for years on numerous issues, including factual issues about intent. I point to the case merely to show how an express definition of agreement can at least help us to see how far we should be willing to dilute it in trying to address complex situations that are likely to arise on the Internet.

### 3. Diluted Definitions

My proposal will also counteract another problem: courts dilute the definition of agreement. I will consider two main categories: those that reduce "agreement" to "mutual understanding" and the like, and those that use the "slight connection" rule.<sup>170</sup>

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<sup>168</sup> *Direct Sales Co. v. United States*, 319 U.S. 703 (1943); *United States v. Falcone*, 311 U.S. 205 (1940).

<sup>169</sup> See, e.g., *People v. Lauria*, 59 Cal. Rptr. 628 (Cal. Dist. Ct. App. 1967).

<sup>170</sup> Courts have diluted the agreement requirement in other, less direct ways. The Ninth Circuit, for example, has approved instructing juries they may find knowledge

a. *Mutual Understanding*

The first version of the diluted definition begins sensibly enough. Courts tell juries they need not find an express agreement and that they may infer an implicit agreement from circumstantial evidence. This perfectly reasonable premise<sup>171</sup> leads, however, to corruption of the actual standard of agreement when courts go on to say juries may infer such an implicit agreement based upon the lower standard of “common understanding,” “mutual understanding,”<sup>172</sup> “working relationship” or “even partnership in crime.”

The First Circuit, for example, recently wrote that the agreement “may consist of no more than a tacit understanding.”<sup>173</sup> North Carolina went a bit further in asserting that the agreement may rest upon a mutual, implied understanding” or even a “union of wills.”<sup>174</sup>

Pattern jury instructions mirror this guidance. Arizona’s jury instruction, for example, provides that the jury need not find an “express agreement,” but may infer an agreement from a “common criminal objective.”<sup>175</sup> A typical federal jurisdiction follows a similar pattern, allowing a jury to infer an agreement if the defendants “shared a general understanding about the crime.”<sup>176</sup>

Courts have regularly asserted that the “common goals” definition can be quite “broad” or “expansive.”<sup>177</sup> The Fifth Circuit conceded

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based upon willful ignorance in conspiracy cases. *United States v. Ramos-Atondo*, 732 F.3d 1113, 1120 (9th Cir. 2013). As the defendant argued without success, “it is impossible to conspire to be deliberately ignorant.” *Id.* I would simply say that one cannot promise to achieve a goal based on ignorance of the facts; one cannot promise to import drugs when he does not actually believe a boat contains drugs rather than, say, undocumented aliens.

<sup>171</sup> The same rule, by the way, applies to implicit contracts. *WILLISTON ON CONTRACTS*, *supra* note 18, § 1:3 (“An agreement ‘may be implied from the parties’ conduct and the surrounding circumstances.”) (quoting *S.E.C. v. Cuban*, No. 3:08-CV-2050-D, 2013 WL 791405 (N.D. Tex. Mar. 5, 2013)); *see also* *RESTATEMENT (SECOND) OF CONTRACTS* § 19 (AM. LAW INST. 2016).

<sup>172</sup> *United States v. Soto*, 780 F.3d 689, 702 (6th Cir. 2015) (stating “tacit or material understanding”); *Thornton v. State*, 331 Ga. App. 191, 197 (2015) (stating “mutual understanding”).

<sup>173</sup> *United States v. Alejandro-Montañez*, 778 F.3d 352, 358 (1st Cir. 2015).

<sup>174</sup> *State v. McClaude*, 765 S.E.2d 104, 107 (N.C. Ct. App. 2014).

<sup>175</sup> *REVISED ARIZONA JURY INSTRUCTIONS (CRIMINAL)* § 10.037 (4th ed. 2016).

<sup>176</sup> *PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT* § 4.18.371(1) (2016).

<sup>177</sup> *United States v. Morris*, 46 F.3d 410, 415 (5th Cir. 1995) (“The Fifth Circuit has broadly defined this criterion and has adopted an expansive notion of a ‘common purpose.’”); *see United States v. Huelzo*, 546 F.3d 174, 184-85 (2d Cir. 2008) (Newman, J., concurring) (collecting cases but rejecting rule).

that the definition of “common goals” may have become so expansive as to “become a mere matter of semantics.”<sup>178</sup> Indeed, even the Supreme Court has multiplied the inferences by stating that the common purpose or plan may be inferred from a “development and collocation of circumstances.”<sup>179</sup>

Other courts have diluted the requirement in other, similar ways. In *United States v. Weiner*, the court held that the jury may infer agreement simply based upon the “working relationship” between the parties, evidencing a “joint criminal enterprise.”<sup>180</sup> No talk here of agreement, really, or apparent acknowledgment of the danger of guilt by association.

These diluted definitions risk convicting defendants for conduct and intent that does not reach what we actually want to count as a conspiracy. It also presents the risk of arbitrary enforcement since the diluted terms are ambiguous or vague, allowing one jury to convict and another to acquit — for essentially the same facts — based on their own comprehension of what the term “common understanding” means in the context before them.

This problematic ambiguity in the term “understanding” has arisen in the contracts arena, where courts have noted that “understanding” can mean either agreement or merely recognition or acknowledgment.<sup>181</sup> This latter plain meaning of “understanding” often arises when parties wish to recite threshold understandings, a whereas clause, as background to the operative part — the actual agreement.<sup>182</sup> Similarly, Bryan Garner has cautioned against the use of “understanding” precisely because it dilutes agreement, making it appear an agreement has been reached when it has not.

**understanding** is a vague word sometimes used in DRAFTING as a weaker word than *agreement* or *contract*. If there is an agreement, then use the word *agreement*; if there is none, then *understanding* may suggest unsatisfactorily that there is.<sup>183</sup>

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<sup>178</sup> *Morris*, 46 F.3d at 415 (quoting *United States v. Richerson*, 833 F.2d 1147, 1153 (5th Cir. 1987)).

<sup>179</sup> *Glasser v. United States*, 315 U.S. 60, 80 (1942).

<sup>180</sup> 3 F.3d 17 (1st Cir. 1993) (quoting *United States v. Moran*, 984 F.2d 1299, 1300 (1st Cir. 1993)).

<sup>181</sup> *E & H Land, Ltd. v. Farmington City*, 336 P.3d 1077, 1082 (Utah Ct. App. 2014).

<sup>182</sup> LARAU DIETZ ET AL., 17A AM. JUR. 2D *Contracts* § 383 (2016) (“[R]ecitals indicate only the background of a contract [and] do not ordinarily form any part of the real agreement.”).

<sup>183</sup> BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 897 (2d ed. 1995).

Just as in contracts, my definition of exchange of promises in conspiracy will avoid the dangerous ambiguities that arise from “understanding.”

*b. Slight Connection Rule*

Another version of the diluted definition of agreement presents far greater risks than the one discussed above. Numerous courts have adopted the “slight connection”<sup>184</sup> or “slight evidence”<sup>185</sup> rule. It applies when assessing whether a defendant has joined an existing conspiracy. The first problem we face involves understanding what the rule actually entails. Under the typical formulation it appears to seriously dilute any agreement requirement.<sup>186</sup>

The slight connection rule runs as follows. In existing conspiracy cases, these courts first recite the sensible rule that the government must prove that the defendant knowingly participated in the conspiracy. But these courts then say that in proving this knowing participation, the government need only establish a “slight connection” between the defendant and the conspiracy.<sup>187</sup> In other words, the “slight connection” standard appears to supersede the “knowing participation standard.”

The “slight evidence” rule works the same way, though it is sometimes a rule on appeal.<sup>188</sup>

Several opinions have criticized both rules as lowering the standard a jury must find in order to convict a defendant of conspiracy.<sup>189</sup> Even if the question is whether the defendant joined an existing conspiracy rather than formed a new one himself, these judges argue the same

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<sup>184</sup> *United States v. Mahbub*, 818 F.3d 213, 230 (6th Cir. 2016) (“The connection of the defendant to the conspiracy need only be slight . . . .”) (quoting *United States v. Price*, 258 F.3d 539, 544 (6th Cir. 2001)); *United States v. Tran*, 568 F.3d 1156, 1164 (9th Cir. 2009) (“Only a slight connection is necessary to support a conviction of knowing participation.”); *United States v. Kellam*, 568 F.3d 125,139 (4th Cir. 2009); *United States v. Huezco*, 546 F.3d 174, 188 (2d Cir. 2008) (Neuman, J., concurring) (collecting cases but rejecting rule).

<sup>185</sup> *Huezco*, 546 F.3d at 185 (Neuman, J., concurring) (discussing “slight evidence” rule and its relationship to the “slight connection” rule).

<sup>186</sup> *See id.* at 188.

<sup>187</sup> *Kellam*, 568 F.3d at 139 (“After a conspiracy is shown to exist, however, the evidence ‘need only establish a slight connection between the defendant and the conspiracy to support conviction.’”) (quoting *United States v. Brooks*, 957 F.2d 1138, 1147 (4th Cir. 1992)).

<sup>188</sup> *United States v. Durrive*, 902 F.2d 1221, 1228 (7th Cir. 1990) (discussing the appellate version of the rule and rejecting it).

<sup>189</sup> *See Huezco*, 546 F.3d at 187-88 (Neuman, J., concurring); *Durrive*, 902 F.2d at 1227-28.

standard of “agreement,” with the same standard of proof, should apply. As Judge Neuman wrote, “these words inevitably create the risk of lowering the standard of proof significantly below ‘beyond reasonable doubt.’”<sup>190</sup>

The Sixth Circuit in *United States v. Mahbub* recently rejected Judge Neuman’s view, upholding the slight connection rule based on Sixth Circuit precedent.<sup>191</sup> There, the court approved a jury instruction that required proof that the defendant knowingly and voluntarily joined an existing conspiracy, intending to advance its main goals. But the instruction also said that the defendant’s connection to the conspiracy need not be substantial. “A slight role or connection may be enough.”<sup>192</sup> Other recent cases continue to apply the rule,<sup>193</sup> though others do not.<sup>194</sup>

Even when it comes to joining an existing conspiracy, contrast these strange rules with the typical black letter law as announced in leading Supreme Court cases, or in the Model Penal Code: the prosecutor must prove that the defendant *agreed* with at least one member of the existing conspiracy to further at least one goal of the existing conspiracy.<sup>195</sup> Once this threshold agreement has been proved, the government may then show that the defendant has joined the larger, existing conspiracy by proving merely his knowledge of the broad outlines of the broader conspiracy. But again, the traditional rules required the threshold proof that the defendant *agreed* with at least one other person.

The slight connection or evidence rule appears to eliminate this threshold step of showing the defendant entered into an agreement

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<sup>190</sup> *Huezo*, 546 F.3d at 188 (Neuman, J., concurring).

<sup>191</sup> *United States v. Mahbub*, 818 F.3d 213 (6th Cir. 2016) (“Without taking any stance of the merits of [Judge Neuman’s] position, we cannot conclude that the use of a jury instruction that finds support in Sixth Circuit case law . . . constitutes plain error.”) (citing *United States v. Price*, 258 F.3d 539, 544 (6th Cir. 2001)).

<sup>192</sup> *Id.*

<sup>193</sup> *United States v. Grasso*, 724 F.3d 1077, 1086 (9th Cir. 2013); *United States v. Taylor*, No. 11-452, 2012 WL 5211781, 3 (D.N.J. Oct. 22, 2012); see *United States v. Hernandez*, 433 F.3d 1328, 1333 (11th Cir. 2005) (allowing a slight connection to suffice).

<sup>194</sup> See, e.g., *United States v. Boria*, 592 F.3d 476, 480 (3d Cir. 2010) (“[S]light evidence of Boria’s connection to the conspiracy is not sufficient . . .”).

<sup>195</sup> *Blumenthal v. United States*, 332 U.S. 539, 558 (1947) (“By their separate agreement, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope . . .”); MODEL PENAL CODE § 5.03 (AM. LAW INST. 2015) (similarly requiring as a threshold that the defendant agreed with at least one other before finding him part of a larger conspiracy based on his knowledge of other conspirators).

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with at least one other person. With respect to the agreement prong, it appears to be enough to show that *others* agreed; the defendant may join on a showing less than agreement. Worse, the prosecution need only show this new person joined the conspiracy merely by showing she had a “slight connection” to the existing conspiracy.

Even if we take a more charitable view of the “slight connection” standard as a gloss on “knowing participation” rather than as a substitute for it, that gloss will inevitably tend to dilute whatever rigor “knowing participation” supplies, and again, risk punishment for mere presence or association. In rejecting the appellate version of the rule, the Seventh Circuit deemed it an unwarranted “dilution” of the appropriate standard.<sup>196</sup>

My proposal would eliminate the “slight connection” rule, whether it is a diluted version of “agreement” or merely a confusing version of it. My proposal would require proof that the defendant exchanged promises with at least one member of the larger, existing conspiracy. Once that agreement has been established, then the government need only prove that the defendant was aware in a more general sense of the overall goals of the conspiracy and that others, perhaps unidentified, are involved. My proposal merely follows the leading cases on multi-party conspiracies, but restores the central role an agreement should play.

#### 4. Mere Presence Cases

The failure to define agreement, or diluting it, have led to practical problems, most particularly unjust conspiracy convictions of those who are merely present or associate with criminals but have committed no crime themselves. These cases reveal prosecutors willing to take to trial defendants who merely associate with drug dealers, juries willing to convict such bystanders, and trial courts willing to endorse these convictions and sentence based upon them. True, these defendants win eventual acquittal on appeal, but only after undergoing arrest, pre-trial detention, trial, sentencing, imprisonment, and, only after three or four years,<sup>197</sup> release.

These initial convictions create an effective rule of guilt by association. They likely give rise to arrests and plea bargains that operate in the shadow of this illegitimate rule that those associating

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<sup>196</sup> United States v. Durrive, 902 F.2d 1221, 1225 (7th Cir. 1990).

<sup>197</sup> E.g., United States v. Tran, 568 F.3d 1156, 1156 (9th Cir. 2009) (involving three years between crime and reversal); United States v. Esquivel-Ortega, 484 F.3d 1221, 1221 (9th Cir. 2007) (involving four years); United States v. Sanchez-Mata, 925 F.2d 1166, 1166 (9th Cir. 1991) (involving three years).

with criminals are guilty themselves. The Eleventh Circuit, in upholding a conviction as against the argument of “mere presence,” let slip what many courts likely believe: that a person who associates with criminals, though innocent himself, has no one but himself to blame if he ends up prosecuted.<sup>198</sup>

In that case, *United States v. Lyons*, an eight-month pregnant woman twice accompanied her boyfriend to his drug deals. The jury convicted her of conspiracy on a theory that she was not merely present, but performing “counter-surveillance.” In affirming, the Eleventh Circuit, while conceding that “mere presence” does not suffice, went on to criticize an innocent person who is present with those who commit crimes: “presence is no virtue. One who is present at — or in the company of those clearly engaged in — drug deals is skating on thin ice.”<sup>199</sup> The dissent argued that the defendant was convicted, indeed, for mere presence.

Juries have convicted for mere presence in a wide variety of circumstances. In some, the defendant was found in a car, van, or truck with drugs and drug dealers, but with no evidence that he knew or, even if he did know, no evidence that he had agreed to participate.<sup>200</sup> Other cases have reversed convictions when the defendant lived with or even slept in the same room as the drug stash or a drug dealer, whether knowingly or not.<sup>201</sup> Numerous other cases for “mere presence” raise all manner of factual scenarios involving association, including accompanying a friend while he makes an illegal straw fire arm purchase,<sup>202</sup> meeting an acquaintance at the airport who has drugs,<sup>203</sup> and so on.<sup>204</sup> In all of these cases mentioned, the appellate courts reversed, though again, often years later.

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<sup>198</sup> *United States v. Lyons*, 53 F.3d 1198, 1202-03 (11th Cir. 1995).

<sup>199</sup> *Id.* at 1202.

<sup>200</sup> *E.g.*, *Tran*, 568 F.3d at 1160; *Esquivel-Ortega*, 484 F.3d at 1224; *United States v. Camara*, No. 99-10510, 2002 WL 1378993, at \*2 (9th Cir. June 26, 2002); *United States v. Ramirez*, 176 F.3d 1179, 1181 (9th Cir. 1999); *United States v. Ramos-Rascon*, 8 F.3d 704, 706 (9th Cir. 1993); *Sanchez-Mata*, 925 F.2d at 1167.

<sup>201</sup> *E.g.*, *United States v. Estrada-Macias*, 218 F.3d 1064, 1064-65 (9th Cir. 2000); *United States v. Vasquez-Chan*, 978 F.2d 546, 546 (9th Cir. 1992); *United States v. Ocampo*, 937 F.2d 485, 487-88 (9th Cir. 1991); *United States v. Eduardo-Franco*, 885 F.2d 1002, 1010-11 (2d Cir. 1989); *United States v. Soto*, 716 F.2d 989, 991 (2d Cir. 1983).

<sup>202</sup> *United States v. Jones*, 371 F.3d 363, 366 (7th Cir. 2004).

<sup>203</sup> *United States v. Nusraty*, 867 F.2d 759, 764-65 (2d Cir. 1989).

<sup>204</sup> *E.g.*, *United States v. Morillo*, 158 F.3d 18, 25 (1st Cir. 1998); *United States v. Andujar*, 49 F.3d 16, 21 (1st Cir. 1995); *United States v. Perez-Tosta*, 36 F.3d 1552, 1559 (11th Cir. 1994); *United States v. Skillern*, 947 F.2d 1268, 1270 (5th Cir. 1991); *United States v. Penagos*, 823 F.2d 346, 347 (9th Cir. 1987); *United States v. Jenkins*,

These reversals, and their slender roster of incriminating facts, reflect juries uncommonly disposed to convict those who merely associate with criminals. Perhaps this is simply human nature, but as these reversals make clear, it is not the law. Take account, too, that the standard to reverse on appeal is a demanding one. In some jurisdictions the defendant must show that no reasonable juror could have found an agreement.<sup>205</sup> In many federal circuit courts of appeal, the standard is the even more demanding standard: if there is the “slightest evidence,” the court must affirm.<sup>206</sup>

In light of these demanding review standards, one can imagine many more convicted of conspiracy for mere presence who fail to overturn their convictions on appeal; the *Lyons* case above represents one such example.<sup>207</sup>

Many factors no doubt contribute to these wrongful convictions, including the tainted climate the defendants have found themselves in. But when a defendant is found in a car filled with drugs and at least one drug dealer, a jury is more likely to convict under the existing standard of “tacit understanding,” or “slight connection” — the prevailing standards in the jurisdictions reported above — than they would be under my standard.

Consider the *Lyons* case under my standard. If the jury, or the court for that matter, were to assess whether defendant Price had exchanged promises with her boyfriend to participate in the drug sales, would a jury have been as likely to convict her for simply accompanying him on two drug deals.

The same tighter definition of agreement can be applied to the other mere presence cases discussed above. When a person meets an acquaintance at the airport who is carrying drugs, are there facts that could lead the jury to find that they had previously communicated, and that they had promised that upon arrival, they would distribute the drugs? Or, when a woman is found to have slept in the same room

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779 F.2d 606, 611-612 (11th Cir. 1986); *United States v. Pantoja-Soto*, 739 F.2d 1520, 1522 (11th Cir. 1984) (being present at closed gas station); *United States v. Galvan*, 693 F.2d 417, 417 (5th Cir. 1982); *United States v. DeSimone*, 660 F.2d 532, 537 (5th Cir. Unit B 1981); *United States v. Lopez*, 625 F.2d 889, 889 (9th Cir. 1980); *United States v. Cloughessy*, 572 F.2d 190, 189 (9th Cir. 1977); *United States v. Quintana*, 508 F.2d 867, 880 (7th Cir. 1975); *Mickenberg v. State*, 640 So. 2d 1210, 1210 (Fla. Dist. Ct. App. 1994); *Saint Louis v. State*, 561 So. 2d 628, 628 (Fla. Dist. Ct. App. 1990); *Ashenoff v. State*, 391 So. 2d 289, 288 (Fla. Dist. Ct. App. 1980).

<sup>205</sup> See, e.g., *United States v. Smith*, 450 F.3d 856, 860 (8th Cir. 2006).

<sup>206</sup> *United States v. Durrive*, 902 F.2d 1221, 1228 (7th Cir. 1990) (discussing the appellate version of the rule and rejecting it).

<sup>207</sup> See *United States v. Lyons*, 53 F.3d 1200, 1198 (11th Cir. 1995).

as a stash of drugs, knowing it is there, can the jury find that she promised her roommate she would help her to distribute the drugs, or was the defendant merely sleeping there because that's where she could find a place to sleep — the presence of drugs notwithstanding? And of course in those many cases<sup>208</sup> in which the government provides little, if any, evidence that the defendant even *knew* of the presence of drugs, my promise test will rule out conviction.

#### D. Antitrust

In some ways my proposal mirrors developments in antitrust law, which has recently required a tighter definition of agreement. These developments in antitrust law support my proposal. But the reasoning moves in both directions, and my proposal can help understand and further these developments in antitrust law.

Much like ordinary criminal conspiracy, early Sherman Act cases defined agreement somewhat loosely as including unity of purpose or a common design and understanding.<sup>209</sup> The Court often did not make clear whether parallel conduct sufficed, at least to raise the inference of an agreement.<sup>210</sup>

But the Supreme Court<sup>211</sup> and lower courts<sup>212</sup> have recently enhanced the requirement of agreement at the center of an antitrust conspiracy. The government or plaintiffs must prove more than mere parallel conduct; they must prove some plus factors that demonstrate an agreement or, in the words of one court, commitment. Even here, the courts do not generally expressly say that the fact-finder must find promises, but these cases come far closer to such a requirement than do ordinary criminal conspiracy cases.

These recent antitrust cases implicitly reject a definition of agreement as “harmony of opinion” arrived at independently. Just as experts might agree that smoking causes cancer without having communicated any promises, so competitors might independently arrive at the same prices without promising each other to do so. The competitors have a harmony of opinion as to prices, and therefore

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<sup>208</sup> See cases cited *supra* notes 200–205.

<sup>209</sup> See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984) (“A § 1 agreement may be found when ‘the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.’”) (quoting *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)).

<sup>210</sup> See *Interstate Circuit v. United States*, 306 U.S. 208, 228 (1939).

<sup>211</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007).

<sup>212</sup> See *United States v. Apple, Inc.*, 791 F.3d 290, 318 (2d Cir. 2015) (stating conspiracy requires, beyond parallel conduct, some “commitment”).

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agree in that sense, but the Court has recognized two propositions: first, harmony of opinion does not suffice as a definition or standard for an antitrust agreement and, second, courts and juries risk adopting this weaker version of agreement if they are not careful. The Court therefore required, even at the pleading stage, some evidence tending to prove an agreement beyond mere harmony of opinion.<sup>213</sup>

We can draw a few lessons from antitrust and civil conspiracy cases.

First, these cases lend some support to my notion that an agreement in the ordinary criminal conspiracy context requires firmer definition because courts have begun to do so in the antitrust context. “Agreement” is not so self-explanatory after all.

Second, and working in reverse, my proposal to simply require promises should apply more expressly in the antitrust cases themselves. Promises would become the plus factor. Of course, juries can still draw inferences from circumstantial evidence; but they will do so in order to find a promise.

Third — and on the other hand — we must be cautious in comparing antitrust or civil conspiracy with criminal conspiracy. After all, in many antitrust and civil conspiracy cases the underlying conduct, if undertaken alone, would be perfectly legal. The conduct only becomes criminal when done pursuant to an agreement (along with other requirements). To transform otherwise innocent conduct into an unlawful conspiracy requires that we be all the more sure of the underlying agreement.

This distinct feature of antitrust conspiracy militates for caution but does not completely undermine adapting lessons from these cases to criminal conspiracy. That is, in many other ordinary criminal conspiracy cases, the defendant’s conduct might also be perfectly lawful, as when he stands on a street corner near others who are selling drugs. In these cases, the defendant’s conduct becomes criminal *only if* he has agreed with others to commit a crime.

#### E. *Neal Katyal and Group Harm*

Not everyone endorses the traditional justifications adduced above for punishing conspiracies, justifications that lead quite naturally to a definition of agreement rooted in promises. Neal Katyal finds<sup>214</sup> in social science research reasons to fear criminal group dynamics that do not depend upon promises or any expressly tightened definition of “agreement.”

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<sup>213</sup> See *Twombly*, 550 U.S. at 545.

<sup>214</sup> See Katyal, *supra* note 10 at 1310-11.

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In particular, his research shows that criminal groups become dangerous because they reinforce individual resolve, reinforce other members' extreme views, make members think less of outsiders, and perform more efficiently.<sup>215</sup> As relevant here, these dynamics persist *regardless* of how members enter the group. That is, even if persons are randomly assigned to a group rather than agreeing to join it, or if they join it without really agreeing to remain in the group or to further its activities, the group effect will occur. Thus, much of Katyal's theory that groups are dangerous does not really depend on promises, an agreement, or the moral obligation to follow through that might follow.<sup>216</sup>

In addition, Katyal justifies punishing conspiracies not so much because of individual culpability, but because it affords prosecutors a useful tool to crack open these secret, complex groups. It allows prosecutors to charge lower players with a crime to encourage them to cooperate and provide evidence on higher ups who would otherwise evade scrutiny.

Katyal's theory of conspiracy thus stands as an argument against my proposal because his view does not rely upon a definition of agreement involving promises. In fact, he would likely insist upon leaving "agreement" flexible enough to include associations based on less than promises or other commitments. Perhaps Katyal is right that merely associating with a group, without any promise or commitment to further its criminal ends, leads to trouble, and that my definition is too rigid and limited.

But Katyal's view runs head long into the ancient and contemporary principle that we may not punish mere guilt by association.<sup>217</sup> In other words, a person who associates with criminals may well be more likely to commit crimes, but this alone cannot justify criminal punishment for reasons ranging from free speech and free association to ordinary principles of criminal liability. These principles lie deeply imbedded in the twentieth-century development of law, including free speech law, as well as international criminal law's avoidance of conspiracy law entirely.

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<sup>215</sup> See *id.* at 1312-19.

<sup>216</sup> See *id.* at 1337. Even when Katyal says that an agreement is crucial even under his theory because it marks the joining of a group, and thus the development of group psychosis, he uses "agreement" largely as a synonym for becoming a member, regardless of how. There's no promise in his version of agreement.

<sup>217</sup> See cases cited *supra* notes 200-204.

## III. FREE SPEECH

So far I have rooted my argument in basic criminal law principles: my definition will ensure serious criminal intent, make the commission of the crime more likely, and help jurors (and appellate courts) weigh difficult, ambiguous facts.

In this section, I address free speech. First, I will discuss how courts have responded to the argument that the criminal laws should not punish mere speech unattended by an *actus reus*. This version of the free speech argument rests in ordinary criminal law principles and sidesteps any direct discussion of the First Amendment.

Second, I will turn to the First Amendment. Scholars have offered differing rationales on why we may punish conspiracy consistent with the First Amendment; my definition of agreement fits neatly within both main camps and therefore enjoys additional support from these arguments.

A. *The Agreement Is the Act*

For three hundred years, defendants have complained that conspiracy punishes mere words and contains no *actus reus* requirement, from conspiracies to kill the Queen to very recent terrorism conspiracies convictions based in part on political or religious speech.<sup>218</sup> And for three hundred years, the courts in England and America have responded with the same metaphysical formula: the agreement is the act.<sup>219</sup>

As early as 1700, the House of Lords explained that the crime of conspiracy does not require proof of an overt act because “the very assembling together was an overt act.” The Supreme Court recently reinforced this principle — common law conspiracy, and hence many federal conspiracy statutes, do not require proof of an overt act

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<sup>218</sup> See *United States v. White*, 698 F.3d 1005, 1008 (7th Cir. 2012) (stating defendant argued solicitation conviction punished him for his online speech); *United States v. Stewart*, 590 F.3d 93, 148 (2d Cir. 2009) (stating defendant argued she was punished for zealous legal advocacy); *United States v. Rahman*, 189 F.3d 88, 114 (2d Cir. 1999) (stating blind cleric argued conspiracy charge punished him “solely on his political views and religious practices”).

<sup>219</sup> See *United States v. Shabani*, 513 U.S. 10, 16 (1994) (“[T]he criminal agreement itself is the *actus reus*.”); *Mulcahy v. The Queen*, (1868) 3 LRE & I. App 306 (HL) 317 (appeal taken from Ir.) (stating “the very plot is an act in itself”); *R v. Bass*, (1705) 88 Eng. Rep. 881, 882; 11 Mod. 55 (stating “the very assembling together was an overt act”).

because the “criminal agreement itself is the *actus reus*.”<sup>220</sup> Scores of federal cases continue to repeat this formula<sup>221</sup> to the present.<sup>222</sup>

Courts trot out this cliché with little explanation of how words can constitute an act — at least the type of *actus reus* we usually consider to lie at the center of a crime, a physical act.<sup>223</sup> The Model Penal Code, for example, defines the “act” at the center of a crime as “bodily movement,” and others agree with this straightforward definition.<sup>224</sup>

I suspect the phrase to be meaningless<sup>225</sup> or at least unhelpful,<sup>226</sup> a mere “labeling game.”<sup>227</sup> But I will nevertheless address it because, if it means anything to say an agreement counts as an act, it can only be because the agreement consists of an exchange of promises. This is about as act-like as words can get. I consider two possibilities below; the first, I reject, and the second, I grudgingly adopt.

The first possibility: a conspiracy requires the defendants combine to commit a crime, and combining requires them to physically assemble together — an act. This possibility lies in certain hints courts give. In *Bass*, for example, the court says that the “very assembling together was an overt act.” *Mulcahy* says the very “plot” is the act. Other courts translate conspire from the Latin as “breathing together,” which also can be taken literally as a physical act.

If courts merely mean that an agreement counts as the act because the parties must physically come together, and perhaps even close

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<sup>220</sup> *Shabani*, 513 U.S. at 10.

<sup>221</sup> See *United States v. Salahuddin*, 765 F.3d 329, 340 (3d Cir. 2014); *United States v. Abdulle*, 564 F.3d 119, 127 (2d Cir. 2009); *United States v. Yearwood*, 518 F.3d 220, 229 (4th Cir. 2008); see *United States v. Valle*, 301 F.R.D. 53, 81 (S.D.N.Y. 2014), *aff'd* 807 F.3d 508 (2d Cir. 2015).

<sup>222</sup> See *Pena v. United States*, No. 13 CV 6029 (MGC), 2015 WL 1931316, \*2 (S.D.N.Y. Apr. 29, 2015).

<sup>223</sup> See MODEL PENAL CODE § 1.13 (AM. LAW INST. 2015) (defining “act” as “bodily movement”).

<sup>224</sup> See, e.g., *City of Seattle v. Wilson*, 213 P.3d 636, 639 (Wash. 2009); LAFAVE, *supra* note 7, § 6.1.

<sup>225</sup> See Redish & Downey, *supra* note 27 at 716 (saying without an overt act, an agreement is “pure expression”); Eugene Volokh, *Speech Integral to Criminal Conduct*, 101 CORNELL L. REV. 30, 33 (2015) [hereinafter *Speech Integral*] (“[T]hough agreements are often labeled ‘conduct’ rather than speech, they are indeed communication.”).

<sup>226</sup> Eugene Volokh has thoroughly discussed and largely discredited at least the more facile efforts by courts and commentators to label certain categories of speech “conduct” in order to avoid free speech problems. See Volokh, *Speech as Conduct*, *supra* note 37.

<sup>227</sup> *King v. Governor of New Jersey*, 767 F.3d 216, 225-26 (3d Cir. 2014) (saying the “enterprise of labeling certain verbal or written communications ‘speech’ and others ‘conduct’ is unprincipled and susceptible to manipulation”).

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together in order to whisper, this justification for calling an agreement an act seems weak. After all, at least until recently, almost all communication required physical proximity. To call an agreement an act merely because the parties had to physically get together to communicate seems to make all speech an act. And if all speech is an act, then we come back to the problem of punishing mere speech and raising free speech concerns.

Conversely, today many conspiracies occur without any physical proximity via telephone and Internet communication. Gilberto Valle was accused of conspiracy with people he had never met other than in chat rooms and via the Internet.

Another perspective on this same view enjoys some support from the history of conspiracy's application, or misapplication, to labor organization and other action that would be legal if taken by an individual but becomes transformed, by conservative Lochner-era courts in particular, into a crime.<sup>228</sup> Here we can view the conspiracy as a physical assembly; in the case of labor actions or other mass protests, the assembly will involve great numbers of people. This very assembly, to halt industry, was itself the act, even though those assembling were really declining to work rather than physically preventing anyone else from working.

Indeed, Steven Morrison has argued that the entire view of conspiracy as a distinct evil in which the act is itself the agreement arose out of these labor cases.<sup>229</sup>

But to state this support for agreement as itself the act, and a distinct evil in itself, is to refute it. The labor cases, and other cases, punishing conspiracies even though the acts themselves were lawful when performed by individuals, have been discredited as bad conspiracy law and bad for free speech.<sup>230</sup>

We might be tempted to abandon the notion that the agreement is the act as an artifact of a discredited era, but we cannot: the Supreme Court and lower federal courts continue to rely upon this concept.<sup>231</sup> The agreement itself is the act. We must therefore find some rationale that actually does justify treating the agreement as an act.

This brings us to our second possibility: the agreement is an act because it involves promises. An agreement is not just any speech, but involves the *act* of promising, and even more so, the act of exchanging

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<sup>228</sup> Morrison, *supra* note 152, at 492.

<sup>229</sup> *See id.* at 498.

<sup>230</sup> *See id.* at 496-98.

<sup>231</sup> *See supra* notes 211-13 and accompanying text.

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promises. This view enjoys at least some literal support from *Mulcahy v. The Queen*, an English case from 1868, discussed above and perhaps the most quoted criminal conspiracy case. Just after saying that the agreement is the act and therefore requires no additional overt act, the court says, “promise against promise, *actus contra actum*.” The agreement is an act because a promise is an act and, in particular, an exchange of promises, as in contract law, constitute an act. The court does not say why these promises constitute an act, but because the words of a promise create a moral obligation, a promise seems more act-like than other mere statements. As noted above in Part II, only a handful of American cases have quoted this exact language concerning promises, but numerous cases continue to insist that the agreement is the act.

By contrast, an agreement that involves mere harmony of opinion, for example, does not strike our intuition as constituting an act the way mutual promises do. When experts agree that smoking causes cancer, we are less likely to describe their independent opinions, albeit a consensus, as an act.

Furthermore, we can certainly note without discussing in any detail one of the chief features of twentieth-century language philosophy: the argument that words and sentences in particular can accomplish things and are therefore acts. J.L. Austin titled his seminal lectures *How to Do Things with Words*, and his chief follower, John Searle, wrote the book *Speech Acts*. Now courts do not cite Austin or Searle in explaining why an agreement counts as an act, but an agreement would certainly fall at the center of their conception of a speech act.<sup>232</sup> The agreement accomplishes something just as two people saying, “I do” at a wedding accomplishes the marriage.

But Austin, Searle, and others consider almost all speech to be an act; their philosophies would provide little reason to target conspiracy alone among speech-acts for criminal punishment. Moreover, Austin and Searle use “act” in a somewhat figurative manner as meaning accomplishing something, such as a marriage. But “act” and *actus reus* as used in criminal law traditionally refers to physical acts and bodily movements that cause harm directly.

In the end, the “agreement is the act” argument remains unpersuasive. As others have pointed out, to deem the pure speech used to form an agreement as the type of act central to a crime — a physical act — is “simply wrong.”<sup>233</sup> But again, to make the best of a

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<sup>232</sup> Both consider promises core speech acts, or “illocutionary” as they would put it. They both consider agreements to be acts for the same reason.

<sup>233</sup> See Redish & Downey, *supra* note 27, at 717.

bad situation, I argue that if the Courts' incantation — that the agreement is the act — is to have any meaning, an exchange of promises best captures that meaning.

### B. *Conspiracy and the First Amendment*

Another entry point toward answering this same question — how can we consider the agreement in a conspiracy to be an “act”? — comes from considering why we may punish conspiracy consistent with the Free Speech Clause of the First Amendment.<sup>234</sup> Kent Greenawalt has offered the most robust justification, a refinement of Austin and Searle, though in the end it still seems to boil down to asserting that the agreement at the center of a conspiracy is more act than speech. In any event, Greenawalt's theory provides strong support for my proposal, and in fact he would likely argue we *must* define conspiracy as an exchange of promises to avoid violating the First Amendment.

Greenawalt argues that the First Amendment only protects the type of speech that helps the search for truth. “Smoking causes cancer,” would fall squarely within such a principle. Conspiracy, by contrast, falls outside free speech principles because an agreement to commit a crime does not, in his view, further the search for truth. Rather, the agreement at the center of a conspiracy consists a “mutual commitment” and “a serious undertaking” to commit a crime. This “mutual commitment” makes the crime more likely, he says; the agreement “serves, in a sense, to lock them on course.”<sup>235</sup> These features of an agreement alter the moral situation more than they communicate true or false facts, and therefore do not fall under his conception of a free speech principle.

If Greenawalt is right, we *must* define an agreement as an exchange of promises to avoid running afoul of the First Amendment. It is only because the agreement is an act<sup>236</sup> — an exchange of promises — that the First Amendment does not apply. But even if Greenawalt is wrong,

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<sup>234</sup> The Supreme Court has held with little fanfare or analysis that punishing a criminal conspiracy does not violate the Free Speech Clause. This is so because conspiracies are “intended to induce or commence illegal activities.” *United States v. Williams*, 553 U.S. 285, 298 (2008). Interestingly, the Court looked to the concrete consequences of conspiracy rather than repeating, yet again, the notion that a conspiracy is merely an act. *Id.* at 298-99.

<sup>235</sup> GREENAWALT, *supra* note 37, at 63.

<sup>236</sup> I simplify here; Greenawalt would say “situation-altering utterances.” *See id.* But that definition too would require, essentially, an exchange of promises.

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as Eugene Volokh and others have argued,<sup>237</sup> even if we cannot by fiat or some alchemy transform words into acts, the First Amendment may still require we define an agreement as an exchange of promises.

After all, Volokh, in explaining why we may punish conspiracies consistent with the Free Speech Clause, *also* defined the agreement at its core as, essentially, an exchange of promises.<sup>238</sup> More precisely, Volokh's definition of agreement requires an intention to be "morally or legally bound":

An agreement is essentially a communication that the speaker intends to do something under certain circumstances, and intends to be morally or legally bound to do it, coupled with a communication from the other party that the other party agrees to the proposed deal.

Volokh would apply the imminence test from *Brandenburg v. Ohio* to conspiracy, or a balancing test with *Brandenburg* as one factor,<sup>239</sup> to find conspiracies punishable consistent with the First Amendment. After all, the agreement as defined by Volokh makes more likely the commission of the crime. The agreement probably does not make the commission of the crime, "imminent," but Volokh finesses this problem largely by pointing to the historical pedigree of conspiracy.

Martin Redish and Michael Downey take a different approach: they argue that common law conspiracy — an agreement without an overt act requirement — violates the First Amendment.<sup>240</sup> In their view, an agreement is pure speech. They reject Greenawalt's effort at defining the agreement as conduct that falls outside the First Amendment, and they seem implicitly to reject Volokh's view that we can punish most conspiracies under the *Brandenburg* test.

They would therefore require all conspiracy include an overt act requirement. This overt act would be "intertwined" with the speech that makes up the agreement and would "transform" the earlier speech from protected speech to unprotected speech. The earlier speech would become "nothing more than an element of the non-expressive behavior" constituted by the overt act.

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<sup>237</sup> See Redish & Downey, *supra* note 27 ("Greenawalt's agreement-as-conduct argument is simply wrong."); Volokh, *Speech as Conduct*, *supra* note 37, at 1283-84.

<sup>238</sup> See Volokh, *Speech Integral*, *supra* note 225, at 33-34.

<sup>239</sup> See *id.* at 33. Volokh relies on three factors to justify punishing conspiracies: (i) courts have long excluded such agreements from free speech protections, (ii) conspiracy yields tangible consequences, and (iii) the speech used to create a conspiracy has very little social value. *Id.*

<sup>240</sup> See Redish & Downey, *supra* note 27, at 721.

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First, it seems they have essentially committed the same sin as Greenawalt: using some unexplained process to transform words into acts. Using their example, when a bank robber and driver utter the words of agreement about robbing a bank, that speech enjoys First Amendment protection; but when they take steps to rob the bank, those overt acts retroactively rob the earlier words of their protection. Maybe, but it seems weird. Their solution parallels the very type of alchemy they critique, such as the argument that the agreement itself is the act, or the once-popular formula that we may punish speech that is “brigaded with action.”<sup>241</sup>

In any event, if we were to adopt the Redish-Downey view, that the Constitution requires proof of an overt act, my tightened definition of agreement would not suffice to take conspiracy outside the ambit of the First Amendment. On the other hand, I suspect Redish and Downey would approve my test as at least a step in the right direction. My definition of agreement at least makes criminal conduct more likely, and it is steps toward that later criminal conduct, according to them, that would allow us to punish the anterior agreement.

In the end, both Greenawalt and Volokh conclude we may only punish conspiracy consistent with the Free Speech Clause because, in their view, conspiracy involves promises or obligation. But they merely assume that conspiracy works this way; neither has noted that courts and statutes do not define the conspiracy as an agreement involving promises. In fact, the diluted definitions courts often supply, “understanding” or “slight connection,” define a crime that could well run afoul of the First Amendment under either a Greenawalt or a Volokh framework. The Free Speech Clause may therefore require my definition of agreement as an exchange of promises.

#### IV. PROFUSION OF SUPPLEMENTAL RULES

Finally, the failure to define “agreement” at the center of a conspiracy has led to a little noticed pathology in the law of conspiracy: a profusion of special rules and jury instructions just for conspiracy cases that practically make up a body of law themselves. They are confusing and, I argue, ultimately unnecessary if we properly define agreement. These rules range from the familiar to the arcane: the requirement of proof of an overt act (an addition to common law

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<sup>241</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring). Volokh critiques this expression as obscuring the obvious: we are still punishing pure speech. See Volokh, *Speech as Conduct*, *supra* note 37, at 1313.

conspiracy);<sup>242</sup> the “slight connection” rule for joining an existing conspiracy;<sup>243</sup> the “mutual understanding” gloss on agreement;<sup>244</sup> the “slight connection” rule for appellate review;<sup>245</sup> the rule barring conviction based on mere presence or association;<sup>246</sup> special rules of *mens rea*, including a requirement both that the defendant intend to agree *and* intend to commit the crime;<sup>247</sup> the buy-sell exception,<sup>248</sup> and the Tenth Circuit’s special “interdependence” requirement.<sup>249</sup>

Many of these rules and guidelines work at cross-purposes. The rule that the jury may find an agreement based merely on “common understanding” might appear to dilute the definition of agreement too much, so courts *also* warn the jury, with another supplemental instruction, that they may not find an agreement based on mere presence or guilt by association.<sup>250</sup>

My proposal to define agreement as an exchange of promises will render many of these rules obsolete, or at least allow courts to relate these chaotic and confusing rules back to a core motivating definition.

#### A. *Mens Rea*

The supplemental instructions and legal principles concerning conspiratorial *mens rea* present perhaps the strongest example of the superstructure of special conspiracy rules run amok. Federal courts typically require three or four different *mens rea* in the same case:

1. knowledge of the conspiracy,
2. knowingly and voluntarily joining the conspiracy,

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<sup>242</sup> See *United States v. Shabani*, 513 U.S. 10, 13-14 (1994) (noting common law conspiracy did not require proof of an overt act).

<sup>243</sup> *United States v. Tran*, 568 F.3d 1156, 1164 (9th Cir. 2009).

<sup>244</sup> See *United States v. Collins*, 799 F.3d 554, 589 (6th Cir. 2015) (“Even a tacit or mutual understanding among conspirators is sufficient.”) (quoting *United States v. Gardner*, 488 F.3d 700, 710 (6th Cir. 2007)).

<sup>245</sup> See *United States v. Durrive*, 902 F.2d 1221, 1228 (7th Cir. 1990) (noting but rejecting rule).

<sup>246</sup> See *Tran*, 568 F.3d at 1166.

<sup>247</sup> See e.g., *United States v. Paz-Alvarez*, 799 F.3d 12, 21 (1st Cir. 2015).

<sup>248</sup> *State v. Allan*, 83 A.3d 326, 335 (Conn. 2014) (“The Circuit Courts of Appeals uniformly acknowledge that evidence of a mere buyer-seller relationship, without more, does not constitute a conspiracy to distribute drugs.”).

<sup>249</sup> See *United States v. Heckard*, 238 F.3d 1222, 1229 (10th Cir. 2001) (listing as the fourth elements of conspiracy: “interdependence among the alleged conspirators”).

<sup>250</sup> See *United States v. Lyons*, 53 F.3d 1198, 1207 (11th Cir. 1995) (approving trial judge’s instruction warning against conviction based on mere presence).

3. the specific intent to join the conspiracy, *and*
4. the specific intent to commit the crime

The First Circuit, for example requires the government establish *all four*;<sup>251</sup> the Second Circuit requires only three.<sup>252</sup> States impose similar redundancies.<sup>253</sup>

Moreover, these courts require these three or four *mens rea* — in addition to the requirement that the jury find an agreement — with no explanation how they all relate. This multiplicity of intent requirements likely confuses jurors and continues to confuse courts.<sup>254</sup> This profusion of *mens rea* raises numerous questions of redundancy, such as why courts require proof of the knowledge elements when the specific intent elements seem to include them, at least in most cases.

But I want to focus on the central redundancy: the requirement of any *mens rea at all* in addition to the agreement requirement. After all, if the defendant agreed with another to commit a crime, why must we *also* find that he intended to enter the agreement *and* that he intended that the agreement succeed? Aren't all those concepts already covered by the concept of "agree"?<sup>255</sup> If courts explained that these additional *mens rea* requirements were really just a gloss on "agreement," the instruction would likely be helpful. As it is, however, the instruction ends up simply causing confusion, because courts fail to explain the relationship between the requirement that the jury find an "agreement" and the requirement it find both kinds of intent.

My proposal defining agreement as an exchange of promises would clarify the landscape. A promise to commit a crime, or help further its

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<sup>251</sup> *Paz-Alvarez*, 799 F.3d at 21.

<sup>252</sup> *United States v. Valle*, 807 F.3d 508, 515-16 (2d Cir. 2015) (requiring only three of these, leaving out the third numbered one).

<sup>253</sup> See MODEL PENAL CODE § 5.03 (AM. LAW INST. 2015). The MPC commentary suggests a few reasons the drafters added this purpose prong: most fundamentally, to tighten up the nebulous nature of "agreement." They also said a purpose prong would be helpful for special types of conspiracy cases, including vendor cases such as *United States v. Falcone*, 311 U.S. 205 (1940). For these special types of cases that already involve a legitimate commercial agreement, it does make sense to emphasize that the *mens rea* should be seen as purpose to use that agreement to further a criminal purpose; N.J. STAT. ANN. § 2C:5-2 (2002) (indicating "with purpose to promote"); TEX. PENAL CODE ANN. § 15.02 (1994); *Allan*, 83 A.3d at 333-34 ("Conspiracy is a specific intent crime, with the intent divided into two elements: (a) the intent to agree or conspire and (b) the intent to commit the offense . . .").

<sup>254</sup> See *United States v. Gigante*, 982 F. Supp. 140, 169 (E.D.N.Y. 1997) ("Historically, the intent element for conspiracies has been criticized as a difficult and complex creature.").

<sup>255</sup> *Id.*

ends, by necessity includes the *mens rea* that the promisor intends that the crime occur. That is, a court could instruct juries that conspiracies consist of an agreement to commit a crime, and an agreement, in turn, means an exchange of promises to do so. The court could elaborate that a promise means that the defendant really promised and intended to carry out the mission. But this additional gloss will come as no surprise to anyone who understands what a promise is. It will also make clear that the jury is not required to find intent in addition to agreement; rather, agreement and promise already include this intent.

### B. Overt Act Requirement

Most state conspiracy statutes<sup>256</sup> and some federal ones<sup>257</sup> require proof of an overt act in furtherance of the conspiracy. We can view this overt act requirement in two ways. First, we can view it as another *ad hoc* rule added to the superstructure to cure the defects that arise from a weak definition of agreement. If we properly defined agreement, we might not need proof of an overt act; as it is, the courts have reasoned that the overt act requirement helps show that the criminal plan is serious, and does not reside merely in the heads of the conspirators.<sup>258</sup>

But we must also address whether the overt act requirement, *ad hoc* or not, succeeds in fixing or ameliorating the defects in a weak definition of “agreement.” If it does, then the requirement undermines my project to some extent.

A closer look at the overt act requirement shows, however, that it actually performs little work in fixing a weak definition of agreement. First, as noted in the introduction, the overt act requirement can be satisfied by one of the other conspirators.<sup>259</sup> This requirement thus does nothing to help in mere presence cases. For example, consider the common cases described above in which a defendant is arrested in a car or house with others who possess or distribute drugs. Those others have taken an overt act in furtherance of the conspiracy to distribute drugs by possessing or actually distributing them; the

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<sup>256</sup> See, e.g., LAFAVE, *supra* note 7, § 12.2(b).

<sup>257</sup> See 18 U.S.C. § 371 (2012).

<sup>258</sup> See *Yates v. United States*, 354 U.S. 298, 334 (1957) (“The function of the overt act in a conspiracy prosecution is simply to manifest that the conspiracy is at work and is [not] a project resting solely in the minds of the conspirators . . . .”); *People v. Ribowsky*, 568 N.E.2d 1197, 1202 (N.Y. 1991).

<sup>259</sup> See *People v. McGee*, 399 N.E.2d 1177, 1181-82 (N.Y. 1979) (discussing how “the overt act of any conspirator may be attributed to other conspirators to establish the offense of conspiracy”).

requirement is thus met and the jury need only find that the defendant agreed, a requirement they often find even when the defendant was merely present.

Second, the overt act requirement can be satisfied by the smallest of steps toward the crime.<sup>260</sup> This step need not be criminal itself.<sup>261</sup> When a telephone call or another conversation, or even mere silence, suffice to satisfy the overt act requirement, then this requirement performs almost no function beyond the agreement itself.<sup>262</sup> I say almost because courts do refuse to find that the discussions used for the agreement itself count as the overt act.<sup>263</sup>

Finally, one of the most common federal conspiracy charges, drug conspiracy, does not require an overt act,<sup>264</sup> and many other federal criminal conspiracy statutes such as money laundering<sup>265</sup> or Hobbs Act conspiracy<sup>266</sup> are trending away from an overt act requirement. Several state conspiracy statutes also do not require an overt act.<sup>267</sup>

### C. Buy-Sell Cases

Another court-created rule we must add to the superstructure of special conspiracy rules is called the “buy-sell” exception. Imagine A sells drugs to B in a one-off transaction. We can charge A with distribution and B with possession, naturally, but can we also charge both with conspiracy to distribute drugs? On the surface one might imagine that we can, but the trend in federal and state courts alike has been to reject conspiracy under the buy-sell exception.<sup>268</sup>

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<sup>260</sup> See *State v. Dent*, 869 P.2d 392, 398 (Wash. 1994).

<sup>261</sup> *People v. Smith*, 337 P.3d 1159, 1168 (Cal. 2014).

<sup>262</sup> See *Dent*, 869 P.2d at 398 (“[E]ven mere silence can be an overt act.”) (quoting *State v. Ray*, 768 S.W.2d 119, 121 (Mo. Ct. App. 1988)); *Redish & Downey*, *supra* note 27 at 708-09 (stating “virtually any act is capable of satisfying the overt act requirement”).

<sup>263</sup> *People v. Menache*, 470 N.Y.S.2d 171, 174 (N.Y. App. Div. 1983). (stating “[c]onversation among conspirators may merely be cementing the agreement itself” and therefore not proof of an overt act).

<sup>264</sup> See *United States v. Shabani*, 513 U.S. 10, 15 (1994).

<sup>265</sup> *Whitfield v. United States*, 543 U.S. 209, 214 (2005).

<sup>266</sup> See e.g. *United States v. Salahuddin*, 765 F.3d 329, 338 (3d Cir. 2014).

<sup>267</sup> See FLA. STAT. § 777.04 (2008); *State v. Larmand*, 780 S.E.2d 892, 895 (S.C. 2015) (“Because the crime of conspiracy is the agreement itself, the State need not show any overt acts in furtherance of the common scheme or plan.”); LAFAVE, *supra* note 7, § 12.2 (collecting states).

<sup>268</sup> See *United States v. Delgado*, 672 F.3d 320, 333 (5th Cir. 2012); *United States v. Moran*, 984 F.2d 1299, 1302 (1st Cir. 1993); *State v. Allan*, 83 A.3d 326, 335 (Conn. 2014) (“The Circuit Courts of Appeals uniformly acknowledge that evidence

Under the buy-sell exception, the courts will not convict a defendant of conspiracy merely based upon a single drug transaction. Rather, the government must prove that in addition to this transaction, the parties agreed to commit some future drug transaction.<sup>269</sup>

This exception makes abundant intuitive sense, but when the courts attempt to explain why these cases are exceptions to conspiracy, they fall short. First, courts will say that A and B are conspiring to commit different crimes: A to sell and B to possess.<sup>270</sup> But as phrased above, they actually are conspiring to commit the same crime: the sale of drugs. B has agreed to help A sell drugs, by buying the drugs.<sup>271</sup> Other reasons the courts adduce similarly fall short in actually justifying the exception.

My proposal explains the exception better than the current explanations. When A sells drugs to B, they have *not* agreed to anything. Rather, they have engaged in a simple barter, a real-time trade. A hands the drugs to B, who simultaneously hands the money to A. Neither has made a promise to commit a crime but rather each is currently committing it.<sup>272</sup> My proposal also makes sense of the courts' additional requirement to establish a conspiracy: the government must prove not only this transaction but some future one. If the parties agree to a future one, they *are* promising to commit a crime, and they have therefore agreed.

This explanation parallels the same view Farnsworth has taken with respect to the difference between barter and contract. He argues that when a person hands money over for some good, they have not created a contract because neither has made any promise as to the future. I quote Farnsworth for this point at length because his explanation so closely parallels the courts' buy-sell exception. The law of contracts, he says,

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of a mere buyer-seller relationship, without more, does not constitute a conspiracy to distribute drugs.”).

<sup>269</sup> See *Allan*, 83 A.3d at 340. (stating “the state must proffer evidence of an agreement in *addition* to the purchase and sale agreement between the two parties”).

<sup>270</sup> See *id.* (“[O]ne has the intention to buy and the other has the intention to sell.”).

<sup>271</sup> Cf. *Ocasio v. United States*, 136 S. Ct. 1423, 1426 (2016) (finding a victim of extortion can conspire with the extortioner since by making the payment the victim is promising to assist the extortioner carry out the crime).

<sup>272</sup> The seller has likely implicitly promised that the substance is the drug advertised and the correct weight, but this warranty is not an agreement to commit a crime.

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is therefore concerned with exchanges that relate to the *future* because a “promise” is a commitment as to future behavior. Examples of exchanges that do not include such a commitment (and so do not involve a contract in this sense) are the transaction of barter, in which the parties simply make a present exchange of, say, apples for oranges, and the present (or “cash”) sale, in which the parties make a present exchange of, say, apples for money.<sup>273</sup>

This explanation also captures why we would like to exempt one-off drug transactions from conspiracy law. The justifications for punishing conspiracy as a crime separate from the target crime involve the special danger of persons forming confederacies to commit future crimes. The very confederacy represents the danger; and a confederacy requires some projection through time.<sup>274</sup> Agreeing to a drug transaction tomorrow satisfies this temporal aspect because it creates a confederacy for a day. Buying and selling in the moment do not create any lasting confederacy.

#### CONCLUSION

Critics have long complained that conspiracy risks punishing mere thought or speech; courts have confidently responded that the agreement at the center of a conspiracy guards against such dangers. But those same courts have failed to define “agreement” in a way that ensures it performs the work asked of it. In fact, courts do not define agreement at all.

I have turned attention to this neglected area of law and proposed a robust definition of agreement in conspiracy as an exchange of promises. Such a definition best justifies punishing conspiracies by establishing that the parties to the conspiracy are serious and likely to carry out the crime. My definition also supplies a concrete yardstick for juries to apply to the often circumstantial evidence presented in conspiracy cases.

Finally, agreement as an exchange of promises greatly simplifies the law of conspiracy. By failing to define agreement, courts have found it necessary to erect a superstructure of supplemental rules and jury instructions to compensate, rules that confuse juries and courts alike.

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<sup>273</sup> FARNSWORTH, *supra* note 100, at 4.

<sup>274</sup> See *United States v. Moran*, 984 F.2d 1299, 1302-03 (1st Cir. 1993) (stating one-off sale does not present the “special set of dangers” that stem from the “jointness” of a real conspiracy).

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Restoring a strong definition of agreement will eliminate these supplemental rules, or at least make sense of them.

This article highlights many of the drawbacks to conspiracy, including numerous convictions based on mere presence or words; nevertheless, I do not advocate abandoning conspiracy. Rather, I argue we return to its foundational premises and take seriously its defining principle: an *agreement* to commit a crime. We must not allow courts to point to the centrality of the agreement as mere rhetoric and then allow those courts to drain that requirement of any real meaning.