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# THE MENS REA REQUIREMENT FOR CONSPIRACY: THE MODEL PENAL CODE AND THE PROGRESSIVE LAW OF JUDGE LEARNED HAND

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This article will explore the judicial opinions of Judge Learned Hand of the Second Circuit concerning the mens rea requirement for conspiracy. It was in the development of a progressive mens rea requirement that Judge Hand made his greatest contribution to conspiracy law. His opinions will be discussed with regard to the American Law Institute's Model Penal Code and official comments from Tentative Draft No. 10 since many of his thoughts were incorporated by its drafters.<sup>1</sup> The article will also develop an analytical framework for the mens rea requirement for conspiracy. Hopefully, this framework will clarify an admittedly complex and seemingly contradictory body of law. It should be emphasized that this article does not attempt to deal with the many evidentiary problems which plague conspiracy law.

## I. BACKGROUND—CONSPIRACY

Conspiracy is defined by the Code,<sup>2</sup> Judge Hand,<sup>3</sup> and the current law<sup>4</sup> as an inchoate crime; that is, the commission of the crime is not based on the occurrence of the substantive evil the law seeks to prevent, but rather rests upon an agreement to commit that evil. Therefore, conspiracy deals only with situations in which either the agreement to commit a substantive offense has not yet reached the level of an attempt, or the agreed upon plan has failed prior to an attempt.

Under the Code, conspiracy merges into the substantive offense when the defendant's actions reach the level of an attempt.<sup>5</sup> The

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1. MODEL PENAL CODE § 5.03, Comments at 107-33 (Tent. Draft No. 10, 1960) [hereinafter cited as Comments].

2. *Id.* at 96-97. The same view is taken in THE PROPOSED CRIMINAL CODE FOR THE STATE OF MISSOURI (hereinafter cited as the MISSOURI PROPOSED CRIMINAL CODE), § 9.020(1) (1973).

3. *See, e.g.*, United States v. Austin-Bagley Corp., 31 F.2d 229, 233 (2d Cir. 1929).

4. *See, e.g.*, United States v. Feola, 95 S. Ct. 1255, 1263 (1975).

5. MODEL PENAL CODE § 1.08(1)(b), Comments at 32-33 (Tent. Draft No. 5, 1956); Comments, *supra* note 1, at 98-100.

drafters of the Code chose not to prescribe punishment for an agreement to commit a crime once the crime itself has been committed. However, as perceived by Judge Hand<sup>6</sup> and the current law,<sup>7</sup> conspiracy does not merge into the substantive offense, but remains an independent crime regardless of whether the substantive offense is ultimately committed.

The propriety of punishing conspiracy even after the commission of the substantive offense is not an issue in this article. Here the only concern is with the mens rea of the parties at the time they formed their agreement. Therefore, although most of the cited decisions of Judge Hand and the current law involve the actual commission of substantive offenses, this article will examine only the inchoate conduct completed prior to any attempt to commit the substantive offense.

In order to understand some of the more controversial aspects of conspiracy, one must examine the social policies behind punishing such inchoate behavior. Because a conspiracy involves an agreement between two or more persons to commit a crime, it is viewed as more dangerous than the acts of an individual and, thus, warrants earlier intervention by the legal system. There are several reasons for this fear of group action. First, it is believed that there is psychological reinforcement for the decision to commit the crime and social pressure against a decision to postpone or reject its commission.<sup>8</sup> Second, even if one removes himself from the conspiracy, other conspirators may still complete the act which he helped set in motion at an earlier date.<sup>9</sup> Third, it is believed that there is a greater likelihood of accomplishing the crime due to the increased number of participants.<sup>10</sup>

To combat this danger of group action, society has permitted its law enforcement officials to intervene any time after an agreement has been formed and accompanied by an overt act.<sup>11</sup> The hope is that crime prevention will be served by allowing the implementation of isolation and rehabilitation techniques before the criminal

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6. See, e.g., *United States v. Austin-Bagley Corp.*, 31 F.2d 229 (2d Cir. 1929).

7. See, e.g., *Callanan v. United States*, 364 U.S. 587, 589-90 (1961).

8. *Id.* at 593-94; see also Note, *Criminal Conspiracy: Bearing of Overt Acts Upon the Nature of Crime*, 37 HARV. L. REV. 1121, 1123 (1924).

9. Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 924 (1959).

10. See *Callanan v. United States*, 364 U.S. 587, 593-94 (1961); Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276, 283-84 (1948).

11. See text accompanying notes 15-18 *infra*.

activity reaches the level of an attempt.<sup>12</sup>

Since the defendant has already decided to risk punishment for the commission of the substantive offense, punishment for conspiracy probably has little deterrent value.<sup>13</sup> For example, the law penalizes murder partially for the purpose of discouraging similar anti-social conduct. If one is planning to murder, the penalty for conspiracy will not have any additional deterrent effect above and beyond the penalty imposed for committing the substantive offense. However, there are two possible exceptions to this reasoning. First, a person may feel that his chances of being apprehended would be small if the crime were successfully completed, but large prior to the time of commission. Second, perhaps a penalty for conspiracy will force a person contemplating criminal conduct to consider the consequences at an earlier date.

## II. ELEMENTS OF CONSPIRACY

Section 5.03 of the American Law Institute's Model Penal Code defines "conspiracy" as follows:

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

- (a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
- (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.<sup>14</sup>

*A. The first point of permissible legal intervention is after the formation of an agreement to promote or facilitate the commission of a crime and the occurrence of an overt act which brings the agreement to life.*

Because of the fear of group conduct, conspiracy as defined by

12. Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276, 284 (1948).

13. Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 925 & n.27 (1959).

14. MODEL PENAL CODE § 5.03 (Tent. Draft No. 10, 1960). In the MISSOURI PROPOSED CRIMINAL CODE § 9.020, the definition varies slightly:

- (1) A person is guilty of conspiracy with another person or persons to commit an offense if, with the purpose of promoting or facilitating its commission he agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such offense.

the Code,<sup>15</sup> Judge Hand,<sup>16</sup> and most current law<sup>17</sup> only requires an agreement to commit an act, and the performance of an overt act, no matter how insignificant,<sup>18</sup> in furtherance of the agreement. In contrast, an individual not a member of a group can be punished only if he has taken a "substantial step" toward the commission of a crime beyond the stage of mere preparation.<sup>19</sup>

*B. The object of a conspiratorial agreement must be the commission of a crime.*

One tendency under the common law was to construe broadly the object of the conspiracy in order to minimize antisocial group activity.<sup>20</sup> Consequently, members of groups were prosecuted for conspiracy to commit acts which would not have been criminal if performed by a single individual.<sup>21</sup> Some states follow the common law and still view agreements to "injure the public morals" as criminal conspiracies.<sup>22</sup> The American Law Institute (A.L.I.) rejected this broad construction of the conspiratorial object, believing that conspiracies whose objects were defined as generally "malicious," "immoral," "oppressive," etc., were too vague to be made the object of criminal prosecution.<sup>23</sup> The A.L.I.'s approach concurs with Judge Hand's view that immoral conduct is not enough to constitute

15. MODEL PENAL CODE § 5.03(1), (5) (Tent. Draft No. 10, 1960). The MISSOURI PROPOSED CRIMINAL CODE § 9.020(4), also requires overt acts.

16. See, e.g., *United States v. Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944); *United States v. Austin-Bagley Corp.*, 31 F.2d 229, 233 (2d Cir. 1929).

17. See, e.g., CAL. PENAL CODE § 184 (West 1970); ILL. ANN. STAT. ch. 38, § 8-2 (Smith-Hurd Supp. 1975); § 556.130, RSMo 1974 Supp.; N.Y. PENAL LAW § 105.20 (McKinney 1975); *contra*, e.g., ALA. CODE tit. 14, § 104 (1959); WASH. REV. CODE § 9.22.020 (1961).

18. See Comments, *supra* note 1, at 141 (for the Code's position); *United States v. Austin-Bagley Corp.*, 31 F.2d 229, 233 (2d Cir. 1929) (for Judge Hand's position); e.g., § 556.130, RSMo 1974 Supp. (previous Missouri law excepted felonies upon the person of another in § 556.130 RSMo 1969); *People v. Sullivan*, 113 Cal. App. 2d 510, 248 P.2d 520 (1952), *cert. denied*, 345 U.S. 955 (1953); *People v. Klinkenberg*, 90 Cal. App. 2d 608, 204 P.2d 47 (1949) (for illustrations of current law's position).

19. R. PERKINS, CRIMINAL LAW 557 (2d ed. 1969).

20. See, e.g., *State v. Dalton*, 134 Mo. App. 517, 114 S.W. 1132 (St. L. Ct. App. 1908).

21. See, e.g., *State v. Loser*, 132 Iowa 419, 422-24, 104 N.W. 337, 338 (1905); *Commonwealth v. Donoghue*, 250 Ky. 343, 349-50, 63 S.W.2d 3, 5 (1933).

22. See, e.g., ALA. CODE tit. 14 § 103 (1959); CAL. PENAL CODE § 182 (West 1970); WASH. REV. CODE § 9.22.010 (1961). Missouri amended § 556.120 in 1973, deleting the object of committing "any act injurious to the public health or public morals" as sufficient to constitute a conspiracy, but retaining restrictions against specific false or malicious agreements to indict another for any offense, procure another to be charged or arrested for any offense, or move or maintain any suit.

23. Comments, *supra* note 1, at 98, 102-03. The same view is taken in the MISSOURI PROPOSED CRIMINAL CODE § 9.020, Comment at 117.

criminal conspiracy.<sup>24</sup>

Since the major purpose of conspiracy law is to prevent the commission of substantive crimes, only agreements whose objects are criminal should be punishable. When distinguishing civil wrongs from criminal acts, the legal system should strive for maximum predictability. Providing criminal punishment for an agreement to commit a non-criminal act definitely fails this test.

*C. The scope of liability for each individual actor is measured by his own culpability.*

The Code's measure of an individual actor's culpability is his "purpose of promoting or facilitating" the commission of a crime.<sup>25</sup> Where an individual conspirator's culpability has been established, it is irrelevant that one or all of the persons with whom he conspired cannot be convicted.<sup>26</sup> Section 5.04 explicitly provides that where the actor is responsible, it is no defense that he conspired with one who was irresponsible or immune from prosecution.<sup>27</sup> Similarly, one party's secret intention not to carry out the agreement does not affect the other party's culpability. In terms of the Code's rationale, conviction would not be based on the actor's promotion or facilitation of a substantive offense, but rather on the concept that such a dangerous individual should be subject to the restraints of the legal system.<sup>28</sup>

The conventional approach under current law looks to the culpability of the conspiracy as a whole in order to define the individual culpability of each actor. Consequently, there must be either at least two guilty conspirators or none.<sup>29</sup>

The Code's view also differs from Judge Hand's. He maintained that at least two conspirators must be capable of being convicted if there is to be a successful prosecution of any one for conspiracy.<sup>30</sup>

The concept of individual culpability under the Code also varies from current law concerning inconsistent verdicts. The conven-

24. See *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940).

25. Comments, *supra* note 1, at 107. The MISSOURI PROPOSED CRIMINAL CODE is in accord, § 9.020, Comment at 117-20.

26. Comments, *supra* note 1, at 104; the MISSOURI PROPOSED CRIMINAL CODE § 9.020, Comment at 117, agrees.

27. MODEL PENAL CODE § 5.04(1)(b), (Tent. Draft No. 10, 1960); Comments, *supra* note 1, at 104, 171-72; *accord*, MISSOURI PROPOSED CRIMINAL CODE § 9.020, Comment at 117.

28. See Comments, *supra* note 1, at 104-05.

29. Comments, *supra* note 1, at 104; *United States v. Chase*, 372 F.2d 453 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967).

30. *United States v. Austin-Bagley Corp.*, 31 F.2d 229, 233 (2d Cir. 1929).

tional view is that the actor's conviction cannot stand if his only alleged co-conspirator has been acquitted.<sup>31</sup> Under the Code, it is irrelevant that a co-conspirator is acquitted, because there is little reason to deny one's culpability because of another's innocence.<sup>32</sup> Furthermore, the Code states that a criminal should not be allowed to go free just because there may have been a miscarriage of justice in the co-conspirator's trial.<sup>33</sup> Judge Hand promulgated similar views in *United States v. Austin-Bagley*,<sup>34</sup> where he held that the acquittal of two co-conspirators was not determinative of the culpability of the other co-conspirators.

### III. ESTABLISHING THE PURPOSE TO COMMIT A PROHIBITED ACT

Having presented a background on conspiracy, the remainder of this article will deal with two principal issues: first, when does mere knowledge of another's unlawful acts or plans constitute purpose to promote or facilitate the commission of a crime;<sup>35</sup> and second, where knowledge does not exist, when can a court find an inference of purpose to promote or facilitate the commission of a crime? The answers to these questions are crucial because, regardless of the elements of the substantive crime, purposefulness is always an element of a conspiracy to commit the crime.<sup>36</sup>

The Model Penal Code has largely adopted Judge Hand's view of conspiracy as it relates to mens rea and the requirement that there be a purpose to promote or facilitate the commission of a crime.<sup>37</sup> Purpose may be established in relation to prohibited conduct, such as importing illicit drugs, or in relation to prohibited results, such as homicide.<sup>38</sup> In either event, the general rule under the Code is that the actor must have the purpose of performing the prohibited conduct or accomplishing the prohibited result.<sup>39</sup>

Perhaps the biggest problem in this area of conspiracy law is that of purposefulness in relation to circumstance elements. A cir-

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31. *United States v. Fox*, 130 F.2d 56, 57 (3d Cir.), cert. denied, 317 U.S. 666 (1942); *People v. James*, 189 Cal. App. 2d 14, 16, 10 Cal. Rptr. 809, 810 (1961).

32. Comments, *supra* note 1, at 106. Accord, MISSOURI PROPOSED CRIMINAL CODE § 9.020, Comment at 117.

33. Comments, *supra* note 1, at 105-06.

34. 31 F.2d 229, 233 (2d Cir. 1929).

35. See generally Comments, *supra* note 1, at 107-09.

36. *Id.* at 109.

37. MODEL PENAL CODE § 5.03(1) (Tent. Draft No. 10, 1960); Comments, *supra* note 1, at 107-09.

38. Comments, *supra* note 1, at 109.

39. *Id.* See also R. PERKINS, CRIMINAL LAW 629 (2d ed. 1969).

cumstance element is a fact which exists independently of an act but may cause the act to be classified as a crime.<sup>40</sup> For example, the age of a female is a fact which exists independently of the act of seduction, but which will result in the classification of the act of seduction as a crime.<sup>41</sup> The problem which circumstance elements creates is most acute in relation to strict liability offenses and will be discussed in Section III. C., *infra*.

A. *Purpose cannot be established where lawful conduct is combined with mere knowledge of planned illegal action.*

Assume that A, knowing of B's illegal plans, agrees to perform a lawful act for B. Can A be convicted of having conspired with B?

The crucial question to be answered under the Code in this situation is whether knowledge is sufficient to find purposefulness to promote or facilitate the commission of a crime when A has acted lawfully. Both Judge Hand<sup>42</sup> and the Code<sup>43</sup> require more than mere knowledge for a finding of purposefulness. In contrast, Judge Parker of the Fourth Circuit believed that a lawful act, combined with knowledge of planned criminal activity, was sufficient to constitute criminal conspiracy.<sup>44</sup>

In *United States v. Falcone*,<sup>45</sup> the conspiracy conviction of a merchant who sold sugar with knowledge that it was being used for the illicit production of whiskey was reversed, Judge Hand stating:

There are indeed instances of criminal liability . . . where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome . . . .<sup>46</sup>

Judge Hand believed that, although the defendant's conduct may have been morally reprehensible, it nevertheless fell short of a part-

40. See generally Comments, *supra* note 1, at 110-13.

41. *Id.* at 110, 112.

42. *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940).

43. Comments, *supra* note 1, at 108-09.

44. *Scales v. United States*, 227 F.2d 581, 589 (4th Cir. 1955), *aff'd*, 367 U.S. 203 (1961).

See also *Backun v. United States*, 112 F.2d 635, 637 (4th Cir. 1940).

45. 109 F.2d 579 (2d Cir.), *aff'd*, 311 U.S. 205 (1940).

46. *Id.* at 581.



nership in crime or a personal advancement of the criminal purpose of the conspiracy.<sup>47</sup>

Under current law, the requirement of purpose to facilitate the commission of a crime is unclear. Some decisions require informed and interested cooperation, or a "stake in the venture," in addition to knowledge,<sup>48</sup> although others hold that knowledge may, in some cases, be sufficient to convict for conspiracy.<sup>49</sup> As the commentary to the Code properly notes, many of the cases requiring intent or purpose stress such facts as quantity sales, the seller's encouragement, and continuity of the relationship in situations where the vendor knowingly sells material for an illegal purpose.<sup>50</sup> However, in some cases, preventing the vendor from conducting business with the vendee when he has knowledge of the vendee's illegal activities may put an unrealistic burden on the vendor who is motivated to make a normal profit.<sup>51</sup> Such a person may not be dangerous enough to require rehabilitation or isolation.<sup>52</sup>

*B. Purpose may be found regarding an implied term in the agreement.*

Implied terms may be properly established as actual parts of a conspiratorial agreement from the express terms if they are indispensable to the commission of the crime.<sup>53</sup> For example, if *A* and *B* conspire to defraud the public in the sale of land, an implied term to use the mails may be inferred if such a use was necessary in order to carry out their scheme.

The problem posed by the use of implied terms may be illustrated by the following hypothetical: *A* and *B* conspire to deal in stolen securities. *B* then makes arrangements to bring the stolen securities across a state line. Can *A* be convicted for conspiracy to bring stolen securities across state lines?

Judge Hand,<sup>54</sup> current law,<sup>55</sup> and the Code<sup>56</sup> have established

47. *Id.*

48. *See, e.g.,* Direct Sales Co. v. United States, 319 U.S. 703, 711-13 (1943).

49. *See, e.g.,* Quirk v. United States, 250 F.2d 909, 911 (1st Cir. 1957), *cert. denied*, 356 U.S. 913 (1958); United States v. Tramaglino, 197 F.2d 928, 930 (2d Cir. 1952).

50. Comments, *supra* note 1, at 107.

51. *Id.*

52. *See* text accompanying notes 8-12 *supra*.

53. *See, e.g.,* Blue v. United States, 138 F.2d 351, 361 (6th Cir. 1943).

54. United States v. Crimmins, 123 F.2d 271, 273 (2d Cir. 1941).

55. *See, e.g.,* Nassif v. United States, 370 F.2d 147, 152-53 (8th Cir. 1966); Fisher v. United States, 324 F.2d 775, 780 (8th Cir. 1963), *reh. denied*, 379 U.S. 873 (1964); Mansfield v. United States, 155 F.2d 952, 955 (5th Cir.), *cert. denied*, 329 U.S. 792 (1946); Oliver v. United States, 121 F.2d 245, 250 (10th Cir. 1941).

56. *See* Comments, *supra* note 1, at 111. Although the Code discusses this problem in

purpose to promote or facilitate the commission of a crime through inference from implied terms in the agreement. In *United States v. Crimmins*,<sup>57</sup> Judge Hand used the theory that implied terms in interstate commerce crimes could establish the circumstance element required to create a federal offense (crossing of state boundaries). He reasoned that knowledge that the items would travel or would naturally have to travel through interstate commerce met the requirement of purpose to have them cross state lines, thus allowing prosecution. A finding of a lack of such knowledge, though, would mean the purpose requirement for the implied term would be unfulfilled, since a finding of conspiratorial liability would then go beyond the terms of the understood agreement.

Instead of making the interstate transportation of stolen items a circumstance element of the offense, however, the drafters of the Code believed it should only be relevant as a basis for obtaining federal jurisdiction,<sup>58</sup> thus vitiating the need to find purpose in that regard. The Supreme Court recently adopted the Code's view in *United States v. Feola*,<sup>59</sup> in which the Court stated that knowledge of the victim's identity as a federal agent was not necessary for conviction of conspiracy to assault a federal official. The Court said:

. . . we hold that where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of the substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense.<sup>60</sup>

Under the formulation outlined in the Code<sup>61</sup> and *Feola*,<sup>62</sup> if the circumstance element either was an express term of the agreement between the parties or actually occurred through commission of the substantive offense, knowledge of the circumstance element need not be shown. Although this eliminates the necessity of considering jurisdictional implied terms for acts which are crimes even without such terms (e.g., theft or assault), it should be noted that inferences

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the context of circumstance elements, it appears to recognize Judge Hand's view that liability should be imposed in this situation if the court finds that there is an "implied term in the agreement" that securities would be brought across interstate boundaries.

57. 123 F.2d 271, 273 (2d Cir. 1941).

58. Comments, *supra* note 1, at 112.

59. 95 S. Ct. 1255 (1975).

60. *Id.* at 1269.

61. Comments, *supra* note 1, at 112.

62. 95 S. Ct. 1255, 1269 (1975).

of purpose from implied terms may still establish other elements as parts of conspirators' plans.<sup>63</sup>

By viewing these circumstance elements as substantive parts of the offense and thus requiring inferences of purpose regarding such implied terms, Judge Hand imposed a greater burden of proof on the prosecution and afforded greater protection to the defendant. Such a view, however, also increased the temptation to weaken the purpose requirement, so that the net effect of *Feola* may be minimal.<sup>64</sup>

Judge Hand's writings reveal some inconsistencies as to the required specificity of an implied term sufficient to establish purpose. In *United States v. Tannuzzo*,<sup>65</sup> the court indicated that, even though the defendant probably would have been willing to have the goods sold across state lines, this did not constitute an implied term in the agreement. Judge Hand<sup>66</sup> did not participate in that decision, although he did write a pre-conference memorandum on the subject in which he disagreed with the majority opinion's factual conclusion:

There was enough to hold Vespole in the testimony of Dusatnick that in Vespole's presence he was told by Mike that they were moving the stuff from one drop to another but that all would come right. This is within our decision in *United States v. Crimmins*. Vespole knew that they were moving it where they could and became party to where they chose to move it.<sup>67</sup>

In this situation, Hand equated a willingness to have the goods moved with an implied term to have the goods moved. This apparently is a divergence from his own purposefulness standard which he usually so staunchly defended. However, this memorandum by Judge Hand might be better analyzed under the reasoning in Section IV of this article, relating to liability for acts of co-conspirators

63. *Id.*

64. *Id.* at 1266. Justice Blackman noted that Hand's analysis in *Crimmins* had been rejected by some circuits, and that most avoided it by finding the required knowledge through inference from the scope of the conspiratorial agreement. He also criticized Hand by saying that the *Crimmins* doctrine could not have been applied in that case, since the substantive offense proscribed clearly wrongful conduct which could not have been engaged in without an intent to accomplish the forbidden result, and thus the requisite intent was present. *Id.* at 1267.

65. 174 F.2d 177, 179-80 (2d Cir.), *cert. denied*, 338 U.S. 815 (1949).

66. Augustus Hand, however, wrote the opinion.

67. L. Hand, Pre-Conference Memorandum: *United States v. Tannuzzo*, at 2 (1949). (Hand Papers on file at Harvard Law School. I gratefully acknowledge permission from the executor of the Hand estate to examine and quote from this memorandum.)

within the common purpose of the conspiracy. In any event, Judge Hand drew the line clearly in *United States v. Penn*<sup>68</sup> when he said, “[m]en do not conspire to do that which they entertain only as a possibility . . . .”<sup>69</sup>

The social purposes of conspiracy law are met when an implied term establishing purpose is found to exist. When defendants enter into a conspiracy via a plan, some of whose terms are implicit, the danger of concerted action and the psychological reinforcement of group activity are as great as in cases in which the terms of the conspiracy are explicit.

C. *Conspiratorial purpose to commit strict liability crimes can exist despite defendant's ignorance of circumstance elements.*

In the above section, circumstance elements were not necessary to establish the commission of a crime, but were mainly important in determining jurisdiction. In a strict liability crime, however, there is no criminal act without the presence of the circumstance element in question. The problem in this section can best be illustrated by the following hypothetical: A and B conspire to seduce C without the use of force or threats. Unknown to A and B, C is only sixteen years old. Can A and B be convicted for conspiracy to commit statutory rape?

This area of conspiracy law is one of the most complex and controversial. Liability for conspiracy still hinges on a showing that the actor had the purpose to promote or facilitate the commission of a crime, even though the substantive crime itself has no mens rea requirement.<sup>70</sup> The rationale for imposing liability in this situation is that if the object of the agreement (to seduce C) is carried out, then the conduct which constitutes the substantive crime (the seduction of a girl under the age of 18) will necessarily be accomplished. Therefore, since the agreement *necessarily* embodies the prohibited conduct, the purpose to promote or facilitate the commission of a crime may be inferred despite the actor's ignorance of circumstance elements. Those advocating liability in such cases also reason that where knowledge is not required for conviction of the substantive offense, it need not be present for conviction of conspiracy either, if the object of the conspiracy necessarily includes the

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68. 131 F.2d 1021 (2d Cir. 1942).

69. *Id.* at 1022.

70. Comments, *supra* note 1, at 110, 112-13.

prohibited conduct.<sup>71</sup> In other words, the purpose to commit an act, regardless of any intention to act criminally, is all that is required.<sup>72</sup>

However, if the object of the conspiracy only includes a possibility of prohibited conduct, the conspiratorial requirement of a purpose to promote or facilitate the commission of a crime is not met.<sup>73</sup> For example, if *A* and *B* conspire to seduce the first girl they talk to, the requisite purpose would be lacking. Because there is no guarantee that the first girl they talk to will be under age 18, the government should not intervene at the time of the agreement.

The Code gives a qualified vote of support for the above analysis, but leaves the issue open for further judicial development:

Under Section 5.03(1)(a) it is enough that the object of the agreement is "conduct which constitutes the crime," thus importing the mental state required by the substantive offense, except as to result elements, where purpose clearly is required . . . . Although the agreement must be made "with the purpose of promoting or facilitating" the commission of the crime, we think it strongly arguable that such a purpose may be proved although the actor did not know of the existence of a circumstance which does exist in fact, when knowledge of the circumstance is not required for the substantive offense. Rather than press the matter further in the Draft, we think it wise to leave the issue to interpretation . . . .<sup>74</sup>

Judge Hand adopted a similar position in support of conspiracy convictions in strict liability crimes in *United States v. Mack*.<sup>75</sup> There, the object of the agreement was that no disclosure be made to anyone concerning the activities of a prostitute. Judge Hand found that carrying out the object of this agreement would necessarily constitute the prohibited conduct of failing to register her as an alien within thirty days and, therefore, the finding of intent was proper even though the actor had not been previously aware of her alienage or the registration requirement.

A contrary view seems to be presented in *United States v. Crimmins*.<sup>76</sup> Although Judge Hand based his decision on the absence of an implied term, the case is famous for his "red light"

71. *Id.*; *cf.* *United States v. Mack*, 112 F.2d 290, 292-93 (2d Cir. 1940); *Wilkerson v. United States*, 41 F.2d 654, 656 (7th Cir. 1930).

72. In *United States v. Feola*, the Court explicitly stated that it was saving this question for another day. 95 S. Ct. 1255, 1267 (1975).

73. *Cf.* *United States v. Crimmins*, 123 F.2d 271, 273 (2d Cir. 1941).

74. Comments, *supra* note 1, at 113.

75. 112 F.2d 290 (2d Cir. 1940).

76. 123 F.2d 271, 273 (2d Cir. 1941).

example.<sup>77</sup> Judge Hand reasoned that one could not conspire to run a red light which he did not know existed. The most one could do would be to conspire to drive recklessly, an act which would not necessarily constitute the substantive crime of running a red light. His reasoning, although basically sound, might be carried a step further. If one conspires to drive recklessly, there is only a possibility that he will run a red light. Similarly, if *A* and *B*, being unfamiliar with a town, agree to drag race from point *X* to point *Z* on a map, they will not have formed a conspiracy to run the red light at point *Y* midway between. Because the light may be green when they race past point *Y*, there is only a *possibility* that the object of the conspiracy and the prohibited action will be identical. However, if *A* and *B* agree, while sitting under a stoplight of which they are unaware, to begin the race as soon as the blue Ford passes, a police officer overhearing their conversation and knowing the light will still be red when the Ford passes could arrest them for conspiracy to run the red light. Here the concept of strict liability becomes relevant; the object of the agreement would *necessarily* constitute the prohibited conduct.

Although it appears that the Code views *Crimmins* and *Mack* as contradictory cases,<sup>78</sup> the “red-light” example in *Crimmins* is not a rejection of the reasoning in *Mack*. In *Crimmins*, *A* conspired with *B* to deal in stolen securities. The court found that there was not an implied term to deal in interstate securities and that *A* had no knowledge of *B*’s activities with interstate securities. A close examination of the facts in *Crimmins* reveals that the prerequisites for a *Mack*-type (strict liability) analysis are missing. An agreement to deal in stolen securities does not necessarily include an agreement to bring stolen securities across state lines. It is conceivable that *A* intended to deal only in intrastate securities.<sup>79</sup> Therefore, even though strict liability as to the interstate element would exist in the completed crime, the agreement entertained only a possibility of dealing in interstate securities. In *Mack*, the agreement to keep the activities of the prostitute secret necessarily involved the prohibited conduct of failing to register her as an alien.

In strict liability cases the rationale for punishing conspiracy relates to the danger involved in waiting until an attempt actually

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77. For a discussion of Hand’s “red-light” example in a different context, see *United States v. Feola*, 95 S. Ct. 1255, 1266-67 (1975).

78. See Comments, *supra* note 1, at 113 & n.64.

79. See *United States v. Crimmins*, 123 F.2d 271, 273 (2d Cir. 1941).

occurs. Why should law enforcement officials be forced to wait until the sixteen-year-old is being seduced before they can act? To suspend legal intervention in the hope that the conspiracy might fail prior to an attempt, or that the conspirators might become aware of the circumstance element and change their minds, may be too costly to society. The object of the agreement already embodies the conduct subject to the strict liability penalties and, therefore, it is thought that the conspiracy should be nipped in the bud. The same rationale concerning crime prevention exists in strict liability cases as in the conventional conspiracy situation, except that in the former the conspirator might gain knowledge of the circumstance element and change his mind.

Those who oppose finding purpose in strict liability offenses where circumstance elements were unknown to the actor argue that the conspirators, for example, might see the stoplight and terminate the race. They argue that one cannot form the requisite purpose for conspiracy without knowledge of the circumstances.<sup>80</sup> This objection is applicable to any conspiracy to commit an offense containing a circumstance element. To find a purpose to promote or facilitate the commission of a crime where there is neither intent to act criminally nor knowledge of the circumstances which make one's contemplated conduct criminal stretches the concept of purposefulness to its outer limits—and perhaps beyond.

#### IV. SCOPE OF CONSPIRACY: PURPOSE AND LIABILITY FOR THE ACTS OF CO-CONSPIRATORS

In the above section the requirement of purpose to promote or facilitate the commission of a crime was discussed. Once this purpose is established, one must look to relationships between the co-conspirators to determine the extent of conspiratorial liability.

##### A. *A conspirator is liable for the acts of co-conspirators within the common purpose of the conspiracy.*

The problem in this section may be illustrated by the following hypothetical: *A* and *B* have conspired to rob a bank. *A* knows that *B* has hired a getaway driver but does not know his identity. *C*, the driver, plans to steal a car to use in the robbery. Can *A* be held for conspiracy to steal a car?

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80. See G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 84 (2d ed. 1961); see also *Davidson v. United States*, 61 F.2d 250, 253-54 (8th Cir. 1932).

Under the Code's rationale, when a conspirator (A) knows of the existence of a co-conspirator (C) and understands the purpose of the conspiracy (robbing a bank), he may be held accountable for the acts (stealing a car) of the co-conspirator (C) which are within the common purpose of the conspiracy (robbing a bank).<sup>81</sup> Current law would hold A liable even though A does not know the identity or the existence of C.<sup>82</sup> Therefore, if the plans to steal a getaway car are found to be within the common purpose of the conspiratorial agreement, A may be held liable for the plans of C.

In *United States v. Andolschek*,<sup>83</sup> Judge Hand supported the Code's formulation:

It is true that at times courts have spoken as though, if A. makes a criminal agreement with B., he becomes a party to any conspiracy into which B. may enter, or may have entered, with third persons. That is of course an error: the scope of the agreement actually made always measures the conspiracy, and the fact that B. engages in a conspiracy with others is as irrelevant as that he engages in any other crime. It is true that a party to a conspiracy need not know the identity, or even the number, of his confederates; when he embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them. Nevertheless, he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others may do in execution of them.<sup>84</sup>

In *United States v. Peoni*,<sup>85</sup> Judge Hand also said:

At times it seemed to be supposed that, once some kind of criminal concert is established, all parties are liable for everything anyone of the original participants does, and even for what those do who join later. Nothing could be more untrue. Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it. The confusion is perhaps due to the fact that everything done by the conspirators—including the dec-

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81. See Comments, *supra* note 1, at 119, 123.

82. See, e.g., *United States v. Friedman*, 445 F.2d 1076, 1080 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971); *United States v. Cirillo*, 468 F.2d 1233, 1239 (2d Cir.), *cert. denied*, 410 U.S. 989 (1972); *United States v. Hester*, 465 F.2d 1125, 1127 (8th Cir. 1972).

83. 142 F.2d 503 (2d Cir. 1944).

84. *Id.* at 507.

85. 100 F.2d 401 (2d Cir. 1938).



larations of later entrants—is competent evidence against all, so far as it may fairly be thought to be in execution of the concert to which the accused is privy, though that doctrine too is often abused.<sup>86</sup>

However, Judge Hand's language in *United States v. Crimmins*<sup>87</sup> may leave the door open for an extension of a conspirator's liability:

It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding.<sup>88</sup>

Here, Judge Hand implies that the conspiracy may be enlarged beyond its original boundaries if a conspirator has knowledge of a co-conspirator's plans to so enlarge it. The exact extent of this liability, enlarged by knowledge, is uncertain. However, the language in *Andolschek* and *Peoni* indicates that the enlargement may not take the form of including entirely new criminal activities which are in no way related to the original conspiracy.

The rationale for Hand's view might be that A, having joined the initial agreement, is under a duty to control the direction of the conspiratorial activities or suffer the consequences for those expanded activities of which he has knowledge. The rationale for the basic rule that a conspirator is liable for the acts of co-conspirators within the common purpose of the conspiracy appears to be rooted in the generalized fear of group conduct.<sup>89</sup>

*B. The late-entering conspirator may be liable for the previous plans of his co-conspirators.*<sup>90</sup>

Assume that A and B have conspired to commit larceny and sell the fruits in a black market. Subsequently, but before the larceny occurs, C conspires with A and B to receive stolen goods. At the time C enters into the conspiracy, he learns the full dimension of the plans of A and B to commit larceny. Can C be convicted of conspir-

86. *Id.* at 403.

87. 123 F.2d 271 (2d Cir. 1941).

88. *Id.* at 273.

89. *Callanan v. United States*, 364 U.S. 587, 593-94 (1961). See also Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 924 (1959).

90. This section will not cover the situation where the previous conspiracy has been completed prior to the appearance of a late entrant; rather it will deal only with the inchoate offense, that is, where none of the conspirators' actions has reached the level of an attempt.

acy to commit larceny, as well as conspiracy to receive stolen goods?

Under the Code's unilateral approach to individual responsibility, *C* can be held accountable only prospectively from the time he enters the conspiracy.<sup>91</sup> Therefore, *C* would almost certainly be held accountable for the conspiracy to receive stolen goods. Moreover, because the agreement to receive stolen goods may encourage or aid the conspiracy to commit larceny, and because the Code defines conspiracy as an agreement to promote or facilitate the commission of a crime, *C* would probably be liable for conspiring to commit larceny.<sup>92</sup> If, on the other hand, the larceny had been completed by the time *C* entered the picture, *C* would be liable only for the conspiracy to receive stolen goods.<sup>93</sup>

Judge Hand believed that, regardless of whether the late entrant's agreement encouraged the original conspirators, he should be held accountable as long as he had full knowledge of the previous conspiracy. In *Kaplan v. United States*,<sup>94</sup> Hand wrote:

The notion is expressed in those cases which say that, in joining, a new conspirator assumes whatever has been earlier done in pursuance of the plan . . . . While the new adherent must, of course, be aware of the plan as a whole to become a party to the enterprise, by his conscious adhesion he adopts what has been done before. Hence it seems to us immaterial that the conspiracy be laid as of a date earlier than that at which all in fact joined, or that the original parties are convicted upon an overt act which takes place before the new party came in . . . .<sup>95</sup>

This statement is consistent with Judge Hand's views on the liability of a conspirator for the acts of his co-conspirators within the common purpose of the conspiracy.<sup>96</sup> Because Judge Hand imposed liability only for the fair import of the concerted purpose or agreement as understood by the conspirator,<sup>97</sup> if the acts of *A* and *B* are within the common purpose of their conspiracy with *C*, *C* would be held liable for conspiracy to commit larceny.

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91. Comments, *supra* note 1, at 130. See note 14 *supra*. The MISSOURI PROPOSED CRIMINAL CODE § 9.020 does not include a clause classifying aiding or soliciting of crimes as sufficient purposes to constitute a conspiracy, as does § 5.03(1)(b) of the MODEL PENAL CODE. However, since § 7.070(2) makes such conduct a separate offense, it falls under the more general Missouri definition of conspiracy.

92. Comments, *supra* note 1, at 132.

93. *Id.*

94. 7 F.2d 594, 596 (2d Cir. 1925).

95. *Id.* (citations omitted).

96. See pt. IV § A of this article, *supra*.

97. See text accompanying note 88 *supra*.

Current law imposes liability if a late entrant merely has full knowledge of the previous conspiracy,<sup>98</sup> rather than the more rigorous requirements of the Code.

The social justifications for punishing conspiratorial conduct are present if the late entrant actually encourages the members of the existing conspiracy.<sup>99</sup> However, the justification for punishing a late-entering conspirator who does not encourage the other conspirators in their earlier plans may be different. One rationale for punishing conspiratorial conduct is the belief that participation in a group may make each individual conspirator bolder in his actions. This rationale does not appear to apply to the situation where the late entrant has no effect on previously made plans. Also, the late entrant would not be held for helping precipitate the initial agreement or for increasing the efficiency of the conspiracy. Therefore, in terms of isolation or rehabilitation, the late entrant should be judged on the basis of his own plans, as proposed by the Code, and not on the acts and plans of others. In contrast, current law favors punishing the late entrant in order to deter latecomers from joining conspiracies. By making the latecomer liable for the previous plans of co-conspirators as well as for his own prospective plans, he conceivably might be deterred from joining the conspiracy. It is, however, extremely doubtful that the latecomer would have any knowledge of this added liability.

## V. CONCLUSION

The Code, Judge Hand, and some current law have sought to limit the conspiracy offense by focusing on individual culpability. In this view, that which is not criminal for an individual cannot become a crime by virtue of a group agreement to commit it. Paradoxically, this focus on individual culpability in another way broadens liability as compared to conventional conspiracy law. For example, conventional law and the decisions of Judge Hand require that conviction be possible for at least two persons before liability can be imposed on any one individual. Under the Code, however, if one party is irresponsible or acquitted, the other party may nevertheless be convicted for conspiracy. Thus, the Code's focus on individual culpability imposes liability in some circumstances forbidden by

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98. See, e.g., *United States v. McGann*, 431 F.2d 1104, 1106-07 (5th Cir.), cert. denied, 401 U.S. 919 (1970); *Mendelson v. United States*, 58 F.2d 532, 535 (D.C. Cir. 1932).

99. *Callanan v. United States*, 364 U.S. 587, 593-94 (1961). See also Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 924 (1959).

conventional conspiracy law.

A significantly beneficial aspect of the focus on individual culpability is the requirement that each individual in the conspiratorial agreement possess the purpose of promoting or facilitating the commission of the substantive crime in question. Hand's substantial effect on the drafters of the Code is apparent in the text and footnotes of the official comments. However, despite Hand's powerful impact on the drafters, important differences remain between their respective views on the mens rea requirement of conspiracy. First, the Code, a reform document, goes further in requiring purposeful conduct on the part of a defendant than did Judge Hand. Hand was willing to find an inference of purpose in a broader set of circumstances than is the Code.<sup>100</sup> Second, Hand endorsed implied terms as manifestations of purpose sufficient to meet the mens rea requirement of conspiracy. Although the Code and the current law also recognize the necessity in some circumstances to infer purpose through implied terms, in mail fraud and interstate commerce cases—prime areas for application of implied terms according to Hand—the Code recommended that circumstance elements such as use of the mails or the crossing of state boundaries be considered only as a basis of federal jurisdiction rather than as an element of the offense. The Supreme Court recently aligned the current law with the Code's view. Third, where the object of the conspiracy is the same as the conduct constituting the substantive crime in strict liability cases, Hand would allow prosecution. He reasoned that the purpose to commit the act existed even if the knowledge that the act was criminal did not. The Code failed to take a firm stand on strict liability crimes, but leaned in the same direction. Fourth, under a ratification theory, Hand and the current law would allow a late entrant to be held accountable for previously conceived plans if they fell within the common purpose of his agreement and the previous plans and their implications were known to him. The Code indicated that if the late entrant's conspiracy did not promote or facilitate the previous conspiracy, he would not possess the requisite purposefulness for conviction on the previous conspiracy. Hand and the current law focus on the individual in this situation but require less than the Code for imposition of liability.

The tendency under past and present law has been to use the

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100. Perhaps Hand as a judge felt limited in his power to dismantle common law conspiracy as developed by generations of jurisprudence.

fear of group conduct to weaken mens rea requirements and procedural safeguards for those accused of conspiracy. The emphasis on individual culpability, which Judge Hand and the Code espouse, would prevent this weakening effect from occurring.