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Liability for Coconspirator's Crimes in the Wisconsin Party to a Crime Statute

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LIABILITY FOR COCONSPIRATOR'S CRIMES IN THE WISCONSIN PARTY TO A CRIME STATUTE

I. INTRODUCTION

The Wisconsin party to a crime statute[1] provides, in part, that one who conspires to commit a crime may be liable for a crime committed by a coconspirator.[2] Imposing such liability is not subject to question where the conspirator is actively involved in the crime, giving advice, counsel or aid. A debatable issue arises, however, where the conspirator is not active in the commission of the specific crime, but merely agrees with another to commit a crime.

Most jurisdictions agree with Wisconsin in holding that regardless of whether one actively participates, a conspirator may justly be held vicariously liable for a coconspirator's crime.[3] Massachusetts long ago rejected this conspiracy the-

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1. WIS. STAT. § 939.05 (1979). The statute provides:

(1) Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although he did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.

(2) A person is concerned in the commission of the crime if he:

(a) Directly commits the crime; or

(b) Intentionally aids and abets the commission of it; or

(c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime. This paragraph does not apply to a person who voluntarily changes his mind and no longer desires that the crime be committed and notifies the other parties concerned of his withdrawal within a reasonable time before the commission of the crime so as to allow the others also to withdraw.

2. *Id.* § 939.05(2)(c) (1979).

3. *See, e.g.*, United States v. Diaz, 655 F.2d 580 (5th Cir. 1981); United States v. Sutton, 642 F.2d 1001 (6th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980); Johnson v. State, 252 Ark. 1113, 482 S.W.2d 600 (1972); People v. Carmichael, 106 Cal. App. 3d 124, 612 P.2d 962, 164 Cal. Rptr. 872 (1980); Norman v. State, 381 So. 2d 1024 (Miss. 1980); State v. Stein, 70 N.J. 369, 360 A.2d 347 (1976); Commonwealth v. Roux, 465 Pa. 482, 350 A.2d 867 (1976); State v. Barton, __ R.I. __, 424 A.2d 1033 (1981). *See also* 16 AM. JUR. 2D *Conspiracy* § 19 (1979); 15A C.J.S. *Conspiracy* § 74 (1967).

ory, holding that active participation is necessary.[4] The debate over the theory has increased with New York[5] and North Carolina[6] courts recently following the Massachusetts rule. This comment will outline the conspiracy theory, discuss its bases and attempt to evaluate whether it merits its place in the party to a crime statute.

II. THE CONSPIRACY THEORY OF ACCOMPLICE LIABILITY

Under the conspiracy theory of accomplice liability,[7] the essential act is an agreement between two or more to direct their conduct toward realization of a criminal objective.[8] The criminal agreement may be express or tacit, and may be proved by circumstantial evidence.[9] Each member of the conspiracy must individually and consciously intend the realization of the criminal objective.[10] Further, a conspirator

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4. Commonwealth v. Knapp, 26 Mass. (9 Pick.) 494 (1830). *See also* Commonwealth v. Perry, 357 Mass. 149, 256 N.E.2d 745 (1970); Commonwealth v. Stasiun, 349 Mass. 38, 206 N.E.2d 672 (1965).

5. People v. McGee, 49 N.Y.2d 48, 399 N.E.2d 1177, 424 N.Y.S.2d 157 (1979), *cert. denied sub nom.* Quamina v. New York, 446 U.S. 942 (1980).

6. State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980).

7. The conspiracy theory of accomplice liability stated in WIS. STAT. § 939.05(2)(c) (1979) should not be confused with the independent crime of conspiracy, which punishes one who agrees to commit a crime without regard to whether a substantive crime results from that agreement. WIS. STAT. § 939.31 (1979) sets forth the crime of conspiracy as follows:

> Whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony.

Note that in Wisconsin one cannot be convicted both of conspiracy under § 939.31 and as a party to a substantive crime which is the objective of the conspiracy. WIS. STAT. § 939.72(2) (1979).

8. State v. Nutley, 24 Wis. 2d 527, 556, 129 N.W.2d 155, 167 (1964), *cert. denied*, 380 U.S. 918 (1965). *See also* Bergeron v. State, 85 Wis. 2d 595, 606-07, 271 N.W.2d 386, 389-90 (1978); Hawpetoss v. State, 52 Wis. 2d 71, 80, 187 N.W.2d 823, 827 (1971); State v. Copening, 103 Wis. 2d 564, 579, 309 N.W.2d 850, 857 (Ct. App. 1981).

9. *Nutley*, 24 Wis. 2d at 559, 129 N.W.2d at 169. *See also Bergeron*, 85 Wis. 2d at 611, 271 N.W.2d at 389-90; *Hawpetoss*, 52 Wis. 2d at 80-81, 187 N.W.2d at 827; *Copening*, 103 Wis. 2d at 579, 309 N.W.2d at 857.

10. *Nutley*, 24 Wis. 2d at 556, 129 N.W.2d at 167. *See also Bergeron*, 85 Wis. 2d at 606-07, 271 N.W.2d at 389-90; *Hawpetoss*, 52 Wis. 2d at 80, 187 N.W.2d at 827; *Copening*, 103 Wis. 2d at 579, 309 N.W.2d at 857. Additionally, a conspirator must gain benefit from the criminal agreement, that is, have a stake in the venture. *Nutley*, 24 Wis. 2d at 556, 129 N.W.2d at 167. *See also Bergeron*, 85 Wis. 2d at 606, 271

is liable not only for a crime which he or she intended to occur, but for any other crime which under the circumstances is a natural and probable consequence of the intended crime.[11] In short, "[t]he fact of [the criminal] agreement imposes liability for the substantive offense on all conspirators when the crime is consummated by a single perpetrator."[12]

The Wisconsin conspiracy theory parallels the federal law. The drafters of the Wisconsin Criminal Code used the federal law as a model for the party to a crime statute.[13] The leading federal case is *Pinkerton v. United States*.[14] In *Pinkerton*, the defendant was convicted with his brother for conspiring to evade federal taxes and for specific evasions committed by his brother while the defendant was in jail. The government presented no evidence that the defendant directly participated in the tax violations.[15] The Supreme Court decided that direct participation was not necessary and held that the jury could convict the defendant of the crimes committed by his brother upon proof that the crimes were committed in furtherance of the original conspiracy.[16] In dicta, the Court limited the conspiracy theory to "natural consequences," stating:

> A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the

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N.W.2d at 389; Krueger v. State, 84 Wis. 2d 272, 286, 267 N.W.2d 602, 609 (1978), *cert. denied*, 439 U.S. 874 (1978).

11. WIS. STAT. § 939.05(2)(c) (1979). *See infra* note 104.

12. *Nutley*, 24 Wis. 2d at 556, 129 N.W.2d at 167. Note, however, that a conspirator is not responsible for crimes committed by coconspirators after a timely notification of withdrawal from the conspiracy. WIS. STAT. § 939.05(2)(c) (1979). *Cf.* United States *ex rel.* Chabonian v. Gray, 398 F. Supp. 1020 (E.D. Wis. 1975) (no withdrawal defense where defendant did not leave burglary scene). The defense of withdrawal does not appear to be available when the defendant is charged with the crime of conspiracy. *See supra* note 7 and accompanying text.

13. *See* Minutes, Criminal Code Advisory Committee of the Wisconsin Legislative Council, February 22 and March 28, 1952 (copy on file in Criminal Justice Reference and Information Center, University of Wisconsin Law Building, Madison, Wisconsin), *cited in* Brief of Amicus Curiae at 10-11, n.13, Wray v. State, 87 Wis. 2d 367, 275 N.W.2d 731 (Ct. App. 1978), *aff'd per curiam*, 91 Wis. 2d 839, 280 N.W.2d 784 (1979).

14. 328 U.S. 640 (1946).

15. *Id.* at 645.

16. *Id.* at 646-47.

> scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.[17]

Pinkerton was affirmed in *Nye & Nissen v. United States*,[18] where the Court stated that in *Pinkerton* it "held that a conspirator could be held guilty of the substantive offense even though he did no more than join the conspiracy, provided that the substantive offense was committed in furtherance of the conspiracy and as a part of it."[19] The Wisconsin conspiracy theory also imposes liability for coconspirators based on the act of conspiracy alone,[20] and limits liability to natural and probable consequences.[21] Thus, the Wisconsin conspiracy theory of accomplice liability follows the *Pinkerton* rule.

The Wisconsin conspiracy theory with its minimal requirement of a criminal agreement contrasts with other approaches to accomplice liability.[22] In his classic formulation, Judge Learned Hand stated that the definition of an accomplice requires that "he in some sort associate himself with the venture, that he participate in it as something he wishes to bring about, that he seek by his conduct to make it succeed."[23] Judge Hand emphasized not criminal agreement but active participation in the criminal venture. Such active

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17. *Id.* at 647-48.

18. 336 U.S. 613 (1949).

19. *Id.* at 618.

20. WIS. STAT. § 939.05(2)(c) (1979). *See supra* notes 7-12 and accompanying text. Wisconsin cases, however, have revealed defendants who not only conspired but actively participated in commission of the agreed upon crimes. *See infra* notes 103-04 and accompanying text.

21. WIS. STAT. § 939.05(2)(c) (1979). *See infra* note 104 and accompanying text.

22. Justice Jackson, commenting on the *Pinkerton* case, described the conspiracy theory as "the novel and dubious theory that conspiracy is equivalent in law to aiding and abetting." Krulewitch v. United States, 336 U.S. 440, 451 (1949) (Jackson, J., concurring).

Note, however, that although the conspiracy theory may appear to be in contrast to the accomplice theories of aiding and abetting and of solicitation, which require active participation, the conspiracy theory was long ago accepted by most courts. *See* Perkins, *The Act of One Conspirator*, 26 HASTINGS L.J. 337, 338-39 (1974).

23. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (describing the liability of one who aids, abets, counsels, commands or procures). This formulation of accomplice liability was quoted as definitive in Nye & Nissen v. United States, 336 U.S. 613, 618-19 (1949), and has been quoted in recent cases as the standard rule. *See, e.g.*, United States v. Beck, 615 F.2d 441, 448 (7th Cir. 1980); United States v. Smith, 546 F.2d 1275, 1284 (5th Cir. 1977).

participants have been convicted of crimes directly executed by another under the theories of aiding and abetting and of solicitation.[24] Section 939.05 of the Wisconsin statutes sets forth those two theories, and it will prove useful to compare them with the conspiracy theory before discussing the merits of the conspiracy theory.[25]

For conviction under the aiding and abetting[26] theory, one must consciously intend that his or her conduct will aid another in the execution of the crime.[27] The conduct of an aider and abettor must, as a matter of objective fact, aid the other person in execution of the crime.[28] Although such conduct may include an act constituting an essential element of the crime, the Wisconsin court has not required such conduct in all cases.[29] For example, although mere presence at the scene is not sufficient to prove aiding and abetting,[30] evidence showing the defendant stood ready and willing to render aid if needed has been held sufficient.[31] Further, aiding and abetting does not require a defendant's direct presence at the scene; locating a victim and driving a getaway car after the crime can constitute aiding and abetting.[32] In

24. *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 64 (1972).

25. The jury need not agree on the applicable theory; jurors may disagree on whether the defendant directly committed the crime, aided and abetted, solicited, or conspired in the crime. Holland v. State, 91 Wis. 2d 134, 280 N.W.2d 288 (1979), *cert. denied*, 445 U.S. 931 (1980). *See* Note, *Application of* Gipson*'s Unanimous Verdict Rationale to the Wisconsin Party to a Crime Statute*, 1980 WIS. L. REV. 597, 613.

26. WIS. STAT. § 939.05(2)(b) (1979).

27. State v. Nutley, 24 Wis. 2d 527, 554-56, 129 N.W.2d 155, 167 (1964), *cert. denied*, 380 U.S. 918 (1965). *See also* Krueger v. State, 84 Wis. 2d 272, 285-86, 267 N.W.2d 602, 608-09 (1978), *cert. denied*, 439 U.S. 874 (1978); Mentek v. State, 71 Wis. 2d 799, 804-06, 238 N.W.2d 752, 755-56 (1976); Clark v. State, 62 Wis. 2d 194, 197-98, 214 N.W.2d 450, 452 (1974). Also instructive as to intent are cases which held that the aider and abettor must have knowledge or belief that the other intends to commit a crime. Frankovis v. State, 94 Wis. 2d 141, 148-50, 287 N.W.2d 791, 794-95 (1980); Roehl v. State, 77 Wis. 2d 398, 407-08, 253 N.W.2d 210, 214-15 (1977); State v. Haugen, 52 Wis. 2d 791, 796-97, 191 N.W.2d 12, 15-16 (1971).

28. *Nutley*, 24 Wis. 2d at 554-56, 129 N.W.2d at 167. *See also* May v. State, 97 Wis. 2d 175, 184-85, 293 N.W.2d 478, 483 (1980); Hawpetoss v. State, 52 Wis. 2d 71, 77-79, 187 N.W.2d 823, 826 (1971).

29. Taylor v. State, 55 Wis. 2d 168, 177-78, 197 N.W.2d 805, 810 (1972).

30. State v. Haugen, 52 Wis. 2d 791, 796-97, 191 N.W.2d 12, 15-16 (1971).

31. Krueger v. State, 84 Wis. 2d 272, 285-86, 267 N.W.2d 602, 608-09 (1978), *cert. denied*, 439 U.S. 874 (1978).

32. State v. Marshall, 92 Wis. 2d 101, 122, 284 N.W.2d 592, 601 (1979).

Carter v. State[33] the Wisconsin court described the aiding and abetting theory:

> Like a drama on the stage, each party was engaged in the general scheme of the crime by performing his allotted part in the plot; but unlike a drama, all the actors, those who played the principal roles and those in the supporting roles, were guilty under the law as principals.[34]

Aiding and abetting includes assistance rendered by words and acts, and covers any encouragement or support given at or near the scene of the crime.[35]

The solicitation[36] section of 939.05(2)(c) concerns defendants not present at the scene and parallels the common law concept of an accessory before the fact.[37] A solicitor is

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33. 27 Wis. 2d 451, 134 N.W.2d 444 (1965), *cert. denied*, 389 U.S. 867 (1967).

34. *Id.* at 455, 134 N.W.2d at 446.

35. Judiciary Committee Report on the Criminal Code, 5 Wisconsin Legislative Council Report 4 (1953). *See also* United States v. Barnett, 507 F. Supp. 670, 674 n.4 (E.D. Cal. 1981), *rev'd on other grounds*, 667 F.2d 835 (9th Cir. 1982) (distinction between "aiding" and "abetting" another: aiding does not imply guilty knowledge or felonious intent, whereas abetting includes knowledge of the wrongful purpose and encouragement of the crime).

It is not necessary that an aider and abettor enter into an agreement, that is, a conspiracy, with the perpetrator to commit a crime. *See* State v. Manson, 76 Wis. 2d 482, 486, 251 N.W.2d 788, 790 (1977). In *Manson* the defendant joined others in a bar fight during which the victim was beaten to death; the court affirmed the defendant's second degree murder conviction as an aider and abettor, though no conspiracy existed among the parties. Although the state conceded that no evidence of an agreement existed because of the suddenness of the fight and because the defendant did not know the other parties, the defendant was an aider and abettor. *Id.*

Further, it is not necessary that the perpetrator be aware of the aider and abettor's efforts. State v. Nutley, 24 Wis. 2d 527, 555, 129 N.W.2d 155, 167 (1964), *cert. denied*, 380 U.S. 918 (1965). In *Nutley* the court cited the famous *Talley* case:

> [A] group of men in one town set out to kill a particular person who lived in another town. The friends of the victim, hearing of the plot against him, attempted to warn him by sending him a telegraph message. Another person, a judge, who also disliked the potential victim, directed the telegraph operator to destroy the message, telling him it was unimportant. The judge was held liable for murder under the complicity theory, even though the perpetrators were not aware of his assistance until after they consummated the crime.

Id. (citing State v. Talley, 102 Ala. 25, 15 So. 722 (1894)).

The Wisconsin court has made two other important statements on aiding and abetting. A "stake in the venture," although relevant to prove aiding and abetting, is not necessary to prove it. Krueger v. State, 84 Wis. 2d 272, 286, 267 N.W.2d 602, 609 (1978), *cert. denied*, 439 U.S. 874 (1978). Finally, the defense of withdrawal is not available to an aider and abettor. May v. State, 91 Wis. 2d 540, 549-50, 283 N.W.2d 460, 463 (Ct. App. 1979), *aff'd*, 97 Wis. 2d 175, 188, 293 N.W.2d 478, 484 (1980).

36. WIS. JURY INSTR.—CRIMINAL 400(C) (1962).

37. *See* Krueger v. State, 171 Wis. 566, 177 N.W. 917 (1920); Karakutza v. State,

liable as one who advises, hires, counsels or otherwise procures another to commit a crime.[38] The Wisconsin court has failed to recognize solicitation as a distinct theory of accomplice liability. In *State v. Charbarneau*[39] the court stated that section 939.05(2)(b) refers to guilt as an aider and abettor, while section 939.05(2)(c) relates to guilt as a conspirator.[40] The court's omission of solicitation as a third theory embodied in that statute is understandable because solicitation is subsumed by the conspiracy theory, which broadly covers those concerned in the commission of the crime prior to its actual commission.[41] However, the court ought to separate

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163 Wis. 293, 156 N.W. 965 (1916). *See also* Brief for Appellant at 11, State v. Cydzik, 60 Wis. 2d 683, 211 N.W.2d 421 (1973). Most Wisconsin cases involving solicitors, that is, accessories before the fact, are handled in terms of conspiracy theory. *See infra* note 41 and accompanying text. North Carolina, because it distinguishes between the liability of a solicitor, a conspirator and an aider and abettor, has many cases employing the solicitation theory. *See* State v. Furr, 292 N.C. 711, 235 S.E.2d 193 (1977), *cert. denied*, 434 U.S. 924 (1977).

38. WIS. STAT. § 939.05(2)(c) (1979). A solicitor is not liable as a party to a crime where he or she gives timely notification of such withdrawal. *Id.* However, the defense of withdrawal does not appear to be available when the defendant is charged with the crime of solicitation. *See* WIS. STAT. § 939.30 (1979).

The solicitation theory of accomplice liability set forth in WIS. STAT. § 939.05(2)(c) (1979), should not be confused with the independent crime of solicitation which provides:

> Whoever, with intent that a felony be committed, advises another to commit that crime under circumstances which indicate unequivocally that he or she has such intent is guilty of a Class D felony; except that for a solicitation to commit a crime for which the penalty is life imprisonment the actor is guilty of a Class C felony and for a solicitation to commit a Class E felony the actor is guilty of a Class E felony.

WIS. STAT. § 939.30 (1979). The solicitor can be convicted of the crime of solicitation even if the person solicited does not commit the object crime. If the person solicited does commit the crime, the solicitor becomes a party to the crime under WIS. STAT. § 939.05(2)(c) (1979). A person may not be convicted under both § 939.30 for solicitation and § 939.05 as a party to the crime which is the objective of the solicitation. WIS. STAT. § 939.72(1) (1979).

39. 82 Wis. 2d 644, 264 N.W.2d 227 (1978).

40. *Id.* at 651, 264 N.W.2d at 231.

41. Judiciary Committee Report on the Criminal Code, 5 Wisconsin Legislative Council Report 4 (1953). One commentator rejected the conspiracy theory of accomplice liability, distinguishing conspiracy from solicitation:

> This "predominantly mental" character of the crime [of conspiracy] distinguishes it from accessorial criminality which attaches to the conduct of one who counsels, commands, induces or procures another to commit a crime. The difference lies in the gap between promise and incitement, between acquiescence and procurement. To incite or procure is an affirmative act closely allied to aiding and abetting . . . .

solicitation from conspiracy in any theoretical analysis. As will be discussed below, a solicitor who actively participates in the criminal venture as one who advises, incites or commands another to commit a crime, may not resemble a conspirator who merely agrees to commit a crime and does nothing more.[42]

III. ANALYSIS

Most jurisdictions agree with Wisconsin in holding a conspirator liable for a crime committed by a coconspirator, regardless of whether he or she has actively participated as a solicitor or an aider and abettor.[43] Such liability may be imposed, for example, even where the defendant never actually agreed to the specific crime charged,[44] or where the defendant did not know the person who committed the crime.[45] The conspiracy theory has been supported under a number of rationales. Under one explanation, "one of the surest ways to encourage another to commit a crime is to enter into a conspiracy with him for the accomplishment of that very result."[46] The Wisconsin court used this group encouragement rationale in its leading case on accomplice liability, *State v. Nutley*:[47] "[T]he fact of the agreement materially reinforces the desire of the parties to carry out their portion of the division of criminal labor. Since each conspirator psychologically reinforces the conduct of the overt perpetrator, each is justly held responsible for his substantive crime."[48] Closely

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Klein, *Conspiracy—The Prosecutor's Darling*, 24 BROOKLYN L. REV. 1, 7 (1957). Another commentator, on the other hand, has suggested that solicitation and conspiracy are virtually the same, at least in cases involving few individuals: As to solicitation, "[i]f *A* said to *D*, 'I wish you would murder *X*,' whereupon *D* hunted up *X* and killed him, *A* would be guilty of murder." Perkins, *supra* note 22, at 358 (footnote omitted). As to conspiracy, "[i]f *A* said to *D*, 'Let us murder *X*, to which *D* agreed, and *D* promptly hunted up *X* and killed him, the only reasonable conclusion is that *A* is guilty of murder." *Id.*

42. *See infra* notes 86-91 and accompanying text.

43. *See, e.g., supra* note 3.

44. *See infra* notes 80-81 and accompanying text.

45. *See infra* note 85 and accompanying text.

46. State v. Barton, __ R.I. __, 424 A.2d 1033, 1037 (1981) (quoting Perkins, *supra* note 22, at 358).

47. 24 Wis. 2d 527, 556, 129 N.W.2d 155, 167 (1964), *cert. denied*, 380 U.S. 918 (1965).

48. *Id.* (footnote omitted).

related to group encouragement is the group danger rationale set forth in *Callanan v. United States*:[49]

> [C]ollective criminal agreement . . . presents a greater potential threat to the public than individual delicts. 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. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.[50]

Finally, the *Pinkerton* Court's rationale included reasoning by analogy from the principle in the law of conspiracy that the act of one is the act of all: if one conspirator may supply the overt act necessary to commit all of the partners of the independent crime of conspiracy, "the same act or acts are . . . likewise attributable to the others for the purpose of holding them responsible for the substantive offense."[51]

The group encouragement and group danger rationales have not been directly attacked by courts critical of the conspiracy theory. However, the New York Court of Appeals in

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49. 364 U.S. 587 (1961). The *Callanan* group danger reasoning was cited as a basis for the conspiracy theory in State v. Barton, __ R.I. __, __, 424 A.2d 1033, 1037 (1981).

50. 364 U.S. at 593-94, *quoted with approval in* Iannelli v. United States, 420 U.S. 770, 778 (1975). The group danger rationale also provides the basis for the independent crime of conspiracy and the basis for the federal rule imposing separate convictions and consecutive sentences for the conspiracy and for a crime which is the objective of the conspiracy. *Id.* at 777-78. However, consecutive sentences are rarely imposed in practice. Marcus, *Conspiracy: The Criminal Agreement in Theory and Practice*, 65 GA. L. REV. 925, 938 (1977) (findings based on survey of criminal trial judges and attorneys). In Wisconsin such consecutive sentences are not allowed under WIS. STAT. § 939.72(1) (1979). *See supra* note 7.

51. Pinkerton v. United States, 328 U.S. 640, 647 (1946). *Pinkerton* "is the case most often cited when speaking of vicarious liability in a conspiracy context . . . ." State v. Barton, __ R.I. __, __, 424 A.2d 1033, 1036 (1981). See the discussion of the *Pinkerton* case *supra* in text accompanying notes 14-21.

People v. McGee[52] criticized the *Pinkerton* analogy from the principle operating in the independent crime of conspiracy—that the act of one is the act of all.[53] The New York court admitted that once a criminal agreement is shown, the overt act of any conspirator may be attributed to other conspirators to establish the independent crime of conspiracy,[54] and that act may be the specific substantive crime.[55] However, the court pointed out that the overt act is not the crime in a conspiracy prosecution,[56] but is merely an element of the crime that has its basis in the criminal agreement.[57] A conviction of conspiracy may stand on the overt act committed by another because the act "merely provides corroboration of the existence of the agreement and indicates that the agreement has reached a point where it poses a sufficient threat to society to impose sanctions."[58] Thus, the principle that the act of one is the act of all may be applied to prove the existence of the socially harmful agreement to which the defendant is a party,[59] but the New York court would not extend that principle to punish the defendant for substantive crimes in which he or she did not participate.[60] Such an extension "is repugnant to our system of jurisprudence, where guilt is generally personal to the defendant."[61]

The Massachusetts Supreme Judicial Court has long been opposed to the conspiracy theory,[62] and was the first court to raise this issue of personal guilt.[63] The conspiracy theory runs contrary to the principle in our criminal law that

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52. 49 N.Y.2d 48, 399 N.E.2d 1177, 424 N.Y.S.2d 157 (1979), *cert. denied sub nom.* Quamina v. New York, 446 U.S. 942 (1980).

53. *Id.* at 57-58, 399 N.E.2d at 1181-82, 424 N.Y.S.2d at 162. The principle that the act of one conspirator is the act of all has also been applied as a rule of evidence. *See infra* note 114 and accompanying text.

54. *Id.* at 57, 399 N.E.2d at 1181-82, 424 N.Y.S.2d at 162.

55. *Id.* at 57, 399 N.E.2d at 1182, 424 N.Y.S.2d at 162.

56. *Id.* at 57-58, 399 N.E.2d at 1182, 424 N.Y.S.2d at 162.

57. *Id.*

58. *Id.* at 58, 399 N.E.2d at 1182, 424 N.Y.S.2d at 162.

59. *Id.*

60. *Id.*

61. *Id.*

62. Commonwealth v. Knapp, 26 Mass. (9 Pick.) 494 (1830).

63. Commonwealth v. Stasiun, 349 Mass. 38, 48, 206 N.E.2d 672, 679 (1965). *See also* Commonwealth v. Richards, 363 Mass. 299, 306, 293 N.E.2d 854, 859 (1973); Commonwealth v. Perry, 357 Mass. 149, 152, 256 N.E.2d 745, 757 (1970).

one is punished for one's own blameworthy conduct, not that of others.[64] Recently, the North Carolina Supreme Court, in *State v. Small*,[65] joined Massachusetts and New York in rejecting the conspiracy theory and cited as its rationale a violation of the principle of personal guilt.[66]

In raising the issue of personal guilt with respect to the conspiracy theory, the Massachusetts and New York courts have cited Professor Sayre's article on criminal responsibility for the acts of another,[67] in which he notes that the concept of personal guilt was well established in criminal law by the eighteenth century; that concept is best described as a repudiation of the doctrine of *respondeat superior* developing in that century in the law of torts.[68] Under the doctrine of *respondeat superior* the master is liable for the acts of his or her servant committed within the scope of employment and in the course of the business.[69] Since the case of *Rex v. Huggins*[70] it has been clear that *respondeat superior* may not serve as a basis for criminal liability.[71] In *Rex v. Huggins* the court stated that "[i]t is a point not to be disputed but that in criminal cases the principal is not answerable for the act of the deputy, as he is in civil cases; they must each answer for their own acts, and stand or fall by their own behavior."[72] The doctrine of *respondeat superior* has no place in criminal law because "it is of the very essence of our deep-rooted notions of criminal liability that guilt be personal and individual; and in the last analysis the inarticulate, subconscious sense of justice of the man on the street is the only sure foundation of law."[73] In civil law, a claim may be made against

64. *Stasiun*, 349 Mass. at 48, 206 N.E.2d at 679.

65. 301 N.C. 407, 272 S.E.2d 128 (1980).

66. *Id.* at __, 272 S.E.2d at 137.

67. Sayre, *Criminal Responsibility For the Acts of Another*, 43 HARV. L. REV. 689, 702-06 (1930), *cited in* People v. McGee, 49 N.Y.2d 48, 58, 399 N.E.2d 1177, 1182, 424 N.Y.S.2d 157, 162 (1979), *cert. denied sub nom.* Quamina v. New York, 446 U.S. 942 (1980); Commonwealth v. Stasiun, 349 Mass. 38, 48, 206 N.E.2d 672, 679 (1965).

68. Sayre, *supra* note 67, at 699-701.

69. *Id.* at 702. *See, e.g.*, Saunders v. DEC Int'l, Inc., 85 Wis. 2d 70, 270 N.W.2d 176 (1978); Snider v. Northern States Power Co., 81 Wis. 2d 224, 260 N.W.2d 260 (1977).

70. 2 Strange 882 (1730), *quoted in* Sayre, *supra* note 67, at 700-01.

71. Sayre, *supra* note 67, at 701.

72. 2 Strange at 885, *quoted in* Sayre, *supra* note 67, at 700-01.

73. Sayre, *supra* note 67, at 717 (footnote omitted).

all conspirators for damages resulting from acts committed pursuant to the conspiracy by one or more conspirators.[74] The basis for civil liability of a conspirator resembles the liability of a master for torts of a servant under the doctrine of *respondeat superior*.[75] If the *respondeat superior* reasoning of civil conspiracy has no place in criminal law, the criminal responsibility of a conspirator should not be as broad as the civil liability of a conspirator. However, courts, citing Professor Sayre,[76] that reject the vicarious criminal liability of the conspiracy theory impliedly suggest that such a theory approaches the doctrine of *respondeat superior*.

To suggest that the conspiracy theory is comparable to *respondeat superior* may be extreme. *Respondeat superior* has no place in criminal law because it would impose penalties on defendants who have met the social standards of the criminal law.

> The distinction between *respondeat superior* in tort law and its application to the criminal law is obvious. In tort law, the doctrine is employed for the purpose of settling the incidence of loss upon the party who can best bear such loss. But the criminal law is supported by totally different concepts. We impose penal treatment upon those who injure or menace social interests, partly in order to reform, partly to prevent the continuation of the anti-social activity and partly to deter others. If a defendant has personally lived up to the social standards of the criminal law and has not menaced or injured anyone, why impose penal treatments?[77]

Criminal conspirators, however, cannot claim that they have lived up to the standards of criminal law; they thus may deserve harsh penal treatment under the group encouragement and group danger reasoning noted above.[78]

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74. *See, e.g.*, Augustine v. Anti-Defamation League of B'nai B'rith, 75 Wis. 2d 207, 249 N.W.2d 547 (1977); Jolin v. Oster, 44 Wis. 2d 623, 172 N.W.2d 12 (1969); Cohn v. Zippel, 12 Wis. 2d 258, 107 N.W.2d 184 (1961).

75. State v. Small, 301 N.C. 407, __ n.12.1, 272 S.E.2d 128, 138 n.12.1 (1980).

76. *See supra* note 67.

77. Commonwealth v. Koczwara, 397 Pa. 575, __ n.1, 155 A.2d 825, 827 n.1 (1959), *cert. denied*, 363 U.S. 848 (1960), *quoted in* W. LAFAVE & A. SCOTT, *supra* note 24, § 32 at 224, where it was argued that criminal liability should be imposed on faultless employers for conduct of employees only where minor penalties, excluding imprisonment, are involved.

78. *See supra* notes 46-50 and accompanying text.

While it may be extreme to claim that the conspiracy theory approaches *respondeat superior*, cases applying the conspiracy theory may in fact offend the elementary notion that guilt must be personal to the defendant.[79] In *Anderson v. Superior Court*,[80] the defendant referred at least two women to an abortionist for a portion of the abortionist's fee. Proof that the defendant was part of the general conspiracy was held sufficient for trial and possible conviction of the defendant for twenty-six subsequent abortions in which she did not participate.[81] In *United States v. Scruggs*[82] the court upheld the defendant's convictions for seven counts of transporting altered money orders,[83] rejecting the defendant's claim that there was no evidence to support the convictions. The *Scruggs* court held the defendant liable for the acts of coconspirators who altered and passed the money orders, and stated that vicarious liability attached even if the defendant neither participated in the acts nor knew of them.[84] Further, the conspiracy theory, if adhered to, could hold each retailer in a huge narcotics ring liable for every sale of narcotics

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79. *See supra* note 73 and accompanying text. The principle of personal guilt has not always prevailed in criminal law. Examples of early criminal liability resting on a nonpersonal basis include liability of the clan for the wrongs of its members, or the male head of the household for the wrongs of the members of his household. Sayre, *supra* note 67, at 717 n.102 (citing I F. POLLACK & F. MAITLAND, HISTORY OF THE ENGLISH LAW (2d ed. 1898). The concept of personal guilt prevails as law matures:

> [A]s law matures, personal and individual criminal responsibility comes to supplant group responsibility. The latter may be an effective way of enforcing law and order, but it does violence to our more sophisticated present-day conceptions of justice. There seems no question but that a state law imposing a fine upon all the residents of a city ward in which a murder occurred would be held unconstitutional today, because it would offend our modern sense of propriety and justice.

Id.

Judges have suggested that application of conspiracy theory might be held unconstitutional as a violation of due process if the defendant is convicted of a substantive crime with no participation in the crime. United States v. Moreno, 588 F.2d 490, 493 (5th Cir. 1979), *cert. denied*, 441 U.S. 936 (1979); Park v. Huff, 506 F.2d 849, 864-65 (5th Cir. 1975) (Thornberry, J., dissenting).

80. 78 Cal. App. 2d 22, 177 P.2d 315 (Ct. App. 1947).

81. *Id.* at __, 177 P.2d at 316-17.

82. 583 F.2d 238 (5th Cir. 1978).

83. The money order scheme consisted of purchasing money orders in small amounts, altering the amounts to large sums and then cashing the altered money orders. *Id.* at 239.

84. *Id.* at 242.

made by every other retailer.[85]

The drafters of the Model Penal Code rejected the conspiracy theory, concluding that it is unjust to hold a conspirator accountable for crimes he or she did not influence.[86] Admitting that all conspirators ought to be punished for their criminal agreement,[87] the drafters argued that only those conspirators who actively participate in the specific crimes ought to be punished for such crimes.[88] Discussing the well known case involving Lucky Luciano[89] and his lieutenants in a New York City vice ring, the drafters noted:

> Luciano and others were convicted of sixty-two counts of compulsory prostitution, each count involving a specific instance of placing a girl in a house of prostitution, receiving money for so doing or receiving money from the earnings of a prostitute, acts proved to have been done pursuant to combination to control commercialized vice in New York City. The liability was properly imposed with respect to those defendants, who directed and controlled the combination; they commanded, encouraged and aided the commission of numberless specific crimes.[90]

The drafters then contrasted the leaders of the conspiracy, who could have been convicted under traditional accomplice theories of aiding and abetting or of solicitation without any help from conspiracy theory, with others less involved who could not have been guilty of the many specific crimes under the traditional accomplice theories. As to the lesser members of the conspiracy—each of the prostitutes or runners in-

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85. W. LAFAVE & A. SCOTT, *supra* note 24, § 65 at 514 (citing United States v. Bruno, 105 F.2d 921 (2d Cir. 1939), *rev'd on other grounds*, 308 U.S. 287 (1939), a case involving 88 defendants in a narcotics conspiracy). *See also* United States v. Decker, 543 F.2d 1102 (5th Cir. 1976). In *Decker* the court held that the conspiracy theory of accomplice liability applies to narcotics conspiracies, stating:

> The "chain" conspiracy has as its ultimate purpose the placing of the forbidden commodity into the hands of the ultimate purchaser. . . . That form of conspiracy is dictated by a division of labor at the various functional levels—exportation of the drug from Europe and importation into the United States, adulteration and packaging, distribution to reliable sellers, and ultimately the sale to the narcotics user.

Id. at 1104 (quoting United States v. Agueci, 310 F.2d 817, 826 (2d Cir. 1962)).

86. MODEL PENAL CODE § 2.04 comment (Tent. Draft No. 1, 1953).

87. *Id.*

88. *Id.*

89. People v. Luciano, 277 N.Y. 348, 14 N.E.2d 433 (1938).

90. MODEL PENAL CODE § 2.04(3) comment (Tent. Draft No. 1, 1953).

volved in the plan—the extensive liability for all sixty-two crimes would have been possible only under conspiracy theory, since, apart from entering the overall criminal agreement, the lesser members exerted little influence. Such liability would be unjust because although they committed specific crimes and may have assisted others,

> they exerted no substantial influence on the behavior of a hundred other girls or runners, each pursuing his or her own ends within the shelter of the combination. A court would, and should hold that they are all parties to a single, large conspiracy; this is itself, and ought to be, a crime. But it is one crime. Law would lose all sense of proportion if in virtue of that one crime, each were held accountable for thousands of offenses that he did not influence at all.[91]

This argument is most persuasive in cases similar to those just noted involving complicated criminal schemes. Holding defendants liable for crimes committed by coconspirators appears most troublesome in cases involving complex conspiracies with members operating at many different levels.[92] The modern criminal organization "is frequently structured like an ordinary business with different echelons of authority and responsibility."[93] Traditional accomplice theories of aiding and abetting and of solicitation are sufficient to convict those at the upper echelons for specific crimes arising out of the conspiracy, as the drafters of the Model Penal Code noted.[94] However, conspiracy theory is necessary to punish those at lower levels for specific crimes in which they did not participate.

Whether such defendants at lower levels deserve the harsh treatment of the conspiracy theory ultimately becomes a choice among values. The group encouragement and group danger arguments noted above[95] must be set against concerns expressed by three state courts that the conspiracy

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91. *Id.*

92. *See* Perkins, *supra* note 22, at 352-58.

93. *Id.* at 354 n.117. *See also supra* note 85.

94. *See supra* notes 86-91 and accompanying text. Traditional accomplice theories may be sufficient to convict but insufficient to penalize such leaders of criminal organizations. Congress sought to eradicate organized crime by adding severe penalty provisions for those who initiate, organize and supervise criminal organizations. 18 U.S.C. § 3575(e)(3) (1976). *See also* 18 U.S.C. §§ 1961-1964 (1976). The Wisconsin Organized Crime Control Act is a similar effort to control organized crime. WIS. STAT. ANN. §§ 946.80-.87 (West Supp. 1982-1983).

95. *See supra* notes 46-50 and accompanying text.

theory offends traditional notions of personal guilt.[96] Those who focus on the principle of personal guilt may reject the idea of liability for crimes committed by coconspirators by arguing that the problems of group encouragement and group danger may be dealt with by imposing a penalty for the independent crime of conspiracy.[97] On the other hand, those less concerned with the principle of personal guilt may argue that a conspiracy conviction fails to deal with group encouragement and group danger; convictions for substantive crimes committed by coconspirators may be justified as an "occupational hazard"[98] confronting those tempted to engage in a criminal conspiracy.[99]

The choice of whether to accept the conspiracy theory under the reasoning of group encouragement and group danger, or to reject the theory in favor of the principle of personal guilt, involves a difficult balancing of interests in complicated conspiracy cases.[100] It has been argued, however, that the need to attack such complicated criminal schemes with the conspiracy theory may be overestimated.[101] Arguably, analysis focusing on group encouragement and group danger

> seems to mistake the nature of the typical conspiratorial group, and therefore to overestimate the need for this attack on organized crime. It is an oversimplification to regard most group crimes as resulting from the machinations of large criminal organizations; in many cases, the perpetrator receives his aid or counsel from at most a few individuals. The application of traditional complicity rules

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96. *See supra* notes 61-66 and accompanying text. A number of commentators also have been critical of the conspiracy theory: *See, e.g.*, ABA Criminal Justice Section, American Bar Association Policy Regarding S-1, The Proposed Federal Criminal Code (94th Congress) at 5 (1975); W. LAFAVE & A. SCOTT, *supra* note 24, § 65 at 513-15; MODEL PENAL CODE comment § 2.04 (Tent. Draft No. 1, 1953); National Committee on Reform of Federal Criminal Laws, Working Papers 156 (1970); Klein, *supra* note 41, at 7-9; *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 994-1000 (1959) [hereinafter cited as *Developments*].

97. *See supra* note 7. *See also* People v. McGee, 49 N.Y.2d 48, 57-58, 399 N.E.2d 1177, 1181-82, 424 N.Y.S.2d 157, 162 (1979), *cert. denied sub nom.* Quamina v. New York, 446 U.S. 942 (1980).

98. State v. Barton, __ R.I. __, __, 424 A.2d 1033, 1038 (1981).

99. *Id.*

100. *See* Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276, 283-84 (1948).

101. *Developments, supra* note 96, at 999.

> alone will ordinarily be sufficient to hold each member of a small-scale conspiracy liable for acts committed in its furtherance.[102]

Wisconsin cases employing the conspiracy theory have involved such small scale operations. Conspirators held liable for agreed upon crimes[103] and for crimes arising as a natural and probable consequence out of the agreed upon crimes,[104] were actively involved in the specific crimes. The defendants in these cases could have been convicted under the traditional accomplice theories of aiding and abetting and solicitation.[105] Further, the courts of the three states rejecting the conspiracy theory have noted that past cases employing language suggestive of conspiracy theory involved

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102. *Id.*

103. Bergeron v. State, 85 Wis. 2d 595, 271 N.W.2d 386 (1978) (evidence that defendant helped find someone to kill the victim); Miller v. State, 25 Wis. 384 (1870) (evidence that defendant either inflicted mortal blow with her own hand or was present aiding and abetting her husband in murder), *cited in* W. LAFAVE & A. SCOTT, *supra* note 24, § 65 at 513 n.5; Wray v. State, 87 Wis. 2d 367, 275 N.W.2d 731 (Ct. App. 1978) (defendant arrested while fleeing from the burglary scene), *aff'd per curiam*, 91 Wis. 2d 839, 280 N.W.2d 784 (1979).

104. State v. Nutley, 24 Wis. 2d 527, 129 N.W.2d 155 (1964), *cert. denied*, 380 U.S. 918 (1965) (defendant active in gun fight held liable for partner's attempted murder based on conspiracy to resist arrest); State v. Bachmeyer, 247 Wis. 294, 19 N.W.2d 261 (1945) (driver of getaway car held liable for partner's murder based on conspiracy to commit armed robbery); Pollack v. State, 215 Wis. 200, 253 N.W. 560 (1934) (defendant present and actively involved in robbery held liable for partner's first degree murder based on conspiracy to rob), *overruled on other grounds*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965), *cited in* W. LAFAVE & A. SCOTT, *supra* note 24, § 65 at 513 n.3.

Under the natural and probable consequence rule of § 939.05(2)(c) a conspirator or a solicitor need not intend the specific crime charged. Section 939.05 does not explicitly provide that an aider and abettor, as well, may be liable for a crime other than the intended crime. However, the Wisconsin Supreme Court has held that an aider and abettor is responsible not only for an intended crime, but also for other crimes which were committed as a natural and probable consequence of the intended crime. State v. Manson, 76 Wis. 2d 482, 486, 251 N.W.2d 788, 790 (1977); State v. Asfoor, 75 Wis. 2d 411, 430-31, 249 N.W.2d 529, 537-38 (1977); State v. Cydzik, 60 Wis. 2d 683, 696-99, 211 N.W.2d 421, 429-31 (1973); State v. Stanton, 106 Wis. 2d 172, 176-80, 316 N.W.2d 134, 137-38 (Ct. App. 1982).

Although the natural and probable consequence rule holds parties to a crime equally guilty regardless of intent, the intent and culpability of an individual defendant may be considered in sentencing. State v. McClanahan, 54 Wis. 2d 751, 757, 196 N.W.2d 700, 703 (1972). *See also* Enmund v. Florida, 102 S. Ct. 3368 (1982) (United States Supreme Court held that the eighth amendment forbids imposition of the death penalty on a defendant who aids and abets a robbery in the course of which a murder is committed but is unintended and committed by others).

105. *See supra* notes 26-38 and accompanying text.

defendants who had not merely conspired in but had actively participated in the crimes.[106] One might conclude, then, that traditional accomplice theories are sufficient, and that the conspiracy theory is unnecessary to hold a defendant liable for crimes committed by another.

Although Wisconsin conspiracy cases reveal defendants actively involved in uncomplicated group crimes, one cannot be certain that this pattern will continue. Future state cases may involve complex criminal schemes whereby conspirators at the periphery of the criminal enterprises might be convicted of crimes they did not influence, as discussed above.[107] The federal system usually handles the complex conspiracies.[108] With its greater resources the federal system is best suited to combat schemes involving white collar crime, and organized crime, including narcotics smuggling and extortion.[109] However, survey research findings suggest that with the growing sophistication of crime, state prosecutors will begin to turn to conspiracy theory as an effective approach to serious criminal activities such as narcotics, robbery, consumer fraud and other white collar crimes.[110]

The group encouragement and group danger arguments may become significant if state prosecutors in future cases look to conspiracy theory as a means to effectively deal with complicated criminal schemes. Currently, the need for conspiracy theory appears questionable because traditional accomplice theories are sufficient to deal with the small scale group crime which predominates in state prosecutions.[111] Even if one accepts the group encouragement and group danger arguments in favor of conspiracy theory as currently valid in Wisconsin, a final factor involving the law of evidence must be considered before one can conclude that the

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106. State v. Small, 301 N.C. 407, __, 272 S.E.2d 128, 141 (1980); People v. McGee, 49 N.Y.2d 48, 58, 399 N.E.2d 1177, 1182, 424 N.Y.S.2d 157, 162 (1979); Commonwealth v. Stasiun, 349 Mass. 38, 49, 306 N.E.2d 672, 679 (1965).

107. *See supra* notes 79-91 and accompanying text.

108. *See* Marcus, *supra* note 50, at 946-50 (findings based on survey of criminal trial judges and attorneys).

109. *Id.*

110. *Id.*

111. *See supra* notes 103-04 and accompanying text.

conspiracy theory merits its place in the party to a crime statute.[112]

The so-called coconspirator rule of evidence is a powerful tool available to prosecutors[113] which places a difficult burden on defendants in group crime cases. The rule is another application of the general principle that the act of one conspirator is the act of all: If *A* and *B* are engaged in a conspiracy, the acts and statements of *B* occurring while the conspiracy is actually in progress and in furtherance of the design are provable against *A* because they are acts for which *A* is responsible as a matter of substantive law.[114] It may be obvious that the acts of *B* are provable against *A*.[115] It is not so clear that *B*'s statements ought to be provable against *A*, in light of principles under the confrontation clause[116] and under hearsay principles[117] which argue against admitting out of court statements not subject to cross-examination when made.[118] Such statements, however,

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112. *See* Klein, *supra* note 41, at 9; *Developments, supra* note 96, at 999-1000.

113. *Developments, supra* note 96, at 984-89 (1959).

114. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 267, at 645 (2d ed. 1972) (footnote omitted).

115. The principal limitation on the admission of acts is relevancy. *Developments, supra* note 96, at 988. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01 (1979).

116. The defendant has the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI.

117. The general rule is that out of court statements presented at trial to prove the truth of the matter asserted are inadmissible. WIS. STAT. §§ 908.01(1)-(3), 908.02 (1979). *But see* WIS. STAT. § 908.01(4)(b)5.

118. One author has summarized the concerns underlying both the hearsay rule and the confrontation clause:

> Underlying the general hearsay rule that out-of-court statements presented at trial to prove the truth of matters asserted therein are inadmissible is a basic concern for reliability. Such statements lack three safeguards that surround the introduction of non-hearsay evidence: hearsay statements are not made under oath; they are not made under circumstances such that the trier of fact can consider the demeanor of the declarants; and, most important, they are not subject to cross-examination. Thus, it is felt that the party against whom they are introduced cannot adequately test whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed. In the absence of some special guarantee of reliability inherent in the circumstances surrounding the making of such statements, their admission in criminal cases presents a significant danger of misguided convictions.
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> This concern for reliability, especially in its focus on the importance of

are not hearsay under Wisconsin law,[119] and are generally admissible provided a foundation is laid by independent proof of the conspiracy.[120] Objections under the confrontation clause to admission of statements of a coconspirator-declarant usually are ruled in favor of admission when the prosecution has either produced, or demonstrated the unavailability of, the declarant;[121] when the declarant is unavailable the prosecution must demonstrate that the declarant's statements bear adequate indicia of trustworthiness.[122] Surviving a confrontation clause challenge, statements of a coconspirator made during the course of and in furtherance of the conspiracy are admissible against all parties to the conspiracy.[123]

For example, in the recent case of *State v. Dorcey*,[124] the defendant was charged with delivery of a controlled substance as a party to the crime. The state provided independ-

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cross-examination, seems also to be the hallmark of the sixth amendment's confrontation clause, which ensures to each defendant the right "to be confronted with the witnesses against him."

Davenport, *The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1378-79 (1972) (footnotes omitted).

119. Section 908.01(4)(b)5 provides: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . [a] statement by a coconspirator of a party during the course and in furtherance of the conspiracy." *See, e.g.*, State v. Dorcey, 103 Wis. 2d 152, 157, 306 N.W.2d 612, 614-15 (1981); Bergeron v. State, 85 Wis. 2d 595, 612-13, 271 N.W.2d 386, 394-95 (1978).

120. *Dorcey*, 103 Wis. 2d at 157, 307 N.W.2d at 614. Not all of the elements of the crime of conspiracy need be proven, and the defendant need not be charged with conspiracy. *Id.* (citing Caccitolo v. State, 69 Wis. 2d 102, 230 N.W.2d 139 (1975); O'Neil v. State, 237 Wis. 391, 296 N.W. 96 (1941); 22A C.J.S., *Criminal Law* § 758b (1961)). The statement of one coconspirator will not be received against another until a prima facie case of a conspiracy has first been made. *Dorcey*, 103 Wis. 2d at 157, 307 N.W.2d at 615 (citing State v. Timm, 244 Wis. 508, 12 N.W.2d 670 (1944); Gelosi v. State, 215 Wis. 649, 255 N.W. 893 (1934); 22A C.J.S., *Criminal Law* § 760b (1961)). The conspiracy upon which admissibility depends must be proven independently of the coconspirator's statements at issue. *Dorcey*, 103 Wis. 2d at 158, 306 N.W.2d at 614 (citing Glasser v. United States, 315 U.S. 60 (1942)); Federal Life Ins. Co. v. Thayer, 222 Wis. 658, 269 N.W. 547 (1936). However, the court may hear the disputed testimony first, contingent upon a later showing that there was a conspiracy. *Dorcey*, 103 Wis. 2d at 158, 307 N.W.2d at 614 (citing United States v. Halpin, 374 F.2d 493 (7th Cir. 1967)); Schultz v. State, 133 Wis. 215, 113 N.W. 428 (1907).

121. *Dorcey*, 103 Wis. 2d at 161, 307 N.W.2d at 616-17 (citations omitted).

122. *Id.* (citations omitted).

123. *Id.* at 162-63, 307 N.W.2d at 617 (citing WIS. STAT. § 908.01(4)(b)5 (1979)).

124. 103 Wis. 2d 152, 307 N.W.2d 612 (1981).

ent proof of a conspiracy for purposes of the rules of evidence, including evidence that the defendant delivered cocaine to his coconspirator.[125] Finding the independent evidence of a conspiracy sufficient, the trial court admitted the testimony of an undercover officer who had gone to the coconspirator's house to purchase the cocaine.[126] The officer testified that the coconspirator offered to sell him cocaine and also testified as to a phone conversation he overheard which was damaging to the defendant.[127] The supreme court held that the officer's testimony was admissible although the defendant was not present in the house when the coconspirator's statements were made.[128]

Admitting statements of coconspirators may be justified when the statements have a high degree of assurance of trustworthiness.[129] Justice Abrahamson has been persuaded, however, by commentators arguing that coconspirators' statements may be highly untrustworthy.[130] One commentator has argued that coconspirators' declarations are reliable to prove that some conspiracy exists, but are less trustworthy to show its aims and membership.[131] Perhaps the coconspirator rule of evidence is supportable, if at all, not on a theory of trustworthiness but on a theory of necessity:

> It has been said that admission of coconspirators' hearsay declarations is justified by necessity. The suggestion is that criminal agreements are inherently secret, that participation is possible without the commission of overt acts, and consequently that there is a necessity sufficient to justify

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125. *Id.* at 155, 307 N.W.2d at 613.

126. *Id.* at 155, 307 N.W.2d at 614.

127. *Id.* at 154, 307 N.W.2d at 613.

128. *Id.* at 159-60, 307 N.W.2d at 615-16.

129. In *Dorcey* the coconspirator-declarant's statements were considered sufficiently trustworthy to survive a confrontation clause challenge because the statements were against the declarant's penal interests. *Id.* at 164, 307 N.W.2d at 618.

130. *Id.* at 174-79, 302 N.W.2d at 619-24 (Abrahamson, J., dissenting) (quoting with approval *Davenport*, *supra* note 118, at 1384; Levie, *Hearsay and Conspiracy—A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159, 1165-66 (1954); Comment, *The Hearsay Exception for Co-Conspirators' Declarations*, 25 U. CHI. L. REV. 530, 533-34, 539-41 (1958); Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741 (1965)).

131. Levie, *supra* note 130, at 1165-66, *quoted in* State v. Dorcey, 103 Wis. 2d 152, 177, 307 N.W.2d 612, 624 (Abrahamson, J., dissenting).

admission of hearsay of questionable reliability . . . .[132]

Prosecutors and defense counsel, of course, come to different conclusions on the merits of the coconspirator rule of evidence.[133] At a minimum, one can conclude that the rule plays a major role in group crime cases;[134] it may allow the jury to hear evidence otherwise considered unreliable with the danger that the verdict on the alleged crimes will be unduly affected.[135]

This danger becomes particularly important in combination with the conspiracy theory of accomplice liability, where proof of involvement in a conspiracy is all that is required for guilt as to alleged crimes.[136] In *State v. Small*,[137] the North Carolina Supreme Court refused to make such a combination. In *Small* the court rejected the conspiracy theory, but admitted that involvement in a conspiracy, proved in part through the coconspirator rule of evidence, may be strong evidence of active participation.[138] When one who conspires is shown to have been present at the scene, evidence of the conspiracy, including acts and statements of all the conspirators may be relevant to show the defendant aided and abetted in the commission of the crime.[139] Likewise, when the defendant-conspirator is shown to have been absent from the scene, evidence of the conspiracy may be relevant to prove the state's solicitation theory.[140] In North Carolina party to a crime cases, then, the coconspirator rule of evidence is important to help the jury accept or reject the state's argument that the defendant actively participated.[141]

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132. Comment, *supra* note 130, at 534, *quoted in* State v. Dorcey, 103 Wis. 2d 152, 176, 307 N.W.2d 612, 624 (Abrahamson, J., dissenting).

133. "Not surprisingly, prosecutors, and perhaps even courts at times, tend to welcome this opportunity for a more relaxed admission of evidence, while defense counsel regard the [coconspirator] exception as a plague upon both their clients and the integrity of the criminal process." Davenport, *supra* note 118, at 1385 (footnotes omitted).

134. *Id.* at 1383.

135. *Id.*

136. Klein, *supra* note 41, at 9; *Developments, supra* note 96, at 999-1000.

137. 301 N.C. 407, ___, 272 S.E.2d 128, 135-37 (1980).

138. *Id.* at ___, 272 S.E.2d at 136.

139. *Id.*

140. *Id.*

141. *Id.* (citing MODEL PENAL CODE comment § 2.04(3) (Tent. Draft No. 1, 1953)).

However, evidence of involvement in the conspiracy will not itself make the defendant liable for crimes committed by coconspirators.[142] Under Wisconsin's conspiracy theory, proof that one has conspired is sufficient to hold one liable for substantive crimes.[143] Arguably, combining the conspiracy theory with the coconspirator rule of evidence places a burden on the defendant which outweighs the possible benefits to society.[144]

The group danger argument in favor of the conspiracy theory focuses on society's interest in eradicating group crime.[145] If that interest is serious enough to justify the "harsh rule"[146] that membership in a conspiracy is sufficient for conviction of coconspirators' crimes, one might expect that "courts should insist upon competent, definitive and highly reliable evidence to establish that the accused had in fact entered into a corrupt agreement."[147] However, a lenient attitude towards the prosecution is apparent in the coconspirator rule of evidence.[148] This rule allowing admission of possibly unreliable out of court statements thus appears as another "harsh rule" which may burden an individual defendant while it promotes society's interest in eradicating group crime. The coconspirator rule of evidence often aids the prosecution by showing a defendant's active involvement in a crime, as discussed in *Small*;[149] however, evidence of coconspirators' statements may show nothing more than membership in a conspiracy. The fact that liability for coconspirators' crimes may be imposed based upon possibly unreliable evidence of membership in a conspiracy

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142. *Id.* at 137 (citing People v. McGee, 49 N.Y.2d 48, 399 N.E.2d 1177, 424 N.Y.S.2d 157 (1979), *cert. denied sub nom.* Quamina v. New York, 446 U.S. 942 (1980)).

Out of court declarations or acts of conspirators present one of a number of ways to prove involvement in a conspiracy. Also important may be evidence of acts and declarations of the defendant himself, testimony of a coconspirator who has turned state's evidence and circumstantial evidence. *Developments, supra* note 96, at 984-85.

143. *See supra* notes 7-12 and accompanying text.

144. Klein, *supra* note 41, at 9; *Developments, supra* note 96, at 999-1000.

145. *See supra* notes 49-50 and accompanying text.

146. State v. Barton, __ R.I. __, __, 424 A.2d 1033, 1038 (1981).

147. Klein, *supra* note 41, at 9.

148. *Id.*

149. *See supra* notes 137-42 and accompanying text.

is an argument against the conspiracy theory.[150] Since the liberal coconspirator rule of evidence is available to prosecutors to combat group crime, it becomes less persuasive to argue under the group danger rationale that society needs the further protection of the conspiracy theory of accomplice liability.

IV. CONCLUSION

The Wisconsin conspiracy theory of accomplice liability holds one who conspires to commit a crime responsible for all crimes committed by coconspirators in furtherance of the conspiracy. It has been argued that a coconspirator deserves such punishment because agreeing to commit a crime encourages the criminal conduct of coconspirators. The conspiracy theory has been further justified on the ground that collective criminal agreement presents a greater danger to society than individual criminal activity. These principles of group encouragement and group danger may explain why the conspiracy theory has been approved by most jurisdictions.

The conspiracy theory is subject to question because the need for the theory to deal with group encouragement and group danger may be overestimated. Wisconsin cases have involved small scale conspiracies with members actively participating in the specific crimes. Any conspirator actively involved in a crime directly executed by another may be convicted of such a crime under traditional accomplice theories of aiding and abetting and of solicitation. Further, where a large scale conspiracy arises, these traditional theories are also sufficient to convict any "leader" of such a scheme for crimes arising out of the conspiracy. By organizing or supervising the general conspiracy, such a leader actively participates in the specific crimes and is liable for the crimes under traditional theories. Thus, in many cases the conspiracy theory appears unnecessary.

In some cases involving complex criminal schemes, the conspiracy theory may be necessary as a prosecutorial device but may be criticized for failing to consider the interests of

150. Klein, *supra* note 41, at 9-10; *Developments, supra* note 96, at 999-1000.

individual defendants. Conspirators at low levels of a criminal organization may not have participated in the specific crimes arising out of the conspiracy. The conspiracy theory nevertheless holds them responsible for the substantive crimes. Holding defendants liable for crimes they have not influenced conflicts with the principle in criminal law that guilt is generally personal, not vicarious. Further, such liability may be imposed with the aid of an evidentiary rule which allows admission of possibly unreliable out of court statements of coconspirators.

Recognizing that the conspiracy theory is unnecessary in some cases, and offensive to elementary notions of personal guilt in other cases, the legislature might repeal the conspiracy provision in the Wisconsin party to a crime statute. Repeal is unlikely, however, as long as the conspiracy provision is viewed as an effective measure to combat group crime.

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