

## Essay

# Crime Talk, Rights Talk, and Double-Talk: Thoughts on Reading *Encyclopedia of Crime and Justice*\*

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Under the leadership of Professor Sanford H. Kadish, scholars from several disciplines have contributed articles on virtually every aspect of American criminal justice to an impressive four-volume work, the *Encyclopedia of Crime and Justice*.<sup>1</sup> As Justice Shirley S. Abrahamson described in her review, Professor Kadish has performed a difficult and needed service.<sup>2</sup> The *Encyclopedia* should be on the bookshelf of every lawyer interested in the criminal law.

I began by thinking to review these books in summary fashion. It is almost impossible to review an encyclopedia, even one devoted to a single, multifaceted field such as criminal justice, in any systematic way. As I read through these volumes, however, I became convinced that Professor George Fletcher was right in saying that the *Encyclopedia* is a "window to orthodox thinking" on issues of "criminal law, criminal procedure, and related fields";<sup>3</sup> hence, one can organize a review around this unifying theme. Fletcher also suggests, and I agree, that it would not be fair to criticize the *Encyclopedia's* essays for lack of originality, for this is an attempt at synthesis, not innovation.<sup>4</sup>

I also had thought to note at some length how different this encyclopedia is from Diderot's controversial eighteenth-century *Encyclopédie*.

\* ENCYCLOPEDIA OF CRIME AND JUSTICE. 4 volumes. Edited by Sanford H. Kadish. New York: The Free Press (Macmillan, Inc.), 1983. Pp. xxxvi, 1790. \$300.

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1. ENCYCLOPEDIA OF CRIME AND JUSTICE (S. Kadish ed. 1983) [hereinafter cited by volume and page number only].

2. Abrahamson, Book Review, 83 MICH. L. REV. 1157 (1985) (reviewing ENCYCLOPEDIA OF CRIME AND JUSTICE (S. Kadish ed. 1983)). Justice Abrahamson is a member of the Wisconsin Supreme Court. Her review was limited to a "sampling" of the four volumes. See *id.* at 1158-59. I decided that despite the difficulties of reviewing a work of this size and variety, I should read all of it. I confess that the task proved somewhat daunting, and I did not read every article with the same care I bestowed upon those in which I was particularly interested.

3. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 955 (1985).

4. *Id.*

Justice Abrahamson, however, already has made the comparison.<sup>5</sup> And Diderot, as he explained in his Prospectus, and as amplified in D'Alembert's *Discours préliminaire*, set out to edit a work that was to be "materialistic, progressive and hostile to all religious and social vested interests."<sup>6</sup> This work makes no such claim, and it would be unfair to tax it for not pursuing such goals.

It is fair, however, to ask whether these volumes succeed on their own terms. I propose to do that. Second, some of the articles—particularly Professor Stone's entry *Sedition*<sup>7</sup>—prompt analysis of factual errors and limitations imposed by an unduly narrow view of the subject. Finally, it is reasonable to ask what a work of this kind tells us—sometimes by indirection—about the confusion, contradiction, and duality of "orthodox" thinking on aspects of criminal law.

### I. General Comments: How Well the *Encyclopedia* Performs Its Mission

I have practiced and written about criminal law since I graduated from law school. It is a lamentable comment upon teaching and lawyering that there are so few good books on this subject. Fletcher's *Rethinking Criminal Law*,<sup>8</sup> Packer's *The Limits of the Criminal Sanction*,<sup>9</sup> and (as a basic reference) LaFave and Scott's hornbook<sup>10</sup> make up almost all the American material that is current and informative.

Professor Kadish makes ostensibly modest claims for these four volumes. An encyclopedia "by definition constitutes an effort to restate what is known rather than to develop new knowledge." But, by "bringing together all that is relevant to the phenomenon of crime into a single work, one can gain new perspectives." The articles are for the "non-specialist," "wider audiences"; yet they are useful to lawyers, judges, teachers, students, and all others with a professional interest in crime.<sup>11</sup>

Professor Kadish does not list criminals or, more precisely, accused persons among this group, but he might well have done so. One recurrent problem in counseling business executives and others accused or suspected of "white collar crime" is helping them to understand the

5. Abrahamson, *supra* note 2, at 1157-58.

6. The quoted summary of D'Alembert's words and the discussion of the *Encyclopédie* are from a biographical note in D. DIDEROT, RAMEAU'S NEPHEW AND D'ALEMBERT'S DREAM 10 (L. Tancock trans. & ed. 1966).

7. Vol. 4 at 1425.

8. G. FLETCHER, *RETHINKING CRIMINAL LAW* (1978).

9. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

10. W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* (2d ed. 1986).

11. Kadish, *Foreword* to vol. 1 at xxi.

boundaries between what they think is acceptable business behavior and what prosecutors think validates a ticket to the nearest federal correctional institution. Many of the articles in the *Encyclopedia* can be helpful to clients who want to understand the process in which they are involved.

Professor Kadish cautions us that constraints of space have limited the number of comparative law articles. However, if the reader begins with the article *Comparative Criminal Law and Enforcement*<sup>12</sup> and follows through with the cross-references to other comparative topics in criminal law and criminal procedure, she will come away with an excellent basic introduction to several legal systems.<sup>13</sup> The comparative criminal law articles focus on “four cultures whose law has developed, to a greater or lesser degree, outside the main Western tradition.”<sup>14</sup> Harold Berman’s article on the Soviet Union<sup>15</sup> is an excellent introduction to the main lines of Soviet legal theory, and the other articles, on China,<sup>16</sup> Islam,<sup>17</sup> and preliterate societies,<sup>18</sup> provide not only an introduction, but good bibliographies.

The problem is not, therefore, that the *Encyclopedia* ignores comparative law. Rather, it would have been wise to ask authors of substantive law topics, such as attempt, theft, *mens rea*, and conspiracy to bring comparative insight into their discussions. For example, the discussion of *Class and Crime*<sup>19</sup> is deficient in not picking up some of the fascinating and challenging theoretical work being done, for example, by Cuban jurists.<sup>20</sup> Also, critical and radical scholars continue to hold a lively debate that would have been interesting to cite at least in some greater detail.<sup>21</sup> As George Fletcher has brilliantly and consistently shown, the comparative and historical approach to basic criminal law topics yields great insight.<sup>22</sup>

If the prospective purchaser wants to sample these wares before buying, I recommend looking through the list of authors to find articles writ-

12. *Id.* at 182.

13. The reader will find that, in general, the cross-reference system at the end of each article leads to related subjects, and compensates for the inherent disadvantages of an alphabetical arrangement.

14. Vol. 1 at 182.

15. Berman, *Comparative Law and Enforcement: Soviet Union*, in vol. 1 at 207.

16. Lubman, *Comparative Law and Enforcement: China*, in vol. 1 at 182.

17. Forte, *Comparative Law and Enforcement: Islam*, in vol. 1 at 193.

18. Nader & Parnell, *Comparative Law and Enforcement: Preliterate Societies*, in vol. 1 at 200.

19. Hindelang, *Class and Crime*, vol. 1 at 175.

20. See, e.g., Quiros Pirez, *El Pensamiento Juridico-Penal Burgues: Exposicion y Critica*, *Revista Juridica*, No. 8, 1985, at 5. (reviewing the relevant literature).

21. See, e.g., Symposium, 10 *CONTEMP. CRISES* 3 (1986) (abolitionism); *Federal Common Law of Crime*, 4 *LAW & HIST. REV.* 223 (1986).

22. See G. FLETCHER, *supra* note 8.

ten by favorites. Other good examples of the *Encyclopedia* essays include any of the contributions by Professor Meir Dan Cohen<sup>23</sup> or Professor George Fletcher.<sup>24</sup> Professor Harold Edgar's article on *mens rea* is enjoyable.<sup>25</sup> Professor Wayne LaFave's pieces are predictably well-done, informative, and wise.<sup>26</sup> Yale Kamisar, for example in his article *Confessions*,<sup>27</sup> is always insightful and challenging.

In sum, this book is a good value. You will not find anywhere else so complete and accurate an introduction to these subjects as viewed from the perspective of American legal scholars.

## II. General Comments: Errors and Omissions

### A. Duplication and Incompleteness—Arrestment as an Example

In a work of this kind, an editor faces difficult problems of classification and of monitoring the content of every article submitted by every contributor. For example, the entry *Arrestment*<sup>28</sup> deals mostly with the procedures for accepting guilty pleas and enforcing plea bargains, and thus substantially overlaps the treatment of these issues in *Guilty Plea*.<sup>29</sup>

Neither of these articles tells us anything important about the history and function of the trial stage known as arrestment. As the *Encyclopedia* relates, arrestment is the procedural hour at which the defendant is given a copy of the charging papers and called upon to plead.<sup>30</sup> This summary is both incomplete and misleading. In many jurisdictions the defendant may waive her right to challenge the sufficiency of the charging papers and to make other procedural motions by entering a plea of not guilty.<sup>31</sup> At common law, demurrers and pleas in bar and abatement generally were interposed before the defendant pleaded "to the general issue."<sup>32</sup> Thus, a lawyer who advised a client to plead "not guilty" at the first appearance in court might be risking a waiver of im-

23. See, e.g., Cohen, *Actus Reus*, in vol. 1 at 15 (discussing *actus reus* in a challenging and thoughtful manner).

24. See Fletcher, *Excuse: Theory*, in vol. 2 at 724; Fletcher, *Justification: Theory*, in vol. 2 at 941. These articles were praised by Glanville Williams in his review, Williams, Book Review, 72 CALIF. L. REV. 1347, 1349 (1984). Fletcher takes up this cudgel again in Fletcher, *supra* note 3, at 955-57. His seminal work on these topics is RETHINKING CRIMINAL LAW, *supra* note 8, ch. 10.

25. Edgar, *Mens Rea*, vol. 3 at 1028. But see *infra* subpart IV(E)(1) (criticizing the *Encyclopedia's* discussion of *mens rea* for not going far enough in its treatment).

26. See, e.g., LaFave, *The Right to Bail*, in vol. 1 at 99.

27. Kamisar, *Confessions*, in vol. 1 at 223.

28. White, *Arrestment*, in vol. 1 at 67.

29. Boyce & Alschuler, *Guilty Plea*, in vol. 2 at 825.

30. White, *supra* note 28, at 67.

31. See, e.g., CAL. PENAL CODE §§ 1002-07 (West 1985) (demurrer entered prior to plea).

32. 2 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 236 (reprint 1971) (1st ed. 1736).

portant rights in those jurisdictions where the common-law rules are still followed in whole or in part.

More significantly, the common-law procedure still rules in a limited class of cases, even under the Federal Rules of Criminal Procedure. Granted, Rule 12 purports to abolish pleas in bar and abatement and demurrers.<sup>33</sup> Thus, the normal procedure in criminal cases, as the *Encyclopedia* notes,<sup>34</sup> is to take the defendant's plea of not guilty. The court then sets a date by which pretrial motions must be filed. Motions "capable of determination without the trial of the general issue"<sup>35</sup> of guilt or innocence are usually raised and determined before trial.

Suppose, however, that a defendant wishes to claim that the indictment fails to state an offense against the United States, or that the court is for some other legal reason without power to try him, and wishes to make such a motion without appearing and pleading to the general issue. This is neither a fanciful nor hypothetical problem. In 1974, Howard Hughes was indicted in the District of Nevada and wished to make motions to dismiss without returning to the United States. An in-chambers decision of Justice Douglas explicitly recognized that the district court would have power to entertain such a motion.<sup>36</sup> Indeed, Federal Rule of Criminal Procedure 12(b)(5), as it existed in 1974, provided: "If a motion is determined adversely to the defendant, he shall be permitted to plead if he had not previously pleaded." This language assumes that there will be some cases in which arraignment is not a necessary step in the process of deciding the viability of the prosecution's case.

Another example will make the point more clearly. Recall the spate of Selective Service prosecutions for failure to report for or submit to induction in the Vietnam War era. As of August 31, 1974, the defendant was a fugitive in 92.8% of all selective service criminal cases pending more than twelve months.<sup>37</sup> Many, if not most, of these defendants were

33. FED. R. CRIM. P. 12(a) states:

Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

34. White, *supra* note 28, at 67.

35. FED. R. CRIM. P. 12(b).

36. Hughes v. Thompson, 415 U.S. 1301 (Douglas, Circuit Justice 1974). Justice Douglas, after polling five other Justices, refused to direct the district judge to "exercise his discretion by postponing an arraignment until after the motion to dismiss the indictment ha[d] been resolved." *Id.* at 1302-03. The Justice first noted that "[t]he District Court certainly has the power to follow that course and sometimes it may be important to prevent harassment or the use of other unconstitutional procedures against an accused." *Id.* at 1302.

37. See Brief of Amicus Curiae, Michael E. Tigar, at 27, United States v. United States District Court, No. 75-1061, (9th Cir. 1975).

outside the United States.<sup>38</sup> Despite this fact, they had a means to move for dismissal of their cases without the necessity of showing up, being jailed, and entering a plea. Indeed, a number of courts entertained and granted motions to dismiss in selective service cases on behalf of fugitive defendants. Most of these tribunals recognized that they might have discretion not to take up and decide the merits of such challenges, but that considerations of judicial economy and docket-clearing militated in favor of doing so.<sup>39</sup>

In sum, a one- or two-paragraph treatment of arraignment, without any guide to its historical or functional significance in the administration of criminal justice, is not particularly helpful. Without unnecessary, antiquarian frolic, some interesting and useful additional information might have been imparted.

## B. Assassination

*Assassination*<sup>40</sup> begins well enough with the origin of the term "assassin," and includes references to common-law history and the legislation that resulted from the assassination of President John F. Kennedy. The article fails, however, to note one of the most significant developments in the law of assassination in the past two decades: internationalization of definitions and remedies. As a result of the increase in assassinations—murders committed for assertedly political reasons—the United Nations and the Organization of American States proposed two treaties, to both of which the United States is a signatory.<sup>41</sup> These treaties provide that the ratifying states shall adopt measures to prevent terrorist killings and to detain and punish perpetrators.<sup>42</sup> The United States Congress has enacted criminal statutes to implement these treaties.<sup>43</sup>

38. *Id.*

39. *See, e.g.,* United States v. Weinstein, 511 F.2d 622 (2d Cir.), *cert. denied*, 422 U.S. 1042 (1975) (authorizing District Judge Weinstein to consider the merits of cases in which the defendants were fugitives); United States v. Salzmann, 417 F. Supp. 1139 (E.D.N.Y.), *aff'd*, 548 F.2d 395 (2d Cir. 1976) (approving Judge Weinstein's dismissal of one fugitive case on speedy trial grounds); *see also* United States v. Daneals, 370 F. Supp. 1289 (W.D.N.Y. 1974) (dismissing indictment for, among other reasons, prosecutorial delay in bringing the case).

40. Turk, *Assassination*, in vol. 1 at 82.

41. Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532.

42. *See generally* HOUSE COMM. ON THE JUDICIARY, IMPLEMENTING INTERNATIONAL CONVENTIONS AGAINST TERRORISM, H.R. REP. NO. 1614, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 4480 [hereinafter H.R. REP.] (observing that the treaties obligate participating states to extradite or prosecute parties who commit certain acts of terrorism within the state's borders).

43. *See* Act for the Protection of Foreign Officials and Official Guests of the United States,

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These developments are significant because they evince an international, collective response to a serious common problem and because they have led to congressional action that broadens the reach of federal homicide jurisdiction.<sup>44</sup> Yet, neither *Assassination* nor *Terrorism*<sup>45</sup> mentions them.

### C. Blackmail and Extortion and Related Articles

*Blackmail and Extortion*<sup>46</sup> is generally admirable, for it traces the history of extortion and blackmail in English, Scottish, and American legal history. The author, Professor James Lindgren, also discusses the federal extortion statute<sup>47</sup> and summarizes the views of legal scholars on the contours of these perplexing offenses.

However, the article is ultimately unsatisfying: it begins by identifying blackmail and extortion as means of accomplishing theft. This characterization certainly is accurate if one thinks of the modern legislative trend, for the Model Penal Code defines these offenses in this way. It is fairly clear, however, that these offenses developed during the eighteenth, nineteenth, and early twentieth centuries along separate lines from common-law theft. The Model Penal Code definition imposes a limitation upon extortion prosecutions, for it requires that the object of the threat be to obtain "property."<sup>48</sup>

This restrictive definition is unsatisfying and, unfortunately, the ar-

Pub. L. No. 92-539, 86 Stat. 1070 (1972), amended by Pub. L. No. 94-467, 90 Stat. 997 (1976) (codified in scattered sections of 18 U.S.C.). The most notable criminal statute is 18 U.S.C. § 1116 (1982) (punishing murder or manslaughter of foreign officials, official guests, or internationally protected persons).

44. See H.R. REP., *supra* note 42 (a report on H.R. 15552, 94th Cong., 2d Sess. (1976), which was subsequently enacted as Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons, Pub. L. No. 94-467, 90 Stat. 997 (1976) (codified as amended in scattered sections of 18 U.S.C.).

45. Kerstetter, *Terrorism*, in vol. 4 at 1529.

46. Lindgren, *Blackmail and Extortion*, in vol. 1 at 115.

47. 18 U.S.C. § 1951 (1982). Professor Lindgren's discussion of the Hobbs Act, the federal extortion statute, focuses in large part upon the Supreme Court's refusal in *United States v. Enmons*, 410 U.S. 396 (1973), to apply the act to allegedly extortionate conduct undertaken by workers to gain higher wages or better working conditions. See Lindgren, *supra* note 46, at 117-18. This exemption is necessary to prevent prosecutors from charging union members under the Hobbs Act for strikes and other legitimate concerted activity. Professor Lindgren agrees with the dissenters in *Enmons*, 410 U.S. at 413, but does not analyze the impact that his interpretation of the Act would have on workers' rights. See Lindgren, *supra* note 46, at 117 (stating it was unfortunate that the language of the Hobbs Act did not prevent the Supreme Court from allowing an exemption for labor unions that use violence to extort wages or work).

48. MODEL PENAL CODE § 223.4 (Proposed Official Draft 1962); See TEX. PENAL CODE ANN. § 31.03(a)-(b) (Vernon Supp. 1987); see also G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW ch. 36 (1978) (discussing English law of robbery and similar offenses, which has the same effect as the Model Penal Code).

ticle *Theft*,<sup>49</sup> to which one is cross-referenced, also fails to delve adequately into the variety of proprietary interests that may be subject to theft. The author of this article, however, does acknowledge that in a few states blackmail statutes forbid threats designed to induce the victim to do or refrain from doing any act. I would add statutes that speak in terms of inducing the victim to refrain from exercising a legal right.<sup>50</sup>

Interestingly, Lindgren discusses a hypothetical case that inherently contradicts his characterization of blackmail and extortion as being crimes of theft.<sup>51</sup> Quoting Glanville Williams, the author puts forth a case of blackmail in which the actor threatens to expose the businessman-victim's income tax evasion unless the victim grants the actor a lucrative contract.<sup>52</sup>

The broad state blackmail statutes and the Glanville Williams hypothetical illustrate that blackmail and extortion cannot, as the author suggests, be pigeonholed as a form of theft. Put another way, the Model Penal Code's classification reflects a decision—whether deliberate or not—to exclude from criminal liability persons whose threatening behavior is not directed at acquiring "property." By speaking of the right to choose a contract partner as a form of intangible property interest, the Williams example could be tortured into the Model Penal Code mold, but it would be a difficult fit.<sup>53</sup> It does not make much historical or analytical sense to regard blackmail simply as a form of theft. It only makes definitional or instrumental sense because the Model Penal Code so classifies the offense.

What harm does the prohibition of blackmail prevent? Threatening behavior is dangerous. When the powerful prey upon the weak and induce them to forgo the exercise of rights, the criminal law has a legitimate concern. This concern is expressed in the history of extortion as a prohibition on *official* intimidation.<sup>54</sup> The threats that constitute black-

49. Schwartz, *Theft*, in vol. 4 at 1537.

50. *E.g.*, N.Y. PENAL LAW § 135.60 (McKinney 1975) (coercion); see *infra* notes 67-69 and accompanying text.

51. Lindgren, *supra* note 46, at 118.

52. *Id.*

53. I have written elsewhere of the problems created by too expansive a definition of theft of intangibles. See Tigar, *The Right of Property and the Law of Theft*, 62 TEXAS L. REV. 1443, 1460-75 (1984). In *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970), the defendants muscled into the refuse business and tried to prevent the victims from soliciting contracts for trash collection. The court rejected a contention that the "right to do business" in Milford, Connecticut, was not property that could be extorted. The statutory term "obtaining property" includes obtaining business concessions by putting the victim in fear. 418 F.2d at 1075-76. This amounts to an assertion that an intangible right may be the subject of theft by extortion.

54. *E.g.*, 18 U.S.C. § 1951 (1982) (defining extortion to include obtaining property under "color of official right").



mail, however, could be of the weak against their oppressors, as in the case of the Black Act,<sup>55</sup> which, as Lindgren points out, forbade demands for property as a condition to not harming persons or property. The Model Penal Code, indeed, defines certain group boycotts that have an acquisitive motivation as theft by extortion if the property sought is not for the benefit of the group.<sup>56</sup> There is also the case of a New York politician prosecuted for extortion for telling a newspaper editor that his paper would not receive official advertising if the editor persisted in attacking the politician and his political group.<sup>57</sup> These cases raise the difficult issues of the nature of the benefit that the actor must seek, the elasticity of "property" as a definitional term, and the propriety of the Model Penal Code's limitation of extortion to situations in which property is sought.

Some of these same trying and interesting issues are raised when examining the distinction between extortion and bribery. In the words of a leading case construing the federal extortion statute, the Hobbs Act,<sup>58</sup> "bribery is a voluntary payment made in order to exert influence upon the performance of a legal duty, [but] extortion involves payment in return for something *to which the payor is already legally entitled.*"<sup>59</sup> Those charged with extortion in political and business contexts often claim that the alleged victim voluntarily parted with consideration. This approach may lead courts to blur the different elements of each offense. For example, in *United States v. Addonizio*,<sup>60</sup> the defendant-public officials were charged with extorting kickbacks from those bidding on municipal public works jobs. They contended that any money they received constituted the proceeds of bribery and not extortion—a not entirely sympathetic argument. The court of appeals, while acknowledging a distinction between the offenses, said that the government need not prove that a particular victim was threatened to induce a particular payment.<sup>61</sup> It was enough that a climate of coercion existed and that the bidders succumbed to it by paying off.

55. 9 Geo. 2, ch. 22 (1723). See generally E. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975).

56. MODEL PENAL CODE § 223.4(e) (Proposed Official Draft 1962).

57. The case was dismissed. It was a case related to *People v. Cunningham*, 88 Misc. 2d 1065, 390 N.Y.S.2d 547 (N.Y. Sup. Ct. 1975). See Facts on File World News Digest, Jun. 19, 1976, at 442 E2.

58. 18 U.S.C. § 1951 (1982). The Act proscribes obstruction or delay of commerce, or an attempt or conspiracy to do so (note the built in conspiracy provision) by (among other means) extortion, the definition of which includes "fear."

59. *United States v. Addonizio*, 451 F.2d 49, 72 (3d Cir.) (emphasis in original), cert. denied, 405 U.S. 1048 (1972).

60. 451 F.2d 49 (3d Cir.), cert. denied, 405 U.S. 1048 (1972).

61. *Id.* at 71-72.

In another case, *United States v. Capo*,<sup>62</sup> the defendants obtained money from a number of people who wanted jobs at Kodak. They promised that in exchange for payments of from \$400 to \$1000, they could see that a particular person's application for work was given priority handling. In affirming the convictions, the court of appeals, relying in part on *Addonizio*, said that the "fear" necessary to find extortion under the Hobbs Act<sup>63</sup> may consist of fear of economic loss, and that economic loss may include loss of a prospective advantage such as employment.<sup>64</sup>

The court sounded a caution against reading its rationale too broadly:

We recognize, of course, that fear of economic loss plays a role in many business transactions that are entirely legitimate; awareness of that fear and use of it as leverage in bargaining, in which each side offers the other property, services, or rights it legitimately owns or controls, is not made unlawful by the Hobbs Act. What the Act reaches is not mere hard bargaining but the exploitation of the fear of economic loss in order to obtain property to which the exploiter is not entitled.<sup>65</sup>

The court said that the ordinary efforts of an employer to "bargain down the level of compensation to be paid" would not violate the Act.<sup>66</sup>

Examination of other areas might have yielded greater insight into the problems of defining extortion and blackmail. The author might have considered statutes that cover some of the territory left out of the Model Penal Code formulation, such as those proscribing attempts to induce a fiduciary to violate her duty.<sup>67</sup> More pointedly, the use of mail fraud prosecutions to deal with behavior that could be termed blackmail or extortion deserved mention.<sup>68</sup> Yet neither this article nor that entitled

62. 791 F.2d 1054 (2d Cir. 1986).

63. 18 U.S.C. § 1951(b)(2) (1982).

64. 791 F.2d at 1062.

65. *Id.* at 1062-63. *Capo* contains an exhaustive review of Hobbs Act cases, and Judge Kearse brilliantly explores the problem of "mere" economic fear as a basis for a charge of extortion.

66. *Id.* at 1063.

67. MODEL PENAL CODE § 224.8 (Proposed Official Draft 1962). This section makes it a crime to offer a "benefit" to induce fiduciary breach; it would be applicable if the benefit consisted in refraining from inflicting a harm. Whether this sort of benefit is a menace equivalent to that required in a prosecution for extortion is discussed in G. WILLIAMS, *supra* note 48, at 798-99; *see also* TEX. PENAL CODE ANN. § 32.43 (Vernon 1974) (accepting a benefit to breach a fiduciary duty is a crime). Texas Attorney General Jim Mattox was prosecuted—and acquitted—under this section for phoning an opponent's lawyer in a lawsuit and allegedly threatening to curtail the opponent's law firm's state bond business unless the lawyer called off some scheduled depositions of Mattox's relatives. *See Texas AG Wins on Bribe Charge*, Nat'l L.J., Mar. 25, 1985, at 25, col. 1.

68. *E.g.*, *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983). This case is interesting because Margiotta was convicted of both mail fraud and extortion, 18 U.S.C. § 1951 (1982), for essentially the same conduct, which consisted of exacting fees and other compensation for himself and others in connection with city and county insurance contracts.

*Mail: Federal Mail Fraud Act*<sup>69</sup> mentions such a prospect.

Obstruction of justice is yet another area in which issues of consent and coercion create difficult choices for advocates and judges. For example, the federal obstruction of justice statute has been used to punish menacing conduct directed at inducing a prospective witness to decline to testify, even when the witness had a perfectly legitimate basis, such as the privilege against self-incrimination, for his silence.<sup>70</sup> Examples in the case law include employers advising employees to maintain silence in the face of a criminal investigation in which the employer is a target.<sup>71</sup> These cases are of intense theoretical and practical interest. But when one turns to the article *Obstruction of Justice*,<sup>72</sup> one finds no reference to

69. Beale, *Mail: Federal Mail Fraud Act*, in vol. 3 at 1015. The author of the mail fraud article does not cite John Coffee's great work, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117 (1981); see also Tigar, *Mail Fraud, Morals, and U.S. Attorneys*, LITIGATION, Fall 1984, at 22.

70. See, e.g., *United States v. Cioffi*, 493 F.2d 1111 (2d Cir.) (witness had participated in making an illegal loan), *cert. denied*, 419 U.S. 917 (1974); *Cole v. United States*, 329 F.2d 437 (9th Cir.) (witness submitted false affidavit to a Senate committee in an unrelated matter and appellant reminded him of this when insisting that the witness take the fifth amendment), *cert. denied*, 377 U.S. 1630 (1964).

71. See *Cole*, 329 F.2d 437.

72. Binder, *Obstruction of Justice*, in vol. 3 at 1091. The discussion in *Obstruction of Justice* also is flawed by failure to refer to recent amendments and expansions of the definition of obstruction. E.g., Act of Oct. 12, 1982, Pub. L. No. 97-291, § 4(a), 96 Stat. 1249-52 (codified as amended at 18 U.S.C. §§ 1512 (1982 & Supp. III 1985), 1513-15 (1982)). These provisions broadly prohibit "tampering" with a victim, witness, or informant by force, threats, or "misleading conduct." They significantly broaden the already intensive reach of the "old" obstruction statute, 18 U.S.C. § 1503 (1982). Section 1503 contains a catch-all clause that, according to most courts, broadens its reach beyond the specific types of obstructive conduct enumerated in the statute's opening clauses. E.g., *United States v. Griffin*, 589 F.2d 200, 203-06 (5th Cir.), *cert. denied*, 444 U.S. 825 (1979); *Cioffi*, 493 F.2d at 1118-19; cf. *United States v. Metcalf*, 435 F.2d 754, 757 (9th Cir. 1970) (holding that because § 1503 is a criminal statute, it must be construed narrowly "so that it can be upheld against the charge of vagueness").

More seriously, the treatment of the federal obstruction of justice statute is so cursory as to be nearly useless. By proscribing any "endeavor" to obstruct, this statute attaches liability to conduct that would fall short of an attempt. See *United States v. Russell*, 255 U.S. 138, 143 (1921) (involving the trial of William "Big Bill" Haywood, the International Workers of the World leader, and noting that "[t]he word of the section is 'endeavor,' and by using it the section got rid of the technicalities which might be urged as besetting the word 'attempt,' and it describes any effort or essay to do or accomplish the evil purpose that the section was enacted to prevent").

The obstruction of justice statute began its life in an 1831 congressional reformulation of the contempt power. The relationship between contempt and obstruction may be seen by examining the respective texts of the statutes now codified in 18 U.S.C. § 401 and § 1503 (1982), and noting the "obstruction" language in both:

A court . . . shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority . . . as —

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice.

18 U.S.C. § 401 (1982).

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any [juror or court officer] in the discharge of his duty, . . . or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or

them.

The discussion above has pointed up the difficulty of determining the nature of "consent." Perhaps the *Encyclopedia* fails to examine this issue and its ramifications comprehensively because of the inherent difficulty of distinguishing between consent and coercion in a capitalist society. If inducing a prospective employee to part with money in order to get the "inside track" on a job, as in *Capo*, is unlawful coercion, why would the same appellation not fit the employer who points to the dozens of people lined up waiting to be interviewed and exacts a salary concession?<sup>73</sup>

The distinction between "real" and "coerced" consent when the threat is of "economic harm" is dependent upon one's sense of what constitutes a "free bargain" in capitalist society. To illustrate, a possible distinction between Mr. Capo and the employer in the hypothetical above is that Capo created a rigged market, while the employer is simply taking advantage of a market that has already been created. But this distinction evaporates when one considers that the reason Capo's alleged victims were desperate for jobs was that the economy in the Rochester, New York, region was depressed, in part because of layoffs at Kodak. I suggest, in short, that any distinction that does not acknowledge capitalist free market ideology as a presupposition will founder.

Indeed, it would have been refreshing to see an exploration of this

impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1503 (1982).

For a historical review, see *Griffin*, 589 F.2d at 204-06, and Justice Black's opinion in *In re Michael*, 326 U.S. 224 (1945). *Michael* was read narrowly by the *Griffin* court, 589 F.2d at 205-06, but this reading is inconsistent with the teaching of *Bronston v. United States*, 409 U.S. 352 (1973).

73. This issue, no doubt, will be illuminated in the context of litigation over "greenmail," the money corporations pay to unwanted suitors to repurchase stock at a premium over market price. The suitor agrees to abandon a takeover bid, and to stop disrupting the ordinary business affairs of the company. All he wants is a little extra money. "In 1984, American corporations spent over \$3.5 billion to repurchase their securities from unwanted shareholders at premiums totaling over \$600 million above market prices." Note, *Greenmail: Targeted Stock Repurchases and the Management Entrenchment Hypothesis*, 98 HARV. L. REV. 1045, 1045 (1985). The student contribution is rich in citations and discussion. The authors, however, were unable to think of a cogent theory to attack the practice. They ought to have considered the Hobbs Act and the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343 (1982), which are predicates for a treble damages civil suit under the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961-1968 (1982). See Tigar, *The Hobbs Act and Rico in Takeover Litigation*, 2 Civ. RICO Rep. (BNA) No. 13, at 2 (Aug. 27, 1986). The *Encyclopedia's* reference to *Racketeering* is a cross-reference to two articles that do not discuss the RICO statute. Yet this statute has become of central importance in federal criminal prosecutions and in civil litigation. To trace the course of civil litigation under RICO, see the issues of *BNA Civil Rico Reporter*, an excellent weekly publication. To grasp the significance of RICO's expansion of categories of criminal liability, see Judge Carolyn Randall's brilliant opinion in *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. Unit A Sept. 1981), *cert. denied*, 455 U.S. 949 (1982), and Judge Alvin Rubin's compendious discussion in *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

issue of “consent” in the *Encyclopedia*. Theft offenses such as larceny and embezzlement, based respectively upon trespassory acquisition and violation of duty, by now have acquired fairly well-defined contours. By the same token, acquisition based upon menaces of physical harm lies at the core of the prohibition of blackmail. However, transactions that involve the victim’s ostensible consent are difficult to sort out. This difficulty has nothing intrinsically to do with these particular offenses, but rather with the fundamental role played by ostensible consent in ordering capitalist social relations. Because “free bargain” is an ideal, derogations from that principle bear some burden of justification. In the field of social regulation, laws that restrict contractual freedom must hurdle a (by now minimal) substantive due process barrier. A discussion of these issues would have illuminated the articles on theft and blackmail as well as many others.<sup>74</sup>

### III. Sedition, Boundaries, and Rights Talk

No footnotes, few internal citations, and sometimes sparse bibliographies force the reader to rely upon the author’s version of events, and even upon her or his selection of material. In the main, this is good. But in an undertaking of this size, this format is bound to create some problems. A review of Professor Stone’s article, *Sedition*,<sup>75</sup> illustrates these problems.

The sedition article also provides a window through which to view the current controversy over the utility of rights rhetoric in the defense of criminal cases with political overtones. I begin with an analysis of Professor Stone’s article in the *Encyclopedia*. My discussion of sedition prosecution then turns to a critical analysis of Professor Mark Tushnet’s article published in this journal, which expressed a view of rights rhetoric at odds with some of the conclusions I draw.<sup>76</sup>

#### A. *Sedition*

1. *Professor Stone’s Error*.—In Professor Stone’s article, we read that in the seventeenth and eighteenth centuries a trial for seditious libel “was structured so as to leave most of the critical decisions in the hands of government officials . . . [The] jury was permitted to decide only

74. For example, the discussion of sex crimes would have been improved by consideration of these issues. With respect to consensual sexual conduct, all agree that some constitutional values are implicated in the state’s decision to regulate or forbid. Since writing this essay, I have read Susan Estrich’s brilliant exposition of consent issues in *Rape*, 95 *YALE L.J.* 1087 (1986).

75. Stone, *Sedition*, in vol. 4 at 1425.

76. See Tushnet, *An Essay on Rights*, 62 *TEXAS L. REV.* 1363 (1984).

whether the defendant had actually published the words in question. The judges reserved to themselves the central issues of malicious intent and bad tendency."<sup>77</sup> This paragraph is seriously misleading. Had the style of the *Encyclopedia* been to insist upon more case citations or footnotes, the error would perhaps have been caught. It may be that somewhere in the editing process, Professor Stone's meaning was misstated.

In any event, the quoted passage does not comport with what juries actually did in libel cases, nor with what they were expressly "permitted to" do. Stone impliedly acknowledges this when noting that a colonial jury acquitted John Peter Zenger in 1735 by arrogating to itself the power to decide the truth of the allegedly libelous attack upon the Governor of New York. The jury responded to the forceful and brilliant argument of Zenger's counsel, Andrew Hamilton of Philadelphia.<sup>78</sup>

The *Zenger* jury was acting consistently with its powers as declared in *Bushell's Case*.<sup>79</sup> When Quaker leaders William Penn and William Mead were charged in England in 1670 with rioting in Gracechurch Street, their jury refused to convict them. They announced a verdict of "[g]uilty of speaking in Gracechurch Street."<sup>80</sup> This, said the Recorder of London, who presided, was no verdict at all, and he ordered the jurors committed for contempt in default of a fine of forty marks apiece.<sup>81</sup> Some jurors paid, but Bushell brought a habeas corpus. Chief Justice Vaughan held that a jury could not be punished for rendering whatever verdict its conscience should dictate.<sup>82</sup>

Were it only that Professor Stone failed to mention the jury's independence after *Bushell's Case*, I would not bother to comment. The quoted passage, however, also fails to take account of Lord Mansfield's celebrated direction to the jury in the libel case of *Miller*,<sup>83</sup> and the subsequent controversy in the House of Lords concerning the related case of

77. Stone, *supra* note 75, at 1426.

78. *Id.* at 1426. *Rex v. Zenger*, 17 Howell's *State Trials* 675 (1735); see also J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (S. Katz 2d ed. 1972) (reprint of trial and valuable historical commentary); L. RUTHERFORD, JOHN PETER ZENGER: HIS PRESS, HIS TRIAL AND A BIBLIOGRAPHY OF ZENGER IMPRINTS 69-126 (1904 & photo. reprint 1968) (quoting the proceedings at Zenger's trial and explaining why the jury's verdict was predictable); THE TRIAL OF PETER ZENGER (V. Buranelli ed. 1975) (reprint of trial).

79. *Rex v. Bushell*, 6 Howell's *State Trials* 999, 124 Eng. Rep. 1006 (C.P. 1670).

80. *Rex v. Penn*, 6 Howell's *State Trials* 951, 962 (1670).

81. *Id.* at 966-67.

82. 6 Howell's *State Trials* at 1007-19, 124 Eng. Rep. at 1011-14. Professor Plucknett has noted the ingenuity with which Chief Justice Vaughan constructed his argument. Vaughan relied upon the alleged survival of attain as a means of punishing jurors who brought in a wrong verdict though he knew that "for practical purposes attain was obsolete." T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 134 (5th ed. 1956).

83. *Rex v. Miller*, 20 Howell's *State Trials* 869 (1770).

*Woodfall*.<sup>84</sup>

Miller was a printer charged by information with libelous statements contained in a pseudonymous letter to George III in the *London Evening Post* of December 19, 1769. Woodfall, the author of the letter, and Almon,<sup>85</sup> a bookseller who had sold a reprint of it, were prosecuted in separate cases.

Miller's counsel stressed freedom of the press. They insisted that the Crown must prove the libel to have been scandalous and seditious, as alleged in the information. They wondered aloud why the Crown had not shown the words to be false. When Lord Mansfield charged the jury, he began by saying that the jury had to decide, first, whether the defendant published the letter, and second, the meaning of the words used in it.<sup>86</sup> This second aspect of the jury's task was perhaps not so difficult in Miller's case, for the words were plain enough, except that the author wrote "m—y" and "k—g" when he probably meant "majesty" and "king."<sup>87</sup>

But if Mansfield was right about the law, an alleged libel that blemished its target by innuendo would present a real jury issue as to whether the words referred to a particular public official at all, or were intended mockingly. Anyone who doubts that this jury question had real meaning for libel defendants should read the eloquent summation for Zenger delivered by Andrew Hamilton in 1735 in New York.<sup>88</sup> And there is no doubt that Mansfield correctly stated at least that part of the jury's task. Indeed, in *Woodfall's* case, he is reported to have presented the blank spaces as raising a truly debatable issue.<sup>89</sup>

True, Mansfield went on to say that the information's allegations "scandalous" and "seditious" were "mere formal words."<sup>90</sup> According to one report of *Woodfall's* case, he even said that such allegations were as superfluous as those in a typical eighteenth century murder indictment that the defendant acted "at the instigation of the devil."<sup>91</sup>

Mansfield lectured the jury that they should limit themselves to the issues of publication and meaning, taking up a theme that the prosecutor had explored at length. He concluded, however, by acknowledging that the jury had the power to—was "permitted to"—acquit the defendant

84. Rex v. Woodfall, 20 Howell's *State Trials* 895 (1770).

85. Rex v. Almon, 20 Howell's *State Trials* 803 (1770).

86. *Miller*, 20 Howell's *State Trials* at 892-93.

87. *Id.* at 893.

88. Rex v. Zenger, 17 Howell's *State Trials* 675, 703-22 (1735).

89. Rex v. Woodfall, 20 Howell's *State Trials* 895, 900-08 (1770).

90. *Id.* at 900-01.

91. *Id.* at 901.

even though they found publication. Further, he determined the meaning to have been as alleged by the Crown: "And, indeed, if you were for having the power of pronouncing a verdict of not guilty, as to the fact; to be sure the jury, in every cause, may make an end of the question, whether they have not a right to find that verdict."<sup>92</sup>

Mansfield went on to stress the unwisdom of the jury taking such liberties, and then repeated that he thought they should stick to deciding about publication and meaning. His words, however, leave no doubt that not only were juries "permitted" to decide more than the issue of publication, but that an eminent judge, who was no friend of seditious folk, saw fit to remind the jury of their power.

Miller's jury acquitted him.<sup>93</sup> Woodfall's jury stayed out until late at night, and gave a verdict of "[g]uilty of printing and publishing only."<sup>94</sup> That verdict, which echoed the one in William Penn's case—guilty of speaking only—set off a further controversy.

The Crown moved that a judgment of guilty be entered on the Woodfall verdict, as the jury had found for the government on the only matter truly in issue. Defense counsel moved for an acquittal, or, in the alternative, for a new trial. Mansfield reiterated that, so far as strict law was concerned, a jury that found the defendant to have published the libel in effect found him guilty of the offense. He qualified this statement, however, by admitting that "[i]f . . . they did not find the meaning put upon the paper by the information, they should have acquitted him."<sup>95</sup>

Given the confusion and the court's refusal to accept an affidavit of the jury foreman in explanation of the verdict, the court ordered a new trial.<sup>96</sup> Nothing in Mansfield's opinion on the new trial motion retreats from the clear acknowledgment in his direction to Miller's jury of its undoubted power to acquit. And although the reports of *Woodfall's* case do not contain the same concession in the same terms, Mansfield did remind that jury—backhandedly—that Woodfall's counsel had argued

92. *Rex v. Miller*, 20 Howell's *State Trials* 869, 894 (1770).

93. *Id.* at 895-96.

94. *Rex v. Woodfall*, 20 Howell's *State Trials* 895, 903 (1770).

95. *Id.* at 920. There are several reports of this case, all of which appear in the *State Trials* at the cited location. In one version, Mansfield says, "I did not leave it to the jury, whether the paper was innocent or not. I never do." *Id.* at 913. The report of his charge to the jury shows that he did tell them that they were to consider only meaning and publication. However, in a colloquy with defense counsel, he conceded that counsel had insisted that the jury was to consider the issue of truth or falsehood. Thus, the jury was permitted to know its options; hence, its verdict. For Mansfield to have claimed, on these facts, that he was not "permitting" the jury to decide the truth issue was regarded as "fencing." *Id.*

96. *Id.* at 921.



that truth was a defense to a charge of libel.<sup>97</sup>

Let us take the story a little further. Mansfield sent his judgment to the House of Lords—a question remains as to whether he actually left it with the clerk of the House—three weeks after he delivered it on November 20, 1770. Lord Camden then proposed questions to Mansfield about the opinion, including, “Whether the opinion means to say that if the judge, after giving his opinion of the innocence or criminality of the paper, should leave the consideration of that matter, together with the printing and publishing, to the jury, such a direction would be contrary to law?”<sup>98</sup>

Mansfield professed surprise at these questions, and Camden asked him to name a day when answers might be forthcoming. Apparently, the matter went no further in the House of Lords, although the press comment was extensive.<sup>99</sup>

Lord Camden’s question was, it seems to me, answered not by Mansfield’s *opinion* for the King’s Bench on the new trial motion, but by his clear recognition of the jury’s power in the *Miller* and *Woodfall* jury charges. To be sure, Mansfield later said in the *Dean of St. Asaph’s* case that a judge could properly charge a jury that it was to decide only the fact of publication and the truth of the imputations.<sup>100</sup> He did not retreat, however, from what he had said in *Miller* and *Woodfall*.<sup>101</sup>

Two important dicta of Lord Holt, in *Fuller’s* case<sup>102</sup> and *Tutchin’s* case,<sup>103</sup> appeared to permit the jury to consider the truth of the alleged libel, although Mansfield fell short of giving these dicta their most expansive reading. Chief Justice Holt, referring to the allegedly false words, asked Fuller, “[C]an you make it appear that they are true?” and told him he might have had subpoenas to bring in witnesses to such facts.<sup>104</sup>

97. See *id.* at 902.

98. The story is told in 3 J. CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND* 391-92 (1873); 2 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 325-26 (1883 & photo. reprints 1973).

99. 3 J. CAMPBELL, *supra* note 98, at 380.

100. *Rex v. Shipley*, 21 Howell’s *State Trials* 847, 1038 (1783).

101. I am also aware of some ferocious comments by English judges before Mansfield that the jury could under no circumstances acquit once they found that the defendant had published the libel. The tone of these utterances was softened in cases later in the eighteenth century, and the most famous such case involves Judge Jeffries, who presided at trial even though he was one of those allegedly libeled. *Rex v. Barnardiston*, 9 Howell’s *State Trials* 1351, 1551-52 (1683).

Jeffries was a judicial monster, and in *Shipley*, 21 Howell’s *State Trials*, at 900, Erskine was no doubt referring to Jeffries when he spoke of abject, unprincipled, and servile judges of former days. See *id.* at 855-57; see also Stryker, *For the Defense*, in 2 *THE WORLD OF LAW* 225 (E. London ed. 1960) (quoting Erskine).

102. *Rex v. Fuller*, 14 Howell’s *State Trials* 517, 534 (1702).

103. *Rex v. Tutchin*, 14 Howell’s *State Trials* 1095, 1128 (1704).

104. *Fuller*, 14 Howell’s *State Trials*, at 534.

Tutchin had leveled charges of corruption and mismanagement at the government. Holt said to the jury, "Now you are to consider, whether these words I have read to you [Tutchin's words], do not tend to beget an ill opinion of the administration of the government?"<sup>105</sup> I concede that *Fuller's* case is often distinguished as not involving libel but imposture, and that the dicta in *Tutchin* may have been a rhetorical flourish rather than an invitation that the jury exercise its power.<sup>106</sup> Great advocates on both sides of the Atlantic, however, read Holt's remarks as a license to acquit, and made this point forcefully to judges and juries.<sup>107</sup>

All of this would not be so important but for the central role that disputes about sedition and seditious libel have played in American political and legal history.<sup>108</sup> The bit of history overlooked by Professor Stone illustrates some powerful truths about the power of assertions of *right*—or about the "critique of rights," if one wishes to view the matter from another direction.

## 2. *The Significance of Jury Power: Professor Tushnet's Error.*—

The concessions, precious few though they were, to jury independence and power were an important theme in the defense of dissent in England and America.<sup>109</sup> This undeniable fact leads me to think that the *Sedition*<sup>110</sup> article in the *Encyclopedia* is a missed opportunity to talk about the function of boundaries in the criminal law, and the role of advocates and judges in identifying and policing those boundaries.<sup>111</sup>

All criminal cases—indeed all lawsuits—involve decisions about boundaries in some sense of that word. Did the defendant do the act, or did he not? The advocate marshals evidence and argument to convince the jury to decide in a particular way.

The most effective and moving advocacy, however, deals with

105. *Tutchin*, 14 Howell's *State Trials*, at 1128.

106. See, e.g., 2 J. STEPHEN, *supra* note 98, at 317-19 (stating that Fuller was considered a cheat and impostor, not a libeller). Stephen argues that although certain words of Lord Holt in *Tutchin* seem to indicate that the jury was to decide the character of the writing, taken as a whole, Holt's direction to the jury was that the paper was a libel as a matter of law. *Id.*

107. See *Rex v. Shipley*, 21 Howell's *State Trials* 847, 1015 (1783) (Erskine for the defense); *Rex v. Zenger*, 17 Howell's *State Trials* 675, 702 (1735) (Hamilton for the defense).

108. See L. LEVY, *EMERGENCE OF A FREE PRESS* (1985) (a revision of L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960)); Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 509-37 (1983). For a critique of *EMERGENCE OF A FREE PRESS*, see Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985).

109. The jury's role, and specifically jury nullification, are discussed in Van Dyke, *Jury: Jury Trial*, in vol. 3 at 932, but without reference to libel cases.

110. Stone, *Sedition*, in vol. 4 at 1425.

111. This is a criticism neither of Professor Stone nor of Professor Kadish. As I have said, agreeing with Professor Fletcher, the *Encyclopedia* was not meant to be particularly innovative.

boundaries between certain types of fundamental values and the power of the state to punish. This is so because, to a greater or lesser degree, jurors have internalized the legal ideology of bourgeois democracy, including principles of freedom and fairness, which are central in cases involving political crimes such as sedition. Judges contribute to the importance of boundary exploration to the extent that they echo these values and instruct the jury about them.

Take an “ordinary” criminal case: A defense lawyer will seek not only to “argue the facts,” but to put the jury’s factual decision in the context of “reasonable doubt,” and if possible, she will allude to the government’s obligation to conduct its investigation fairly. When she argues in this vein, she is trying to make the jury realize that a guilty verdict is not simply a reflection of a decision about “facts,” but rather an exercise in defining a constitutional right—the right not to be convicted save upon reliable and properly obtained evidence that demonstrates guilt beyond a reasonable doubt. And, if the jurors have a reasonable doubt, they are reminded that another fundamental value requires them to acquit.

This sort of argument is, as some would say, “rights rhetoric.” A fierce argument rages today about the utility and validity of rights rhetoric.<sup>112</sup> Many scholars, including some who identify themselves with the Critical Legal Studies movement, argue that rights rhetoric is unstable, indeterminate, reifying, and of no utility.<sup>113</sup> Professor Tushnet, in a provocative article in this journal, made precisely this claim.<sup>114</sup> In one sense, these criticisms are valid. When expressed as a proposition of legal ideology, a statement about “rights” is empty. This criticism is true of all legal categories, as Karl Renner has demonstrated convincingly of the private law concepts of property and contract.<sup>115</sup> In particular cases, the

112. See, e.g., *A Critique of Rights*, 62 TEXAS L. REV. 1363 (1984) (symposium on the Critical Legal Studies movement focusing on the critique of rights); Chase, Book Review, 60 N.Y.U. L. REV. 304 (1985) (reviewing T. CAMPBELL, *THE LEFT AND RIGHTS: A CONCEPTUAL ANALYSIS OF THE IDEA OF SOCIALIST RIGHTS* (1983) and M. GIBSON, *WORKERS’ RIGHTS* (1983)).

113. For a thorough introduction to the dispute, see materials cited *supra* note 112.

114. Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363 (1984).

115. K. RENNER, *THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTION* 87 (A. Schwarzschild trans. 1947), discussed in M. TIGAR, *LAW AND THE RISE OF CAPITALISM* 303-09 (1977). As I have noted, Renner is in one sense correct in saying of the law of property, “There has been no change of norms.” K. RENNER, *supra*, at 87. The general principles of capitalist property relationships remain the same no matter whether the capitalist activity consists of simple commodity production or of advanced monopoly capitalist activity. Cf. Tigar, *supra* note 53, at 1475 (using law of theft to discuss the “illusory neutrality” of law that is in actuality a product of our particular “system of social relations of which the right to property is the central tenet”). But this argument applies only to the most basic aspect of the norm, its general assertion of the relationship between *persona* and *res*. Renner and I agree, however, that legal norms can have a chameleon quality. K. RENNER, *supra*, ch. 2.

question is with what will the category be filled, how, and by whom.

Tushnet is wrong, however, in generalizing from the undeniable fact that rights statements are, as statements, empty, to the proposition that they are meaningless in concrete settings. He is right in arraigning recent judicial and legislative decisions and in recognizing that the representatives of state power increasingly are shedding the mantle of ostensible neutrality. He is wrong in suggesting that advocates, groups associated for social change, and even law professors are doing useless and even misleading work by formulating theories of rights in the context of capitalist social relations. The history and present reality of political prosecutions permits one to examine Professor Tushnet's thesis, while illustrating some gaps in the *Encyclopedia's* treatment of the issue.

Take, for example, a statement: "People have the right to publish truthful assertions about government officials, even if these assertions are tendentious, insulting, and critical." This was the assertion made by advocates for defendants charged with sedition in the period we have been discussing. That statement acquires content only when we begin to ask where it came from, and how the advocates decided to make it. The sedition cases discussed above provide us with an opportunity to examine the function of such a statement, and to discuss Professor Tushnet's thesis in a concrete setting.

The eighteenth century seditious libel cases involved an exploration of two sorts of boundaries. The first had to do with the function of the jury in criminal cases, and the second with the meaning of seditious libel. Taking the second question first, it is familiar law that when a criminal statute defines a boundary between conduct that is lawful and that which is not, and that line is coterminous with the boundary between constitutionally protected and unprotected conduct, the line drawn is subject to special scrutiny.<sup>116</sup> Thus arise the doctrines of vagueness and overbreadth in the first amendment context.<sup>117</sup>

An advocate, therefore, must persuade the jury that freedom of expression will be compromised if the defendant is convicted. This ap-

116. See, e.g., *Street v. New York*, 394 U.S. 576, 594 (1968) (reversing conviction under New York statute making it a crime to "cast contempt upon [any American flag] either by words or act" because such conviction "may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects"); *United States v. Spock*, 416 F.2d 165, 173 n.20 (1st Cir. 1969) (when seemingly normal criminal statute, in addition to prohibiting conspiracy and crime counseling, may affect freedom of association or freedom of speech, court must make sure statute does not improperly infringe upon speech in any particular instance); *Castro v. Superior Court*, 9 Cal. App. 3d 675, 683-84, 88 Cal. Rptr. 500, 506-07 (1970) (stating that when first amendment is involved, government regulations must be drawn precisely and narrowly).

117. See the admirable discussion by Judge Kaus in *Castro*, 9 Cal. App. 3d at 699-700, 88 Cal. Rptr. at 518-19.

proach, like the appeal to the reasonable doubt standard, is rights rhetoric, but it is addressed to the definition and substance of the offense charged rather than to a procedural incident of the trial process. This sort of advocacy, in my view, can be stable, definite, nonmystical, and useful. In the eighteenth century sedition cases, it was all four.

Multiple examples illustrate this point: Glyn arguing for Woodfall<sup>118</sup> and Miller,<sup>119</sup> Erskine in the *Dean of St. Asaph's* case.<sup>120</sup> I would rather use one closer to home—Andrew Hamilton's defense of John Peter Zenger in 1735.<sup>121</sup> As Gouverneur Morris said much later, "[The trial of Zenger was] the morning star of that liberty which subsequently revolutionized America."<sup>122</sup>

The story is familiar:<sup>123</sup> Zenger was charged by information with libeling Governor Cosby of New York. The grand jury had refused to indict. Zenger's New York counsel, Alexander and Smith, moved to disqualify Chief Justice Delancey and Justice Philipse because their commissions recited that they were to serve at the Governor's will and pleasure and not "during good behavior." The judges overruled the motion and ordered Alexander and Smith disbarred for making it. They then appointed one Chambers, known to be a member of Governor Cosby's party, to represent Zenger. So far the script plays like many other political trials, including recent ones.<sup>124</sup>

Alexander sent for Andrew Hamilton, a trial lawyer in Philadelphia, to come and try Zenger's case. Hamilton, then sixty-eight years old, had compiled an enviable record at the bar and in public service. He had represented the Penn family and was a friend and associate of Benjamin Franklin. The verbal battle, with Hamilton on one side and the judges and Attorney General on the other, was fought in the jury's presence. Quite early in the trial, Hamilton admitted that Zenger had published the papers in question. He then turned to two legal issues: the innuendos charged in the information and the truth of the alleged libels.

Zenger had written mockingly of the Governor and his party, and Hamilton insisted that the jury had to decide whether the innuendos pleaded by the Attorney General were supported by the proof. But his

118. *Rex v. Woodfall*, 20 Howell's *State Trials* 895, 899 (1770).

119. *Rex v. Miller*, 20 Howell's *State Trials* 870, 880, 883-85 (1770).

120. *Rex v. Shipley*, 21 Howell's *State Trials* 847, 899-900, 903, 917 (1783).

121. *Rex v. Zenger*, 17 Howell's *State Trials* 675 (1735).

122. *N.Y. Times*, Dec. 10, 1985, at B2, col. 5 (city ed.) (quoting Gouverneur Morris) (original source unattributed).

123. See authorities cited *supra* note 78.

124. See, e.g., J. EPSTEIN, *THE GREAT CONSPIRACY TRIAL: AN ESSAY ON LAW, LIBERTY AND THE CONSTITUTION* (1970) (discussing *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973)).

major verbal salvos were directed at the allegations that Zenger's paper was false, scandalous, and seditious. He first tried to persuade the judges that *Tutchin's*<sup>125</sup> and *Fuller's*<sup>126</sup> cases permitted him to put truth in issue, and required the prosecution to prove falsehood as an element of the offense. When the judges went against him on that score, he turned to the jury:

Then, gentlemen of the jury, it is to you we must now appeal, for witnesses to the truth of the facts we have offered, and are denied the liberty to prove; . . . I am warranted to apply to you both by law and reason. The law supposes you to be summoned out of the neighbourhood where the fact is alleged to be committed; and the reason of your being taken out of the neighbourhood is, because you are supposed to have the best knowledge of the fact that is to be tried. And were you to find a verdict against my client, you must take upon you to say, the papers referred to in the information, and which we acknowledge we printed and published, are false, scandalous and seditious; but of this I can have no apprehension. You are citizens of New York: you are really, what the law supposes you to be, honest and lawful men; and, according to my brief, the facts which we offer to prove were not committed in a corner; they are notoriously known to be true; and therefore in your justice lies our safety.<sup>127</sup>

Hamilton then stressed, "All high things said . . . upon the side of power, will not be able to stop people's mouths when they feel themselves oppressed."<sup>128</sup> His argument, which is worth reading in detail, prevailed. The jury acquitted Zenger, though both the attorney general and the chief justice told them their duty to find a guilty verdict was plain.<sup>129</sup>

That argument was an appeal to rights in a concrete and particular setting: a jury trial. The intended audience accounts in some measure for Hamilton's rhetoric being stable, definite, nonmystical, and useful. The jury apprehended the danger to valid and valuable interests if Zenger were convicted. The verdict represented an express adoption of a view of the boundary between lawful and lawless speech, and of the jury function that had been argued before them. Although the chief justice told the jury that they "may leave . . . to the Court" the issue of whether Zenger's words were a libel, they understood from earlier argument that "may" was a considered word. Hamilton had argued, without significant opposition from the judges or the prosecutor, that the jury had the power to

125. *Rex v. Tutchin*, 14 Howell's *State Trials* 1095 (1704).

126. *Rex v. Fuller*, 14 Howell's *State Trials* 517 (1702).

127. *Rex v. Zenger*, 17 Howell's *State Trials* 675, 703-04 (1735).

128. *Id.* at 706.

129. *Id.* at 722.

## Thoughts on *Kadish*

decide that question,<sup>130</sup> much as Mansfield later acknowledged in *Miller's* case.<sup>131</sup>

Hamilton's eloquent rights rhetoric was rooted in the plight of a fellow being, Zenger, and in a particular political struggle. Professor Tushnet does seem to say that sedition case victories and defenses were once useful; it is simply that they are no longer so.<sup>132</sup> This position misses the point, for Hamilton's advocacy can teach us a lot about the utility of rights rhetoric, and about the different ways in which it should be used and evaluated. To take one small example, to be pursued at greater length below, when Hamilton argued to the judges, his rhetorical and analytical style was quite different than in his remarks directed primarily to the jurors.<sup>133</sup> This duality of modes of expression forcefully reminds us that there can be a gap between formal roles and the power to enforce rights. The jury's acknowledged power to return a general verdict of not guilty in the teeth of judicial urgings to "follow the law" is a profound illustration of this point.

### B. *The Function of Rights Rhetoric*

Rights rhetoric is important to those seeking social change because it *persuades*, *measures*, and *predicts*. We see its persuasive power in cases such as *Zenger*. It summons, and sometimes commands, a result. In *Zenger's* case, this result occurred because Hamilton insisted not only upon a certain boundary between state power and claims of right, but upon the proposition that a jury should determine the boundary line.

In a more general sense, such rhetoric designedly appeals to that group of persons, such as judges, who are assigned the task of expounding legal ideology, including "rights." Although today the persuasive power of appeal to rights has dimmed, judges do not yet feel free to abandon the exercise of responding to rights rhetoric in arguments that appear to be rationally constructed.

When I say that rights rhetoric *measures*, I refer to the characteristic of rights as promises. The rights to speech, press, assembly, petition,

130. *Id.* at 720.

131. 20 Howell's *State Trials* 870, 894 (1770).

132. Tushnet, *supra* note 114, at 1391.

133. When the jury is present, a trial lawyer is *always* addressing that jury, whether or not her remarks explicitly are directed at them. Thus, much of Hamilton's legal argument was made despite the evident futility of trying to convince the biased judges to rule in his favor. He was trying to let the jury see how outrageously the party in power, and its judges, were behaving. He was laying the predicate for an argument directed at the justice and wisdom of acquitting Zenger. I have explored these "subtexts," as an actor would call them, in a dramatized version of the Zenger trial. M. Tigar, *The Trial of John Peter Zenger* (1986) (performed at ABA National Convention, New York, Aug. 10, 1986).

and equal treatment are aspects of legal ideology that citizens are assured will be invoked to mediate the exercise of state power against individuals and groups. A consistent corollary to rights rhetoric, in the forming of legal ideology, is that the regime's legitimacy depends in some sense upon respect for the mediating quality of rights rhetoric. When the regime breaks that promise, by retreat from rights enforcement in its actions and pronouncements, and by the simultaneous insistence that its edicts must be obeyed out of a positivist idea of unquestioned respect for state sovereignty, the measuring function of rights rhetoric becomes important.

By *measuring*, I mean that rights rhetoric performs both a hortatory and an evaluative function. Rights rhetoric is hortatory because activists may argue that when the legal ideology of rights no longer effectively mediates the exercise of state power, state power is to that extent delegitimized. Strivers for social change historically and consistently have spoken in terms of claims of right. The gap between rights promises and state conduct serves in such a context as a lesson: the state, and the system of social relations it protects, is no longer willing or able to keep promises that the prevailing legal ideology indisputably makes.

The evaluative aspect of *measuring* is found in the sort of discourse Professor Tushnet engages in, though perhaps he would not acknowledge this. When he says that the law of sedition no longer raises important rights issues, he concedes by implication that it formerly did. In recognizing this fact—as becomes apparent upon reading eighteenth century history—the question arises why the law of sedition might be relatively less important now than then.

I agree that it is. Indeed, I agree with many of Professor Tushnet's observations that today freedom of speech and press has been restricted and trivialized.<sup>134</sup> The restriction has come as the Supreme Court makes fewer and fewer concessions to rights rhetoric about available means of and forums for public expression. Trivialization occurs when the Court's majority consistently parades rights rhetoric as a justification for permitting the owners and managers of property to do what they wish with the property.<sup>135</sup>

Professor Tushnet and I can disagree, and probably do, about the *extent* to which rights rhetoric and the ideology it reflects have ceased to mediate state power exercised consciously in the interest of the dominant

134. See Tushnet, *supra* note 114, at 1390-92.

135. This trivialization was one theme of my recent review of N. DORSEN, *OUR ENDANGERED RIGHTS: THE ACLU REPORT ON CIVIL LIBERTIES TODAY* (1984). Tigar, Book Review, 94 *YALE L.J.* 970 (1985).



class. That disagreement does not provide the slightest support for saying that rights rhetoric *never* persuades or mediates.

Tushnet tells us that when he demonstrates for a cause, he does not think of himself as exercising “rights,” but rather of being with his friends in a common endeavor.<sup>136</sup> Precisely. But when the cops come and throw him and his fellow demonstrators in jail, his lawyer will argue rights rhetoric to the court. Tushnet and his friends will continue to have their reasons for acting, but that will not be the primary focus of an argument with the state about their “right” to act. The history of this century records the futility of casting aside all reliance on rights rhetoric: the Industrial Workers of the World defendants who stood mute in their sedition trials were less effective as advocates both for “rights” and for their politics.<sup>137</sup>

It may be that Tushnet is arguing that things are so bad that once-useful rights rhetoric no longer mediates state power, and that people who say it does are misleading and diverting the movement for change. If so, I disagree, but we are still having an argument about *measuring*.

If Tushnet resolves this argument to his satisfaction and claims that the mediating effect of rights rhetoric has almost vanished, he still has a job to do. The lesson of past changes in the social system is that rights rhetoric persists *across* the replacement of one ruling class by another. This persistence is not, I would argue, solely a matter of false consciousness, nor a sort of collective hangover that people wake up with the morning after the revolution.

People will continue to believe, based on their experience, that certain “rights” are “due.” In the wake of the socialist transformation for which Tushnet contends, only a fool or a tyrant would shirk the hard responsibility of disembedding rights from their bourgeois context. This process requires recognition that some rights—the right to certain treatment at the hands of the state and the right to just procedures for deciding—are to be valued independent of their place in the pantheon of professed bourgeois values.<sup>138</sup> The task, before the social change occurs,

136. Tushnet, *supra* note 114, at 1382.

137. See generally Z. CHAFFEE, JR., *FREE SPEECH IN THE UNITED STATES* chs. 2, 4, 5, 10 (1941) (illustrating rights rhetoric in the context of war-time prosecutions, postwar sedition laws, deportation, and criminal syndicalism statutes). Compare the situation of those who stood silent with those defended by Darrow in the 1920 Chicago Communist trial. The jury convicted. But the issues raised in the court by the defense led Governor Small to pardon the defendants before they served a day of their sentences. See *ATTORNEY FOR THE DAMNED* 173 (A. Weinberg ed. 1957).

138. I am aware that if one assumes some future classless society, then “rights talk” may become otiose; legal ideology will have become otiose. It also is true that in bourgeois legal ideology, “people confront each other as atomized and isolated bearers of rights.” See Hunt, *The Future of Rights and Justice*, 9 *CONTEMP. CRISES* 309, 311 (1985) (critiquing this view). I disagree that this circumstance

is to identify those rights and to predict means of securing them.

If Tushnet doubts the practical importance of rights rhetoric in this process, he should study carefully the legislative process in a country with a different social and political system such as Cuba. I have spent long hours and days discussing with Cuban jurists their search to accommodate rights rhetoric in the structure of state power, and to accommodate boundary-defining advocacy couched in rights terms. Their codes of criminal procedure and penal law reflect some of this process. Their recent critical analysis of the penal law, looking to reform of unduly "romantic" and "repressive" aspects of the 1980 Code, is a testament to the continuing vitality of rights talk in a socialist country.<sup>139</sup>

Another illustration of the persistence of rights rhetoric across changes of social system is the Universal Declaration of Human Rights,<sup>140</sup> a document contributed to by representatives of various social systems.<sup>141</sup> The Declaration represents a partial, although extensive, consensus on a broad range of rights. The debates over its terms sprang

must "render the realisation of co-operation and community unrealizable." *Id.* My disagreement rests, first, upon a deconstructive analysis of Tushnet's insight: people seeking to change society rightly think of themselves as cooperating with each other, and not first about "rights." They are compelled by the state's repressive apparatus however, to couch their claims in rights terms.

Second, a transformation of society still will leave a state apparatus in place. Socialist countries that have cast aside prematurely the relatively formal guarantees of "rights" have found that this view is not only unduly romantic, but in fact breeds regression. Rights-talk in a socialist society is an indispensable part of the process of respecting human values while seeking to change conditions so that such values will be so deeply embedded as not to need formal protection.

Whether such a state of affairs will come to pass is necessarily conjectural at present. Thus, many socialist legal scholars have sought to identify and preserve those aspects of bourgeois legal ideology that reflect the progressive content of the bourgeois revolutions. These are precisely the aspects of legal thought that are under brutal and consistent attack in capitalist societies today.

Engels wrote that under communism, "[t]he government of persons is replaced by the administration of things." F. ENGELS, *ANTI-DÜHRING: HERR EUGEN DÜHRING'S REVOLUTION IN SCIENCE* 307 (E. Burns trans. 1966). There is no evidence—at least yet—to support such a statement. After all, a somewhat similar claim was made by the capitalist revolutionaries, who said that the overthrow of feudalism would replace a system of dominance of *people* with ownership of things (the right of property) and freely consented relationships (the right of contract), making the state virtually otiose. A socialist society proceeds upon quite different principles than a capitalist one, but the state as a coercive apparatus that affects *people* surely will be around for a long time, hence the need to think in a systematic way about mediating the exercise of its power.

I quickly add that Hunt's piece in fact agrees with much of what I have written above. I have quoted his characterization because it is helpful. Although I find some theoretical parallels between my view and his, I suggest that I have resolved some questions that Hunt does not approach, and that his "ambiguity" about the role of rights discourse can be resolved within the framework I have set out.

139. These observations are based upon recent research conducted in Cuba and with Cuban legal materials. I soon will be writing the results of this research in some detail.

140. U.N. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Sales No. H.78.5 (1948).

141. For a discussion of the United Nations' work in the field of human rights, and of the debates over international norms applicable to capitalist and social countries, see G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 79-83 (1974).

from the experiences of the postwar tribunals that tried Nazi war criminals, but have had a much broader impact. One notable example is the imposition upon Great Britain of international standards of humane treatment of prisoners under the European Convention of Human Rights, an outgrowth of the discussions that produced the Universal Declaration.<sup>142</sup>

The rights rhetoric that flourishes around the debate over enforceable international norms is important because it fuels public and private demands that states behave in particular ways. Thus, entirely aside from the embodiment of rights principles in individually addressed judicial decisions, these principles are demonstrably stable, determinate, and of some utility. Although there is always the risk that appeals to statements of rights risk reifying the principles referred to, this risk is minimal if the speaker couches her remarks as demands for justice and takes a critical perspective.

### C. *Epilogue on Sedition*

I do not fault Professor Stone for failing to undertake a digression on sedition in its historical context. I only disagree with his characterization of the aspects of it that he had time and space to treat. I wonder, though, whether a deeper reflection on the utility of advocacy at the substantive boundaries of the criminal law would have made his article more faithful to the historical record. Readers of the *Encyclopedia* also would have been served by critical analysis of rights-skepticism, of the sort represented by commentators such as Professor Tushnet.

## IV. Conspiracy, the Law of Parties, and Inchoate Crimes

### A. *The Encyclopedia's Analysis*

The article *Conspiracy*<sup>143</sup> illustrates the limits of an encyclopedia such as this. The limited space available, and the determination to present a relatively uncritical synopsis of the law, contribute to making the entry somewhat less valuable than, say, the still-authoritative *Harvard Law Review* Developments Note of 1959.<sup>144</sup>

For example, the introductory paragraph tells us, "Everyone occasionally thinks of committing a crime, but few actually carry the thought into action. Therefore, the law proceeds only against persons who en-

142. See T. O'HAGAN, *THE END OF LAW?* 5-24 (1984).

143. Burke & Kadish, *Conspiracy*, in vol. 1 at 231.

144. *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959) [hereinafter *Developments*].

gage in acts that sufficiently demonstrate their firm intention to commit a crime."<sup>145</sup> I do not know who "the law" is in the reified abstract, but I do know of some prosecutors and judges who have proceeded against persons who had not done nearly enough to meet this definition. This same reification, and consequent failure to ask what is happening to the law of conspiracy in the real world, appears again with the observation that "the law has developed several models"<sup>146</sup> concerning the scope of an alleged conspiratorial agreement.

Before I address the broader questions posed by recent disturbing developments in the law of conspiracy and vicarious liability, I will point out some other disagreements I have with this article on its own terms. The authors' cheerful assurance that "the law" will not punish you unless your guilt is manifest is contradicted in their discussion of the agreement requirement. The orthodox rule is that an alleged conspirator must have manifested assent to the unlawful agreement charged in the indictment, with the intent to make the unlawful venture succeed.

The Harvard Note of 1959 mentioned what it called "judicial weakening of [the] agreement requirement."<sup>147</sup> The authors of the *Encyclopedia* article discuss this topic at some length, using two cases to illustrate their views. The first is Judge Rubin's opinion in *United States v. Alvarez*<sup>148</sup> for a panel of the Fifth Circuit, reversing a conspiracy conviction for insufficient evidence of agreement. Unfortunately, this decision was reheard en banc, as noted at the end of the published panel opinion, and the conviction was affirmed. So the discussion of *Alvarez*' meaning and significance is off the mark.

The second illustration is the parallel conduct agreement case of *Interstate Circuit, Inc. v. United States*,<sup>149</sup> an antitrust case under section 1 of the Sherman Act. The Supreme Court went quite far in sustaining an injunction against a conspiracy to impose restrictions on the distribution of motion pictures. The authors tell us that "the actions of each distributor might just as easily have resulted from the exercise of self-interest in the absence of illegal agreement."<sup>150</sup> They go on to say that the Supreme Court did not require a showing of actual agreement to sustain a finding of conspiracy to restrain trade.<sup>151</sup> This analysis is flawed for several

145. Burke & Kadish *supra* note 143, at 232.

146. *Id.* at 233.

147. *Developments, supra* note 144, at 933.

148. 610 F.2d 1250 (5th Cir.), *vacated*, 610 F.2d 1258, *aff'd on rehearing*, 625 F.2d 1196 (1980) (en banc), *cert. denied*, 451 U.S. 938 (1981).

149. 306 U.S. 208 (1939).

150. Burke & Kadish, *supra* note 143, at 233.

151. *Id.*

reasons.

First, the district court in *Interstate Circuit* found that there was an agreement, and the Supreme Court held this finding supported by the evidence.<sup>152</sup> Second, the case is explained more logically as holding that there need not be any direct communication among each one of the conspirators, provided they all know of and adhere to the deal. The Harvard Note, which also uses *Interstate Circuit* as an example, recognizes this interpretation while not giving it undisputed credence.<sup>153</sup> Third, as I shall discuss in more detail later, a subsequent decision of the Supreme Court, *United States v. United States Gypsum Co.*,<sup>154</sup> reaffirms the requirement of specific intent, including the intent to agree, in terms that cast doubt upon the authors' interpretation of *Interstate Circuit*. Finally, *Interstate Circuit* is a civil case, decided at a time when criminal violations of section 1 of the Sherman Act were misdemeanors; I have difficulty accepting the authors' generalization from this opinion to "conspiracy prosecutions generally."<sup>155</sup>

Other problems are present in this article: its capsule history of conspiracy law goes over the same ground as the 1959 Harvard Note.<sup>156</sup> It ignores, for example, the subsequent research into conspiracy law contained in and spawned by the conspiracy to corrupt public morals cases in England that began in 1961 with *Shaw v. Director of Public Prosecutions*.<sup>157</sup> The authors focus upon that portion of the history of conspiracy dealing with agreements to bring false accusations. Although this history is a major element in the development of modern Anglo-American conspiracy law, a more discerning and accurate historical discussion would have included reference to prosecutions for agreements with other objects, and more broadly to the history of inchoate offenses generally.

152. 306 U.S. at 226. The Court cites earlier cases to clarify that it is holding only that conspiracy does not require "simultaneous action or agreement." *Id.* at 227. That is, one can be guilty by adherence to a plan proposed by another, without knowledge of the name or perhaps even the existence of others who may be accepting the same invitation. *Id.*

153. *Developments, supra* note 144, at 934 n.74, 1005-08.

154. 438 U.S. 422 (1978).

155. *Burke & Kadish, supra* note 143, at 233 (emphasis added).

156. Indeed, there are some similarities of expression between *Conspiracy* and the Harvard Note. *Compare Developments, supra* note 144, at 933 ("The basic principle that a conspiracy is not established without proof of an agreement has been weakened, or at least obscured, by . . . the courts' unfortunate tendency to overemphasize a rule of evidence at the expense of a rule of law.") with *Burke & Kadish, supra* note 143, at 232 (The evidentiary rule that "it is fair to infer an agreement to join a conspiracy from the performance of acts that further the purpose . . . can obscure the basic principle that conspiracy is not established without proof of an agreement.").

157. [1962] App. Cas. 220 (H.L. 1961); see also *Reg. v. Knuller (Printing, Publishing and Promotions) Ltd.*, [1972] 2 Q.B. 179 (C.A. 1971) (holding that conspiracy is not limited only to agreements to perform acts in public, but may also apply to agreements to encourage performance of immoral acts in private).

Sedition, conspiracy, attempt, and other offenses were given powerful impetus from the Star Chamber as mechanisms for punishing conduct that never went beyond the use of words.<sup>158</sup> The Star Chamber's political interest in expanding its jurisdiction over such offenses probably accounts for the development, survival, and expansion of post-English Revolution conspiracy law far more satisfactorily than the authors' more orthodox version of events.<sup>159</sup>

The authors tell us that the crime of conspiracy is "largely unknown, except in modest forms, in continental European countries."<sup>160</sup> This observation is not quite true. "Group crime," when the group has completed an offense, often is punished with a separate or enhanced sanction in Continental countries. More significantly, agreement to commit crimes against the state is punished quite severely in many Continental penal codes.<sup>161</sup> I would not call this "modest." These statutes explicitly recognize the enhanced danger of group criminal activity, and thus serve one of the professed purposes of conspiracy laws in England and the United States. Continental statutes, however, generally do not reflect a perceived legislative wish to punish bad intentions, and thus do not serve the other main purpose of conspiracy prosecutions.

After my difficulties with the *Conspiracy* article, I turned back to those on *Accomplices*<sup>162</sup> and *Attempt*,<sup>163</sup> thinking to find solace in discussions of general principles of the law of parties and of uncompleted

158. G. WILLIAMS, *supra* note 48, at 349.

159. See generally 2 J. STEPHEN, *supra* note 98, at 377-95 (seditious conspiracies); 3 *id.* at 202-27 (conspiracies in restraint of trade); G. WILLIAMS, *supra* note 48, at 349 (noting that Star Chamber created the crimes of attempt, conspiracy, and incitement); Barnes, *The Making of English Criminal Law: (2) Star Chamber and the Sophistication of the Criminal Law*, 1977 CRIM. L. REV. 316, 322-26 (discussing the extensive incorporation of the Star Chamber's law into the common law after the court's abolition).

The theoretical foundations of conspiracy law are discussed in G. FLETCHER, *supra* note 8, §§ 3.5, 3.6. I find Fletcher's historical discussion, *id.* § 3.6, at 222-23, less satisfactory. He speaks of "nineteenth century tendencies to mark the point of criminality as close as possible to consummation of the offense." *Id.* at 223. Workers who were organizing trade unions, as the cases cited by Stephen evidence, observed no such "tendency." The other major post-Star Chamber impetus to conspiracy also involved perceived threats to the existing order, as Stephen's work also illuminates.

Since writing the above, I have spoken with Ivan Illich, who has been doing parallel research into the emergence of the "conspiracy taboo" in Roman Catholic liturgical changes in the twelfth century. The "conspiratio" of the early liturgy was a kiss that denoted equality. As the Church became more hierarchical and the liturgy changed to reflect this, the "conspiratio" became subversive.

160. Burke & Kadish, *supra* note 143, at 237.

161. See, e.g., C. PEN. (France) arts. 87, 94. By these provisions, a conspiracy to attempt to overthrow constitutional government (art. 87), or to commit massacre or devastation over a large area (art. 94), is an offense. If the agreement is accompanied by an overt act in furtherance, the punishment is greater than if there is no overt act. Fletcher points out that the German equivalent of conspiracy is quite broad. G. FLETCHER, *supra* note 8, § 3.6, at 221.

162. Strazzella, *Accomplices*, in vol. 1 at 9.

163. Schulhofer, *Attempt*, in vol. 1 at 91.

crimes. These obviously are subjects closely related to the law of conspiracy, so much so that the Model Penal Code approach to all three categories may be described properly as unitary. I found competent, noncontroversial expositions of these subjects—no fireworks. Then I happened upon Professor Meir Dan Cohen's brilliant piece *Actus Reus*.<sup>164</sup> Professor Cohen's article perhaps is mistitled, and the editors at least should have cross-referenced it to the others I have mentioned.<sup>165</sup> He critically discusses the reasons for punishing criminal intentions and the growing trend in judicial opinions and legislative enactments to trivialize the requirement of a dangerous act by regarding the act's principal significance as simply corroborating the existence of the forbidden intention.

### *B. Some Limits on Conspiracy*

The *Encyclopedia* competently describes conspiracy, aiding and abetting, and attempt. Although describing offenses is useful, even necessary, it seldom yields critical insight. The law of inchoate offenses, in theory and practice, is rife with contradictions that appear only with deeper analysis.

Conspiracy, one might think, is simple enough. *A* and *B* agree to commit a crime and *B* does an overt act to further their scheme. One might ask whether criminalizing such conduct is necessary,<sup>166</sup> or at least whether it is sensible to punish *any* agreement to commit *any* offense, as opposed to proscribing only agreements to commit the most serious crimes.

Charges of conspiracy often directly implicate presumptively protected conduct. More often than almost any other type of case, conspiracy cases involve boundary-marking of the most difficult sort. This problem arises because often the line between criminal and noncriminal conduct is coterminous with that between protected (socially valuable) and unprotected (socially nonuseful) conduct.<sup>167</sup>

The root problem is that the offense of conspiracy is complete long before the alleged plan to cause harm is well in motion, and therefore before the ambiguities of thoughts and words have been made certain in

164. Cohen, *supra* note 23, at 15.

165. Cohen, however, cites Fletcher's work. Vol. 1 at 23.

166. See, e.g., Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137 (1973) (arguing that the problems that conspiracy deals with could be better addressed under other legal doctrines, thus ending the problematic growth of conspiracy laws from judicial improvisation).

167. See, e.g., *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969) (first amendment); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (business conduct).

the crucible of action. An observer often has a lingering doubt that the plotters are really dangerous. Talk is cheap and ambiguous.

Talk, at least the kind called "speech," is also constitutionally protected. *United States v. Spock*<sup>168</sup> is a familiar example. The defendants allegedly conspired to interfere with the Selective Service System. According to the government, their conspiracy fell afoul of a section of the Military Selective Service Act,<sup>169</sup> which does not require an overt act in furtherance of the crime to complete the crime.

The court of appeals reversed the conviction, holding that the "metastatic" rules of ordinary conspiracy law could not apply.<sup>170</sup> The defendants at most had entered into a "bifarious" agreement to engage in lawful agitation against conscription and to resist assertedly lawful authority.<sup>171</sup> Each defendant's intent to join in the unlawful objective must be shown, the court said, by evidence of his thoughts, words, and deeds, and not inferred from the conduct of others. In addition, the government's evidence had to be tested by more rigorous standards than in the usual case.<sup>172</sup>

The *Spock* majority left out any requirement that the speech-conduct of any particular defendant raise a serious risk of significant social harm. Based, however, upon the Supreme Court's sedition and syndicalism decisions, one surely can argue that the government also must shoulder the burden of proving such a danger.<sup>173</sup> The *Spock* court brushed aside the defendants' "imminency" concerns by a two-step reasoning process.<sup>174</sup> First, the court noted that the first amendment's limitations on prosecuting group crime involving speech would be satisfied if the group's *object* was a permissible object of punishment.<sup>175</sup> The court implied that any "clear and present danger" or related concern could be satisfied at this level of discussion. Second, a particular defendant would

168. 416 F.2d 165. For an able exposition of the *Spock* opinions and the issues they raise, see Filvaroff, *Conspiracy and the First Amendment*, 121 U. PA. L. REV. 189 (1972).

169. 50 U.S.C. app. § 462(a) (1982).

170. 416 F.2d at 173.

171. *Id.* at 172-73.

172. *Id.* at 173.

173. *See, e.g.,* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (finding unconstitutional a law that penalizes advocacy without incitement to commit lawless action).

174. *Spock*, 416 F.2d at 172 & nn.16-17.

175. *Id.* at 172 n.17. For an illustration of how much the rationale of footnote 17 in *Spock* can gut first amendment protections, see *United States v. Rodriguez*, 803 F.2d 318, 322 (7th Cir. 1986). The court upheld a conviction for seditious conspiracy. The defendant argued that the court (and presumably the jury) should have applied first amendment doctrine to ensure that he was not being punished for adherence to the lawful aims of the FALN, a Puerto Rican nationalist organization. The court disposed of this argument by pointing to the unlawful objectives of FALN. This ham-handed reasoning misses the point: of course the FALN has unlawful objectives. If it did not have at least some of those, no line drawing would be necessary.



be guilty if his personal participation, judged by his own unequivocal acts and conduct, showed his knowledge of and intent to embrace the unlawful object. The first amendment requires strict proof on this score, the court held.<sup>176</sup> Thus, the application of ordinary conspiracy principles may permit the government to reach individual conduct that is not dangerous in itself, consists only of agreement, and takes place at a point relatively far from the consummation of the group's asserted goal. This possibility is but another instance of general, ostensibly neutral principles of liability trumping specific constitutionally based rights.<sup>177</sup>

*Spock* echoed the cautionary words of *Yates v. United States*<sup>178</sup> and *Noto v. United States*,<sup>179</sup> and took the same skeptical view of the quality of the government's proof. *Spock* therefore stands as a notable example of boundary-marking in the criminal process. The line between protected speech and unprotected conduct was coterminous with that between criminal and noncriminal conduct.

The requirement of specific intent has been used for similar purposes. In *Screws v. United States*,<sup>180</sup> the Court upheld the criminal provisions of the Civil Rights Act against a vagueness challenge by requiring the government to prove that the defendant knew he was violating the victim's rights and had the specific intent to do so.

Another significant case is *United States v. United States Gypsum Co.*<sup>181</sup> The defendants were charged with price-fixing in violation of section 1 of the Sherman Act. One alleged method of setting agreed prices was "interseller price verification." This is a fancy name for calling up competitors and exchanging price information. Exchange of price and other information among competitors is not a per se violation of the Sherman Act, and the Supreme Court stated that "such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive."<sup>182</sup> How can the line between this valuable business behavior and criminal conduct be drawn? The Court retraced familiar ground in holding that the government must prove a specific intent to cause an anticompetitive effect.<sup>183</sup> In practical terms, this means that the defendants must have known that it was likely that the forbidden effects probably would follow from their conduct. The

176. 416 F.2d at 172-73.

177. See Tigar, *supra* note 53, at 1470-71.

178. 354 U.S. 298 (1957).

179. 367 U.S. 290 (1961).

180. 325 U.S. 91 (1945).

181. 438 U.S. 422 (1978).

182. *Id.* at 441 n.16.

183. *Id.* at 435.

Court reached this result by relying upon cases that held strict liability is the exception in criminal cases, and by also noting that Congress recently had raised violations of section 1 of the Sherman Act to felony status.<sup>184</sup>

The most interesting justification for the intent requirement, however, was the Court's acknowledgement that the offense of conspiracy to restrain trade is vague in many contexts. In language echoing the rationale of *Spock* and the cases on which it relied, the Court said:

The imposition of criminal liability on a corporate official, or for that matter on a corporation directly, for engaging in [exchange of price information] which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence; salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment.<sup>185</sup>

This is a remarkable passage. It evokes the warnings of "chilling effect" in the first amendment case of *Dombrowski v. Pfister*,<sup>186</sup> and it seems to elevate business behavior nearly to the place occupied by freedom of speech. It certainly directs judges to police carefully the line between businesspeople getting together and talking, and businesspeople getting together and conspiring.<sup>187</sup>

So there are some judicial warnings about the breadth and vagueness of conspiracy. Whenever first amendment buffs, tax-fraud fans, or price-fixing aficionados forgather, it is customary to drink a toast to specific intent. For me, however, the celebratory wine has a bitter aftertaste for two principal reasons: the procedural morass into which every conspiracy case throws the defendant; and evidence that the rationale of conspiracy law now has eluded courts and legislators.

### C. *Paltering*

Cases like *Spock* and *Gypsum* keep the word of promise to our ear and break it to our hope. I do not refer to their failure to require any real risk of harm, but rather to the few paltry procedural devices to ensure

184. *Id.* at 442 n.18.

185. *Id.* at 441 (footnote omitted).

186. 380 U.S. 479 (1965); see Tigar, *supra* note 135, at 984. If the text seems to suggest that the present Court majority believes that there are constitutional limits on the Sherman Act's prohibition of exchanging business information, the reader has the right idea. See *id.* at 984-88.

187. The Supreme Court has recognized for some time that one must have knowledge of a conspiracy before being found guilty as a coconspirator. See *United States v. Falcone*, 311 U.S. 205 (1940) (finding that person selling goods with knowledge that they are intended for distilling illicit spirits, but without knowledge of conspiracy, will not be guilty as coconspirator).

that the promise is kept. The *Encyclopedia's* treatment of conspiracy mentions the old standard procedural advantages of joinder, admission of hearsay evidence, and venue choice that conspiracy confers on prosecutors.<sup>188</sup> It contains no systematic treatment of the essentially unchecked power of prosecutors conferred by conspiracy statutes as a result of the absence of procedural sorting devices designed to enforce the principles of *Spock* and *Gypsum*.

In federal cases, as in most states, the indictment is a formality. The grand jury is hardly more than the prosecutor's right arm. The charge itself will survive a motion to dismiss if it tracks the statutory language and briefly describes the conspiracy in conclusory terms.<sup>189</sup> In most cases, the sorting function of Federal Rules of Criminal Procedure 7 and 12 do little or nothing to derail a conspiracy prosecution headed for certain collision with protected behavior.

There are occasional nods of the judicial head toward a rule that conspiracy counts in indictments must be examined carefully, but these must be weighed against statements that conspiracy need not be pleaded with the same detail as a substantive offense.<sup>190</sup> Judge Luther Youngdahl once said that when an indictment appears to pose a conflict with the first amendment, it will receive special scrutiny.<sup>191</sup> Few echoes

188. *Burke & Kadish*, *supra* note 143, at 236-37; *see also* *Krulewicz v. United States*, 336 U.S. 440, 445-59 (1949) (Jackson, J., concurring) (a famous exposition of the evils of conspiracy prosecutions). Yet Justice Jackson also said in *Dennis v. United States*, 341 U.S. 494, 577 (1951), "There is no constitutional right to 'gang up' on the government." Judge Aldrich quoted this observation in *United States v. Spock*, 416 F.2d 165, 171 n.12 (1st Cir. 1969).

189. *See, e.g.*, *United States v. Cauble*, 706 F.2d 1322, 1333 (5th Cir. 1983) (finding that an indictment is sufficient if it gives elements of offense charged, informs defendant of charge he must meet, and enables accused to plead acquittal or conviction), *cert. denied*, 465 U.S. 1005 (1984).

190. *See, e.g.*, *Brown v. United States*, 403 F.2d 489, 490 (5th Cir. 1968) (finding that conspiracy count need not spell out allegations with same particularity as count for substantive offense), *cert. denied*, 397 U.S. 927 (1970); *United States v. Devine's Milk Laboratory*, 179 F. Supp. 799 (D. Mass. 1960) (same rule but indictment dismissed) (cited with approval in *Russell v. United States*, 369 U.S. 749, 766 n.13 (1962)). The judicial nod towards "careful scrutiny" of conspiracy indictments is reflected in opinions such as *United States v. Hajecate*, 683 F.2d 894, 897 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983).

In the following discussion of criminal procedure, I must acknowledge that in addition to my training and experience in federal criminal matters, and in addition to having written on these subjects, *see* Practice Manual, 1 Sel. Serv. L. Rep. (Pub. L. Educ. Inst.) ¶¶ 2101-2212 (1968-1969), I never write about this subject without 1-3A C. WRIGHT, FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE (2d ed. 1982), at hand. Indeed, I remember a spirited argument with my mentor and law partner Edward Bennett Williams in 1974 about the pretrial motions we were drafting in a significant criminal case. We wrangled over one point for nearly an hour, our voices rising to a crescendo. Finally, Williams exclaimed, "All right. We'll have to submit this to a *real* authority." He jabbed his finger at the intercom and said to his secretary, "See if you can find Charlie Wright. He's at the Texas Law School."

191. *United States v. Lattimore*, 127 F. Supp. 405, 407 (D.D.C.), *aff'd*, 232 F.2d 334 (D.C. Cir. 1955) (per curiam). The earlier opinion in the same litigation also is worth examining. *United States v. Lattimore*, 215 F.2d 847 (D.C. Cir. 1954).

of these words appear in later cases, although it would be well for advocates to remind courts of them.

How incongruous that courts ritually bless indictments in first amendment cases while showing increased solicitude to civil defendants in certain categories. Federal Rule of Civil Procedure 9(b) has always required particular allegations of fraud. Recently, citing Rule 9(b) and the heightened requirements of Rule 11, the Fifth Circuit in *Elliott v. Perez*<sup>192</sup> held that when a civil defendant may possess immunity from suit, the plaintiff bears a special burden to allege detailed facts showing the immunity not to exist. Judge Brown's majority opinion gives a different rationale for the decision than Judge Higginbotham's concurrence, but both agree that the defendants' immunity extends to a right not to have to defend unnecessary litigation.<sup>193</sup>

One would hope, at least in the first amendment conspiracy cases, that similar reasoning would compel a closer scrutiny of indictments. After all, judicial review of an indictment's sufficiency traditionally has been available and is codified in the federal rules.<sup>194</sup> It does not involve some extraordinary effort to halt the ordinary criminal process, as illustrated in *Dombrowski*,<sup>195</sup> despite the limitations imposed by *Younger v. Harris*.<sup>196</sup> Indeed, if the substantive, first amendment side of *Dombrowski* still lives, as opposed to the procedural, Anti-Injunction Act<sup>197</sup> side, pretrial scrutiny of indictments posing first amendment risks should naturally follow. *Dombrowski* rested upon two procedural premises. First, federal courts under certain circumstances could enjoin state prosecutions. Second, some procedural devices were necessary to prevent prosecutors from subjecting defendants to trial on the basis of allegations that were so overbroad or vague as to threaten first amendment interests.<sup>198</sup>

The first premise has to do with the proper functions of state and federal courts, and has been undercut by later cases. The second one is not affected by those cases. The "chill" of prosecution causes the way to steer wide of the unlawful zone. A lawyer intent on making this point can find support in the case law of Federal Rules of Criminal Procedure 7 and 12.<sup>199</sup> Her success, however, would require the court to do what

192. 751 F.2d 1472 (5th Cir. 1985).

193. *Id.* at 1482; see also *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1986) (dismissing securities fraud claims for failure to plead facts with particularity as required by Rule 9(b), and discussing policies underlying the Rule).

194. FED. R. CRIM. P. 7, 8, 12.

195. *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

196. 401 U.S. 37 (1971).

197. 22 U.S.C. § 2283 (1982).

198. 380 U.S. at 486.

199. See, e.g., *United States v. Hajecate*, 683 F.2d 894, 897 (5th Cir. 1982) (citing United States

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many inexplicably have not: reason from the substantive protection to the procedural right. The first amendment, or so we may believe, is as much a bar to prosecuting protected conduct as it is a bar to punishing such conduct. Reasoning to the same effect is possible from Chief Justice Burger's paean in *Gypsum* to the benefits of competitors freely associating with one another.

If the district court sustains a vague indictment, the murky allegations head for trial with little or no prospect of interlocutory review. So far, at least, the Supreme Court has not placed free speech in the pantheon in which the double jeopardy clause and the speech or debate clause reside.<sup>200</sup> When a defendant claims that his indictment violates or his trial would violate one of these provisions, he has the right of interlocutory appeal from an order denying the motion to dismiss, but not with his free speech claim. This result is curious. Like the double jeopardy claimant, the defendant faced with allegations that threaten first amendment interests should have a legally recognized interest in not being tried, not simply in not being convicted and sentenced.

But what of our conspiracy defendant's right to a bill of particulars, and to discovery? The bill can be useful in complex economic crime

v. Porter, 591 F.2d 1048, 1057 (5th Cir. 1979), and finding that although conspiracy indictments are strictly scrutinized, the indictment in issue gave a sufficient description of the charges required by FED. R. CRIM. P. 7), *cert. denied*, 461 U.S. 927 (1983). In *United States v. Barta*, 635 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981), the trial judge considered materials amplifying the government's theory of the case in order to determine whether an offense had been charged involving an unusual and expansive interpretation of the mail fraud statute. The court of appeals thought the practice was "unusual," but not improper. 635 F.2d at 1003. In *United States v. Kearney*, 444 F. Supp. 1290, 1291 (S.D.N.Y. 1978), the district judge used the bill of particulars to amplify and cast light upon the theory pleaded in the indictment so as to determine the latter's validity. To the same effect is *United States v. Cooney*, 217 F. Supp. 417 (D. Colo. 1963). In *United States v. Lamont*, 236 F.2d 312, 315 (2d Cir. 1956), Chief Judge Clark approved going behind the indictment to determine if the government really had a case, and noted that the prosecution involved first amendment issues.

200. See, e.g., *United States v. Helstoski*, 442 U.S. 477, 488 (1979) (stating that although application of the debate or speech clause will make prosecutions difficult, the clause is designed specifically to give members of Congress immunity from prosecution for legislative acts); *Abney v. United States*, 431 U.S. 651, 660 (1977) ("The rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence."). Even if appealability is not granted from orders refusing to dismiss indictments with first amendment overtones, surely the issues tendered are worthy of review by extraordinary writ. See generally Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973) (illustrating how the concept of advisory writ allows uses of the writ that traditional doctrines would not permit, but indicating that such techniques may not be available to the government in criminal cases). For a recent and encyclopedic discussion of the factors considered in determining whether to hear a petition for mandamus on the merits, see *In re Cement Antitrust Litigation*, 688 F.2d 1297, 1301 (9th Cir. 1982), *aff'd*, 459 U.S. 1191 (1983) (lacking a quorum because four Justices disqualified themselves and having a majority of the qualified Justices deciding that the case could not be heard and determined during the next term, the judgment and order were affirmed under 28 U.S.C. § 2109 (1982)), *supplemented*, 709 F.2d 521 (9th Cir. 1983).

cases and is indispensable in income tax evasion prosecutions to identify the amount and nature of the alleged reporting deficiency.<sup>201</sup> In other types of cases, a bill may have particular application. Beyond identifying unlisted coconspirators and providing a bit more precision, the bill, in my experience, is of little help. It could be of more service; the 1966 amendments to Federal Rule of Criminal Procedure 7(f) were designed to liberalize the procedure for obtaining a bill.<sup>202</sup> Judges, however, seem not to have received the message, even when it has been sung to a first amendment tune.<sup>203</sup> Again, this deafness is unfortunate.

The discovery rights conferred by Rule 16 may be of some help, but the heart of most conspiracy cases are the witnesses who claim to have seen, heard, or even participated in the defendants' deeds and words. The prior statements of these witnesses, including their grand jury testimony, are not producible except as each one testifies at trial. The statutory rule on timing of production<sup>204</sup> makes no sense without some proof that earlier revelation would threaten the safety of a witness. Many of the states do without a timing requirement of this sort and civil law systems generally get by without it.

If the prosecution were required to provide a detailed bill of particulars in cases raising first amendment issues, including the content of witness' statements in summary form, Rule 12(b) might gain new life. Without violating the rule that the general issue may not be tried by motion, a motion to dismiss for failure to state an offense may be heard based upon the allegations of the indictment as amplified, though not modified, by a bill of particulars. Of all possible reforms that might curb the excesses of vague conspiracy charges, judicial insistence on a bill of particulars seems the simplest and most effective. Let the prosecutor provide a better outline. If the outline proves the allegations to be insufficient, the court can dismiss. The temptation to make the bill less than candid can be tempered by enforcing the rule that variance from the bill

201. See cases cited at 1 C. WRIGHT, *supra* note 190, § 131, at 462 n.24.

202. *Id.* § 129, at 433 n.8.

203. Two illustrative cases are *United States v. Ahmad*, 53 F.R.D. 194 (M.D. Pa. 1971), which was a prosecution for conspiracy to harm Selective Service property and to kidnap Henry Kissinger—allegations that turned out to be a figment of the Nixon administration's imagination—and *United States v. Fine*, 413 F. Supp. 740 (W.D. Wis. 1976), an alleged bombing conspiracy. In both cases, the district court reluctantly granted a few particulars, declined to give the defense a true preview of the government's case, and stressed that the government would be permitted to amend the bill with some liberality. Also see the pre-1966 case of *United States v. Mesarosh*, 13 F.R.D. 180 (W.D. Pa. 1952) (defendant convicted of conspiracy to overthrow the United States government). Particulars might have helped the government avoid the embarrassment of *Mesarosh v. United States*, 352 U.S. 1 (1956) (granting new trial when perjury of government witness was exposed after trial and appeal).

204. 18 U.S.C. § 3500 (1982).

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is not permitted except on motion. Too few judges realize the benefits that would flow from taking such an attitude.<sup>205</sup>

In sum, in the typical first amendment conspiracy case the judicially declared solicitude for first amendment rights is a vain promise that is accorded only to those who go through the bankrupting and exhausting process of trial. And first amendment cases, as *Gypsum* suggests, are only the most egregious examples of a common problem.<sup>206</sup> Any vague and sprawling conspiracy case is likely to be cut down only by a prosecutor's whim, a plea-bargaining defendants' failure of nerve, or the eventual action of the jury.

The defendant who claims, as in *Spock*, that the agreement was bifarious, consisting of protected and unprotected objectives, may be confronted with the other side of that blade. All the *protected* associational and speech conduct will be paraded in evidence.<sup>207</sup> Trial lawyers know, as Justice Jackson once recognized, how difficult it is for the jury to separate the proper from the improper use of inflammatory evidence.<sup>208</sup> This use of protected behavior to prove the content of an unprotected agreement points up a particular danger of conspiracy law that I will discuss at greater length in the next subpart of this Essay.

The trial judge may, should, and perhaps will listen to first amendment arguments and embody them in jury instructions on the standard to be applied. The jury may acquit. But these possibilities do not fill the gap between the promise of *Spock* and the real world of the criminal process.

### D. *Alarums and Excursions*

When I was ten or so, a friend and I wondered if space aliens existed

205. In the United Kingdom, prosecutors may appeal by case stated if the magistrate concludes the acts alleged are not sufficient in law to constitute an inchoate offense. See Jackson, *The Criminal Attempts and Conspiracy (NI) Order 1983*, 35 N. IR. LEGIS. Q. 274, 278 (1984). If such a procedure were available generally to defendants and the government, perhaps by extraordinary writ, see *supra* note 200, the boundary questions could be explored without a full trial.

206. See *supra* text accompanying notes 181-87.

207. See, e.g., *Scales v. United States*, 260 F.2d 21 (4th Cir. 1958), *aff'd*, 367 U.S. 203, 255-57 (1961) (finding that evidence of books in Smith Act defendant's possession may be probative of his intent to teach and advocate the ideas in the books). *But cf.* *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957) (holding that membership in Communist Party does not mean petitioner currently has bad moral character and should be denied the opportunity to practice law); *id.* at 247 (Frankfurter, J., concurring) (stating that petitioner's right to due process was violated by state's presumption that past activity in the Communist Party created irrebuttable presumption of bad moral character); *Schneiderman v. United States*, 320 U.S. 118, 136 (1943) (holding that mere association with a political party does not mean that person subscribes to all the beliefs of the organization).

208. See *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (dismissing as "unmitigated fiction" the notion that prejudicial effects can be overcome by jury instructions).

and if any of them were on Earth. How could we know? No doubt such beings would ape carefully the behavior of earthlings. We would have to watch for small, trivial signs that would give them away.

It sometimes seems that boys and girls who had the same fantasies grew up and began working on the criminal law of inchoate crime. As to conspiracy, the overt act requirement has been trivialized or eliminated. In the law of attempt, the principal focus has shifted from the danger created by the defendant's conduct to emphasis upon his *willingness* to commit crime.

We are told that conspiracy law may be justified by the enhanced danger of people "ganging up."<sup>209</sup> But in the Model Penal Code, adopted by many states, we read that a defendant may be liable for conspiracy even though the other participants in the unlawful agreement are all lunatics or police officers.<sup>210</sup> That is, if Mary Jones agrees with an insane person and a police officer who feigns assent to commit a crime, she can be punished for conspiracy even though the lunatic was incapable of agreeing and the officer did not agree. The rationale is that Mary's willingness to commit a crime in concert with others sufficiently identifies *her* as dangerous. As a lawyer, I participated in the defense of the Chicago Eight and the Seattle Seven, and witnessed some of the Panther 21. I await the Mudville One. Of course, federal conspiracy law still requires two to tango,<sup>211</sup> but this restriction may, as we shall see, be of minimal value in cases involving police infiltration of a group in an effort to manufacture evidence of criminal intent.

I am not speaking here of the use of conspiracy or attempt as an add-on or lesser-included offense charge when the evidence is fairly clear that a completed substantive offense has been committed. For example, it is a common—and odious—prosecutorial practice to include a conspiracy count in an indictment involving any completed group crime. The count provides a joinder "umbrella" and may confer some evidentiary advantages.<sup>212</sup> Thus, the principal figures in the group will be liable for the completed offense and for conspiracy. It is familiar law that conspiracy does not merge with the substantive offense.<sup>213</sup>

209. See authorities cited *supra* note 188.

210. MODEL PENAL CODE § 5.04 (Proposed Official Draft 1962).

211. 2 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 27.12 (3d ed. 1977).

212. See W. LAFAYE & A. SCOTT, *supra* note 10, § 6.4, at 526-30; see also *Krulewitch*, 336 U.S. at 454 (Jackson, J., concurring) ("It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together.").

213. See *Pinkerton v. United States*, 328 U.S. 640, 643-44 (1946) (rejecting the defendants' argument that the substantive offenses merged with the conspiracy because both involved the same acts,



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I focus rather upon the “pure” conspiracy or attempt. The former consists simply of agreement to commit an offense, coupled—if the statute requires it—with an overt act that need not be criminal. The law of attempt formerly required that the accused have taken matters so far as to create a real danger that the crime would be committed.<sup>214</sup> Today, the dominant rule is that the attempt is complete whether or not the accused created a danger, provided his intent to do wrong is sufficiently corroborated.<sup>215</sup>

Professor Cohen’s article *Actus Reus*<sup>216</sup> is the best treatment in the *Encyclopedia* of the official rationale for these inchoate crimes. But his brief, although provocative, treatment could not explore the contradictions laid bare by a systematic consideration of these offenses. These contradictions may be viewed from three directions: the evidence of dangerousness, the basis of the conspiracy taboo, and the nature of intent.

1. *The Evidence of Dangerousness.*—In *Gypsum*,<sup>217</sup> the Court thought it sufficient for the government to prove that defendants charged with conspiracy to restrain trade engaged in anticompetitive conduct with knowledge that their conduct would have a forbidden effect upon prices. The government was not required to prove a specific intent to have such an effect.<sup>218</sup> Perhaps no practical difference exists between the two formulations in the antitrust context because an entrepreneur’s *knowledge* that anticompetitive conduct will help fix prices at artificial levels, coupled with some evidence of the conduct itself, is in almost every case a guarantee that the forbidden result was intended. Entrepreneurs, after all, are in business to maximize profits.<sup>219</sup>

A conspiracy to commit a federal crime, under 18 U.S.C. section 371, requires that the defendant know of the unlawful agreement charged in the indictment, and act with specific intent to further it and make it succeed. Here, the “specific intent,” as distinct from knowledge, can become important. Consider, for example, *United States v. Falcone*,<sup>220</sup> a famous and controversial conspiracy case. Falcone and others supplied

and relying on precedents in holding that completion of the substantive offense did not bar conviction for conspiracy.)

214. See W. LAFAYE & A. SCOTT, *supra* note 10, § 62, at 504-06.

215. Model Penal Code § 5.01 (Proposed Official Draft 1962). This section is discussed in G. FLETCHER, *supra* note 8, §§ 3.3-3.4; W. LAFAYE & A. SCOTT, *supra* note 10, § 6.2, at 508-09; see also McKinnon, *Attempting Murder Recklessly: The Significance of R. v. Ancio*, 20 U.B.C.L. REV. 121 (1986) (discussing current developments of conspiracy laws in Canada).

216. Vol. 1 at 15.

217. *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

218. *Id.* at 443-46.

219. See *id.* at 445-46 (noting the special character of the “business conduct” at issue).

220. 311 U.S. 205 (1940).

goods to operators of illegal stills, knowing that these goods were used to make non-tax-paid booze. The Supreme Court affirmed the court of appeals' decision reversing the convictions. First, the Court held that the sales activity did not establish that the respondents knew of the *conspiracy* to make whiskey, as opposed perhaps to knowledge of isolated acts of making it. Second, the government had failed to show an intent to further the conspiracy charged in the indictment, though plainly the sales did in fact further the unlawful activities.

*Falcone* was explained in *Direct Sales Co. v. United States*,<sup>221</sup> in which a drug company was convicted of conspiracy with a doctor to whom it sold quantities of morphine that were grossly in excess of a physician's normal needs for lawful purposes. The Court stressed that when one deals in unregulated articles of commerce, or engages in presumptively lawful activity, it is more difficult to infer knowledge that one's conduct is furthering unlawful ends. The Court repeated that both knowledge of unlawful activity and "intent to further, promote, and cooperate in it" are required to convict.<sup>222</sup>

Neither *Falcone*, nor *Direct Sales*, nor any other case, have solved the riddle of how one determines whether the defendant had the forbidden knowledge and intent. Jury instructions are a welter of confusion: mere association does not make one a conspirator, even if one had knowledge of illegality;<sup>223</sup> however tacit agreements are often proved by circumstantial evidence;<sup>224</sup> and, the defendant can not put his head in the sand<sup>225</sup> and ignore what is happening.

As discussed above, this inherently elusive quality of conspiracy law, and of inchoate crimes generally, creates special risks when the alleged agreement or course of conduct said to constitute an attempt is bifarious. Conspiracy consists in an agreement embodied in words or other assertive conduct, done with a certain intent. Attempt consists of an intent to commit an offense, corroborated by conduct.

221. 319 U.S. 703 (1943).

222. *Id.* at 711. When I first wrote this paragraph, I used the word "lawful" instead of "regulated." My colleague Michael Sharlot suggested the change, which I think adds clarity. Most people dealing with a regulated product such as a narcotic drug are aware of its potential for abuse. This is not true generally of all areas of "regulated" activity, for there are a few areas that are not. See, e.g., *Liparota v. United States*, 471 U.S. 419 (1985) (holding that specific intent is required in food stamp fraud prosecution).

223. See *Direct Sales*, 319 U.S. at 711.

224. See 2 E. DEVITT & C. BLACKMAR, *supra* note 211, § 27.04.

225. The "ostrich" instruction is discussed in *United States v. Ramsey*, 785 F.2d 184 (7th Cir. 1986). Judge Easterbrook said that giving the instruction is "not a good idea," but affirmed the conviction for mail fraud. *Id.* at 191. Because the instruction went to the "scheme" element under 18 U.S.C. § 1341 (1982), the relevance to conspiracy cases is obvious. Cf. *Sandstrom v. Montana*, 442 U.S. 510, 520-24 (1979) (discussing the burden-shifting problems of such an instruction).

## Thoughts on *Kadish*

When the government targets a group for undercover investigation, its agents have an agenda:<sup>226</sup> cause certain words to be spoken in a context that may be considered to betoken assent to the unlawful scheme. Even when the government's evidence is based upon the testimony of an informer who begins to provide information after the fact, the evanescence of words of assent confounds the defendant in confronting and challenging the government's proof. When government has controlled the creation of evidence, however, these difficulties mount.

Consider the typical case of government agents who decide that a group of church workers are engaged in unlawful transportation and sheltering of aliens. The substantive offenses involved are complex and riddled with exceptions. At least some of the church workers may have decided to help out only with lawful activities. All of the workers believe in the biblical injunction to help the sojourner. They are engaged in protected speech, religious, and associational conduct.

The government decides to send an undercover agent to the group, who will feign adherence to it and gather evidence that would show that most of the group's members know that illegal activity is going on and that they intend to further it. The agent has a tape recorder and perhaps video facilities. He can choose which conversations to record. Most important is his *agenda*. He knows what sort of words he wants to evoke from the others, and what sort of emotions he wants to stir up. The church workers plainly desire that the aliens remain in the United States, and be fed, housed, and transported. They abhor the United States' policy, which they believe disregards statutory and international law protection for refugees. They have a certain religious fervor about them. They do not have an agenda, so they are not particularly careful to punctuate their discourse with disavowals of criminal intent.

This sort of "sting operation" scenario has been replayed over and over. The dangers and abuses of these operations have been catalogued by lawyers, scholars, and legislative committees.<sup>227</sup> Some courts have acknowledged that here, as in other law enforcement situations, the government must be careful when it creates evidence not to fall below a certain minimal level of reliability. For example, when the police organize a lineup, they are forbidden by the Constitution to make it unduly suggestive.<sup>228</sup> This rule does not serve an abstract interest in legality, but rather

226. See Tigar, *Crime on Camera*, LITIGATION, Fall 1982, at 24, 24.

227. *Id.*; see *United States v. Myers*, 692 F.2d 823, 843 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983); *FBI Undercover Activities, Authorization, and H.R. 3232, Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983).

228. See, e.g., *Manson v. Braithwaite*, 432 U.S. 98, 116 (1977) (holding that identification evi-

protects the integrity of the fact-finding process from pollution by the deliberate manipulation of evidence.<sup>229</sup> So it is with the police informer who attends a meeting with a tape recorder and a hidden agenda. The inherent lack of control in such a situation may be furthered when the infiltrator is someone who must produce "results" as a condition of winning favorable treatment in the criminal process.

I have dealt in another essay with the tactical problems that confront a lawyer in such a case.<sup>230</sup> My point here is that the structure of the law of inchoate crimes creates and fosters these risks because it regards the willingness to commit a crime, rather than the danger that a crime will be committed, as the proper occasion for intervention by the criminal justice system. Again, the problem is particularly acute in the bifarious agreement we have been discussing. The defendants' clearly protected expression of *desires* that certain results obtain, and their generalized affirmation of a common political, social, and religious purpose, under the rules of evidence, becomes relevant to whether or not they were willing to and intended to take the further step of accomplishing their goals through violation of the law. At their trial, the jury will hear almost nothing but evidence of protected conduct on the one hand, and manufactured evidence on the other.<sup>231</sup>

It would have been refreshing if the *Encyclopedia's* pieces on conspiracy or attempt or *mens rea* had considered some of these consequences, flowing as they do directly from legislative decisions to trivialize the requirement of danger and elevate that of desire or willingness.

2. *The Basis of the Conspiracy Taboo.*—The orthodox history of conspiracy law presented in the *Encyclopedia* is not quite accurate, and does little to help unmask the rationale of inchoate crime. Conspiracy received its biggest boost from the Court of Star Chamber, and was received into the body of the common law after the abolition of Star Chamber in the English Revolution. Star Chamber also contributed to the law of attempt and incitement. Professor Barnes has found early evidence of indictments to commit a somewhat broader range of offenses than the *Encyclopedia's* authors mention.<sup>232</sup>

dence obtained by police procedure that was both suggestive and unnecessary was constitutional because it was unlikely that misidentification had occurred).

229. See *United States v. Valdez*, 722 F.2d 1196 (5th Cir. 1984) (finding undue suggestion in hypnosis of police officer witness to refresh recollection); see also Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313 (1980) (arguing that courts should exclude testimony of previously hypnotized witnesses).

230. See Tigar, *supra* note 226, at 24-27.

231. See *supra* note 207 and accompanying text.

232. See Barnes, *supra* note 159, at 326.

Glanville Williams introduces the treatment of conspiracy in his textbook by telling us that today an agreement to commit an offense coupled with an overt act is a crime.

Anciently, the law was otherwise, no penalty being provided for those who did not accomplish their criminal object. This was because the criminal law was not clearly separated from the law of tort, which provided compensation only when some injury had actually been inflicted. "The idea of punishment is but slowly severed from that of reparation, and where no harm is done there is none to be repaired."<sup>233</sup>

Williams goes on to acknowledge Star Chamber's role in developing conspiracy law.

Star Chamber was dedicated avowedly to extirpating religious and political unorthodoxy. Its jurisprudence was an instance of rulers unilaterally defining disloyalty, and identifying the suspicion of disloyal intentions with danger to the established order.<sup>234</sup> This view was not entirely unreasonable. It was the pattern of revolutionary movements beginning in the eleventh century to call themselves "conspirators," or fellow-swearers, and to take a formal oath of mutual assistance in overthrowing injustice and securing the liberties they thought they deserved.<sup>235</sup>

Thus, the idea of conspiracy does not originate with the state, but with its enemies. It begins at a time when each person was bound by obligations of obedience that were quite often embodied in a formal oath of vassalage.<sup>236</sup> Such an oath obviously had great significance in such a credulous time. The conspirators' oath—usually to act together against feudal restraints on bourgeois activity—was dangerous because the swearers superseded their bond to the lord or sovereign by formally and in the sight of God binding themselves to one another. This sort of conduct looked very much like treason. Similarly, and just as dangerously to the stability of state-imposed religious beliefs, groups of heretics might swear an oath of fellowship.

Conspiracy was dangerous in the eyes of Star Chamber for the same reason that blasphemy was: it defiled man's relationship to a quite real

233. G. WILLIAMS, *supra* note 48, at 349 (quoting F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 509 (2d ed. 1896)).

234. Some of this we have discussed above. Even so vigorous an apologist for Star Chamber as Sir James Stephen concedes it developed a habit of punishing political offenders "without exactly trying" them. 1 J. STEPHEN, *supra* note 98, at 176. See generally *id.* at 168-83 (discussing the Privy Council's criminal jurisdiction).

235. See H. PIRENNE, *MEDIEVAL CITIES* ch. 7 (1925); 1 R. PÉRONOUD, *HISTOIRE DE LA BOURGEOISIE EN FRANCE* chs. 1, 2 (1960); M. TIGAR, *supra* note 115, at 80-96. On the significance of the oath, see Silving, *The Oath* (pts. 1 & 2), 68 *YALE L.J.* 1329, 1527 (1959) (giving an in-depth history of the evolution of the oath and arguing for its repeal).

236. M. TIGAR, *supra* note 115, at 24-29.

god. It violated the state's monopoly on orthodox belief and all the sacerdotal whizbang that embodied and served as proxy for it. In short, conspiracy, without regard to its object, violated a central social taboo. It was but a short step to the proposition that any agreement to commit an illegal act or to accomplish any end by illegal means must be punished, and that the harm was done as soon as the parties' wills were united.

To say that times have changed in the intervening centuries is a cliché. We no longer punish heresy. We do not tolerate test oaths.<sup>237</sup> The Constitution has limited the offense of treason.<sup>238</sup> These developments suggest that the state does not, or should not under these principles of legal ideology, fear those whose ideas differ from orthodoxy. Conspiracy, however, survives in the broadest form. It represents an artifact of a credulous time. In prosecutors' rhetoric, modern conspiracy cases invite jurors to indulge their most atavistic fears:

Your, life, sir, is propelled  
 By a dream of the fear of having nightmare; your love  
 Is the fear of being alone; your world's history  
     The fear of a possible antagonist  
 Out of a possible shadow, or a not-improbable  
 Skeleton out of your dead-certain cupboard.<sup>239</sup>

In a larger sense, the persistence of inchoate crimes in their broadest form lays bare the contradiction between state and citizen. The idea of disobedience, rather than danger to one's fellow-citizens, becomes the occasion for punishment.

The defendant's advocate in a political conspiracy case faces the double burden of demystifying conspiracy and of arraigning the accusations in the political inchoate crime case against the formal guarantees of freedom contained in the Constitution. She struggles to separate permissible from impermissible uses of the conspiracy taboo.

As we have seen, *Spock*<sup>240</sup> and the other political conspiracy cases represent a judicial effort to limit punishment to those who really intended to commit conduct that was not protected by the first amendment. We have seen how difficult it is, as a practical matter, to defend

237. See, e.g., *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 381 (1867) (holding unconstitutional a law requiring lawyers to take oath that they have not engaged in conduct which was illegal); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 278 (1867) (holding state law requiring oaths from clergy unconstitutional as a violation of prohibition of state passing bills of attainder).

238. See Fletcher, *The Case for Treason*, 41 MD. L. REV. 193, 199 (1982). Hans Magnus Enzensberger has written provocatively on this subject in his essay, *Towards a Theory of Treason*, in H. ENZENSBERGER, *POLITICS AND CRIME* 1 (M. Roloff ed. 1974).

239. C. Fry, *The Lady's Not for Burning*, Act 1 (1977).

240. *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).

the legitimate interests of those who clearly agreed to do something but who colorably claim that the “something” was constitutionally protected. Even in “nonpolitical” cases, such as *Gypsum*,<sup>241</sup> we have seen that separating the process of agreeing from that of making an unlawful covenant can be daunting.

This brief sketch suggests that conspiracy law once reflected a perception about belief, fealty, and the state, and that it can no longer—consistent with democratic principles—claim any such justification. The *Encyclopedia*’s failure to discuss the origins of conspiracy law presents a somewhat inaccurate picture and rejects an opportunity to question and examine the rationale of inchoate crime.

3. *The Nature of Intent*.—Consider, however, the “ordinary” agreement to commit an “ordinary” offense, such as robbery or homicide. We have seen that conspiracy is a “specific intent” crime. What if the defendant claims that he did not possess the specific intent to commit a crime, or that he could not have possessed it, because of a mental illness. Even though the law of specific intent sweeps broadly through substantive completed offenses, I pose this question in the context of inchoate crime, because the inchoate offenses are the archetypical specific intent crimes and because we have seen that they are almost purely offenses of the mind and will.

The *Encyclopedia* helps us not at all. The article on *Diminished Capacity*<sup>242</sup> does not even cite the work of Dr. Bernard Diamond, the most prolific and perceptive proponent of mental condition defenses to specific intent crimes.<sup>243</sup> Professor Goldstein’s article, *Excuse: Insanity*<sup>244</sup> is excellent, but the editors did not allocate to him any responsibility to develop a critique of mental condition evidence in this context.

241. *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

242. Arenella, *Diminished Capacity*, in vol. 2 at 612.

243. Dr. Diamond was not always right, but he usually was. He was *always* compassionate, provocative, and insightful. He was on the law faculty at Boalt Hall, where Professor Johnson, *see infra* note 245 and accompanying text, has been since 1966. Dr. Diamond’s teaching, scholarship, and advocacy are the most telling response I know to Professor Johnson’s remarks. Of Dr. Diamond’s work, generally, see Diamond, *The Psychiatrist as Advocate*, 1 J. PSYCHIATRY & L. 5 (1973) (recognizing that psychiatric expert witnesses inevitably play an advocate role); *From Durham to Brawner: A Futile Journey*, 1973 WASH. U.L.Q. 109 (concerning judicial developments with respect to the mentally ill offender); *The Origins of the “Right and Wrong” Test of Criminal Responsibility and Its Subsequent Development in the United States, An Historical Survey*, 54 CALIF. L. REV. 1227 (1966) (with T. Platt) (tracing the origin and subsequent development of the “good and evil” test with responsibility found in American criminal law); *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59 (1961) (arguing that the *mens rea* requirement is a bridge between psychology and law regarding mentally ill offenders); *Isaac Ray and the Trial of Daniel M’Naghten*, 112 AM. J. PSYCHIATRY 651 (1956) (recounting how the writings of Isaac Ray had a profound impact on the most important sanity trial of all time).

244. Vol. 2 at 735.

In my view, these omissions spring from the same source as the *Encyclopedia's* skimpy treatment of the issue of punishing intent: emphasis on psychoanalysis in the field of criminal law has declined in popularity. I quote from another mainstream criminal law scholar, Professor Philip Johnson of Boalt Hall:

A generation ago, a law school might have felt an obligation to seek out a psychiatrist of Freudian persuasion for its faculty, so that students could learn what insanity "really" is and what causes crime. Today, I think that nearly every law school in the country would place greater importance on hiring an economist than a psychoanalyst, largely because of a widespread sense that psychoanalysis has not made good on its promises. While economic analysis has emerged from its former preoccupation with antitrust to provide powerful insights across the entire field of law, forensic psychiatry has lost ground even in its core field of criminal law.<sup>245</sup>

I hold no particular brief for Freudians, but the evidence is fairly strong that the students of mental disorder are less popular in criminal law circles today because they were telling too much truth about the criminal justice system.

The system is based upon a hypothesis of free will. As Professor Cohen's article suggests, this hypothesis rests upon a foundation of philosophical speculation and not upon evidence about the way people decide things.<sup>246</sup> When one turns to the evidence, one finds that ordinary criminals, in general, do not contemplate consequences when they commit crimes.<sup>247</sup> If this demonstrated inability to consider consequences, in turn, is socially determined, as Dr. Diamond has suggested, then it might be argued in a large number of cases that the defendant lacked the ability to form a specific intent to violate a known legal duty.<sup>248</sup>

Drug addiction, postwar delayed stress syndrome, interspousal violence, dependence based on dominance, and submission to another—all these conditions could militate against the image of the defendant freely choosing the criminal path. The psychiatrists and followers of kindred disciplines told us these things. They are being turned out of the legal academy because their insights proved too much, not too little. A system of punishment based so critically upon the defendant's mental attitude could not rationally coexist with an appreciation that social existence

245. P. Johnson, *Do Critical Legal Scholars Belong on Law School Faculties* (1985) (unpublished paper). By the way, if one looks at the contribution made by the economic theorists to criminal law, it is easy to identify their agenda. The orthodox economist needs the myth of free choice as much as the orthodox criminal law theorist; it is central to both of their theories.

246. Cohen, *supra* note 23, at 18-19.

247. *Id.*

248. See *supra* notes 180-87 and accompanying text.



largely determines consciousness and limits the range within which individuals may make truly voluntary choices.

The orthodox academics' skepticism has been echoed in a wave of recent legislation<sup>249</sup> and judicial decisions<sup>250</sup> sharply limiting the role of mental condition evidence in criminal cases. When intent is an element of the crime, however, this movement may bump against the principle that a defendant is entitled to present all relevant evidence that rationally bears upon any aspect of the crime charged. Judicial acceptance of this proposition, however, is measurably grudging.<sup>251</sup>

How might this debate have been aired in the *Encyclopedia*? One might have begun by appreciating, rather than merely citing, Professor Kadish's provocative 1968 article, *The Decline of Innocence*.<sup>252</sup> There he sketched the dispute about the role of mental health professionals and their insights in helping juries understand the defendant's mental state. He recognized that "insanity" was not a talismanic word, and that in any rational system,

[a]bolishing the legal insanity defence is no more likely to keep the trial free of psychiatry and its preceptors and their probing into the mental condition of the accused than is the requirement of the separate trial of the issue of insanity. You can change the name of the game, but you cannot avoid playing it so long as *mens rea* is required.<sup>253</sup>

Kadish's discussion of the contending views in the debate over the insanity defense is a valuable starting point. It permits us to consider not only the now familiar discussion of insanity as an excuse, but also the fundamental problem of intent in the criminal law in the light of what mental health professionals can teach us.

249. See *infra* notes 255-56.

250. See, e.g., *United States v. Davis*, 772 F.2d 1339, 1344 (1985) (upholding the trial court's rejection of defendant's expert testimony regarding a claimed insanity defense based on compulsive gambling), *cert. denied*, 106 S.Ct. 1003 (1986); *United States v. Frisbee*, 623 F. Supp. 1217, 1223-24 (N.D. Cal. 1985) (limiting defendant's expert to testimony on his diagnosis and the facts upon which the diagnosis was based and not allowing testimony involving a direct or indirect opinion on the issue of specific intent); see also *United States v. Prickett*, 790 F.2d 35, 37 (6th Cir. 1986) (holding that application of the amended FED. R. EVID. 704, see *infra* note 256, to a criminal case involving conduct occurring before the amendment did not violate the ex post facto clause of the Constitution, U.S. CONST. art. I, § 1).

251. See, e.g., *United States v. Cebian*, 774 F.2d 446 (11th Cir. 1985) (holding that court's refusal to give jury instruction on diminished capacity was not error because court's instructions concerning specific intent were sufficient); Annotation, *Comment Note.—Mental or Emotional Condition as Diminishing Responsibility for Crime*, 22 A.L.R.3d 1228 (1968) (noting that most courts do not allow evidence of abnormal mental capacity to show lack of intent when such evidence is insufficient for acquittal by insanity).

252. Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273 (1968).

253. *Id.* at 282.

I do not advocate, with Lady Wooton and others,<sup>254</sup> abolition of traditional *mens rea* concepts in the criminal law. On this point, I largely agree with Professor Kadish's observations; the experience of nation-states with quite different social systems has shown the unwisdom of turning over principal responsibility for punishment and "treatment" to the mental health professionals.

Rather, I think judges and legislators are denying psychiatrists and their allies access to courts and are questioning their legal academic credentials because they are afraid that the punitive premises of much existing legislation will be undermined by their insights. In the 1984 Crime Control Act,<sup>255</sup> the legislative history evinces a desire to do away with psychiatric testimony on the defendant's ability to form the specific intent required by the offense.<sup>256</sup> This is the very result that Professor Kadish rightly suggests makes no sense. Fortunately, this expression of "legislative intent" is not reflected in the enactment itself, and distinguished courts have continued to hold that expert testimony may be admissible to support a claim of a mental disease or defect related to "the defendant's capacity to form the mental state required to commit the offense charged."<sup>257</sup>

In sum, the centrality of intent as a measure of dangerousness in inchoate crimes reveals the bankruptcy of the system of criminal justice, and exposes the myth that the state is a neutral arbiter between contending forces. Punishing the agreement to offend is a survivor from a time when legal and religious ideology understood "agreement" quite differently. The persistence of conspiracy and other broadly defined inchoate crimes reflects a decision by the commanders of state power to define "danger" in abstract and self-serving terms that set the state itself up as objectively separate from and in contradiction to the generality of citizens. This separation is maintained in important measure by rejecting any insight based upon scientific efforts to understand the true scope of voluntary action.

## V. Conclusion

Criminal law serves important social functions in ways that are

254. *Id.* at 285-90.

255. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended in scattered sections of 2, 8, 15, 16, 18, 19, 21, 23, 26, 28, 29, 41, 42, 49 U.S.C.).

256. The Act amends Rule 704 of the Federal Rules of Evidence. "Under this proposal, expert psychiatric testimony would be limited to presenting and explaining their diagnoses . . . ." S. REP. NO. 225, 98th Cong., 2d Sess. 230, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3412.

257. See *United States v. McBride*, 785 F.2d 45, 50 (2d Cir. 1986).

largely unexamined and therefore invisible. The *Encyclopedia* is a means to measure standard theories, and to delve for this or that insight. Other works by other authors will disembed criminal law from capitalist legal ideology and examine it critically.

All of us who care about criminal law are in Professor Kadish's debt. None of my criticisms are intended to deny what we owe or to cheapen the coin in which respect should be paid. Indeed, most of my observations are not so much criticism as observation provoked by reading contributions to the *Encyclopedia*.

We need, however, to go beyond orthodoxy in writing about criminal law. Orthodox habits of thinking, coupled with the positivist approach that criminal law lends itself to, are dangerous. Such a turn of mind yields analysis that is cramped, textual, and blind to the purposes permissibly served by a system of criminal justice. When this sort of analysis is served up in ignorance of critical insights, it is baneful enough to spark debate. But when it is indulged deliberately, as proxy for an unstated ideology of repression, the need to shatter old images is obvious.

The history of criminal law, after all, has been written largely in struggles for social change. The old, challenged order sought to define its enemies as criminal. This was accomplished, as we have seen in the case of sedition, by regarding enmity itself as criminal. In other branches of criminal law, such as theft, the old order defined its enemies' very mode of existence as crime.

Today, the greatest dangers to democratic rights are two: the pressure to fasten criminal liability upon someone who has, and manifests in some token way, the desire or willingness to break the law; and, the simultaneous trivialization of the mental element that the government must prove. These twin dangers are manifest in cases with political, first amendment overtones; they also permeate much orthodox thinking about criminal law in ways that express a quite repressive view about a citizen's obligation to the state.