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Civil Conspiracy: What's the Use?

THOMAS J. LEACH*

I. INTRODUCTION

Any lawyer, given a few moments to think about it, could offer a reasonably correct definition of civil conspiracy. She would say it involves an agreement or combination. Extrapolating from the criminal context, she would probably formulate a phrase to convey the object of the agreement: something like “to do an unlawful act.” If pressed for explanation, she would probably come to the point of realizing that the “unlawful act” is most likely to be a recognized tort. She might refine the definition in light of the requirement of an “agreement,” which imports intent, to confine the applicability to intentional torts.

Such a definition of civil conspiracy satisfactorily matches the usual formulation found in the cases and texts: “The essence of conspiracy is an agreement - together with an overt act - to do an unlawful act, or a lawful act in an unlawful manner.”¹

* Associate Professor of Law, University of the Pacific, McGeorge School of Law. I gratefully acknowledge the assistance of many colleagues and students who added much to my work on this article. A senior independent project by Melinda Levy-Storms formed the basis for substantial portions of the historical section; research assistance was provided by Josh Brownstein, Mike Cable, Cynthia De Silva, Amy Hall, Laura O’Kane, Jason Runckel, and McGeorge’s superb staff of research librarians; Professors Joshua Dressler, Julie Davies, Frank Gevurtz, Kathleen Kelly, Brian Landsberg, Larry Levine, Joseph Taylor, and Michael Vitiello provided many helpful comments. I thank my partners and colleagues at Drinker Biddle & Reath, Philadelphia, for training me as a trial lawyer and launching me then on a teaching career; and David Sonenshein and Tony Bocchino of Temple Law School for encouraging me to turn left at Greenland. Finally, with gratitude running back to antiquity (although not quite as far back as *Savile v. Roberts*, see *infra*), during my clerkship with him at the beginning of my legal career I was happily infected with Judge Edmund B. Spaeth, Jr.’s enthusiasm for the law as a constantly developing instrument for bettering the human condition.

1. *Cooper v. O’Connor*, 99 F.2d 135, 142 (D.C. Cir. 1938). While the phrase “to do an unlawful act” seems easy enough to understand as referring to recognized torts, the meaning of the phrase “to do a lawful act in an unlawful manner” is more opaque. See *infra* pp. 12-14.

But if we ask, instead, what is the *use* of the concept of civil conspiracy, the going gets more difficult. To be sure, anyone with a nodding acquaintance with the Federal Rules of Evidence² or state equivalents³ will say that a civil conspiracy, if substantiated by sufficient foundational proof, invokes the co-conspirator exemption from the rule against hearsay. However, this seems a slim, narrow use for such a broad, weighty notion as “conspiracy.” The inquirer’s further research would disclose that, in narrow instances, the concept may provide a means for the imposition of joint liability in instances where the actor characterized as a co-conspirator might not otherwise be liable as a joint tortfeasor, and that it may be argued to support a jurisdictional advantage over non-residents who, if not characterized as co-conspirators, would otherwise be beyond the reach of a state’s long-arm statute (although the advantages of such an application may be illusory). Still, it seems there ought to be more than procedural and joint liability aspects to a civil conspiracy claim. Cannot a plaintiff get more substantively out of his case by alleging and proving a civil conspiracy?

The short answer, based on cases going back to the seventeenth-century, is “no.” “Since liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort.”⁴

Thus, civil conspiracy sits in a neatly wrapped but very small package, useful in relatively few circumstances and subject to a substantial number of limitations. This article suggests that, as limited by common-law rulings of 300 years, the concept of civil conspiracy is relatively useless, given that it applies to so few situations that are not addressed by other concepts of joint liability or by statutory enactments designed to address what legislatures have deemed the areas most in need of relief, *e.g.*, antitrust and RICO. With this background, this article examines whether the concept of civil conspiracy has any broader continuing utility, aside from (1) the sole evidentiary advantage, (2) as a means of adding defendants who may be jointly liable, and (3) the limited jurisdictional use.

This article argues that the concept should have added and renewed vitality for two purposes. First, a stand-alone action for civil conspiracy ought to be considered as a means of sanctioning and preventing types

2. See FED. R. EVID. 801(d)(2)(E) (treating admissions of co-conspirators as non-hearsay statements).

3. See, *e.g.*, CAL. EVID. CODE § 1223(a) (1995) (making admissions of co-conspirators exceptions to the rule against hearsay); N.J. R. EVID. 803(b)(5) (1994) (excepting from the hearsay rule statements made by co-conspirators).

4. Halberstam v. Welch, 705 F.2d 472, 479 (D.C. Cir. 1983).

of anti-social behavior that are not sufficiently addressed by other tort causes of action or statutory schemes. By analogy to the doctrine of criminal law that permits prosecution of conspiracy to commit a crime although the planned crime is never committed, this argument suggests that a cause of action for civil conspiracy similarly should be permitted in situations where the tort that is conspired to be committed is never actually completed, but where, because of the seriousness of the type of activity contemplated, society (speaking through the courts or legislatures) deems the conspiracy one that should be discouraged by the availability of a civil remedy. Two hypothetical uses are offered as examples: (1) a scheme among tobacco manufacturers to enhance the addictive nature of their products and to conceal such facts from the public,⁵ and (2) a carefully planned, jointly organized system of residential burglaries, including surveillance of the target premises and tracking and shadowing of the target owners' movements and habits.⁶ In such cases, the anti-social intent of civil conspiracies is flagrant enough to warrant preventive action. A cause of action premised on such conspiracies would fill a significant gap in the ability of tort law to provide remedies against the threatened harm.

In the tobacco industry hypothetical, for example, contrast the use of a stand-alone conspiracy theory with the general lack of success of private plaintiffs' suits against the industry over the past forty-five years.⁷ With only a handful of exceptions, these suits by private plaintiffs have foundered on the defenses of assumption of the risk and contributory/comparative negligence.⁸ Although state-government suits have begun to yield settlements for health-care costs, even those results may have little exemplary effect on the outlook and attitude of the tobacco industry.⁹ The availability of a stand-alone cause of action for conspiracy could have a much better chance of success than the plain-

5. This "hypothetical" is, of course, based on similar allegations that have been made in the tobacco-industry litigation. To the extent the underlying facts remain to be proved in each individual case, it is appropriate to continue to treat the scenario as hypothetical.

6. See *Halberstam*, 705 F.2d at 472.

7. This section takes information generally from Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63 (1997), except where otherwise noted. See also Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853 (1992); Christine Hatfield, Note & Comment, *The Privilege Doctrines - Are They Just Another Discovery Tool Utilized by the Tobacco Industry to Conceal Damaging Information?*, 16 PACE L. REV. 525 (1996).

8. See Kelder & Daynard, *supra* note 7, at 64, 70. Plaintiffs' causes of action also have been limited by the Supreme Court's ruling that certain claims are preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA). See *Cipollone v. Liggett Group*, 505 U.S. 504 (1992).

9. See, e.g., Eric Brazil, *\$206 Billion Tobacco Deal*, SAN FRANCISCO EXAMINER, NOV. 15, 1998, at A1.

tiffs' suits to date and a more minatory influence than the settlements in the government actions. More importantly, the use of a preventive cause of action for conspiracy could avoid a significant portion of personal injuries and health-care costs for which plaintiffs and state governments are now trying to recover.

Substantively, a stand-alone action for conspiracy can free plaintiffs from the constraints of the affirmative defenses of assumption of risk and contributory/comparative negligence. These defenses apply to defeat claims based on negligence.¹⁰ In a stand-alone action for conspiracy, the basis of the cause of action would be the defendants' intentional agreement to perform a tortious act. Because the claim would not sound in negligence, these affirmative defenses would not apply.¹¹

But it is the preventive capability of a stand-alone cause of action for conspiracy that most distinguishes it from and makes it preferable to the current arsenal of legal weapons at plaintiffs' disposal. Tort law requires that there be damage before there can be recovery. Thus, traditional tort suits cannot prevent the initial damage, but only, by means of the imposition of substantial compensatory and punitive damages, warn the tortfeasor of the potential costs of such tortious actions in the future.¹²

Consider the situation of a plaintiff who sues the tobacco industry. In a field of damage as sweepingly broad as that of the effects of tobacco use, the societal and personal costs are huge.¹³ In recent news, a San Francisco jury awarded plaintiff Patricia Henley \$1.5 million in compensatory damages and \$50 million in punitive damages.¹⁴ Unfortunately, these monetary damages did not change this successful plaintiff's health prognosis, which is terminal.¹⁵ If, however, the law had allowed a suit for an unexecuted¹⁶ conspiracy within the tobacco industry to enhance the addictive qualities of their product, to suppress research into the

10. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 65, at 451, §§ 67-68, at 458 (5th ed. 1984).

11. A stand-alone action for conspiracy would likely also be free from any restraint of the Supreme Court's findings of preemption, as the claim would sound in intentional fraud. See *Cipollone*, 505 U.S. at 527-29. The Court specifically found no preemption of claims sounding in conspiracy, *id.* at 530; but, as we shall see later in this article, that finding would give plaintiffs no meaningful substantive advantage unless the law concerning the availability of a stand-alone action for conspiracy is changed.

12. See KEETON ET AL., *supra* note 10, at § 4, at 25-26.

13. See Kelder & Daynard, *supra* note 7, at 64.

14. See Milo Geyelin, *Jury Awards \$50 Million to Ex-Smoker*, WALL ST. J., Feb. 11, 1999, at A3.

15. Patricia Jacobus, *Terminally Ill Smoker Wins \$1.5 Million*, SAN FRANCISCO DAILY J., Feb. 10, 1999, at A1 (reported the day before the jury returned additional award of \$50 million in punitive damages).

16. As discussed *infra*, "unexecuted conspiracy" means a conspiracy that has not yet been

addictive and harmful nature of smoking, and to suppress dissemination of such information (as was alleged and, apparently, proved to the jury's satisfaction in the Henley case), then there would have been an incentive, both for whistle-blowers and attorneys, to bring a preventive type of action as early as the 1950s and 1960s, when the industry's conspiracy allegedly began. If such an action had been successful, it could have restrained the industry's actions and could have prevented millions of cancer-related deaths and significant health costs. As a trial attorney might put it to a jury, "Today, instead of knowing that she faces a certain and early death, Patricia Henley would be enjoying life fully, without fear and without the agonizing pain of cancer."

There may be disagreement with the hypothesized results of such a scenario. Such contentions do not contradict the central point of this article: a stand-alone action for civil conspiracy can potentially regulate and control anti-social actions more effectively than tort-based, after-the-fact damages suits.

The second purpose for a renewed use, or at least reinvigoration, of the concept of civil conspiracy is its usefulness as a tool for jury persuasion. Inclusion of a claim of civil conspiracy may substantially enhance the advocate's ability to persuade a jury of the outrageous nature of the defendants' conduct, thereby increasing the jury's inclination to award significant compensatory and punitive damages. Without the pleading of conspiracy, the "sell" will be harder and the impact of the case weaker.¹⁷

II. THE ORIGINS OF CIVIL CONSPIRACY

A. *The English History*

Between the Norman Conquest in 1066 and the reign of Edward I, crime in England was abundant.¹⁸ The civil authorities sought to maintain social order, but due to tremendous social unrest during this time - civil war, outlaws who threatened life and property and made travel dangerous - such a balance was difficult to attain. Because enforcement

carried out to the point of damages done, even though there may have been steps taken towards completion of the conspiracy (*i.e.*, the required "overt act").

17. This notion of enhanced jury persuasion is largely based on observations of jury deliberations at the close of student-tried cases in trial advocacy classes at McGeorge School of Law and in programs of the National Institute for Trial Advocacy.

18. Except where noted otherwise, the following historical overview relies on the work of JAMES WALLACE BRYAN, *THE DEVELOPMENT OF THE ENGLISH LAW OF CONSPIRACY* (Da Capo Press ed. 1970) (1909). For a more detailed history, see PERCY HENRY WINFIELD, *THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE* (Cambridge University Press 1921). For a more truncated overview, see WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 6.4 (2d ed. 1986).

resources were stretched thin, the primary focus was to punish actual wrongdoers. There was not enough time or manpower to pursue the punishment of those who intended, but did not accomplish, a wrong. Before the time of Edward I, the concept of the wrong of conspiracy “was limited to combinations [of persons] whose object was to hinder or pervert the administration of justice.”¹⁹ The administration of justice helped maintain social order, so any attempts to interfere with it were viewed as further disturbances of social balance punishable at criminal common law. As criminal law predominated during this time, if any actions for civil conspiracy did occur, they remained undocumented.²⁰

Before the reign of Edward I, no formal definition of conspiracy or its civil remedy existed. During his reign, the Ordinance of Conspirators,²¹ the first of three important conspiracy statutes, was passed in 1293.²² This statute provided a remedy against “conspirators, inventors and maintainers of false quarrels and their abettors and supporters and having part therein, and brokers of debates.”²³ The statute failed to define the elements of the offenses for which the remedy was provided. Although this statute did not contain a definition of conspiracy or conspirator, its purpose - as Bryan puts it, “to provide a civil action in the royal courts for damages caused by the acts of unlawful combinations of malefactors”²⁴ - was clear. The *Articuli Super Chartas*,²⁵ passed in 1305,²⁶ was “no more specific in its mention of ‘conspirators, false informers, and evil procurers of dozens, assizes, inquests and juries.’”²⁷

The first statute to define “conspirator” and to codify common law²⁸ was the Definition of Conspirators, which stated, “Conspirators be they that do confeder or bind themselves by Oath, Covenant, or other Alliance, that every of them shall aid and support the Enterprise of each other falsely and maliciously to indite, or cause to be indited or falsely to acquit people, or falsely to move or maintain Pleas.”²⁹

These statutes codified pre-existing principles of common law relating to unlawful combinations and provided a “suitable procedure for

19. BRYAN, *supra* note 18, at 11.

20. *See id.* at 13 (observing that the ancient records refer only to criminal, as opposed to civil, conspiracy).

21. 21 Edw.

22. *Cf.* BRYAN, *supra* note 18, at 15.

23. *See id.* at 9 (quoting Ordinance of Conspirators, 21 Edw.).

24. BRYAN, *supra* note 18, at 17.

25. 28 Edw., ch. 10.

26. *See* 1 THE STATUTES AT LARGE OF ENGLAND AND OF GREAT-BRITAIN: FROM MAGNA CARTA TO THE UNION OF THE KINGDOMS OF GREAT BRITAIN AND IRELAND 292 (1811).

27. BRYAN, *supra* note 18, at 9-10 (quoting *Articuli Super Chartas*, 28 Edw., ch. 10).

28. *See* BRYAN, *supra* note 18, at 18 (asserting that the Definition of Conspirators was the first statutory definition of “conspirator”).

29. 1305, 33 Edw.

the trial and punishment of conspirators”³⁰ in the civil context. The courts used these as a vantage point from which to further develop the law of conspiracy over the next 200 years.³¹

By the time of Henry VII (1485), one could bring an action by writ of conspiracy upon acquittal after a false indictment by conspirators or in the case of “a false appeal in which the plaintiff had been non-suit [sic].”³² Defects in the administration of this law soon became apparent. For example, false indictments brought by a single individual were not reachable under the Definition of Conspirators.³³ To correct the shortcomings of the statute, judges remolded the application of the law into a new remedy called “malicious prosecution.”³⁴

Malicious prosecution was an action on the case “in the nature of a conspiracy.”³⁵ Improvements in the cause of action developed over the next 250 years (1485-1726).³⁶ The new approach expanded the law to allow actions against single parties, actions without an acquittal by verdict, and actions for all false accusations.³⁷ The development of “probable cause,” a required element that provided a defense against a charge of malicious prosecution if the defense could show sufficient reason to have brought the original charge, limited this expansion.³⁸ The doctrine of probable cause acted to discourage the frivolous and retributory use of this cause of action by newly acquitted defendants. As the doctrine of probable cause developed, so did the importance of the requirement of malice as an element of the action.³⁹ During the development of these two concepts, it became clear that a lack of probable cause was “a more or less accurate test or measure of malice. . . .”⁴⁰ The emphasis on the element of malice increased the credibility of the claim and attracted the attention of lawyers who wanted to correct the wrong caused by the malicious party.⁴¹

The development of the new action on the case of malicious prosecution expanded the law of civil conspiracy to such an extent that it no longer resembled the strict form of the action of conspiracy.⁴² The

30. BRYAN, *supra* note 18, at 22.

31. *See id.* at 21-22.

32. *Id.* at 23.

33. *See id.* at 27.

34. *Id.* at 27-28.

35. *Id.* at 28.

36. *See id.* at 30.

37. *See id.* at 30-36.

38. *Id.* at 36.

39. *See, e.g.,* Savile v. Roberts, 91 Eng. Rep. 1147, 1150 (1698) (recognizing malice as an element of the claim for civil conspiracy in a false indictment cause of action).

40. BRYAN, *supra* note 18, at 43.

41. *See id.* at 38.

42. *See id.* at 45-46.

strict, or old, form of an action of conspiracy was limited to the “illegal combination” itself. This required only a mental commitment and no action by the conspirators. As a result, there often was no damage or injury, and this left no maintainable cause of action. In what has long since been taken as the authoritative statement on the nature and scope of a claim of civil conspiracy, Chief Justice Holt emphasized, in *Savile v. Roberts*,⁴³ that malice and damages were the two primary elements for an action on the case for malicious prosecution. He extended this same observation to his remarks on the requirements for recovery on a claim for conspiracy.⁴⁴ Chief Justice Holt’s observations in *Savile* are generally viewed, by the many cases relying on that decision,⁴⁵ as broad in their reach and dispositive of any lingering confusion concerning the precise import of a claim for conspiracy, which was so often added to a suit for malicious prosecution. Thus, Bryan writes:

These two cases [*Savile* and *Jones v. Gwynn*,⁴⁶ which reaffirmed the points made in *Savile*] mark the culmination of the long process whereby the courts had been gradually unfolding the basic principles relating to the action upon the case for malicious prosecution as it exists today. The courts clearly and authoritatively announced that not conspiracy, but damages flowing from the malice of the defendant, are essential requisites for recovery. The old action of conspiracy was not in terms declared obsolete. But the action upon the case was so broadened in its scope that it became available to redress not only wrongs beyond the operation of the older remedy, but also torts which the old action might still reach; and in competition with the new form of action the action of conspiracy immediately succumbed.⁴⁷

Today, English law provides remedies for both criminal and civil conspiracy. As Clerk and Lindsell note, the Criminal Law Act of 1977 abolished common-law conspiracy except with regard to “conspiracy to defraud, to corrupt public morals or to outrage public decency; the crime of conspiracy otherwise rests upon the agreement to pursue conduct which involves the commission of a criminal [offense].”⁴⁸ A civil conspiracy comprises a tortious act involving an “agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.”⁴⁹ The

43. 91 Eng. Rep. 1147 (1698).

44. See BRYAN, *supra* note 18, at 47-49 (citing *Savile v. Roberts*, 91 Eng. Rep. 1147 (1698)).

45. See *infra* Part IV.A.1-4 (discussing *Savile* and its progeny).

46. 10 Mod. 148, 214 (K.B. 1713).

47. BRYAN, *supra* note 18, at 49.

48. J.F. CLERK & W.H.B. LINDSELL, CLERK & LINDSELL ON TORTS § 23-76, at 1268 n.2 (17th ed. 1995).

49. *Id.* § 23-76, at 1267 (quoting *Mulcahy v. The Queen*, 3 L.R.-E. & I. App. 306, 317 (1868)).

crime of conspiracy and the tort of conspiracy, while originating from similar concepts, are very different. The crime is the agreement to act unlawfully; but the tort occurs only with damage from the agreement.⁵⁰

B. *The American History*

American tort law is a direct descendent of English tort law concepts. Its concepts are traceable to the rise of the system of royal courts in England after the Norman Conquest in 1066.⁵¹ As American jurisprudence developed, its reference to English case law was so frequent that it resembled more an extension than a separate body of law.⁵² Accordingly, it is not surprising that American jurisprudence recites the general outlines of English law on the subject of civil conspiracy, including the principle that there is no recovery for conspiracy alone without a completed, underlying tort.

As in English jurisprudence, civil conspiracy is not independently actionable and requires more than mere agreement.⁵³ Civil conspiracy requires the performance of some underlying tortious act. No matter how atrocious, conspiracy itself does not give rise to a civil cause of action unless a tort has been committed and that tort results in damage.⁵⁴ The American case of *Adler v. Fenton*⁵⁵ incorporated the damage requirement into American tort law over 130 years ago, importing it directly from the *Savile* case.⁵⁶ In 1936, Judge Learned Hand observed that “[w]hatever may be the rule in criminal conspiracies, it is well settled that the civil liability does not depend upon the confederation . . . , but upon the acts committed in realization of the common purpose.”⁵⁷ Damages remain a distinguishing requirement of civil conspiracy today.

One significant way in which American law departs from British is that American courts have been much less accepting of the concept of a

50. See CLERK & LINDSELL, *supra* note 48, § 23-76, at 1268 (citing *Mulcany*) (internal footnote omitted).

51. See G. William Rice, *Of Cold Steel and Blueprints: Musings of an Old Country Lawyer on Crime, Jurisprudence, and the Tribal Attorney's Role in Developing Tribal Sovereignty*, 1997 KAN. J.L. & PUB. POL'Y 31, 41 (recounting the emerging law of tort “[o]n the eve of the Norman Conquest”).

52. See *id.* at 45 (noting that the early Americans brought their English common law concepts with them and proceeded “according to their rights as English people”).

53. See *West v. Carson*, 49 F.3d 433, 436 (8th Cir. 1995).

54. See *Schick v. Bach*, 238 Cal. Rptr. 902 (Ct. App. 1987).

55. 65 U.S. 407 (1860).

56. See *id.* at 410 (citing *Savile* for the proposition that damage must result if a claim for civil conspiracy is to be maintained).

57. *Lewis Invisible Stitch Mach. Co. v. Columbia Blindstitch Mach. Mfg. Corp.*, 80 F.2d 862, 864 (2d Cir. 1936) (Hand, J.). While Judge Hand did not *in haec verba* make clear the distinction between overt acts done in furtherance of the conspiracy, which would not be actionable without more, and the requirement of damages, the cases he cited show he was referring to the latter.

cause of action based on "a legal act by illegal means." The British courts refer to this cause of action as "conspiracy to injure." They describe it as based on situations where the defendants "employ no acts or means that are in themselves unlawful," but their motive was willfully to injure the plaintiff.⁵⁸ The doctrine developed in England during the trade and union disputes of the nineteenth century as a means of limiting rights and responsibilities under the new pressures of the Industrial Age.⁵⁹

In the seminal case of *Quinn v. Leathem*,⁶⁰ the House of Lords described the tort of civil conspiracy as follows: "[A] conspiracy to injure might give rise to civil liability even though the end was brought about by conduct and acts which by themselves . . . could not be regarded as a legal wrong."⁶¹

The case of *Sorrel v. Smith*,⁶² gave this somewhat formless pronouncement more definition. It stated:

(1.) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable.

(2.) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues.⁶³

Only a few American jurisdictions have recognized this separate tort of "conspiracy to injure."⁶⁴ The majority have held that "[m]ere numbers

58. CLERK & LINDSELL, *supra* note 48, §§ 23-85, at 1282.

59. Jerry Whitson, Note, *Civil Conspiracy: A Substantive Tort?*, 59 B.U. L. REV. 921, 923-24 (1979).

60. [1901] App. Cas. 495 (P.C.) (appeal taken from Ir.).

61. [1901] App. Cas. at 510.

62. [1925] App. Cas. 700 (P.C.) (appeal taken from Eng.).

63. [1925] A.C. at 712. Whether this seemingly simple formulation provides much real guidance as to the use of the "tort" has been questioned. See G.J. Hughes, *The Tort of Conspiracy*, 15 MOD. L. REV. 209 (1952).

64. Colorado, Florida, Massachusetts, Michigan, Missouri, New York, Oregon, and Tennessee have, to some degree, acknowledged the tort of "conspiracy to injure" or, as it is more typically termed in American usage, "true conspiracy." See cases collected at Note, *supra* note 59, at 926 n.44.

The American cases generally define "true conspiracy" as "a cause of action which involves more than a mere joint tort and the gist of which consists in the combination itself making unlawful a course of conduct that might not give rise to liability if carried on by a single individual." *Fleming v. Dane*, 22 N.E.2d 609, 611 (Mass. 1939). Moreover:

There can be no independent tort for conspiracy unless in a situation "where mere force of numbers acting in unison or other exceptional circumstances may make a wrong." . . . And in order to prove an independent tort for conspiracy upon the basis of "mere force of numbers acting in unison," it must be shown that there was some "peculiar power of coercion of the plaintiff possessed by the defendants in

cannot convert lawful into unlawful acts.”⁶⁵

In a general sense, the recognition of this separate tort of “conspiracy to injure” is tangential to the purposes of this article, in that the article calls for the recognition of a separate cause of action for an *unexecuted* conspiracy to commit a recognized tort, as opposed to an *executed* conspiracy to do together what would not be actionable if done by only one actor. In one respect, the acceptance - albeit limited in American jurisdictions - of the concept of a legitimate action based on conspiracy to do what otherwise would be lawful supports the argument for a stand-alone action for conspiracy. This point is addressed further in Part IV.A.6.

III. CURRENT USES OF CIVIL CONSPIRACY

When the case law in which civil conspiracy has been shown to be useful is canvassed, three generally recognized uses for it emerge. First, it is a basis for an exemption from the hearsay rule. Second, civil conspiracy may be useful as a means of imposing vicarious liability on actors not at center stage. Finally, it may be used as a means of obtaining long-arm jurisdiction over defendants arguably not otherwise subject to the reach of the long-arm statute. However, consideration of the case law also suggests that these are not always, or even predominantly, the reasons that a claim of civil conspiracy is introduced into a case. Instead, it appears that plaintiffs include it out of instinct. Common sense and analysis of the cases suggest that such instinct should be constrained by more analytical thought. This would allow a plaintiff to persuasively argue the case and to avoid the impression that the plaintiff’s case was brought, formulated, and pleaded by an ass.⁶⁶

combination which any individual standing in a like relation to the plaintiff would not have had.”

DesLauries v. Shea, 13 N.E.2d 932, 935 (Mass. 1938) (citations omitted).

See also Leonard A. Washofsky, Note, *Offenses and Quasi-Offenses—Conspiracy—Civil Action for “True Conspiracy,”* 33 TUL. L. REV. 410, 412-13 (1959) (noting that a “true conspiracy” arises when the motivation behind the actions is unlawful, but the actions themselves are lawful); see, e.g., Willett v. Herrick, 136 N.E. 366, 369 (Mass. 1922) (overruling a demurrer even though the defendant’s objectives were not shown to be unlawful, because a conspiracy to attain those objectives would be tortious); Crofter Hand Woven Harris Tweed Co. v. Veitch, 1942 App. Cas. 435, 447 (appeal taken from Scot.) (finding no conspiracy despite resulting damage when the object of the agreement (to impose an embargo) was not unlawful, because the purpose behind it was “to secure economic stability”).

65. Washofsky, *supra* note 64, at 413. See cases collected at Note, *supra* note 59, at 926 nn. 41 & 43.

66. See Estate of Wilson v. Aiken Indus., Inc., 439 U.S. 877, 880 n. 3 (1978) (Blackmun, J., concurring) (expressing fear that the populace may agree with Mr. Bumble’s assertion in Charles Dickens’s OLIVER TWIST that “the law is a ass—a idiot”).

A. Evidentiary Use

The exemption from the hearsay rule codified by Federal Rule of Evidence 801(d)(2)(E) applies equally to civil and criminal conspiracies.⁶⁷ State common law and codifications generally allow the same provision.⁶⁸ The application of the exemption does not generally raise significant problems or subtleties. The questions that commonly arise are: the degree of proof of the conspiracy required before the exemption will be allowed;⁶⁹ the exact scope of the requirement that the statement sought to be admitted be “in furtherance of the conspiracy”;⁷⁰ and (until the 1998 amendment to Federal Rule of Evidence 801(d)(2)(E), which settled the point) whether the statement that is sought to be admitted is itself sufficient as a foundation for admissibility.⁷¹ There is no question that the conspiracy may be proved by circumstantial evidence, and that the “preponderance of the evidence” standard applies⁷² (although a minority of states set the required proof at “clear and convincing”).⁷³ Because this is perhaps the most common use of a claim of civil conspir-

67. See FED. R. EVID. 801(d)(2)(E). Compare *United States v. Enright*, 579 F.2d 980, 986 (6th Cir. 1978) (holding that, in the criminal law context, a preponderance of the evidence standard applies in deciding whether to admit an alleged co-conspirator's admission), with *James R. Snyder Co. v. Associated Gen. Contractors of Am., Inc.*, 677 F.2d 1111, 1117 (6th Cir. 1982) (extending the *Enright* rule to civil conspiracies).

68. See, e.g., CAL. EVID. CODE § 1223(a) (1995) (exempting co-conspirator statements from the hearsay rule in both the criminal and civil contexts); N.J. R. OF EVID. 803(b)(5) (1994) (providing that the hearsay exception for co-conspirator statements applies in civil as well as criminal proceedings); MD. R. OF EVID. 5-803(a)(5) (1996) (providing that co-conspirator statements are not excluded by the hearsay rule); *Daugherty v. Kessler*, 286 A.2d 95, 101 (Md. 1972) (allowing Maryland's co-conspirator hearsay exception to be applied in a civil conspiracy action).

69. Compare *Bourjaily v. United States*, 483 U.S. 171, 176 (1987) (holding that a proponent must meet the preponderance standard before a co-conspirator statement may be admitted pursuant to Federal Rule of Evidence 801(d)(2)(E)), with *James R. Snyder Co.*, 677 F.2d at 1111 (discussing the conflict regarding whether to apply a mere prima facie standard, the more demanding preponderance standard, or the stringent reasonable doubt standard).

70. See *Bourjaily*, 483 U.S. at 175 (requiring the trial court to find whether the statement was made “in furtherance of the conspiracy” by a preponderance of the evidence under Federal Rule of Evidence 801(d)(2)(E) and quoting same rule).

71. See *Bourjaily*, 483 U.S. at 180 (declining to decide whether a trial court may rely solely on a hearsay statement for the purpose of determining whether a conspiracy existed, but recognizing that a court may at least consider the statement).

72. See *Fink v. Sheridan Bank of Lawton*, 259 F. Supp. 899, 903 (W.D. Okla. 1966) (“The burden of proof is upon a plaintiff in a civil conspiracy case to prove the conspiracy by a preponderance of the evidence. Circumstantial evidence may be sufficient for this purpose.”); see also *United Elec. Coal Co. v. Rice*, 22 F. Supp. 221, 226 (E.D. Ill. 1938) (holding that preponderance of the standard applies to prove damages from a civil conspiracy).

73. See, e.g., *National Rejectors, Inc. v. Thrombin*, 409 S.W.2d 1, 50 (Mo. 1966) (recognizing the Missouri rule that proof of conspiracies must rise to the level of clear and convincing evidence, but may be proved by circumstantial evidence); *Quackenbush v. Slate*, 121 P.2d 331, 333 (Wash. 1942) (holding that, in Washington, one must prove the elements of conspiracy by clear and convincing evidence).

acy, the application of the exemption from the hearsay rule has been commented on extensively.⁷⁴

B. *Joint Liability Use*

[A] civil conspiracy . . . may form a predicate for the establishment of multiple tort liability. . . . The concept of civil conspiracy is sometimes used by an injured plaintiff as a basis for establishing joint and several tort liability among several parties. To be distinguished from the concept of vicarious liability for concerted action, civil conspiracy “came to be used to extend liability in tort . . . beyond the active wrongdoer to those who have merely planned, assisted, or encouraged his acts. Once a conspiracy is proven, each co-conspirator ‘is responsible for all acts done by any of the conspirators in furtherance of the unlawful combination.’”⁷⁵

The major significance of a conspiracy cause of action ‘lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity.’⁷⁶

The use of a conspiracy theory to impose liability is often confused with the similar concepts of joint tortfeasor liability and aider-abettor liability. Arguably the advantage of the choice of a conspiracy theory, in contrast to joint tortfeasorship or aiding and abetting, is that the co-conspirator generally need not be shown to have performed or contributed substantial assistance to a tortious act that caused the plaintiff’s injury in order to be found liable.⁷⁷ It must be noted, however, that even the courts have difficulty separating the concepts; thus, the advantage

74. See, e.g., Steven M. Kowal, *Applying the Co-Conspirator Rule in a Sherman Act Prosecution*, 1991 ANTITRUST 26; Ethel R. Alston, *Annotation, Admissibility of Statement by Co-Conspirator Under Rule 801(d)(2)(E) of Federal Rules of Evidence*, 44 A.L.R. FED. 627 (1979); Todd R. Russell & O. Carter Snead, *Federal Criminal Conspiracy*, 35 AM. CRIM. L. REV. 739 (1998); Robert Humphreys, *In Search of the Reliable Conspirator: A Proposed Amendment to Federal Rule of Evidence 801(d)(2)(E)*, 30 AM. CRIM. L. REV. 337 (1993); Frederic L. Borch III, *The Use of Co-Conspirator Statements Under the Rules of Evidence: A Revolutionary Change in Admissibility*, 124 MIL. L. REV. 163 (1989).

75. 1 STUART M. SPEISER ET AL., *THE AMERICAN LAW OF TORTS* § 3:4, at 386-87 (1983) (quoting *Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 925-26 (Tex. 1979)).

76. *Howard v. Superior Court*, 3 Cal. Rptr. 2d 575, 576 (Ct. App. 1992) (quoting *Mox Inc. v. Woods*, 262 P. 302, 303 (Cal. 1927)).

77. See *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983). Proving a conspiracy theory may be more difficult than proving an aiding-and-abetting theory because finding direct or sufficient circumstantial evidence of an agreement often presents significant challenges. Additionally, circumstantial evidence of “agreement” is likely to be found primarily in the kind of supportive acts that would also establish a finding of aiding-and-abetting. Each set of facts elucidates whether these are real or illusory advantages and/or difficulties. Thus, it is important that the framer of the lawsuit understand the distinction between the two theories, so as to identify the advantages and disadvantages within the facts presented.

may be lost in the confusion.⁷⁸

Additionally, proof of a conspiracy may expose deep-pocket defendants to more liability than an aiding and abetting theory. Under conspiracy theory, all conspirators are held liable for the damages caused by any one of them, regardless of whether or to what extent they participated in the acts that directly caused the damages. In contrast, under an aiding-and-abetting theory, the aider and abettor is held liable for the damages caused by the acts of the main perpetrator, but not the other way around.⁷⁹ It is possible to posit circumstances in which the aider and abettor's acts may have caused the significant damages, but the deep pockets belong to the main perpetrator. In such a case, under an aiding-and-abetting theory, the plaintiff would not have an adequate source for payment of the damages.

C. *Jurisdictional Use*

Some jurisdictions allow a plaintiff to use a conspiracy theory to support the court's exercise of long-arm jurisdiction over non-resident defendants, provided the court has personal jurisdiction over at least one conspirator.⁸⁰ Persuasive arguments exist that this appearance of a separately useful basis for finding extraterritorial jurisdictional reach is illusory.⁸¹ If the extraterritorial defendant's contacts with the jurisdiction

78. See *id.* at 478 n.9.

79. See *id.* at 478.

80. See ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS ¶ 7.09[3], at 7-73 (1983); see generally Stuart M. Riback, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 COLUM. L. REV. 506 (1984) (discussing the "conspiracy theory of jurisdiction" as an independent basis by which a court may obtain personal jurisdiction over co-conspirators); *Textor v. Board of Regents of N. Ill. Univ.*, 711 F.2d 1387, 1392-93 (7th Cir. 1983) (recognizing the "conspiracy theory of jurisdiction" but holding that the plaintiffs failed to state an actionable conspiracy); *Gemini Enters., Inc. v. WMFY Television Corp.*, 470 F. Supp. 559, 565 (M.D.N.C. 1979) (applying the "conspiracy theory of jurisdiction" to extend the long-arm statute to the defendants). *But see* *Mansour v. Superior Court*, 46 Cal. Rptr. 2d 191, 197 (Ct. App. 1995) ("California does not recognize conspiracy as a basis for acquiring personal jurisdiction over a party."); *Allen v. Columbia Fin. Management, Ltd.*, 377 S.E.2d 352, 357 (S.C. Ct. App. 1988) ("We decline to attribute the contacts of one alleged conspirator to another alleged conspirator."); *National Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995) (declining to recognize the "conspiracy theory of jurisdiction" as a basis for personal jurisdiction in Texas). Note, too, that there is a split among Florida appellate courts on this issue. *Compare* *Wilcox v. Stout*, 637 So. 2d 335, 337 (Fla. 2d DCA 1994) (holding that a claim of conspiracy to commit tortious acts supports long-arm jurisdiction), *with* *Execu-tech Bus. Sys., Inc. v. New OJI Paper Co.*, 708 So. 2d 599, 600 (Fla. 4th DCA 1998) (disagreeing with *Wilcox* and holding that assertion of the "conspiracy theory of jurisdiction" will be sustained only when plaintiff shows: (1) a conspiracy existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state; (4) the defendant knew or should have known of the acts in or effects on the forum state; and (5) such acts or effects were "a direct and foreseeable result" of the actions in furtherance of the conspiracy).

81. See Riback, *supra* note 80, at 510-11.

do not satisfy the constitutional requirement that it “purposefully avail[ed] itself of the privilege of conducting activities within the forum State,”⁸² then the conspiracy component cannot confer jurisdiction.

The cases that hold otherwise⁸³ may be understood in one of three ways. The court failed to heed the constitutional requirements, and its erroneous conclusion was not corrected in any subsequent appeal (*e.g.*, *Wilcox*). The extraterritorial actions of the non-resident defendant conspirators were sufficiently aimed or directed at actions taken within the jurisdiction, and, as a result, at least colorable “purposeful availing” was established (*e.g.*, *Textor*).⁸⁴ Finally, though perhaps a mere variation of the preceding explanation:

while the mere presence of a conspirator within the forum state is not sufficient to permit personal jurisdiction over co-conspirators, certain additional connections between the conspiracy and the forum state will support exercise of jurisdiction over co-conspirators. . . . These additional connections exist where substantial acts in furtherance of the conspiracy were performed in the forum state and the co-conspirator knew or should have known that acts would be performed in the forum state.⁸⁵

IV. IS THAT ALL THERE IS?

In summary, the currently available uses of a claim of civil conspiracy are evidentiary, joint liability, and jurisdictional. The concept of “civil conspiracy,” however, should not be limited to these uses.

First, we should not readily accept the limitation that civil conspiracy must be tied to an underlying tort and cannot stand alone as a cause of action for which recovery will lie. Second, for purposes of jury persuasion, the appeal of an image such as “civil conspiracy” is ideal ammunition for certain cases. A jury, when skillfully shown the facts that underlie the argument, will eagerly punish the conspirators and make whole the injured parties.

A. *Civil Conspiracy as a Stand-Alone Cause of Action*

For 300 years it has been taken as settled law that there can be no

82. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

83. *See* Riback, *supra* note 80.

84. Where the constitutional standard is met, showing a conspiracy may aid in satisfying a “laundry list” style state long-arm statute. For example, in *Wilcox*, the court found that conspiracy allegations satisfied a state long-arm statute, thus enabling the court to obtain jurisdiction over an absent party who commits any tortious act “through an agent,” and finding that an in-state co-conspirator is such an agent. *Wilcox*, 637 So. 2d at 337.

85. *Gemini Enters., Inc. v. WFMY Telev. Corp.*, 470 F. Supp. 559, 565 (M.D.N.C. 1979) (citations omitted).

recovery based on a claim of civil conspiracy absent a completed, underlying tort. As a matter of pure logic, why should this be so? No sources appear to doubt that this is the correct rule of law. For example: "Whatever may be the rule in criminal conspiracies, it is well settled that the civil liability does not depend upon the confederation (which need be alleged only by way of inducement^[86]), but upon the acts committed in realization of the common purpose."⁸⁷

There can be no question, we take it, but that an averment that acts were done in pursuance of a conspiracy does not change the nature of the civil action or add anything to its legal force and effect. In a criminal prosecution for conspiracy the unlawful combination and confederacy constitute the essential element of the offense rather than the overt acts done in pursuance of it. But that doctrine does not apply to civil suits for actionable torts.⁸⁸

The allegation of conspiracy in an action for tort which may be committed without a conspiracy, or plurality of tort-feasors, is mere matter of inducement and evidence, and, though a conspiracy be not shown, recovery may be had against the defendant, or defendants, participating in the tort. The gist of the action is not the conspiracy, but the damage done to the plaintiff by the acts of the defendants. The averment of the conspiracy does not change the form of action, which is an action on the case.⁸⁹

Authorities are numerous on the proposition that, in a civil case of this nature, the abstract fraud and conspiracy are not the cause of action, but rather the overt acts done in furtherance of the fraudulent plan.

In 12 Corpus Juris, § 100, pp. 581, 582, we find the following statement of the principle: "For obvious reasons, however, civil liability rests on different grounds, and unless something is actually done by one or more of the conspirators pursuant to the scheme and in furtherance of the object, which act results in damage, no civil action lies against any one [sic]. The gist of the action is the damage and not the conspiracy, and the damage must appear to have been the natural and proximate consequence of the defendant's act."

Again, in section 104, pp. 584, 585: "As a general rule averment and proof that the acts were done in pursuance of a conspiracy do not change the nature of the action or add anything to its legal force and

86. An inducement, when used in this sense, refers to the "matter presented by way of introduction or background to explain the principal allegations of a legal cause, plea, or defense." WEBSTER'S THIRD NEW INT'L DICTIONARY 1154 (1986).

87. *Lewis Invisible Stitch Mach. Co. v. Columbia Blindstitch Mach. Mfg. Corp.*, 80 F.2d 862, 864 (2d Cir. 1936). See *supra* note 57 (commenting on *Lewis*).

88. *Howland v. Corn*, 232 F. 35, 40 (2d Cir. 1916) (quoting *Green v. Davies*, 75 N.E. 536 (N.Y. 1905)).

89. *Barry v. Legler*, 39 F.2d 297, 302 (8th Cir. 1930).

effect.”⁹⁰

The difficulty with this kind of jurisprudence is that, notwithstanding the easy assertion that the reasons for the rule are “obvious,” one searches in vain for an explicated statement of those reasons. The following review examines the cases relied on by the above citations.

1. NEW YORK CASES

A number of the cases cited above rely on *Green v. Davies*,⁹¹ a ruling by the New York Court of Appeals. The case below had proceeded on a complaint that joined causes of action for slander and malicious prosecution, to which the defendants demurred on the ground that such causes of action could not properly be joined. The defendants took an interlocutory appeal from the court’s denial of the demurrer. The Court of Appeal reversed, holding that the defendants had correctly contended improper joinder.⁹² There was more to the case than met the eye:

[T]he learned courts below [had conceded that the joinder was improper], but their judgments proceeded on the theory that the action was not for slander or malicious prosecution, but for conspiracy to injure the plaintiff, of which the slander and arrest were merely the overt acts done in execution of the conspiracy. We are of [the] opinion that this doctrine is opposed to the decisions in this state and cannot be upheld. While it is true that in a criminal prosecution for conspiracy the unlawful combination and confederacy are the gist of the offense, not the overt acts done in pursuance thereof, which at common law it was not necessary to set forth in the indictment, though that rule has been changed by the statute law of this state, the doctrine does not apply to civil suits for actionable torts. In *Hutchins v. Hutchins*, 7 Hill. 104, it was said by Chief Justice Nelson, citing authorities: “The writ of conspiracy, technically speaking, did not lie at common law in any case, except where the conspiracy was to indict the party either of treason or felony, by which his life was in danger, and he had been acquitted of the indictment by verdict. All the other cases of conspiracy in the books were but actions on the case; and though it was usual to charge the conspiracy in the declaration, the averment was immaterial, and need not be proved. The action could always be brought against one defendant, or, if brought against more, one might be found guilty, and the rest acquitted.” The question arose again in *Brackett v. Griswold*, 112 N.Y. 454, 20 N.E. 376, where Judge Andrews wrote: “The gravamen is fraud and damage, and not the conspiracy. . . . The allegation and proof of a conspiracy in an action of this character is only important to connect a

90. *United States v. Pan-American Petroleum Co.*, 55 F.2d 753, 778 (9th Cir. 1932).

91. 75 N.E. 536 (N.Y. 1905).

92. *See id.* at 537.

defendant with the transaction and to charge him with the acts and declarations of his co-conspirators, where otherwise he could not have been implicated. But a mere conspiracy to commit a fraud is never of itself a cause of action, and an allegation of conspiracy may be wholly disregarded, and a recovery had, irrespective of such allegation, in case the plaintiff is able otherwise to show the guilty participation of the defendant. . . . Whenever it becomes necessary to prove a conspiracy in order to connect the defendant with the fraud, no averment of the conspiracy need be made in the pleadings to entitle it to be proved. These principles are well settled. The opinion of Chief Justice Nelson in *Hutchins v. Hutchins*, *supra*, contains an elaborate consideration of the subject, and no other authority need be cited.⁹³

Whether *Green* is a reliable guide to the soundness of the rule there discussed depends on the background of the cases on which the court relied. The *Green* court primarily relied on *Hutchins v. Hutchins*,⁹⁴ which upon inspection does no more than adopt the rule stated in *Savile v. Roberts*⁹⁵ discussed *infra* Part IV.A.4, at least so far as the case concerned whether there can be a separate, stand-alone action for civil conspiracy.⁹⁶ *Hutchins*, therefore, sheds no new light on the issue, even though the *Green* court appeared to agree with the *Brackett* court's view that "[t]he opinion of Chief Justice Nelson in *Hutchins v. Hutchins* . . . contains an elaborate consideration of the subject, and no other authority need be cited."⁹⁷ *Brackett v. Griswold*,⁹⁸ cited by the *Green* court, does no more than incorporate the reasoning of *Hutchins* by reference.⁹⁹

A third case relied on in *Green*, *Keit v. Wyman*,¹⁰⁰ contains what the *Green* court characterized as "a very clear opinion by Judge Follett, who showed from the authorities that the gravamen of the action was not the conspiracy, but the tort."¹⁰¹ However, Judge Follett's "authorities" in *Keit* prove to be none other than, primarily, *Savile v. Roberts*,¹⁰² the case relied on by the United States Supreme Court in *Adler v. Fenton*.¹⁰³ His remaining citations yield no further elucidation of the rationale for

93. *Id.* (lack of paragraphing in original).

94. 7 Hill 104 (N.Y. Sup. Ct. 1845).

95. 91 Eng. Rep. 1147 (1698); *see* discussion *infra* Part IV.A.4.

96. The other cases cited in *Hutchins* concerned another issue decided in the *Savile* case: whether, despite a pleading of civil conspiracy, a verdict might stand against only one defendant when the others were found not liable. That rule does not affect our analysis here.

97. *Green v. Davies*, 75 N.E. 536, 537 (N.Y. 1905).

98. 20 N.E. 376 (N.Y. 1889).

99. *See id.* at 379.

100. 22 N.Y.S. 133 (1893).

101. *Green*, 75 N.E. at 537.

102. 91 Eng. Rep. 1147 (1698).

103. 65 U.S. 407 (1860); *see infra* Part IV.A.3-4 (discussing *Savile* and *Adler*).

the rule.¹⁰⁴

2. MASSACHUSETTS CASES

Another line of cases frequently cited as authority for the “well-established” rule concerning civil conspiracy is a collection of Massachusetts cases. These cases chiefly rely on *Perry v. Hayes*.¹⁰⁵ *Perry* contains no analytical discussion of the rule, but instead simply cites to two older Massachusetts cases, *City of Boston v. Simmons*¹⁰⁶ and *Randall v. Hazelton*.¹⁰⁷ *Simmons* arose from a demurrer sustained “on the ground that the gist of the action was a conspiracy.”¹⁰⁸ In analyzing the complaint, the Massachusetts Supreme Court adopted the usual statement of the rule for civil conspiracy:

The averment of a conspiracy in the declaration does not ordinarily change the nature of the action, nor add to its legal force or effect. The gist of the action is not the conspiracy alleged, but the tort committed against the plaintiff, and the damage thereby done it wrongfully. . . .^[109] On the other hand, when the tort committed and the damage resulting therefrom proceed from a series of connected acts, the averment that they were done by several in pursuance of a conspiracy does not so change the nature of the action that, if the wrongful acts are shown to have been done by one only, it cannot be maintained against him alone, and the other defendants exonerated. As it would be necessary in the case at bar, in order that both defendants should be held responsible, to prove a combination and united

104. These cases include: *Train v. Taylor*, 4 N.Y.S. 492 (N.Y. Sup. Ct. 1889); *Verplanck v. Van Buren*, 76 N.Y. 247 (1879); *Gardiner v. Pollard*, 10 Bosw. 674 (N.Y. Sup. Ct. 1863); *Forsyth v. Edminston*, 11 How. Pr. 408 (N.Y. Sup. Ct. 1855); *Cotterell v. Jones*, 138 Eng. Rep. 655 (1851); *Hutchins v. Hutchins*, 7 Hill. 104 (N.Y. Sup. Ct. 1845); *Jones v. Baker*, 7 Cow. 444 (N.Y. Sup. Ct. 1825).

The *Forsyth* case comes the closest to directly confronting the question - blandly answered by the other courts - of why the rule should exist. In *Forsyth*, the court observes, “[A]ctions on the case, in nature of a conspiracy . . . are actions of *tort*, and are controlled by the general principles which regulate all actions of tort brought to recover damages. The *damage* sustained by the plaintiff is the ground of the action, and not the conspiracy.” This language parrots the famous language from *Savile*, considered *infra* Part IV.A.4. For 300 years courts have, in effect, accepted the age-old rabbit-in-the-hat trick. See *infra* at p. 24.

105. 102 N.E. 318 (Mass. 1913); see *Howland v. Corn*, 232 F. 35, 40 (2d Cir. 1916) (citing *Perry*); *Lewis Invisible Stitch Mach. Co. v. Columbia Blindstitch Mach. Mfg. Corp.*, 80 F.2d 862, 864 (2d Cir. 1936) (same).

106. 23 N.E. 210 (Mass. 1890).

107. 94 Mass. (12 Allen) 412 (1866).

108. *Simmons*, 23 N.E. at 210.

109. As precedent for this rule, the court cited the following Massachusetts cases: *Bowen v. Matheson*, 96 Mass. (14 Allen) 499 (1867); *Randall v. Hazelton*, 94 Mass. 412 (1866); *Hayward v. Draper*, 85 Mass. (85 Allen) 551 (1862); *Parker v. Huntington*, 68 Mass. (2 Gray) 124 (1854); *Wellington v. Small*, 57 Mass. (Cush.) 145 (1849). None of these cases sheds light on the rationale for the rule.

action on their part, the allegation of a conspiracy is a convenient and proper mode of alleging such combination and action. For any other purpose it is wholly immaterial.¹¹⁰

The other case cited in *Perry* is *Randall v. Hazelton*.¹¹¹ *Randall* sheds no light on the reasons for the rule. It cites *Parker v. Huntington*¹¹² and *Hutchins*, which merely parrot the rule from others of these cases.¹¹³ In summary, this collection of jurisprudence shows that the cases feed on one another. Without exception, the cases trace back to the rule announced in *Savile*.¹¹⁴

3. THE GRANDDADDY OF CASES: ADLER V. FENTON

The seminal United States case that provides certainty to the rule of law concerning the nature of civil conspiracy in American jurisprudence is *Adler v. Fenton*.¹¹⁵ That case arose out of a commercial transaction between defendants Adler and Schiff, who operated as traders in Milwaukee, and plaintiffs Fenton “and other merchants in New York.”¹¹⁶ Shortly after a large quantity of merchandise arrived in Milwaukee by shipment from New York as a result of orders placed by Adler and Schiff, Adler and Schiff allegedly assigned the merchandise “to one of their co-defendants, for the ostensible purpose of paying their debts, but really with the purpose of more effectually concealing it from the pursuit of their creditors.”¹¹⁷ The plaintiff merchants averred that Adler and Schiff

had combined and conspired with their codefendants in the court below to dispose of their property fraudulently, so as to hinder and defeat their creditors in the collection of their lawful demands, by means of which fraudulent acts they affirm they suffered vexation and expense, and finally incurred the loss of their debt.¹¹⁸

The case came to the Supreme Court on assignment of error concerning, *inter alia*, the trial court’s charge to the jury

that the plaintiffs sold their goods to Adler & Schiff on credit; they had no interest in the goods sold, or in the other property of these defendants, but an interest in the debt owing for the goods so sold on credit. And if the defendants have been guilty of a conspiracy to

110. *Simmons*, 23 N.E. at 211 (citations omitted).

111. 94 Mass. (12 Allen) 412 (1866).

112. 68 Mass. (2 Gray) 124 (1854).

113. See *supra* Part IV.A.1–2 and *infra* Part IV.A.3 (describing these cases and their parroting of the *Savile* rule).

114. See discussion *infra* Part IV.A.4.

115. 65 U.S. 407 (1860).

116. *Id.* at 408-09.

117. *Id.* at 409.

118. *Id.* at 408.

remove the property of Adler & Schiff, and they did so remove their property, with intent to defraud the plaintiffs in the collection of their debt when it should become payable, even though it was not payable when such removal was effected, the plaintiffs have a cause of action after the debt became payable.¹¹⁹

Finding this charge an incorrect statement of the law¹²⁰ and therefore reversing the lower court's judgment, Justice Campbell wrote for a unanimous Court:

To enable the plaintiffs to sustain an action on the case like the present, it must be shown that the defendants have done some wrong, that is, have violated some right of theirs, and that damage has resulted as a direct and proximate consequence from the commission of that wrong. The action cannot be sustained, because there has been a conspiracy or combination to do injurious acts. In *Savile v. Roberts*, 1 Ld. Raym. 374, Lord Holt said, "it was objected at the bar against these old cases, that they were grounded upon a conspiracy, which is of an odious nature and, therefore, sufficient ground for an action by itself. But to this objection he answered, that conspiracy is not the ground of these actions, but the damages done to the party; for an action will not lie for the greatest conspiracy imaginable if nothing be put in execution." There are cases of injurious acts for which a suit will not lie unless there be fraud or malice concurring to characterize and distinguish them. But in these cases the act must be tortious, and there must be consequent damage. An act legal in itself, and violating no right, cannot be made actionable on account of the motive which superinduced it. It is the province of ethics to consider of actions in their relation to motives, but jurisprudence deals with actions in their relation to law, and for the most part independently of the motive.¹²¹

There it is. The Supreme Court spoke long ago, and with some loquaciousness, on the subject. It even offered a rationale for the rule: motives must be left to the ethicist, whereas it is for the law to deal only with actions and resulting damages. Moreover, the Court quoted from English jurisprudence, giving its reasoning an extra veneer of scholarship and erudition. With such precedent, it is not surprising that Ameri-

119. *Id.* at 409-10.

120. The case turned specifically on the point that "a general creditor cannot bring an action on the case against his debtor, or against those combining or colluding with him to make dispositions of his property, although the object of those dispositions be to hinder, delay, and defraud creditors." *Id.* at 413. The Supreme Court was apparently not blind to the injustice of the situation, for it observed that such was the rule "[i]n the absence of special legislation." *Id.* The Uniform Fraudulent Conveyance Act was drafted fifty-eight years, and first enacted fifty-nine years, after *Adler*. See UNIF. FRAUDULENT CONVEYANCE ACT References and Annotations, 7 U.L.A. 2 (1997) (Table of Jurisdictions).

121. *Adler*, 65 U.S. at 410.

can courts have reiterated this rule as if it had come down with the tablets from Sinai.

The difficulty with this precedent is that it is based on a case decided in 1698, by justices living in a societal setting and time very different from twentieth—soon to be twenty-first—century America. It may be that the rule is a correct one, even transported in time by 300 years. In its broadest form, that view is questionable, given that motive enters into a variety of civil causes of action today – discrimination suits, for example. But there is a strong argument the rule is not correct. Even if correct, it should be analyzed from a more modern viewpoint to assure that the law is used to administer present-day justice, not justice embalmed.

4. THE GREAT-GRANDDADDY OF CASES: SAVILE V. ROBERTS

*Savile v. Roberts*¹²² came to the King's Bench on a writ of error from a judgment in Common Pleas, where the plaintiff, Savile, had alleged that the defendant, Roberts, had twice falsely and maliciously caused him to be indicted for "a riot."¹²³ Savile had been acquitted on both indictments.¹²⁴ The jury found for plaintiff, and the defendant moved for arrest of judgment on the ground that no action lay for the recovery of the plaintiff's unnecessary expenses that arose from the false indictments.¹²⁵ The court below held, and the Court at King's Bench affirmed, that such an action did lie.

[T]his is the ground of the present action, for that the plaintiff was put to *unnecessary charges* to answer the indictment; and it is most plain, that he was put to unnecessary expenses, for that the jury have found this prosecution was false and malicious. Now if there be an injury done to a man's property, occasioned by a wicked and malicious prosecution, it is all the reason in the world that a man should have an action to repair himself.¹²⁶

The above excerpt shows that the decision in *Savile* did not turn on any question concerning the law of civil conspiracy. In short, the purported "rule" of *Savile*, quoted and relied on by the Supreme Court in *Adler*, was dictum. The first clue to this comes at the outset of *Savile*,

122. 91 Eng. Rep. 1147 (1698). This English case is confusingly cited by differing versions of its caption: e.g., *Savile v. Roberts*, *Roberts v. Savill*, *Savill v. Roberts*, *Saville v. Roberts*, and *Savil v. Roberts*. It appears in the reports in eleven different locations and eleven different forms: 87 Eng. Rep. 725, 87 Eng. Rep. 733, 88 Eng. Rep. 1267, 90 Eng. Rep. 841, 90 Eng. Rep. 902, 90 Eng. Rep. 981, 90 Eng. Rep. 1005, 91 Eng. Rep. 664, 91 Eng. Rep. 1147, 92 Eng. Rep. 679, and 92 Eng. Rep. 886.

123. See *Savile*, 91 Eng. Rep. at 1149.

124. See *id.*

125. See *id.*

126. *Roberts*, 87 Eng. Rep. at 734.

where the case in the trial court is summarized as being brought by Savile against Roberts, a *single* defendant, with no named co-defendants or co-conspirators¹²⁷ and no allegations of conspiracy. Chief Justice Holt is actually forthright and candid in stating that his discussion of the law generally, which leads to his discussion of civil conspiracy, is obiter dictum, offered for the purpose of elucidating the area of law for the benefit of future cases.

[F]or the better settling the matter, it may be fit to consider, upon what grounds these actions are maintained; and I take it, that there are three sorts of damages which will support all actions of this nature.

First, where a man is injured in his fame or reputation, so that his good name is lost; by reason of which injury, if the words themselves do not bear an action, the loss or damage that may ensue, will. . . .

The second relates to a man's person, where he is assaulted or beaten, or put under any confinement whereby he is deprived of his liberty. . . .

. . . .

Now there is a third sort of damages which a man may sustain in respect of his property; and this is the ground of the present action, for that the plaintiff was put to *unnecessary charges* to answer this indictment. . . .¹²⁸

Even here, when Chief Justice Holt concludes his outline of the three types of action for malicious prosecution, there is no mention of civil conspiracy. That subject is raised only when the opinion answers an attempt by defendant/appellant Roberts to distinguish the cases the Chief Justice relies on to support the third type of malicious prosecution action.

It has been objected against these old cases, that these actions were grounded upon a *conspiracy*, which is odious in the law, and that to discourage such conspiracies to ruin men, such actions were allowed. But I answer, that in those cases *the conspiracy* was not the ground of the action, but *the damage* which the plaintiff sustained in respect of the needless expenses he was put to; for no action lies for the bare *conspiracy*, but it is the *malicious prosecution* which is the ground of

127. Of course, it is not necessary for a plaintiff to name or sue any of the alleged co-conspirators in order to proceed on a theory of conspiracy. See, e.g., *United States Fidelity and Guar. Co. v. Maish*, 908 P.2d 1329, 1338-39 (Kan. Ct. App. 1995) (applying estoppel principles when an insurance company failed to bring a compulsory counterclaim of civil conspiracy against an insured during the insured's prior action because, although at the time the insurance company did not have the names of the co-conspirators, such was not necessary for a valid claim of civil conspiracy). Nevertheless, the absence of mention of any involvement by anyone other than Roberts indicates that a conspiracy was not involved.

128. *Savile*, 87 Eng. Rep. 733, 734 (initial emphasis added).

the action, and when one only falsely and maliciously carries on the prosecution, yet an action lies; and though it is called an *action of conspiracy*, yet truly it is only an *action on the case*.¹²⁹

Thus, it appears that, if Chief Justice Holt had not deemed these “conspiracy” cases worthy of being distinguished, the quotation from *Savile* on which *Adler* relied never would have existed. To that extent, as measured from the soundness of their cited precedents, *Adler* and its American progeny should not be relied upon automatically as an intelligent exposition of the law of civil conspiracy.

5. JUST BECAUSE YOU'RE PARANOID DOESN'T MEAN THEY'RE NOT
AFTER YOU

It is every brief-writer's nightmare to have a valued citation exposed as dictum. Nevertheless, just because it's dictum doesn't mean it's not the law. If the precedents for the dictum are sound, then the dictum may arguably be taken as a convenient, even if not precedentially binding, guide through a particular legal thicket. Accordingly, the precedents Chief Justice Holt relied on in his frolic and detour concerning civil conspiracy should be examined for soundness. Unfortunately, he cited none. We are left, therefore, to analyze Holt's statement of the law for its soundness of reasoning. Regardless of precedent, should this rule be the rule of law?

6. IS THIS THE RIGHT RULE?

Initially, to assess the wisdom of the rule, we may look to the cases that recite the rule to examine the rationale provided for the rule. As reviewed above, virtually no rationale exists beyond what can be gleaned from reading between the lines of *Savile* and the one glib observation in *Adler*.

Chief Justice Holt says in *Savile* that the cases brought under the common-law form of civil conspiracy were actions on the case of which a necessary element was damages, “for if there be never so great a conspiracy to indict a man, yet if nothing be done in pursuance of that conspiracy, the party can have no action.”¹³⁰ Here, Chief Justice Holt engaged in one of the legal profession's oldest tricks, that of slipping the rabbit into the hat just before pulling it out. If the action is labeled as one in tort, then it requires proof of damages, but that conclusion follows only because of the label chosen. If, instead, it is called an action for conspiracy (without having to put it into a legal category such as contract or tort), then arguably it is not restricted in the definition of its

129. *Id.* at 734-35 (footnotes omitted).

130. *Savile v. Roberts*, 88 Eng. Rep. 1267, 1268 (K.B. 1698).

elements. This, indeed, was the case with the older form of action by writ of conspiracy, wherein the older jurisprudence allowed recovery, even if the conspiracy remained unexecuted.¹³¹

One must acknowledge that Chief Justice Holt's labeling exercise was so effective that no one has questioned it since. Courts and commentators have adopted it as sacrosanct. Bryan provides an apt example:

[T]he old form of action [by writ of conspiracy] embodied a fundamental error. This error lay in the idea that the element of combination among several persons to inflict harm upon another might in itself furnish a universally valid foundation for a civil action for the recovery of damages.

The fallacy involved in making a conspiracy the gist of a civil action is manifest. The immediate purpose of such action is to reimburse the plaintiff for some material loss resulting from the infliction upon him of a legal injury. The amount recoverable is the estimated pecuniary measure of the loss, and in some cases an additional sum by way of "punitive damages." In every instance, however, the plaintiff must have suffered actual damage from the very acts constituting the legal wrong. Now obviously a bare agreement among two or more persons to harm a third person inflicts no material hurt upon him. However malevolent the combination may be, the person against whom it is directed suffers no loss until the acts planned are actually performed. Hence the acts done and not the conspiracy to do them should be regarded as the gist of the proceeding to make good the damage.¹³²

This reasoning is entirely circular. Bryan buys Chief Justice Holt's labeling and then uses the label to prove the correctness of the reasoning. The question not addressed is whether the choice of label and the consequent design of the cause of action are sound.

The social and legal forces that led Chief Justice Holt to construct his design of the cause of action for civil conspiracy as sounding in tort are not addressed herein. The commentators seem to agree unanimously that his design was more useful and more malleable to meet the then-current needs than the older form of action.¹³³ Merely because Chief Justice Holt chose his label, however, does not mean that it should remain applicable unless it continues to make sense. We must continue, therefore, to probe the arguments regarding a cause of action for an unexecuted civil conspiracy.

131. Bryan notes that "[d]uring the reign of Richard II it was even said that one 'might have a writ of conspiracy although they [the defendants] did nothing but the confederacy together, and may recover damages' (Bellewe's Cases, Temp. Rich. II)." BRYAN, *supra* note 18, at 37 n.20.

132. *Id.* at 37-38 (footnote omitted).

133. *See, e.g.*, BRYAN *supra* note 18, at 49; WINFIELD, *supra* note 18, at 123.

The only other stated rationale against a stand-alone action for civil conspiracy is the Supreme Court's statement in *Adler* that the interrelationship between actions and motives is left to the province of ethics, whereas "jurisprudence deals with actions in their relation to law, and for the most part independently of the motive."¹³⁴ This rationale lacks clear meaning. What, precisely, does the phrase "actions in their relation to law" mean? Why is it neatly hedged with the phrase "for the most part?" Justice Campbell must have meant that the law does not take cognizance of the evil that two persons might *plan* to do, only the evil they *actually* do.

On analysis, that assertion does not stand up to scrutiny. The most obvious exception to Justice Campbell's principle lies in the law of criminal conspiracy. There, the law not only recognizes the evil that two persons plan; it also prosecutes the evil nature of the plan.¹³⁵ Given this clear exception, which perhaps is the origin of Justice Campbell's hedge, "for the most part," the only well-reasoned interpretation of *Adler's* theory concerning civil conspiracy is that in *civil* cases, the law does not take cognizance of the motive that might induce a harmful act, but only of the act itself.

This observation leads to two related questions. First, is that statement valid today in light of the development of the law since the time of *Adler*? Second, even if we acknowledge that it is generally valid, although somewhat eroded, should it control the question whether there should be a stand-alone action for conspiracy?

The notion that the civil law does not take cognizance of motive may be generally true, but it is riddled with exceptions. These exceptions were introduced by the development of causes of action unknown or unaccepted at the time of *Adler*. For example, the Sherman Act evaluates the participants' intention to monopolize. Discrimination suits allow proof of invidious motive. "In actions for interference with economic relations it is generally recognized that the defendant's motive is frequently a determining factor as to liability, and sometimes it is said

134. *Adler*, 65 U.S. at 410.

135. The validity and soundness of making criminal conspiracy itself a prosecutable criminal offense without the underlying crime having been completed is controversial. See *Krulewitch v. United States*, 336 U.S. 440, 445, 446 & n.2 (Jackson, J., concurring) (criticizing the application of conspiracy theory to certain situations, including those in which the underlying offense has not been committed); JESSICA MITFORD, *THE TRIAL OF DR. SPOCK* 61 (1969) (calling the crime of conspiracy a vaguely defined "poison"); see generally JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 29.01(A) (2d ed. 1995) (explaining that a conspirator may be prosecuted for conspiracy before committing the substantive offense); Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137 (1973) (discussing the pitfalls of conspiracy jurisprudence).

that bad motive is the gist of the action.”¹³⁶ Especially pertinent here are the cases for “true conspiracy” that at least ten American jurisdictions have allowed.¹³⁷ In those jurisdictions, the motive itself makes the wrong, rather than the underlying act that, by the stock definition of this type of conspiracy, is a “lawful act, but one that is achieved by unlawful means.”

Given this relaxation of the supposed barrier to consideration of motive, it cannot seriously be argued that motive must be excluded automatically from playing a role in civil cases. Granting that the cases in which motive may be considered are the exception rather than the rule, what guidance can we seek to determine whether motive should come into play? Once again, the statement of the rule and its supposed underlying principle merely beg the question: What should the rule be?

The answer to that question lies in analysis of the reasons that would support a rule of law on either side of the issue. Let us pose the question as follows: if one were to assert that the rule in civil cases should be the same as in criminal cases - that there should be a cognizable action for a conspiracy standing alone, without a completed tort or damages resulting - what policy reasons are there to support such a rule, and what detriments argue against it?

a. Reasons That Support The Rule

For guidance on this issue, we may examine the criminal law to see what rationales underlie a prosecution for mere conspiracy without a completed crime. Will such rationales apply with equal force to the civil setting?

Why are conspiracies punished? Two answers are frequently supplied. According to Professor Joshua Dressler:

As with other inchoate offenses, the bar on conspiratorial agreements provides police officers with a basis for arresting people before they commit other criminal offenses.

Conspiracy law allows police intervention at a much earlier point than is permitted under attempt law. . . . [A] common law conspiracy is formed the moment two or more persons agree that one of them will later commit an unlawful act. At common law, no conduct in furtherance of the conspiracy is required; even when an act in furtherance of the conspiracy is statutorily required, the act may be wholly preparatory to the commission of the target offense. Consequently, advocates of conspiracy laws believe that the offense unfet-

136. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 5, at 28 (5th ed. 1984) (footnotes omitted).

137. See discussion *supra* at pp. 9-11 and accompanying notes.

ters police and fills in the gaps in the “unrealistic” law of criminal attempts. They also justify conspiracy law on the ground that an agreement to commit a criminal act is concrete and unambiguous evidence of the actors’ dangerousness and the firmness of their criminal intentions.

. . .

According to advocates of conspiracy laws, two people united to commit a crime are more dangerous than one or both of them separately planning to commit the same offense: “the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer.”¹³⁸

The purported dangers inherent in collective criminal action are many. First, as a result of fear of co-conspirators, loyalty to them, or enhanced morale arising from the collective effort, a party to a conspiracy is less likely to abandon her criminal plans than if she were acting alone. Other special dangers are said to inhere in conspiracies. Collectivism promotes efficiency through division of labor; group criminality makes the attainment of more elaborate crimes possible; and the “[c]ombination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed.”¹³⁹

Each of these rationales supports the use of an action for civil conspiracy standing alone. First, the cause of action can be used as a means of *prevention*. One may argue that it is necessary to prevent the commission of certain civil wrongs by making their very plotting actionable. To paraphrase a section from the passage above: “As with other inchoate offenses, the bar on conspiratorial agreements provides *plaintiffs* with a basis for *suing* people before they commit other *tortious* offenses.” This argument assumes, of course, that the conspirator intends to commit a wrong that society considers outrageous and needful of prevention. This should be limited in much the same way as the rule of criminal law. For example, criminal law should not be intended to promote prosecutions for conspiracy to, say, shoplift.¹⁴⁰

Secondly, a stand-alone action for civil conspiracy can be used to combat “dangers inherent in *collective tortious action*.” Each of the underlying factors listed above may be adapted to a tort setting. Two

138. DRESSLER, *supra* note 135, § 29.02(A), at 394-95 (footnotes omitted) (quoting *Krulewitch v. United States*, 336 U.S. 440, 448-49 (1949) (Jackson, J., concurring)).

139. DRESSLER, *supra* note 135, §29.02(A), at 395 (footnotes omitted) (quoting *Callanan v. United States*, 364 U.S. 587, 593-94 (1961)).

140. This is not to deny that conspiracy has been prosecuted for trivial offenses. *See, e.g., Krulewitch*, 336 U.S. at 449 (1949) (Jackson, J., concurring) (“[The conspiracy concept] also may be trivialized, as here, where the conspiracy consists of the concert of a loathsome panderer and a prostitute to go from New York to Florida to ply their trade . . . and it would appear that a simple Mann Act prosecution would vindicate the majesty of federal law.”) (citation omitted).

people united to commit a *tort* are more dangerous than one or both of them separately planning to commit the same offense. "The strength, opportunities and resources of many is obviously more dangerous and more difficult to monitor than the efforts of a lone *tortfeasor*." As a result of fear of co-conspirators, loyalty to them, or enhanced morale arising from the collective effort, a party to a conspiracy is less likely to abandon her *tortious* plans than if she were acting alone.

Against this argued congruence between the rationales for the criminal rule and a similar civil rule, one might object that society generally takes crime more seriously than civil wrongs. The truth of this contention depends on how heinous the crime is and how outrageous the civil wrong is. If it should be proved that the tobacco companies had consciously, intentionally, maliciously, and with full awareness of the consequences acted in concert to develop the cigarette to its highest level of addictiveness, when that development brought with it a consequential increase in the deadly nature of the addiction, would it seriously be contended that civil law should not reach such conduct, at least in terms of the gravity of the offense to societal interests?¹⁴¹ One might acknowledge that the evil targeted should rise to a very high level of societal toxicity before it should support an independent cause of action for civil conspiracy. But to argue that *no* civil wrong can rise to such a high level - which is the logical underpinning of an argument that there should be no such independent cause of action - is an indefensible prejudgment. The question should await the case presented, as in all common-law jurisprudence.¹⁴²

b. Detriments of the Rule

There are four likely objections to the necessity and workability of the rule. First, opponents will suggest that many of the criticisms lev-

141. I recognize the argument that plaintiffs who could demonstrate actual injury from the conspiracy may constitute a sufficient body of "private attorneys general" to vindicate society's interest in the prevention of such conspiratorial tortious activity. That argument is addressed below in discussion of the question of who may be the plaintiffs in an inchoate conspiracy action, *i.e.*, one brought for the conspiracy alone before the tort and the resulting damage have happened.

142. On this point one may note that when Chief Justice Holt issued his obiter dictum pronouncement on the non-actionability of civil conspiracy as an independent cause of action, he particularly noted the exception provided for by the writ of conspiracy, which targeted conspiracies that rose to a high level of social toxicity:

For conspiracy (to speak properly) lies only for procuring a man to be indicted of treason or felony, where life was in danger. . . . But in an action for a conspiracy no villainous judgment shall be given, unless the life was endangered by that conspiracy; and therefore where it is brought for a trespass, it is only an action upon the case.

Savile v. Roberts, 91 Eng. Rep. 1147, 1150 (K.B. 1698).

eled at the crime of conspiracy¹⁴³ apply equally, or at least with substantial pertinence, to the expansion of the concept of civil conspiracy. Second, opponents will argue that the new rule is an unnecessary expansion of the law of torts at a time when society is inclined to trim back the boundaries of tort law. Third, opponents will object that the rule is unworkable because there are either no plaintiffs or too many plaintiffs. Fourth, opponents will argue that the proposed rule is toothless because without compensable harm there is no outcome (aside from the expense and inconvenience of mounting a defense) that would serve as an appropriate preventive sanction against the conspiring defendants' conduct.

i. *Applicable Criticisms from the Criminal Law.*

To generalize from the most quoted sources that have criticized the use of conspiracy doctrine in the criminal law,¹⁴⁴ the flaw of vagueness, or "overbreadth," seems the critics' preeminent concern.¹⁴⁵ Consider the following:

The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid.

. . . .

[E]ven when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case.¹⁴⁶

"In the long category of crimes there is none, not excepting criminal attempt, more difficult to confine within the boundaries of definitive statement than conspiracy."¹⁴⁷

"A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought."¹⁴⁸

Addressing these criticisms is somewhat problematic, in that the

143. *See supra* note 135.

144. To the sources cited at *supra* note 135, add: Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922); Albert J. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624 (1941).

145. Throughout this section of the article, I have omitted consideration of the flaws that concern only the workings of the criminal law. The point addressed here is the extent to which criticisms on the criminal side should be considered when the expansion of the civil side is contemplated.

146. *Krulewitsch v. United States*, 336 U.S. 440, 446-49 (1949) (Jackson, J., concurring).

147. Albert J. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624 (1941).

148. Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1923).

critics' explanations of the nature of the "vagueness" are themselves vague. In *Krulewitch*, Justice Jackson contented himself with a citation to the above often-quoted passage from Harno's article; a reference to an English author's pessimistic conclusion that "no intelligible definition of 'conspiracy' has yet been established";¹⁴⁹ and the following illustrative definitions of the term that he presents to show their inadequacy:

Justice Holmes supplied an oversimplified working definition in *United States v. Kissel*, 218 U.S. 601. . . : "A conspiracy is a partnership in criminal purposes." This was recently restated "A conspiracy is a partnership in crime." *Pinkerton v. United States*, 328 U.S. 640.

Carson offers the following resume of American cases: "It would appear that a conspiracy must be a combination of two or more persons by some concerted action to accomplish some criminal object; or some object not criminal by criminal means; or, some object not criminal by means which are not criminal, but where mischief to the public is involved; or, where neither the object nor the means are criminal, or even unlawful, but where injury and oppression to individuals are the result." *The Law of Criminal Conspiracies*, as found in *American Cases*, p. 123.¹⁵⁰

To be sure, if the objection of vagueness is based on such definitions as those quoted above, the objection is not hard to understand; such definitions are, to put it bluntly, useless. Such an objection, however, does not pertain to the definition of civil conspiracy used in this article's analysis and as the basis for the suggested expansion of the concept. This definition ("An agreement - together with an overt act - to do an unlawful act, or a lawful act in an unlawful manner"), has a recognizable meaning far more understandable than the definitions Jackson quoted, especially when it is particularized by the clarification that a recognized tort must be the object of the conspiracy.

Rather than their quarrel being simply with the looseness of the definition, it is more likely the critics are concerned that the charge of criminal conspiracy could be levied against the conspirators even where the objectives of the conspiracy were not criminal themselves.¹⁵¹ This objection does not pertain to the suggested expansive use of civil conspiracy, which would apply only to recognized torts as the object of the conspiracy.

149. *Krulewitch v. United States*, 336 U.S. 440, 446, n.3 (1949) (quoting R.S. WRIGHT, *THE LAW OF CRIMINAL CONSPIRACIES* (1873)).

150. *Id.*, at 447 n.4.

151. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* (2d ed. 1986) §6.4(b), at 527 ("Undoubtedly the main reason for this criticism [of vagueness] is the fact that the law of conspiracy developed in such a way that certain objectives not in themselves criminal will suffice").

Another basis for the critics' objection to vagueness is the intangible aspect of the factors of agreement and intent. Immediately after his reference to the "chameleon-like" quality of the concept, Justice Jackson, quoting Harno, observed that conspiracy "is always 'predominantly mental in composition' because it consists primarily of a meeting of minds and an intent."¹⁵² LaFave and Scott note that "the vagueness stems from other aspects of the crime as well, including the uncertainty over what is sufficient to constitute the agreement and what attendant mental state must be shown."¹⁵³ The implication of this complaint is that, without clearer specification of the concreteness required of the agreement or the intent, alleged conspirators will be defending against charges so ill-defined that they will be unable to formulate their defenses. "These ambiguities compound the difficulties of defending against a conspiracy charge, for 'it is hard to find an antidote for the poison you cannot identify.'"¹⁵⁴

As applied to civil cases, this criticism of vagueness demonstrates an underestimation of the ability of judges to require specificity in the underlying pleading, discovery, and dispositive motions of cases brought before them. Defendants can test the adequacy of the plaintiff's pleadings by motions to dismiss, for judgment on the pleadings, or for a more definite statement.¹⁵⁵ It is true that under federal and similar state-court notice pleading there will likely be few cases disposed of at the pleading stage, but the early testing process serves to sensitize the judge to possible weaknesses in a plaintiff's ability to prove her theories of agreement and intent. Such early sensitivity to the possibility of a "fishing expedition" will guide the judge's later consideration of dispositive motions.

Assuming the sufficiency of the pleadings,¹⁵⁶ if discovery discloses that proofs are lacking, summary judgment or judgment as a matter of law¹⁵⁷ may dispose of the case. In all such settings, the court will exercise its judgment in deciding whether there is a sufficient showing of agreement and intent to warrant further entertainment of the case. Finally, if the plaintiff survives all of these hurdles, she still must per-

152. *Krulewitch*, 336 U.S. at 447-48.

153. LAFAVE & SCOTT, *supra* note 151, at 527 (footnote omitted).

154. *Id.* (quoting J. MITFORD, *THE TRIAL OF DR. SPOCK* 61 (1969)).

155. *See* FED. R. CIV. P. 12(b)(6), (c), & (e).

156. Plaintiffs will have a persuasive argument that little specificity should be demanded at the pleading stage, given that the agreements that underlie conspiracies are so often unspoken and can only be discovered and demonstrated through investigation. A more radical approach to answering this criticism would be to require more specificity at the pleading stage, by expanding the coverage of rules such as FED. R. CIV. P. 9(b) (requiring particularity when pleading fraud or mistake).

157. *See* FED. R. CIV. P. 50, 56.

suade the jury. A case that does not merit the sanction of exemplary damages will be turned away by the jury's sound instincts for what is important and what is not.

The critics' point may not be the lack of safeguards against non-meritorious cases, but the lack of a standard against which to measure the proofs of agreement and intent. But how does this criticism distinguish the proposed cause of action for civil conspiracy from other matters in which intent is an issue?¹⁵⁸ Inevitably, one must rely on the good judgment and common sense of judges and juries to weed out the good cases from the bad. If this is not so, the answer to the criticism addressed here is not to forbid actions for civil conspiracy but to replace our system of trial by judge or jury.

Analysis of the evidence offered at trial in a case such as *Halberstam v. Welch*¹⁵⁹ demonstrates that our judge and jury safeguards are sufficient to protect defendants from the fear of vagueness on the issues of agreement and intent. *Halberstam* involved a murder prosecution of a cat-burglar, Bernard Welch, and his common-law wife, Linda Hamilton, arising out of the shooting of a prominent Washington, D.C. physician when he surprised the burglar in the physician's home.¹⁶⁰ The issue was the sufficiency of the evidence to show agreement and intent on the part of Ms. Hamilton that would expose her to liability for the wrongful death.¹⁶¹

The *Halberstam* opinion shows how clear the proofs of agreement and intent can be, even when based on circumstantial evidence.¹⁶²

[C]ourts have to infer an agreement from indirect evidence in most civil conspiracy cases. The circumstances of the wrongdoing gener-

158. See discussion *supra* pp. 26-27.

159. 705 F.2d 472 (D.C. Cir. 1983). This case is discussed in greater detail *infra* in the section concerning jury persuasion.

160. See *id.* at 474-76.

161. See *id.* at 476.

162. It may appear that we have turned the principle of *a fortiori* on its head by arguing that a strong case shows how adequate the safeguards are. The concern is, of course, that weak cases will slip past the judge and dupe the jury into a plaintiff's verdict where the proofs are much less convincing than in *Halberstam*. The point is that the strength of the proofs in a case like *Halberstam* shows what the courts are looking for and will be used as a guide against which to measure other cases as they are tested in pre-trial and mid-trial motions challenging the sufficiency of the proofs and, similarly, when they are tested on appeal.

To analyze this issue from the other end of the telescope, one may look at a case where the proofs offered of agreement and intent were demonstrably insufficient. See discussion of *Wolf v. Liberis*, 505 N.E.2d 1202 (Ill. App. Ct. 1987), *infra* in the section concerning jury persuasion. There, the court demonstrated its ability to distinguish a bad case from a good case by dismissing the conspiracy count.

If this suggested reliance on the wisdom of our judges and juries does not satisfy the critics, then as an alternative we might require that agreement and intent be proved by clear and convincing evidence in civil conspiracy cases.

ally dictate what evidence is relevant or available in deciding whether an agreement exists. Factors like the relationship between the parties' acts, the time and place of their execution, and the duration of the joint activity influence the determination. In this case, Hamilton and Welch did not commit burglaries together but their activities were symbiotic. They were pursuing the same object by different but related means. Their home became the storage and processing base for Welch's criminal activities; they thus performed some of their different parts of the illegal operation together at the same location. The long-running nature of the scheme is also crucial to the inference of agreement - Hamilton's knowledge and aid over five years makes some kind of accord extremely likely - perhaps only a tacit accord, but that is enough. Furthermore, while Hamilton's extensive participation in the profits of the illegal venture might not by itself prove an agreement, her unquestioning accession of wealth during this period is certainly consistent with such an agreement. Totaling all this evidence up, the district court's conclusion that Hamilton and Welch reached an understanding about their illegal enterprise withstands attack.¹⁶³

Moreover, the soundness of the Court of Appeals' reasoning on this point is buttressed by the specific findings by the trial court:

[Hamilton] knew full well the purpose of [Welch's] evening forays and the means by which she and Welch had risen from "rags to riches" in a relatively short period of time. She closed neither her eyes nor her pocketbook to the reality of the life she and Welch were living. She was compliant, but neither dumb nor duped, so long as her personal comfort and fortune were assured. She was a willing partner in his criminal activities.¹⁶⁴

Perhaps most convincingly from a trial lawyer's perspective, "[t]he district court based this conclusion largely on Hamilton's own testimony."¹⁶⁵ The fact-finder's opportunity to see and hear the defendant's testimony as to whether she did or did not participate in any agreement and whether she could be found to have had the required level of intent rests squarely on the Anglo-American tradition that places ultimate trust in the aptitude of the adversarial system to flush out the adequacy or inadequacy of proofs. As noted above, if one cannot trust that safeguard, then one must turn to a new system of dispute resolution. The commentators (and even appellate courts) that express concern about "vagueness" fail to account adequately for the revealing nature of the trial confrontation among witnesses, advocates, and fact-finders.

163. *Halberstam v. Welch*, 705 F.2d 472, 486-87 (D.C. Cir. 1983).

164. *Id.* at 474 (quoting *Halberstam v. Welch*, No. 81-0903, Mem. Op. at 5 (D.D.C. Mar. 24, 1982)).

165. *Id.* at 474.

This answer runs counter to a prevalent opinion that judges and juries do not keep frivolous or meritless cases at bay. The news is full of reports of causes of action and verdicts that sound preposterous.¹⁶⁶ However, my experience as a trial lawyer, my conversations with colleagues about their experiences, and my observations of student trials in law school that are presided over by judges and decided by volunteer jurors from the community, all lead me to respectfully disagree with the doubters.

Finally, on this first leg of the criticisms of criminal conspiracy that may also apply to civil conspiracy, we may expect to hear the concern of the "burden on the courts." If one doubted whether the remedy of a

166. The *Krulewitch* case may be cited - as Justice Jackson argued and intended - as a leading example of the kind of miscarriage of justice that an overly-vague use of conspiracy doctrine can produce. There, a post-conspiracy statement was admitted as a co-conspirator hearsay exception to buttress the proofs of agreement and intent.

The challenged testimony was elicited by the Government from its complaining witness, the person whom petitioner and the woman defendant allegedly induced to go from New York to Florida for the purpose of prostitution. The testimony narrated the following purported conversation between the complaining witness and petitioner's alleged co-conspirator, the woman defendant.

She asked me, she says, "You didn't talk yet?" And I says, "No." And she says, "Well, don't," she says, "until we get you a lawyer." And then she says, "Be very careful what you say." And I can't put it in exact words. But she said, "It would be better for us two girls to take the blame than Kay (the defendant) because he couldn't stand it, he couldn't stand to take it."

Krulewich v. United States, 336 U.S. 440, 441 (1949). This conversation took place more than a month and a half after the completion of the allegedly conspired Mann Act trip to Florida. See *id.* at 442. Given how hard the parties fought to admit or exclude this hearsay, which was the issue that brought the case to the Supreme Court, it is likely the rest of the Government's case was feeble. Indeed, this was the inference drawn by the majority, which reversed on the ground of the erroneous admission of this evidence and concluded:

[E]rror should not be held harmless under the harmless error statute if upon consideration of the record the court is left in grave doubt as to whether the error had substantial influence in bringing about the verdict. We have such doubt here. The Florida District Court grand jury failed to indict. After indictment in New York petitioner was tried four times with the following results: mistrial; conviction; mistrial; conviction with recommendation for leniency. The revolting type of charges made against this petitioner by the complaining witness makes it difficult to believe that a jury convinced of a strong case against him would have recommended leniency. There was corroborative evidence of the complaining witness on certain phases of the case. But as to all vital phases, those involving the sordid criminal features, the jury was compelled to choose between believing the petitioner or the complaining witness. The record persuades us that the jury's task was difficult at best. We cannot say that the erroneous admission of the hearsay declaration may not have been the weight that tipped the scales against petitioner.

Id. at 444-45.

Such a foolish case as *Krulewitch* might be argued as a sound basis for drawing the narrowest possible limits around the use of conspiracy doctrine. Given the relief the defendant finally obtained in the Supreme Court, the case may be used equally to support the argument that one may rely on judges and juries adequately to protect against misuse of the doctrine.

stand-alone action for civil conspiracy is truly needed, the burden on the courts should be taken into consideration in weighing the social utility of the amendment to the law. However, if the need for the remedy is seen as strong and persuasive, as it should be for the kind of anti-social behavior posited by the two hypothetical conspiracies discussed herein, then the issue of the burden on the courts should be, not an argument against expansion of the law, but rather a challenge to the ingenuity of the courts and budgeters to respond to new needs with new remedies.¹⁶⁷

ii. *Too Great an Expansion of Tort Law?*

It is not the purpose of this article to join the debate whether tort law needs to be reformed, constricted, expanded, or locked in *status quo*. The point here is that, as reviewed above, there is no binding precedent - unless one wishes to honor 300 years of dictum-based jurisprudence - to constrain those who would expand the reach of tort law to target unexecuted civil conspiracies. Whether the law should be so expanded depends on the seriousness of the conspiracy that may be uncovered; until it is uncovered, it is too early to say. The tools are available, so the path is clear for the courts or legislatures to expand the law if the need is found to arise.¹⁶⁸

167. Beyond the objection to vagueness, there are three further criticisms directed at the law of criminal conspiracy that arguably would apply to civil conspiracy. First, some commentators express concern that standard venue provisions can work an unfair hardship on defendants in a conspiracy action because the acts by one conspirator may give rise to venue in a location where another of the conspirators had no connection. As a result, one conspirator will be "compel[led] . . . to defend at a great distance from any place he ever did any act because some accused confederate did some trivial and by itself innocent act in the chosen district." *Krulewitch*, 336 U.S. at 453; see also Johnson, *supra* note 135, at 1175-80. This objection could be resolved by adding a special venue provision to a civil conspiracy statute. Such a provision could mimic the suggestion voiced in the criminal-law arena of siting venue where the agreement was made.

Second, commentators are concerned that the statute of limitations that is applicable to conspiracy cases may subject defendants to an unreasonably long period of vulnerability to suit because the statute ordinarily does not begin to run until the conspiracy is either abandoned or successfully completed. See Johnson, *supra* note 135, at 1180. This objection could be answered by requiring the statute of limitations on suits for civil conspiracy to begin to run on the formation of the agreement or from the date on which the existence of the conspiracy could have been discovered through reasonable diligence.

Third, it is objected that the co-conspirator exemption from the hearsay rule is too often abused by having the co-conspirators' admissions used as the basis for the finding of the underlying agreement - a classic "bootstrap." *Id.* at 1185. Of course, to the extent this concern stemmed from the possibility that the contested statements *alone* could provide the required foundation, a question left open in *Bourjaily*, the 1998 amendment to Federal Rule of Evidence 801(d)(2)(E) answered this concern by specifying that such admissions could be considered but were not alone sufficient to establish "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered. . . ." If that amendment does not fully meet the objection, then the rule could be further amended to rule out consideration of the contested statements until the underlying foundation is proved by other, independent evidence.

168. The availability of other remedies, such as injunctive relief or suits under RICO, may

iii. *Too Many or Too Few Plaintiffs?*

The objectors to the proposed rule will raise the question of who can sue. If no one has suffered compensable harm, who will have standing? This would be a problem under the federal standing requirement of “injury-in-fact,” given our hypothetical of an unexecuted conspiracy.¹⁶⁹ If there is no one who can have standing, the rule will languish in this law review article. In the antique terms of civil docket management, it will be *non prossed*.

At the other end of the spectrum, to award standing to anyone targeted by the conspiracy may introduce too many plaintiffs. In the example of the tobacco companies’ conspiracy, anyone who has seen or heard an advertisement for cigarettes could argue for the right to sue because he has been made a target of the conspiracy.

There are several answers to these standing problems. As to the requirement of “injury-in-fact,” it may be that this proposed expansion of the law must take place in state courts where the requirements for standing need not be injury-based.¹⁷⁰ If new legislative enactments accomplish this expansion, the drafters could provide the more accommodating type of standing that is found in such statutes as the Fair Hous-

strengthen the objection that this expansion of the use of civil conspiracy is unwarranted. However, an injunction effectively would deter only the conspirators themselves, whereas the underlying rationale for expanding the use of civil conspiracy includes deterring not only the specific conspiracy, but also other similar conspiracies. It is meant to be a tool to enable private or states’ attorneys general to take action to prevent pernicious forms of anti-social behavior. In that respect, an injunction against specific conspirators would fail to meet the broader purpose. As to RICO, its use is limited to conduct that affects interstate commerce and economic interests by damaging a business. See 18 U.S.C. §§ 1961, 1962 (1984). Those restrictions would render it inapplicable to many types of civil conspiracy that the suggested stand-alone action could reach.

169. See *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 152-53 (1970) (establishing the two-part standing test which requires that: (1) a plaintiff allege a cause of action based on an “injury in fact”; and (2) the interest the plaintiff seeks to protect come within the “zone of interests to be protected or regulated by the statute or constitutional guarantee in question”).

170. The U.S. Supreme Court has stated explicitly that “standing” is a requirement imposed on federal courts based on the “Cases” and “Controversies” language of Article III, section 2 of the United States Constitution. *Flast v. Cohen*, 392 U.S. 83, 94 (1968). Hence, states may construe the standing requirements imposed by their own constitutions as not requiring the same inquiry regarding “injury-in-fact.” For example, the Alaska Supreme Court has noted that “[t]he Alaska Constitution does not explicitly limit court jurisdiction to ‘cases’ and ‘controversies’ . . .” *Moore v. Alaska*, 553 P.2d 8, 23 (Alaska 1976). The *Moore* court further observed that, because “the requirement of adversity [in the “injury-in-fact” analysis under standing doctrine] has no constitutional base in Alaska, our requirement that it exist must be characterized as a judicial rule of self-restraint—as must the entire doctrine of standing itself.” *Id.* Although the *Moore* court ultimately decided to continue to promote an “adversity” requirement in the standing analysis in order to “ensure that a question presented for [the court’s] review is one that is appropriate for judicial determination,” *id.*, the point remains that at least one court has recognized the possibility of a less injury-based claim under state law.

ing Act.¹⁷¹

As to the problem of too many plaintiffs, the use of class actions may be appropriate to many cases. Alternatively, a statutory enactment can give standing to the whistle-blower who pursues, uncovers, and prosecutes an action against the conspirators. As a third alternative, one could award standing to states' attorneys general to prosecute civil conspiracies on behalf of the states' citizenry, as in environmental enforcement actions.

Further, the standing problems revealed by the hypothetical "macro-conspiracy" concerning the tobacco companies would not appear to exist in the "micro-conspiracy" hypothesized concerning the cat-burglar ring targeting private homes. One might imagine a situation based on the facts of *Halberstam*, except that the cat burglar is caught before he puts his plans into action against his targets' residence. His plans disclose that he has surveilled the family's activities for months; he has shadowed their movements as they walk their pets and travel to work, school, and weekend trips to their country house; he has obtained engineering specifications for their home alarm system by clever thievery via the Internet; and he has self-defense plans in place, including arming himself with a .357 Magnum. When the intended victims learn of these plans, have not the invasion of their privacy (albeit unknown to them at the time it was ongoing) and the foreboding threat to their safety changed them forever? Should they have no recompense beyond the "satisfaction" of seeing the burglar convicted of criminal conspiracy or attempted burglary? Should that arguable satisfaction continue when their predator is released on parole after four months of incarceration? Do the targeted victims of these facts lack standing?¹⁷²

171. Because, within the limits of constitutional requirements, standing turns on prudential judicial limitations on federal court jurisdiction, Congress has been able to loosen the standing doctrine in some instances. Section 812 of the Fair Housing Act of 1968 expands standing to the limits of Article III of the United States Constitution. As a result, merely "prudential" determinations of standing analysis are not applicable to these causes of action. See *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 98, 108 (1979); *accord* *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209-10 (1972) (reaching some conclusion regarding section 810 of the Fair Housing Act of 1968 with respect to tenants alleging unlawful discrimination). Indeed, in *Gladstone*, the Court recited the rule that pure Article III analysis requires only that a plaintiff show "some actual or threatened injury as a result [of the defendant's conduct]." 441 U.S. at 99.

172. In the majority of American jurisdictions, a cause of action for invasion of privacy may be available on these hypothetical facts. See, e.g., *Shulman v. Group W Prod., Inc.*, 955 P.2d 469, 490 (Cal. 1998) (confirming that California recognizes the tort of intrusion, the elements of which are: (1) "intrusion into a private place, conversation or matter"; and (2) that such intrusion is done "in a manner highly offensive to a reasonable person"). Nevertheless, the remedy of a preventive action for unexecuted civil conspiracy is arguably needed in jurisdictions that interpret narrowly the kinds of intrusion that are actionable. For example, in the hypothetical there was no "snooping" or peering into the intended victims' residential premises. The defendants might argue successfully against an invasion of privacy claim on the grounds that "[o]n the public street,

iv. *Too Toothless?*

In answer to the objection that a minatory cause of action for unexecuted civil conspiracy will be ineffective because there will be no damages to sanction the type of conduct the conspirators were plotting, the availability of exemplary damages would provide the necessary threat. After all, exemplary damages are deemed appropriate for exactly that purpose. Beyond simply punishing the direct defendant, they are also intended to deter others from similar conduct in the future.¹⁷³

This solution only raises the next difficulty, namely, the majority rule that exemplary damages are allowed only where there is an award of compensatory damages.¹⁷⁴ One solution to this problem would be to allow an award of nominal damages for the claim of conspiracy, thus authorizing an additional award of exemplary damage. Some courts, however, have held that exemplary damages may not be obtained when only nominal damages are awarded.¹⁷⁵ In opposition to such decisions, Prosser asserts that because

it is precisely in the cases of nominal damages that the policy of providing an incentive for plaintiffs to bring petty outrages into court comes into play, *the view very much to be preferred* appears to be that of the minority which have held that there is sufficient support for punitive damages.¹⁷⁶

Moreover, Prosser notes that some courts have even allowed exemplary damages in cases in which the jury awards no other damages.¹⁷⁷

In many instances, this approach would put the “reasonable relation” issue to a test¹⁷⁸ because the defendants would assert that in relation to nominal damages any exemplary damages would have to be

or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there.” KEETON ET AL., *supra* note 10, § 117, at 855.

173. *Stevens v. Owens-Corning Fiberglas Corp.*, 57 Cal. Rptr. 2d 525, 533 (Ct. App. 1996) (“The purpose of punitive damages is a public one—to punish wrongdoing and deter future misconduct by either the defendant or other potential wrongdoers.”); *see* *Leidholt v. District Ct.* 619 P.2d 768, 770 (Colo. 1980) (observing that Colorado law utilizes exemplary damages to punish wrongdoers and deter others from engaging in similar conduct); *Walker v. Sheldon*, 179 N.E.2d 497, 498 (N.Y. 1961) (explaining that exemplary damages are awarded to punish the defendant, to deter the defendant from committing the act again, and to deter others from doing the same); JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS § 14.05(A), at 239 (1996) (listing the dual objectives of exemplary damages: punishment and prevention).

174. *See, e.g., Building Structures, Inc. v. Young*, 968 P.2d 1287 (Or. 1998); *Jemison v. National Baptist Convention, USA, Inc.*, 720 A.2d 275 (D.C. Cir. 1998); *Schlegel v. Ottumwa Courier*, 585 N.W.2d 217 (Iowa 1998); *Durham v. Mooney*, 507 S.E.2d 877 (Ga. Ct. App. 1998); *see also* KEETON ET AL., *supra* note 10, § 2, at 14.

175. KEETON ET AL., *supra* note 10, § 2, at 14 n.71.

176. *Id.* § 2, at 14 (emphasis added).

177. *See id.* § 2, at 14 n.72.

178. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

minimal. The “reasonable relation” factor, however, is only one factor to be considered in determining whether punitives have been assessed properly and constitutionally, and it is not the predominant factor.¹⁷⁹ “Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct. As the [Supreme] Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect ‘the enormity of his offense.’”¹⁸⁰ Further, and particularly applicable to the hypotheticals posed in this article, low awards of compensatory damages may properly support a higher ratio of damages than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. Cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine may justify a higher ratio.¹⁸¹

Alternatively or in addition, the law could allow as recoverable compensatory damages the expenses incurred by plaintiffs in exposing and resisting the wrongful activities of the defendants. British law has allowed such recovery in civil conspiracy cases:

[T]he plaintiffs maintain, and must maintain, a large investigation department, and the money actually expended in unravelling and detecting the unlawful machinations of the defendants which have been proved in this case before any proceedings could be taken must have been considerable. I can see no reason for not treating the expenses so incurred which could not be recovered as part of the costs of the action as directly attributable to their tort or torts. That these expenses cannot be precisely quantified is true, but it is also immaterial. Accordingly, the plaintiffs have proved the damage which is essential to the tort of conspiracy. . . .¹⁸²

Alternatively, this problem could be solved by specifying the availability of exemplary damages alone and the methods for calculating and substantiating them in a statutory enactment that gives the right to bring a cause of action for civil conspiracy. This solution would answer the point that underlies many of the troublesome issues this article discusses, namely, that if the cause of action lies in tort then it partakes of all the requirements of tort law, including the necessity of demonstrating

179. *See id.* at 574-75.

180. *Id.* at 575 (footnotes omitted). In *Gore*, the Supreme Court further noted that in determining reprehensibility, “‘trickery and deceit’ . . . are more reprehensible than negligence,” and that “‘for Justice Kennedy, the defendant’s intentional malice was the decisive element in a ‘close and difficult’ case.’” *Id.* at 576 (citations omitted).

181. *See id.* at 582.

182. *British Motor Trade Ass’n v. Salvadori*, 1949 Ch. 556, 569.

damages.¹⁸³ If you call it a duck it will have to have feathers; if you call it a tort it will have to have damages. So, if it is important enough to have the action, then let us call it something else.

B. *Jury Persuasion*

The second suggested use for the concept of civil conspiracy is as a pleading and rhetorical device for jury persuasion. A claim of civil conspiracy can set a context for a case that will appeal to the fact-finder's sense of justice or, what is often the more persuasive fulcrum, the fact-finder's outrage at injustice. People react negatively to "ganging up" when one side of a controversy tries to impose its will on the other by means of its superior numbers. A "fair fight" is one in which the contestants go one-on-one. When both members of a tag team climb into the ring on televised wrestling and pummel the lone wrestler from the other team, the crowd hoots in outrage. "Ganging up" is, in a word, un-American.

People also react negatively to secret plottings and subversive, clandestine campaigns. "Sunshine Laws" are intended in part to shed light on the workings of government. It is considered rude to whisper. Cicero worked this theme over 2000 years ago in his prosecution of the conspiracies of Catalina, whom he accused of plotting to overthrow the republican government of Rome:

For now, Catalina, your hopes must obviously be at an end. The darkness of night no longer avails to conceal your traitorous consultations. A private house does not suffice to keep the voices of your conspiracy secret. Everything is patently apparent. It all bursts out into the open; you are forced to give up the whole outrageous design. So do as I say: dismiss all those projects of carnage and conflagration from your mind. You are hemmed in on every side. All your schemes are more glaringly evident to us than the light of day.¹⁸⁴

Teachers of trial advocacy emphasize the importance of striking a theme that appeals to the fact-finder's innate sense of justice and opposition to injustice. It therefore can be of great use to a plaintiff to argue the themes of conspiracy: the secret cabals, the clandestine plottings, the combination of concealed forces aimed at a single victim. It is an effective variant on the David versus Goliath theme.

To be sure, one can argue in closing argument that the defendants "conspired," "ganged up on the plaintiff," and "plotted secretly" even

183. See *supra* 24-25 (discussing Chief Justice Holt's choice of label for the "new" form of action for conspiracy).

184. *The First Speech Against Lucius Sergius Catalina* (October 21, 63 B.C.), in MARCUS TULLIUS CICERO, *SELECTED POLITICAL SPEECHES OF CICERO* 78-79 (Michael Grant trans., 1969) (footnote omitted).

without having pleaded a claim for civil conspiracy. The attorney's closing rhetoric, however, has more authority when it is tied to an instruction the court gives the jurors.¹⁸⁵ In the Trial Advocacy course at McGeorge School of Law, each semester concludes with a jury trial for all participating students, and the jury's deliberations are observed on closed-circuit television. During the observations, the jury routinely returns to the court's instructions. They want to be sure they are doing their best to follow the law they have been given. Imagine the same case being deliberated, but in one setting there is no instruction on civil conspiracy, in the other there is. Assume that the plaintiff's counsel has argued brilliantly the theme of conspiracy, of "ganging up." In the first hypothetical setting, the jury will search the instructions in vain for guidance on or echo of this theme; in the second, they will find it set forth clearly, resonating with and reaffirming the attorney's phrases. On which case would you like to have your client's interests depend?

As an illustration of the kind of case in which this persuasive use was employed creatively and effectively, consider *Halberstam v. Welch*.¹⁸⁶ In 1980 Michael Halberstam, a prominent Washington, D.C. physician, was shot and killed in his home when he surprised a burglar in the house.¹⁸⁷ After the burglar was caught and convicted, facts emerged that he was something of a modern-day Pink Panther, but without humor.¹⁸⁸ Bernard Welch preyed on the homes and offices of the rich and famous.¹⁸⁹ His targets were precious metals, coins, and jewelry.¹⁹⁰ He was so successful in his business that eventually he lived in a \$1,000,000 home in suburban Virginia, with a second home in Minnesota.¹⁹¹ He operated a smelting operation in his basement, where he melted down the metals that were more sellable in bulk than in coin.¹⁹²

After Welch's murder conviction, Halberstam's widow brought a civil action for wrongful death and survival. A default judgment was taken against Welch.¹⁹³ The part of the case pertinent to this discussion of civil conspiracy was the plaintiff's inclusion of Welch's common-law wife, Linda Hamilton, as a defendant. The suit alleged that Hamilton

185. See, e.g., CARLSON & IMWINKELRIED, *DYNAMICS OF TRIAL PRACTICE* 36 (2d ed. 1995).

186. 705 F.2d 472 (D.C. Cir. 1983).

187. See *id.* at 475.

188. As the appellate court described it, "This case arises out of the shocking climax to a coldly efficient criminal campaign that had confounded, frustrated, and ultimately terrorized the Washington area [,] . . . [a] rampage that left widowed the wife of one of the community's most eminent physicians." *Id.* at 474.

189. See *id.* at 474-76.

190. See *id.*

191. See *id.* at 475.

192. See *id.*

193. See *id.* at 474.

had assisted Welch in the operation of the burglary “business” and was liable as a co-conspirator.¹⁹⁴

After a non-jury trial,¹⁹⁵ the court found Hamilton jointly and severally liable with Welch and entered a judgment against both in the amount of almost \$6,000,000.¹⁹⁶ The appeal provided an opportunity for the appellate court to consider the applicability of the concepts of co-conspiracy and aiding and abetting as sources of joint civil liability for a less-than-fully active participant in an organization that led to the commission of crimes. From the point of view of fact-finder persuasion, the case is equally instructive.

The Court of Appeals summarized Hamilton’s involvement in Welch’s “business” as follows:

With Hamilton’s knowledge, Welch installed a smelting furnace in the garage and used it to melt gold and silver into bars. He then sold the ingots to refiners in other states. Hamilton typed transmittal letters for these sales. She also kept inventories of antiques sold, and in general did the secretarial work. . . . The buyers of Welch’s goods made their checks payable to her, and she deposited them in her own bank accounts. She kept the records on these asymmetrical [sic] transactions - which included payments coming in from buyers, but no money going out to the sellers from whom Welch had supposedly bought the goods. Hamilton remembered no mail from dealers in antiques or precious metals. . . .

Not surprisingly, given the “low” cost of Welch’s materials, his business was a profitable one. By 1978 [only three years after Welch and Hamilton first met] Hamilton and Welch had a gross annual income in excess of \$1,000,000. Hamilton’s individual tax returns for 1978 and 1979 reported gross earnings of \$647,569.21 and \$491,762.16, respectively, from the sale of gold and silver. She took deductions, per Welch’s instructions, for “cost of goods sold and/or operations” in 1978 and 1979 of \$498,770.87 and \$360,000, respectively - despite the absence of any evidence of payouts for such goods. Hamilton assumed that Welch filed a separate tax return. . . .

After the police apprehended Welch, they obtained a search war-

194. *See id.*

195. I recognize that in discussing the effect on a *jury* of the persuasive effect of a claim of civil conspiracy, I am using a *non-jury* trial as illustrative. I submit that persuading the judge is not all that different from jury persuasion. The brush strokes may be different, but the picture painted still must appeal to the fact-finder’s gut instinct for justice. Given that the inclusion of a conspiracy claim helped persuade the trial court and appellate judges in *Halberstam, a fortiori* such a claim would have jury appeal.

196. *See Halberstam*, 705 F.2d at 472, 474. Of course, the first question that might spring to mind is why it was worth pursuing such a claim and obtaining such a judgment against a pair of criminals. The answer appears to lie in the extraordinary profitability of Welch’s enterprise: “As a result of Welch’s innumerable burglaries over the course of five years, he and Hamilton acquired a fortune that would have been the envy of a Barbary brigand.” *Id.*

rant for the Great Falls house and discovered Welch's basement "inventory": some fifty boxes containing approximately three thousand stolen items - antiques, furs, jewelry, silverware, and various household and personal effects. While Hamilton admitted having seen the boxes, she claimed not to have seen their contents before. She said she did not go down to the basement often, although she had free access to it.¹⁹⁷

Given this factual situation, it is evident that the choice of a claim of civil conspiracy was wise. Imagine the rhetoric that could be used emphasizing secrecy, plotting, subversion - the fetid atmosphere of this anti-social enterprise. Imagine how much more effective it was to talk of "conspiracy," even to quote Cicero, as opposed to offering a dry explanation of the law of joint tortfeasorship.

This section concerning the persuasive value of a claim of civil conspiracy would be incomplete without a look at the underbelly of the issue, that is, the kind of case that throws in a claim of civil conspiracy as if it were the proverbial kitchen sink. In *Wolf v. Liberis*,¹⁹⁸ the plaintiff's decedent sued for the decedent's wrongful death, which had resulted from the following events:

[Defendant Nick] Liberis and his fiancée, Linda Manno (now Linda Liberis), had dinner at a restaurant and had a personal argument. Manno testified that she had several glasses of wine during the meal and several more after Liberis drove her home. At about 2:00 a.m. she drove to Liberis' apartment where they resolved their argument. Because Manno had been drinking, Liberis offered to follow her while she drove home. Manno took a wrong turn, drove through a red light, and then lost control of her vehicle at Central and Belmont and drove her car part way through a store window. Liberis then parked his car, backed Manno's car out of the window and parked it. He told Manno to stay there while he went to call the police

As Liberis attempted to get back into his own car, he was approached by three men who attempted to restrain or attack him In the meantime, Manno had left the scene of the original accident and driven home. Liberis got back into his own car and began to drive away. One of his assailants pulled open his car door and attempted to wrest control of the steering wheel, causing Liberis to lose control and drive head-on into the vehicle driven by plaintiff's decedent.¹⁹⁹

The plaintiff sued Linda Liberis on the theory, among others, that she was liable with Nick Liberis for tortious concert of action in the

197. *Id.* at 475-76.

198. 505 N.E.2d 1202 (Ill. App. Ct. 1987).

199. *Id.* at 1204-05.

nature of a civil conspiracy.²⁰⁰ The trial court denied Ms. Liberis' motion for summary judgment, but the appellate court granted her leave to appeal.²⁰¹

In reversing and directing a grant of summary judgment,²⁰² the appellate court disposed of the plaintiff's civil conspiracy theory in a single sentence: "Neither the allegations of the . . . complaint nor the proofs support a theory of civil conspiracy against Linda Liberis."²⁰³ The plaintiff's counsel was fortunate in being spared the embarrassment of presenting such a claim to a jury. Imagine, for example, the closing arguments on each side. What "agreement" would plaintiff have argued Ms. Liberis made with Mr. Liberis, and as to what "unlawful act"? What "unlawful overt act" was performed by either Ms. or Mr. Liberis "pursuant to and in furtherance of the common scheme"?²⁰⁴ Assuming that the plaintiff's counsel survived that oratorical outing, consider the ammunition that defense counsel would then have had. He could have asked the jury to take the following questions into the jury room for deliberation. How could Ms. Manno have made an "agreement" with Mr. Liberis when her blood alcohol level was so elevated that she drove through a red light, into a store window, and then resumed her drive home after Mr. Liberis "backed the car out of the window"? After she drove off, when Mr. Liberis confronted his attackers, how is it that plaintiff suggests Ms. Manno "participated" in any of his subsequent acts? What act did Mr. Liberis perform "pursuant to and in furtherance of the common scheme": driving recklessly to escape his attackers? By this time it would be difficult for the jury to maintain its composure and its respect for the plaintiff's case, when the theory advanced by plaintiff's counsel was so ludicrous.

The danger of this kind of mindless pleading, beyond its virtual guarantee of failure of the theory itself, is that its idiocy will infect plaintiffs' other, more plausible and persuasive theories. The jury is likely to conclude that if this "conspiracy" is the kind of justification a plaintiff is offering for recovery, then every other justification is equally baseless.

V. CONCLUSION

No one should disagree that the inclusion of a conspiracy claim in the appropriate case might help persuade the fact-finder that the defend-

200. *See id.* at 1205, 1208.

201. *See id.* at 1204.

202. *See id.* at 1209.

203. *Id.* at 1208.

204. *Id.* (citing *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)).

ants did something very bad to the plaintiff.²⁰⁵ There may be substantial resistance to the idea of an expanded rule of law to allow suits for unexecuted civil conspiracies; however, such resistance should provide more reasoned justification than a mere parroting of the dictum-based jurisprudence reviewed in this article. If the rule is not to be allowed, it should be because it would be a bad rule, not because Lord Holt said so and nobody has called his bluff for 300 years.

205. I plead guilty to putting the rabbit in the hat by referring to “the appropriate case.” My justification for the tautology is that otherwise I would have to repeat the analysis set forth in the foregoing discussion.