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The Model Penal Code's Wrong Turn: Renunciation as a Defense to Criminal Conspiracy

R. Michael Cassidy
michael.cassidy@bc.edu

Gregory I. Massing

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THE MODEL PENAL CODE'S WRONG TURN: RENUNCIATION
AS A DEFENSE TO CRIMINAL CONSPIRACY

*R. Michael Cassidy** & *Gregory I. Massing†*

Abstract

While the Model Penal Code was certainly one of the most influential developments in criminal law in the past century, the American Law Institute (ALI) took a seriously wrong turn by recognizing “renunciation” as a defense to the crime of conspiracy. Under the Model Penal Code formulation, a member of a conspiracy who later disavows the agreement and thwarts its objective (for example, by notifying authorities of the planned crime in order to prevent its completion) is afforded a complete defense to conspiracy liability. This defense has enormous implications for crimes involving national security and terrorism, which are typically planned covertly and involve extensive coordination among multiple actors.

Many states follow the Model Penal Code approach and recognize the renunciation defense, without defining its precise contours or limits. Other states are still struggling with the issue and have yet to accept or reject the renunciation doctrine. After surveying state and federal law across the United States, this Article unpacks proposed policy arguments both for and against the renunciation defense. This Article concludes that none of the ALI's pragmatic justifications in support of the doctrine survive close scrutiny. Moreover, when considering the *presence* of social harm caused by an actor's participation in a conspiracy—in contrast to the *absence* of harm with other inchoate offenses such as incomplete attempts—renunciation is theoretically inconsistent with the retributive aims of the criminal law. Renunciation should be best understood historically as a special form of legislative grace designed to counteract some of the harsher aspects of conspiracy law. This Article argues that states grappling with this issue should decline to recognize the renunciation defense and instead focus their attention on eliminating some of the more notable inequities of conspiracy liability.

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† Executive Director, Rappaport Center for Law and Public Service, Suffolk University Law School, and Adjunct Faculty, Boston College Law School.

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INTRODUCTION

While the enormously influential Model Penal Code has been appropriately described by scholars as one of the most important developments in criminal law in the past century,¹ the American Law Institute (ALI) took a seriously wrong turn by recognizing “renunciation” as a defense to the crime of conspiracy. The Code embraced renunciation to create a legislative safety valve to a highly controversial crime of dubious origin with vast sweep. But the fact that the law of conspiracy is “vague,”² “elastic,”³ and anachronistic⁴ does not justify adding a fully incoherent defense to an already partially incoherent crime.

In this Article, we unpack proposed policy arguments in favor of a renunciation defense and conclude that none of them survive close scrutiny. Renunciation can best be viewed as a form of legislative grace designed to counteract some of the harsher aspects of conspiracy law. States grappling with the question of whether to recognize the renunciation defense—either legislatively or by judicial decision—should decline to do so and instead focus their attention on restricting some of conspiracy law’s more notable inequities. Vesting prosecutors

1. See, e.g., Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 948 (1999); Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEX. L. REV. 353, 355 (2010).

2. Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 393 (1922).

3. *Krulewitch v. United States*, 336 U.S. 440, 451 (1949) (Jackson, J., concurring).

4. Edward M. Wise, *RICO and Its Analogues: Some Comparative Considerations*, 27 SYRACUSE J. INT’L L. & COM. 303, 312–13 (2000) (describing the French view of conspiracy as “barbarous legal anachronism unworthy of modern law” (quoting BRADLEY F. SMITH, REACHING JUDGMENT AT NUREMBERG 51 (1977))).

with the discretion to leverage cooperation from turncoat conspirators is more conducive to public safety and crime prevention than recognizing a complete defense for conspirators who later abandon a joint criminal enterprise.

To frame our discussion, imagine the following scenario: three high school seniors who were suspended for possessing narcotics on school property discuss planning a Columbine-style attack on the school as revenge. The members of the group plan a multifaceted assault on the school using an assortment of automatic and semiautomatic weapons and develop a list of students, teachers, and administrators to target during the raid. They talk about taking the vice principal and certain students hostage. They steal a map of the school from an administrative office and label it with entry points and other information relevant to the planned attack. They even attempt to build an explosive device with fertilizer, which they unsuccessfully try to ignite in a nearby forest. The leader of the plot, whose father owns an assortment of firearms, shows his confederates one of his father's handguns and threatens to shoot anyone who speaks to the police. Fearing the increasingly menacing actions of that student, one member of the group reports the plan to a police officer assigned as liaison to the high school. The police thereafter obtain a warrant to search the bedroom of the alleged ringleader and seize the school map, a handwritten list of potential victims, a chart of supplies and weaponry needed, a handgun, and records of computer searches pertaining to explosives.

Whether the participant who reported the plan to the police is guilty of conspiracy will depend on the jurisdiction in which the case is brought; in particular, it will depend on whether the jurisdiction recognizes the "renunciation" defense and, if so, how it is defined. In jurisdictions that do not recognize the renunciation defense, the defendant may be punished for conspiracy; his only hope for mitigation of the offense will be making a deal with the government for immunity or a lesser sentence in exchange for cooperation in the prosecution of others.

This Article proceeds in five parts. In Part I, we discuss the historical genesis of the crime of conspiracy at common law. In Part II, we discuss the Model Penal Code's definition of conspiracy and its recognition of the renunciation defense previously unknown to the common law. In Part III, we survey state developments on the renunciation issue since the 1961 adoption of the Model Penal Code. In Part IV, we examine federal law and the reasons why federal courts have recognized withdrawal, but not renunciation, as a defense to conspiracy. In Part V, we examine the public policy arguments both for and against the renunciation defense. We conclude that the defense is inconsistent with the retributive aims of the criminal law and has the

potential to hamper law enforcement efforts to detect and prevent dangerous covert activity.

I. A BRIEF LOOK AT THE COMMON LAW OF CONSPIRACY AND ITS EVOLUTION IN THE UNITED STATES

The crime of conspiracy did not exist at early English common law.⁵ It was first developed by three statutes enacted during the reign of Edward I that were designed to address obstruction of justice.⁶ The first conspiracy statute was passed in 1285.⁷ It prohibited combinations of one or more persons to procure false indictments.⁸ The process of liberalization began with Poulterers' Case in 1611, when the Court of Star Chamber ruled that a victim's indictment and acquittal of the crime falsely accused was not required in order to prove a conspiracy.⁹ From that early decision, it was an "easy step" to the much more general proposition that accomplishment of criminal purpose was not necessary to prove a criminal conspiracy and that the essence of the crime was the agreement itself.¹⁰

In the seventeenth century, two developments occurred that had a profound effect in shaping English conspiracy law beyond its rather limited statutory origin. First, courts started extending the offense of conspiracy beyond obstruction of justice to reach agreements to commit crimes of whatever nature—both felonies and misdemeanors.¹¹ Thereafter when the English courts began to view themselves as *custos morum*—guardians of public morality—they assumed the power to punish as misdemeanors all acts in contravention of public morals, irrespective of whether the conduct violated an express statute.¹² The combination of these two developments led William Hawkins to conclude in his 1716 treatise that "there can be no doubt but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law."¹³ This statement later came to be

5. See Kenelm E. Digby, *The Law of Criminal Conspiracy in England and Ireland*, 6 L.Q. REV. 129, 129–30 (1890) (describing the crime as "distinctly of modern growth"). See generally 2 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 12.1(a), at 254 (2d ed. 2003).

6. 2 LAFAVE, *supra* note 5, § 12.1(a), at 255; see also Sayre, *supra* note 2, at 394–95.

7. 13 Edw. I, c. 12 (1285) (Eng.).

8. *Id.*; see also Sayre, *supra* note 2, at 395.

9. Poulterers' Case, (1611) 77 Eng. Rep. 813 (K.B.) 813–16; 9 Co. Rep. 55b, 55b–57b (holding that defendant had been properly convicted of conspiracy to bring a false indictment even though the grand jury had returned a no bill against the purported victim).

10. See Sayre, *supra* note 2, at 398–99.

11. *Id.* at 400.

12. See R. v. Sidney, (1664) 82 Eng. Rep. 1036 (K.B.); 1 Sid. 168.

13. 1 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 446 (London, John Curwood ed., 8th ed. 1824).

regarded as authoritative in the case of *Rex v. Edwards*,¹⁴ where the court ruled that “[a] bare conspiracy to do a lawful act to an unlawful end, is a crime, though no act be done in consequence thereof.”¹⁵ The ghost of Hawkins’ definition thereafter reappeared in Lord Denman’s famous opinion in *Rex v. Jones*,¹⁶ where he stated that an indictment must “charge a conspiracy, either to do an unlawful act, or a lawful act by unlawful means.”¹⁷

American jurisdictions that retain the English common law version of the crime now define conspiracy, consistent with *Jones*, as an agreement between two or more persons to commit an unlawful act, or to commit a lawful act by unlawful means.¹⁸ The *actus reus* of conspiracy is the agreement, which may be proven circumstantially through concerted action toward a common purpose.¹⁹ The *mens rea* of conspiracy is a dual intent: the defendant must have both an intent to agree and an intent to commit the object of the agreement.²⁰

Two interrelated justifications are traditionally advanced for punishing agreements to commit unlawful activity.²¹ First, conspiracy is an inchoate crime that allows law enforcement to intervene early enough in the criminal process to apprehend dangerous individuals and prevent their completion of planned acts.²² Second, conspiracies present special dangers to the public because the psychological dynamics and synergies of group activity make the object of a plan more likely to succeed when contemplated by a group than when contemplated by an individual.²³ The Model Penal Code recognizes both objectives in its

14. (1724) 88 Eng. Rep. 229 (K.B.); 8 Mod. 320.

15. *Id.* at 229–30.

16. (1832), 110 Eng. Rep. 485 (K.B.); 4 B & Ad. 345, 349.

17. *Id.* at 487 (Lord Denman, C.J.); Although Professor Francis B. Sayre claims that Lord Denman later repudiated this broad language, it nonetheless “came to be considered as a sacred and final dispensation” of English law. Sayre, *supra* note 2, at 405. Professor Sayre argues that the actual common law decisions in England and America do not support the frequently reiterated proposition that to constitute a criminal conspiracy neither the object pursued nor the means used need to be criminal, so long as they are unlawful. *Id.* at 405–06. Sayre contends that the *Hawkins* doctrine was actually limited to a narrow class of agreements to commit torts involving fraud, but thereafter was stretched beyond recognition. *Id.* at 409.

18. 2 LAFAVE, *supra* note 5, § 12.1(a), at 255 (citing *Pettibone v. United States*, 148 U.S. 197 (1893); *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111 (1842)).

19. *See, e.g.*, *Glasser v. United States*, 315 U.S. 60, 80 (1942); *Commonwealth v. Beneficial Fin. Co.*, 275 N.E.2d 33, 70 (Mass. 1971).

20. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 443 n.20 (1978).

21. *See* 2 LAFAVE, *supra* note 5, § 12.1(c), at 263.

22. Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 3 (1992) (citing *United States v. Wallach*, 935 F.2d 445, 470 (2d Cir. 1991)); *see, e.g.*, *United States v. Rabinowich*, 238 U.S. 78, 88 (1915).

23. *Callanan v. United States*, 364 U.S. 587, 593–94 (1961); *United States v. Townsend*, 924 F.2d 1385, 1394 (7th Cir. 1991). *See generally* Neal Kumar Katyal, *Conspiracy Theory*, 112

adoption of conspiracy liability.²⁴ The notion that each underlying theory must be at work is evidenced by the fact that the crime of conspiracy, unlike the crime of attempt, does not merge with a completed substantive offense; both may be charged, proven, and punished.²⁵ If a conspiracy were construed only as a method of invoking inchoate liability, and not as a socially dangerous act in and of itself, the law would recognize merger upon completion of the substantive crime and prevent double punishment.²⁶

The crime of conspiracy has been subjected to persistent criticism by scholars and judges due to its potential elasticity and an enduring unease about punishing evil thoughts.²⁷ In light of these concerns, many states have taken two steps to narrow the English common law definition of conspiracy. The first step has been to limit the “object” of the agreement. In jurisdictions that follow the English common law definition of the crime (where neither the object nor the means of the agreement need be criminal, so long as one or both of them is unlawful), some jurisdictions require proof of illegality injurious to the public health or welfare.²⁸ A more common approach is to limit the object of the conspiracy to agreements to commit an actual crime (either a felony or a misdemeanor).²⁹ A smaller number of states have gone even further and limit criminal conspiracies to agreements to commit felonies.³⁰

A second typical limitation on the common law definition of conspiracy is to require proof that at least one coconspirator committed an overt act in furtherance of the agreement. No “overt act” was required at English common law.³¹ In the United States, a general

YALE L.J. 1307, 1315–24 (2003) (discussing the effect of group mentality on criminal undertakings).

24. MODEL PENAL CODE § 5.03 cmt. at 387 (Official Draft and Revised Comments 1985).

25. See *Callanan*, 364 U.S. at 587–90.

26. See Marcus, *supra* note 22, at 4, 6 n.23. Nonetheless, a few state statutes today provide that a defendant may not be convicted and punished for both conspiracy and the object crime. 720 ILL. COMP. STAT. 5/8-5 (West 2002); OR. REV. ST. § 161.485 (2009); VA. CODE ANN. § 18.2-23.1 (West 2011).

27. See, e.g., *Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring); Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137, 1137 (1973); Peter Buscemi, Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1123 (1975).

28. See *Commonwealth v. Dyer*, 138 N.E. 296, 303 (Mass. 1923); *State v. Burnham*, 15 N.H. 396, 401–02 (1844); *Commonwealth v. Donoghue*, 63 S.W.2d 3, 8–9 (Ky. 1933).

29. See, e.g., CONN. GEN. STAT. ANN. § 53a-48(a) (West 2007); 720 ILL. COMP. STAT. ANN. 5/8-2 (West 2002); IOWA CODE ANN. § 706.1 (West 2003); ME. REV. ST. ANN. tit. 17-A, § 151(1) (2006); N.J. STAT. ANN. § 2C:5-2(a) (West 2005).

30. See, e.g., ALASKA STAT. § 11.31.120(a) (2010); NEB. REV. STAT. § 28-202 (West 2011); N.M. STAT. ANN. § 30-28-2 (LexisNexis 2004).

31. 2 LAFAVE, *supra* note 5, § 12.2(b), at 271; see, e.g., *Commonwealth v. Judd*, 2 Mass. 329, 336–37 (1807).

federal conspiracy statute was enacted in 1948; its major innovation was the imposition of an overt act requirement.³² A majority of states have now added an overt act requirement to their conspiracy crimes.³³ Requiring proof of an overt act is thought to serve two major purposes. First, it adds a *locus poenitentiae* to the crime, giving actors an opportunity to pause, reflect, and change their minds, thereby avoiding punishment for guilty thoughts that do not ripen into conduct.³⁴ Second, the overt act serves as circumstantial evidence of the agreement which, due to the secrecy of the participants, must often be proven indirectly.³⁵ Where an overt act is required, that element of conspiracy is typically not difficult to prove; even minor, noncriminal acts in furtherance of the objective will suffice,³⁶ such as making a phone call, mailing a letter, purchasing implements necessary for the crime, or delivering goods or money.³⁷ Some states have taken the overt act requirement a step further by demanding proof of an act that constitutes a “substantial” step toward commission of the offense.³⁸

II. THE MODEL PENAL CODE AND RENUNCIATION

The Model Penal Code defines the crime of conspiracy in Section 5.03, the third section of Article 5, “Inchoate Crimes.” The Code groups conspiracy with the crimes of attempt and solicitation, two other offenses that are considered complete prior to or without the occurrence of the evil that is their objective, but nonetheless sufficiently evil to warrant punishment. Indeed, the Code grades these three crimes as the same degree as the most serious offense that is their object, except that an attempt, solicitation, or conspiracy is never graded higher than a second-degree felony; that is, when the object is a capital or first-degree felony, the attempt, solicitation, or conspiracy is treated as a felony in

32. 18 U.S.C. § 371 (2006); Kenneth A. David, *The Movement Toward Statute-Based Conspiracy Law in the United Kingdom and the United States*, 25 VAND. J. TRANSNAT'L L. 951, 959 (1993).

33. *See Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 920, 945–46 (1959). The Model Penal Code requires proof of an overt act for all conspiracies other than conspiracies to commit a first or second-degree felony. MODEL PENAL CODE § 5.03(5) (Official Draft and Revised Comments 1985).

34. *United States v. Britton*, 108 U.S. 192, 204–05 (1883); *see also Yates v. United States*, 354 U.S. 298, 334 (1957) (suggesting that the purpose of the overt act requirement is to prove that the conspiracy is “at work” rather than merely contemplative (quoting *Carlson v. United States*, 187 F.2d 366, 370 (10th Cir. 1951)) (internal quotation marks omitted)).

35. *See United States v. Nelson*, 383 F.3d 1227, 1229 (10th Cir. 2004) (citing *United States v. Torres*, 53 F.3d 1129, 1135 (10th Cir. 1995)).

36. *Yates*, 354 U.S. at 333–34; *see also Developments in the Law: Criminal Conspiracy*, *supra* note 33, at 946.

37. *See* 2 LAFAVE, *supra* note 5, § 12.2(b), at 274.

38. ME. REV. ST. ANN. tit. 17-A, § 151(4) (2006); OHIO REV. CODE ANN. § 2923.01(B) (LexisNexis 2010); WASH. REV. CODE ANN. § 9A.28.040(1) (West 2009).

the second degree.³⁹ In treating these three inchoate crimes alike, the ALI started down a road that would force it to take a wrong turn in applying the renunciation defense to conspiracy.

The Code embraces certain reforms developed in response to the English common law's expansive definition of conspiracy with respect to both the object of the agreement and the "overt act" requirement, discussed below. As to the former, the ALI agreed that criminal conspiracy should be limited to situations in which the object is the commission of a specific substantive criminal offense, not a vague notion of corruption, dishonesty, or immorality.⁴⁰ The Code does not, however, limit the criminal objective to the commission of a felony.⁴¹

For conspiracies to commit a misdemeanor or a low-level felony, the Model Penal Code definition requires proof of completion of at least one overt act in furtherance of the agreement by at least one conspirator.⁴² This overt act requirement, derived from American common law and federal statutes, is intended to "afford[] at least a minimal added assurance, beyond the bare agreement, that a socially dangerous combination exists."⁴³ Yet for conspiracies to commit a first- or second-degree felony, the ALI follows the English common law tradition and dispenses with any overt act requirement. According to the ALI, this accommodation strikes a balance between the objectives of giving law enforcement the ability to intervene early enough to prevent the most serious crimes, while refraining from punishing mere low-level criminal disposition.⁴⁴ Even where an overt act is required, the Code adopts the minimal standard of "an overt act in pursuance" of the conspiracy, considering the law to be "well settled that any act in pursuance of the conspiracy, however insignificant, is sufficient,"⁴⁵ and rejecting the requirement that the act amount to a "substantial step" toward the commission of the crime.⁴⁶

The Code's requirements for conspirator liability, as with the other

39. MODEL PENAL CODE § 5.05(1) (Official Draft and Revised Comments 1985); *see id.* § 5.03 cmt. at 391.

40. *Id.* § 5.03 cmt. at 395–97. The eighty-five-word definition of "criminal conspiracy" in MODEL PENAL CODE § 5.03(1) mentions "to commit" or the "commission" of a "crime" no fewer than four times.

41. In addition, the ALI declined to address within the doctrine of criminal conspiracy agreements with objectives that would not be criminal when pursued by a single individual, but might be criminal when conducted by a combination of individuals (e.g., antitrust violations), considering these activities best addressed in the definition of substantive crimes dealing with specific types of group behavior. *Id.* § 5.03 cmt. at 396–97.

42. *Id.* § 5.03(5).

43. *Id.* § 5.03 cmt. at 453.

44. *Id.*

45. *Id.* at 454.

46. *See id.* at 455.

inchoate crimes, are informed by the ALI's view of the penal purposes that these crimes serve. At the outset, the ALI discounts general deterrence as a justification for any of the inchoate crimes. The commission of each of these crimes requires the actor to have the intent to commit the object offense;⁴⁷ if the threat of punishment for the planned crime is insufficient to deter its commission, the ALI thought it unlikely that punishment for the inchoate crime would have any marginal deterrent value.⁴⁸ Instead, the inchoate crimes, conspiracy in particular, serve other functions of the criminal law that the ALI terms "considerations of prevention."⁴⁹ First, defining crimes that are completed during the preparation stages (before their object is accomplished) gives law enforcement agencies a tool to intervene and prevent the commission of the criminal object before it occurs.⁵⁰ Second, the evil intent inherent in the design to carry out a criminal object itself indicates that the actors are disposed toward such activity; even if their specific objective is thwarted, they are likely to commit other crimes on future occasions. The inchoate crimes provide a legal basis for incapacitating those individuals who are disposed to criminality.⁵¹ The crime of conspiracy in particular addresses a special, and perhaps more dangerous, version of criminal disposition that occurs in group activity in which multiple actors inspire and embolden each other.⁵²

Thus, the crime of conspiracy as set forth in the Model Penal Code gives police and prosecutors a powerful tool to intervene before a crime is committed and to prevent and punish incipient group criminal activity, with the offense considered so serious that it warrants punishment equal to the planned crime. Too powerful, perhaps, as the ALI, simultaneous with providing for conspirator liability, provided a safety valve to protect against the crime it created. That safety valve is the renunciation defense, whereby a conspirator who meets the requirements of the defense is not guilty of the conspiracy.

As we have seen, traditional common law conspiracy doctrine did not admit a defense even if the actor subsequently renounced the

47. With respect to conspiracy, the actor must possess the "purpose of promoting or facilitating" the commission of a crime and must also "agre[e]" with another to engage or aid in its commission. *Id.* § 5.03(1); *see also* United States v. U.S. Gypsum Co., 438 U.S. 422, 435 (1978) (holding that intent must be established in an antitrust case).

48. MODEL PENAL CODE art. 5 intro. at 293–94.

49. *Id.* at 294.

50. *Id.*; *see id.* § 5.03 cmt. at 387–88 (explaining that conspiracy complements the provision dealing with attempt and solicitation "in reaching preparatory conduct before it has matured into commission of a substantive offense" and as a "basis for preventive intervention by the agencies of law enforcement").

51. *Id.* art. 5 intro. at 294; *id.* § 5.03 cmt. at 388.

52. *Id.* § 5.03 cmt. at 387–88 (noting that "[s]haring lends fortitude to purpose").

conspiracy and actively worked to prevent its accomplishment.⁵³ This rule flowed naturally from the doctrinal principle that a conspiracy is complete with the agreement; as soon as the agreement is made, the crime is completed, and no subsequent action can exonerate the conspirator. The ALI considered this “strict and inflexible” rule to be overly severe, punishing even a momentary agreement from which the actor subsequently and completely withdrew.⁵⁴ The ALI was not comforted by the overt act requirement, adopted at American common law to mitigate this harsh result⁵⁵ and also embraced in the Code with respect to conspiracies to commit misdemeanors and lower-level felonies.⁵⁶ The ALI thought that the overt act requirement provided insufficient protection against injustice “in view of the insignificant nature of the act that suffices.”⁵⁷ Alternatively, the commentary to the Model Penal Code suggests that the defense of renunciation *supplements* the overt act requirement (and *substitutes* for the overt act in the case of second-degree felonies and above) with another *locus poenitentiae*, giving the actor an opportunity to reconsider and avoid liability.⁵⁸

The ALI contends that the only viable rationale for rejecting renunciation is if the crime of conspiracy—“the act of agreement itself”—is believed to be so indicative of the actor’s criminal character and future dangerousness that incapacitation is warranted notwithstanding the conspirator’s subsequent actions.⁵⁹ So framed, of course, this argument against the defense is doomed to failure; the very act of renunciation is evidence that the ex-conspirator lacks the evil intent that would make him dangerous enough to punish for a mere state of mind, and “[t]he Institute was not prepared to support that proposition.”⁶⁰

The ALI erred by underestimating the danger posed by conspirators

53. *See id.* at 457.

54. *Id.* The ALI quotes the statement of Lord Coleridge in *Mogul Steamship Co. v. McGregor, Gow, & Co.*, [1888] 21 Q.B.D. 544 (Eng.):

In the *Bridgewater Case* [unreported], referred to at the bar, and in which I was counsel, nothing was done in fact; yet a gentleman was convicted because he had entered into an unlawful combination from which almost on the spot he withdrew, and withdrew altogether. No one was harmed, but the public offence was complete.

MODEL PENAL CODE § 503 cmt. at 457 (quoting *Mogul S.S. Co.*, 21 Q.B.D. at 549).

55. *See supra* notes 32–38 and accompanying text.

56. MODEL PENAL CODE § 5.03(5).

57. *Id.* § 5.03 cmt. at 457.

58. *Id.* at 453–54.

59. *Id.* at 457.

60. *Id.*

prior to the achievement of their purpose. This error was perhaps an inevitable result of the decision to group the three inchoate crimes together. The ALI's calculation of the evil intent inherent in the "act of agreement" prior to its consummation is colored by comparison to the intent of one who attempts or solicits a crime. In attempt and in some cases of solicitation, even if the actor never veers from his evil intent and objective, the desired outcome may not occur due to circumstances beyond the actor's control: the gun misfires, or the hit man loses his nerve. The actor's intent in these situations, which warranted special recognition in the Model Penal Code's treatment of the inchoate crimes,⁶¹ is far different from the state of mind of a conspirator who walks away from a conspiracy. Yet the ALI mistakenly limited its consideration of the conspirator's dangerousness by focusing solely on the actor's *mens rea*, to the exclusion of the harm that is set in motion by the "act of agreement itself." Although one coconspirator may walk away, the danger caused by his initial participation in the conspiracy does not necessarily subside. Indeed, as discussed below, in ten states that follow the ALI's recommendation and allow the renunciation defense, a former conspirator will not be guilty of conspiracy even if its object is realized without his participation—when the evil he once intended actually does occur. To the extent the crime of conspiracy targets the special dangers of group activity, the ALI took too narrow a view in assessing only the actor's subjective intent.

Under the Model Penal Code's formulation, then, the renunciation defense provides an outlet for individuals whose behavior belies their evil intent, as the fact of renunciation itself "manifests a lack of the firmness of purpose" inconsistent with individual dangerousness.⁶² Consistent with its focus on renunciation as belying dangerousness, the ALI required renunciation to be "complete and voluntary"; it cannot be a reaction to a change in circumstances that makes detection or apprehension more likely or a desire by the perpetrator to postpone the crime to a more advantageous time, objective, or victim.⁶³

The ALI's other stated justification for the renunciation defense,

61. The Model Penal Code states that:

Finally, and quite apart from . . . considerations of prevention, when the actor's failure to commit the substantive offense is due to a fortuity . . . his exculpation on that ground would involve inequality of treatment that would shock the common sense of justice. Such a situation is unthinkable in any mature system designed to serve the proper goals of the penal law.

Id. art. 5 intro. at 294.

62. *Id.* § 5.03 cmt. at 457–58.

63. *Id.* § 5.03(4). Compare *id.* § 5.01(4) and *id.* cmt. at 358–59 (attempt) with *id.* § 5.02(3) (solicitation).

again related to the crime prevention policy supporting the recognition of conspiracy as an inchoate offense, is to offer an incentive for conspirators to desist from criminal activity.⁶⁴ In this regard, however, the actor must do more than simply walk away from the conspiracy. To qualify for the affirmative defense of renunciation, the actor must stop the conspiracy from attaining its objective.⁶⁵ The Code adopts a strict definition of renunciation with regard to the crime of conspiracy: “It is an affirmative defense that the actor, after conspiring to commit a crime, *thwarted the success of the conspiracy*, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.”⁶⁶

The emphasis on “thwarting”—actually preventing others from accomplishing the object of the conspiracy—is unique to the Code’s treatment of conspiracy. With respect to attempt, which involves only a single actor, the actor can make out the affirmative defense by “abandon[ing] his effort to commit the crime,” while for solicitation, which involves another person,⁶⁷ it is sufficient to “persuad[e] [the person solicited to commit the crime] not to do so.”⁶⁸ A conspiracy, however, contemplates the presence of other actors privy to the agreement who can carry out the crime even if one of their cohorts abandons them.⁶⁹ Thus, to negate liability for conspiracy, the renunciation defense requires that the conspirator actually prevent the crime that is the object of the conspiracy from taking place. If an actor renounces a conspiracy but his efforts to thwart it are unsuccessful, he does not qualify for the affirmative defense of renunciation (which would fully relieve him of criminal liability); he will be considered to have merely abandoned the conspiracy, triggering the commencement of the statute of limitations as to him.⁷⁰

The Code does not enumerate what steps the actor must take to prevent the object crime from occurring. As an example of conduct that might thwart a conspiracy, the commentary mentions that generally “timely notification to law enforcement authorities will suffice.”⁷¹ But notification alone is not enough to make out the defense. If the notification fails because the authorities fail to act or act too late, the defense is not valid.⁷² As discussed in the next Part, a number of states

64. *Id.* § 5.03 cmt. at 457–58.

65. *Id.* at 458.

66. *Id.* § 5.03(6) (emphasis added).

67. *Id.* § 5.01(4).

68. *Id.* § 5.02(3).

69. *Id.* § 5.03 cmt. at 458.

70. *Id.* § 5.03(7)(c). The significance of abandonment or withdrawal is discussed in connection with federal law, *infra* Part IV.

71. MODEL PENAL CODE § 5.03 cmt. at 458.

72. *Id.* Most states that revised their statutes in response to the Model Penal Code

are more relaxed in their recognition of renunciation and allow the defense even if the object of the conspiracy is achieved, so long as the actor either notifies the police *or* makes “a substantial effort” to prevent the criminal conduct.⁷³ The ALI wisely eschewed this formulation as requiring “delicate judgments of timeliness and substantiality” not necessary under the Code’s bright-line rule.⁷⁴

When our angry and alienated high school student contacts the police to report a plot to attack administrators, teachers, and peers at the school, he does not yet have a defense of renunciation under the Code. Whether he can avail himself of the defense depends on whether the police are actually able to arrest his confederates and prevent the attack. Alternatively, the actor can make out the defense by stopping the attack himself—say, by destroying the materials collected to carry out the assault—even if he does not report his confederates to the police. He is not guilty of participating in the conspiracy, although the other participants are guilty, assuming the authorities somehow learn of their dangerous intentions and are able to prosecute them.

Finally, consistent with the Model Penal Code’s general treatment of affirmative defenses, excuse, and justification, the defendant bears the burden of producing “sufficient evidence”—a standard intentionally left undefined—to raise the renunciation defense, an allocation of responsibility generally applied in the Code to matters particularly within the knowledge of the defendant.⁷⁵ Once raised, however, the prosecutor has the burden to disprove the defense beyond a reasonable doubt.⁷⁶ Thus, the Code’s defense of renunciation is not a true affirmative defense in the sense that the defendant does not bear the burden of proof. The ALI justifies placing the burden on the government to disprove renunciation because the requirement to show actual thwarting is so onerous. The ALI concedes that it would be reasonable to put the burden on the defendant in states that have less stringent renunciation requirements, such as taking “reasonable efforts” to prevent the crime.⁷⁷

Thus, the Model Penal Code’s meandering road to renunciation is a study of ambivalence. The ALI considered the crime of conspiracy so serious as to merit punishment equal to (or, in the case of first-degree

followed the Code in requiring that the notification succeed in preventing the crime. *Id.* at 458–59. See *infra* note 80 and accompanying text.

73. MODEL PENAL CODE § 5.03 cmt. at 459.

74. *Id.*

75. *Id.* § 1.12(1)–(5); *Id.* cmt. at 194–96.

76. *Id.* § 1.12(1)–(2)(a).

77. *Id.* § 5.03 cmt. at 459 n.260 (citing HAW. REV. STAT. § 705-530(5) (West 2011)). The Model Penal Code recognizes that some states may define affirmative defenses and require the defendant to prove them by a preponderance of the evidence. *Id.* § 5.03 cmt. at 459–60.

felonies and capital crimes, almost equal to) the punishment for the object crime because the actor's evil state of mind manifests dangerousness, and law enforcement needs a tool to permit early intervention. An overt act requirement provides a safety valve to prevent punishing a mere state of mind except when a serious crime is contemplated. Even when an overt act is required, the slightest act will do. To be sure that only highly dangerous states of mind are punished, however, the Code allows a renunciation defense. Yet the defense should not be too readily available; only a person who actually stops the object crime from occurring can qualify. Perhaps because the Code makes it too hard to qualify for the defense, the prosecution is assigned the burden of disproving it. This approach adds layer of incoherence upon layer of incoherence. As we suggest below, a better way to mitigate the punishment for those who are less culpable, and at the same time to provide an effective tool for law enforcement to prevent and prosecute dangerous conspiracies, would be not to recognize the renunciation defense at all.

III. RENUNCIATION UNDER STATE LAW

If the ALI's approach to the renunciation defense belies some doubts about its underlying purpose and efficacy, the odd patchwork of approaches taken by the states is further evidence of the lack of consensus about how to resolve the issue. While conspiracy is a crime in all fifty states, only a bare majority—twenty-six states⁷⁸—recognize the affirmative defense of renunciation. In response to events such as the September 11, 2001 terrorist attacks and the Columbine High School massacre, some have urged courts and legislatures in states that have not adopted the defense to do so in order to encourage participants in nascent conspiracies (like the youth in our example) to take action to stop their coconspirators from achieving their objectives.⁷⁹ As we argue below, these states should reject such overtures.

In the twenty-six states that have enacted the renunciation defense, the contours of the defense vary widely, but generally fall within two camps. The larger camp consists of fifteen states that have adopted the Model Penal Code's stringent version of "thwarting," which requires

78. See *infra* notes 85–88.

79. See, e.g., Memorandum and Appendix for the Defendant/Appellant at 16–18, *Commonwealth v. Nee*, 935 N.E.2d 1276 (Mass. 2010) (No. SJC-10634), available at http://www.ma-appellatecourts.org/display_docket.php?dno=SJC-10634 (arguing that the court should adopt defense of renunciation to foster communications between students and school officials to prevent school violence). The Massachusetts Supreme Judicial Court declined to accept the defendant-appellant's invitation to create the defense, finding that the facts proffered were insufficient to give him the benefit of the defense even if the court were inclined to create it. *Nee*, 935 N.E.2d at 1283–84.

the defendant to take action that actually results in the failure of the remaining conspirators to accomplish their objective.⁸⁰ The benefit of this approach, as the ALI notes,⁸¹ is that it creates a bright-line rule that is easy to apply and, by definition, can never be invoked when the object of the conspiracy is accomplished. For example, a Pennsylvania appellate court flatly rejected two codefendants' claims that they were entitled to an acquittal under the renunciation defense in a case in which the object of the conspiracy was not prevented: "We are unable to understand how Henkel and Lischner acted to 'thwart the success of the conspiracy' given the fact that Jones was murdered and his body dumped in the river."⁸² In a Connecticut case, a defendant whose role in a robbery conspiracy was to act as the getaway driver claimed that he abandoned the conspiracy by leaving his coconspirators at the scene of the crime: "[A]s soon as [they] got out of sight, I jumped in the front seat and took off" because "I didn't want any part of it."⁸³ The court held that this evidence did not warrant a renunciation instruction:

[T]he defendant took no steps to thwart the success of the conspiracy. He did not notify the police, nor did he, in any way, urge [the coconspirators] to desist from their criminal purpose. . . . [H]is flight from the scene in no way served to prevent the actual commission of the robbery.⁸⁴

The rule is equally easy to apply in a case in which the police act on information provided by one conspirator, intervene to stop the object crime before it occurs, and arrest the coconspirators: the conspirator who reported the conspiracy is not guilty.

The bright line begins to blur, however, when the conspirator renounces the conspiracy and attempts to thwart it by means other than reporting it to law enforcement. In Florida, for example, the legislature

80. Five states adopted the Code's formulation of the defense verbatim or nearly verbatim. COLO. REV. STAT. ANN. § 18-2-203 (West 2004); CONN. GEN. STAT. ANN. § 53a-48b (West 2007); OR. REV. STAT. ANN. § 161.460 (West 1971); 18 PA. CONS. STAT. ANN. § 903(f) (West 1998); WYO. STAT. ANN. § 6-1-303(b) (2011). Nine states replaced the Model Code's use of the word "thwarted" with the word "prevented." DEL. CODE ANN. tit. 11, § 541(a) (West 2007); FLA. STAT. § 777.04(5)(c) (2010); IND. CODE ANN. § 35-41-3-10 (LexisNexis 2009); KY. REV. STAT. ANN. § 506.060(1) (West 2006); ME. REV. STAT. ANN. tit. 17-A, § 154(2)(B) (2006); MO. ANN. STAT. § 564.016(5)(1) (West 1999); N.D. CENT. CODE § 12.1-06-05(3)(b) (1997); TENN. CODE ANN. § 39-12-104 (2010); TEX. PENAL CODE ANN. § 15.04(a) (West 2011). New Jersey's formulation is discussed *infra* at note 87 and accompanying text.

81. MODEL PENAL CODE § 5.03 cmt. at 459.

82. Commonwealth v. Henkel, 938 A.2d 433, 446 (Pa. Super. Ct. 2007).

83. State v. Richardson, 671 A.2d 840, 844 (Conn. App. Ct. 1996) (internal quotation marks omitted).

84. *Id.*

permits the renunciation defense if the accused, “[a]fter conspiring with one or more persons to commit an offense, persuaded such persons not to do so.”⁸⁵ It is difficult to imagine how this defense would play out in court (with each of the conspirators claiming that it was his idea to abandon the conspiracy). It is also difficult to justify why a conspirator who talks his confederates out of a plan is not guilty of the conspiracy, while the other confederates, who willingly abandon the scheme at his urging, *are* guilty.⁸⁶

The New Jersey codification of renunciation—essentially the Model Penal Code version on steroids—goes the furthest in preventing such uncertainties of proof. To qualify for the renunciation defense in New Jersey, the accused not only must have “thwarted or caused to be thwarted the commission of any offense in furtherance of the conspiracy,” but must *also* have “informed the authority of the existence of the conspiracy and his participation therein.”⁸⁷

The second camp consists of ten states that have accepted the ALI’s recommendation to allow the renunciation defense, but have watered down the defense by allowing defendants to qualify without necessarily stopping the crime that is the object of the conspiracy. In these states, it is enough if the renouncing conspirator merely makes a “reasonable,” “substantial,” or “proper” effort to prevent the crime.⁸⁸ This approach

85. FLA. STAT. § 777.04(5)(c) (2010). The defense is also available if the defendant “otherwise prevented commission of the offense.” *Id.*

86. In one of the few published cases applying the defense, a Florida appellate court found that the conspiracy defendant who “refused to discuss the planned importation of contraband with the agent who had infiltrated the conspiracy[,] [l]ater . . . told the agent that a co-conspirator conceived the plan alone,” and eventually had his phone number changed so the agent could not call him, fell “far short” of the statutory requirements for the defense because he failed to “show that he actually persuaded his confederates to abandon the enterprise.” *Etheridge v. State*, 415 So.2d 864, 864–65 (Fla. 2d Dist. Ct. App. 1982).

87. N.J. STAT. ANN. § 2C:5-2(e) (West 2006)

88. ALA. CODE § 13A-4-3(c) (LexisNexis 2005) (stating that the defendant is not liable if “he gave a timely and adequate warning to law enforcement authorities or made a substantial effort to prevent the enforcement of the criminal conduct contemplated by the conspiracy”); ALASKA STAT. § 11.31.120(f) (2010) (allowing the affirmative defense if defendant “either (1) gave timely warning to law enforcement authorities; or (2) otherwise made proper effort that prevented the commission of the crime that was the object of the conspiracy”); ARIZ. REV. STAT. ANN. § 13-1005(A) (2010) (recognizing renunciation if the defendant “gave timely warning to law enforcement authorities or otherwise made a reasonable effort to prevent the conduct or result which is the object of the . . . conspiracy”); HAW. REV. STAT. ANN. § 705-530(3) (1993) (allowing an affirmative defense if the defendant “gave timely warning to law-enforcement authorities or otherwise made a reasonable effort to prevent the conduct or result which is the object of the conspiracy”); MINN. STAT. ANN. § 609.05(3) (West 2009) (holding that a person who “makes a reasonable effort to prevent the commission of the crime prior to its commission is not liable if the crime is thereafter committed”); NEB. REV. STAT. ANN. § 28-203 (LexisNexis 2009) (allowing the defense for a defendant who “gave timely warning to law enforcement authorities or otherwise made a reasonable effort to prevent the conduct or result”); N.H. REV.

poorly serves the penal interests that the crime of conspiracy is defined to promote. This approach not only exonerates defendants who take part in conspiracies that achieve the very evils they previously intended, but also raises the question of what constitutes a “reasonable” effort (how hard the defendant must try) to stop the other conspirators from achieving the objective. Eight of these states further specify that giving timely notice to law enforcement authorities establishes the defense.⁸⁹ Under this formulation, reporting the crime is by definition a “reasonable” effort sufficient to exonerate the defendant. This formulation at least benefits from the justification that a renouncing defendant should not be penalized for law enforcement officials’ negligence in responding to his tip, although it still leaves open the difficult question of whether the tip was sufficiently detailed and timely to permit the authorities to intervene.⁹⁰

Ohio, which provides the greatest flexibility in allowing defendants to establish the affirmative defense of renunciation, is in a camp of its own. Under Ohio law, a defendant who *either* thwarts the conspiracy, as under the Model Code formulation, *or* “inform[s] any law enforcement authority of the existence of the conspiracy and of the actor’s participation in the conspiracy,” can invoke the renunciation defense.⁹¹ However, Ohio goes even further and fully exonerates a defendant who merely withdraws from or “abandon[s] the conspiracy . . . by advising all other conspirators of the actor’s abandonment.”⁹² The Ohio

STAT. ANN. § 629:3(III) (LexisNexis 2007) (allowing a defendant who renounces “by giving timely notice to a law enforcement official of the conspiracy and of the actor’s part in it, or by conduct designed to prevent commission of the crime agreed upon”); N.Y. PENAL LAW § 40.10(1) (McKinney 2009) (allowing an affirmative defense that “the defendant withdrew from participation in such offense prior to the commission thereof and made a substantial effort to prevent the commission thereof”); VT. STAT. ANN. tit. 13, § 1406 (2009) (establishing that renunciation is achieved by “(1) conduct designed to prevent the commission of the crime agreed upon; or (2) giving timely notice to a law enforcement official of the conspiracy and of the defendant’s part in it”). In Arkansas, while the Model Penal Code’s “thwarting the success of the conspiracy” is recognized as sufficient to qualify for the defense, it is not necessary, as the defendant may also qualify if he or she “(A) [g]ave timely warning to an appropriate law enforcement authority; or (B) [o]therwise made a substantial effort to prevent the commission of the offense.” ARK. CODE ANN. § 5-3-405 (2006).

89. These states include Alabama, Alaska, Arizona, Arkansas, Hawaii, Nebraska, New Hampshire, and Vermont. *See supra* note 88.

90. While one might envision situations where a coconspirator attempts to thwart the crime by giving notice to law enforcement but is unsuccessful because of police inaction or ineptitude, our research uncovered no cases where the government actually commenced a prosecution against a renouncing coconspirator in such a situation. Due to concerns about jury nullification, it is far more likely that a prosecutor faced with a scenario of reasonable but failed efforts would enter a non-prosecution agreement with the actor in exchange for his cooperation in the prosecution of others.

91. OHIO REV. CODE ANN. § 2923.01(I)(2) (LexisNexis 2010).

92. *Id.*

legislature apparently confused the doctrine of “withdrawal,” discussed in Part IV, with the defense of renunciation, making Ohio the only jurisdiction in which a former conspirator can be completely excused from criminal liability for conspiracy by merely walking away upon notice to his confederates.

Thus, in the ten states that allow “reasonable” efforts to qualify for a renunciation defense, the high school student in our hypothetical may absolve himself from liability if he absconds with the plans and materials, even if his confederates refurbish their supplies and carry out their school hostage attack without him. He will certainly qualify for the defense in these ten states if he reports the plot to the police in sufficient detail and sufficiently in advance of the crime so that a reasonably competent police officer would be able to stop the attack. In the fourteen of the fifteen states using a version of the Model Penal Code’s “thwarting” formulation, the youth will have a good defense if he either destroys the materials or if he informs the police, but only if the object crime does not take place. In New Jersey, the defendant must report to the police *and* the object crime must not take place. On the other end of the spectrum in Ohio, if he merely tells his confederates that he no longer wishes to participate in the shooting spree and ceases to cooperate with them, he is absolved of any liability for his part in the conspiracy, no matter what happens next.

The states are equally fractured regarding the placement of the burden of proof for this so-called affirmative defense. One might expect, as the ALI suggests, that the fifteen states with a rigorous, actual thwarting requirement for invoking the defense would place the burden on the government to disprove renunciation when raised, while the states with more lenient “reasonable effort” standards would place the burden on the defendant to prove the defense. This is not the case; there is no perceptible pattern explaining how states allocate the burden.⁹³ The burden of proof issue seems to be more a question of state criminal law traditions and practices in general, rather than specifically tailored conspiracy statutes to address the doctrine of renunciation.

Most states—all but six⁹⁴—now define the crime of conspiracy by

93. See MODEL PENAL CODE § 5.03 cmt. at 459 (Official Draft and Revised Comments 1985).

94. In Maryland, Massachusetts, North Carolina, Rhode Island, South Dakota, and Virginia, the crime remains a creature of judicial decision. See *Townes v. State*, 548 A.2d 832, 834 (Md. 1988); *Commonwealth v. Judd*, 2 Mass. (2 Tyng) 329, 337 (1807); *State v. Parker*, 66 S.E.2d 907, 912 (N.C. 1951); *State v. LaPlume*, 375 A.2d 938, 941 (R.I. 1977); *State v. Jenner*, 434 N.W.2d 76, 81 (S.D. 1988); *Gray v. Commonwealth*, 537 S.E.2d 862, 865 (Va. 2000). In *Gray*, based on Virginia’s common law of conspiracy, the Virginia Supreme Court held that the trial court correctly instructed the jury that “withdrawal from the agreement or change of mind is no defense to the crime of conspiracy.” *Id.* at 866. Evidence introduced at trial might have supported a renunciation defense as well—the defendant told the intended victim about the plot

statute. The renunciation defense is statutorily defined in the twenty-six states discussed above. In no state does the renunciation defense exist purely as a matter of common law. Recently in Massachusetts (one of the few states in which conspiracy remains a common law crime⁹⁵), the state's highest court declined an appellant's invitation to create a common law defense of renunciation.⁹⁶

The hypothetical described in the Introduction to this Article is loosely based on the facts of *Commonwealth v. Nee*.⁹⁷ In *Nee*, three teenage students devised an elaborate plan to "shoot up" their high school on the anniversary of the Columbine massacre in Colorado. They developed a list of ingredients for explosives and necessary supplies, stole a map of the school from an administrative office, and labeled it with entry points and other information relevant to the planned attack. They also tried to build an explosive device using gunpowder, duct tape, a plastic breath mint container, and a candle fuse; working together, they unsuccessfully attempted to ignite this homemade device in a nearby town forest. Eventually, fearing the increasingly menacing actions of their de facto leader, two members of the group reported the plan to a police officer assigned as liaison to the high school. Police officers obtained a warrant to search the home of the alleged ringleader and seized a handwritten list of potential victims, a chart of necessary supplies and weaponry, and records of computer searches pertaining to weapons, pipe bombs, and other explosives.⁹⁸

This fact pattern would seem to satisfy the renunciation defense in any of the twenty-six states that recognize it, even New Jersey; the defendants took reasonable efforts to thwart the conspiracy by reporting it to the police and the crime was averted. One additional fact, however, negated their eligibility for the defense. In reporting the crime, they neglected to mention their own participation in the conspiracy, instead pinning it entirely on the ringleader.⁹⁹ Their decision to present the facts in this manner was based on the notion that fully disclosing their participation was tantamount to self-incrimination.¹⁰⁰ The court, however, regarded their failure to confess their part in the conspiracy not to be a full "renunciation" of the crime, holding that under any

and the victim then reported the conspiracy to the State Police, prompting a search of the defendant's home and the discovery of evidence sufficient to convict him of conspiracy to murder—but the defendant did not assert a renunciation defense, and the court did not reach the issue. *Id.* at 864.

95. A Massachusetts statute prescribes the punishment for conspiracy, but does not define the elements of the crime. MASS. GEN. LAWS ANN. ch. 274, § 7 (West 2000).

96. *Commonwealth v. Nee*, 935 N.E.2d 1276, 1281 (Mass. 2010).

97. *Id.* at 1276.

98. *Id.* at 1278–80.

99. *Id.* at 1280–81, 1283–84.

100. *Id.* at 1280–81.

reasonable definition of that term, renunciation must include admitting one's own participation.¹⁰¹ The court asserted, not particularly persuasively, that granting the benefits of the renunciation defense to one who failed to reveal and renounce his own criminal activity would not serve the ALI's purposes of withholding punishment for those who are less culpable or "provid[ing] an incentive for individuals who have entered into a conspiracy to 'desist from pressing forward with their criminal designs.'"¹⁰² Finding that the trial evidence would not have warranted an instruction on renunciation even if the defense were available in Massachusetts, the *Nee* court declined to decide whether to recognize the defense as a matter of common law, although the court declared in a footnote that it possessed the power and authority to do so.¹⁰³

Massachusetts appears to have reached the correct result in *Nee*, although perhaps on the wrong grounds. For the reasons discussed in Part V below, the courts and legislatures in the other twenty-three states that have not yet recognized the renunciation defense should similarly decline to do so.

IV. RENUNCIATION AND WITHDRAWAL UNDER FEDERAL LAW

The federal law of conspiracy does not recognize a defense of renunciation.¹⁰⁴ When an overt act is required, such as under 18 U.S.C. § 371, the crime is complete upon taking the overt act, and a defendant

101. *Id.* at 1284 ("He cannot be found to have 'renounced' an enterprise in which he denied participation."). For this proposition, the court, making the same mistake as the Ohio legislature, relied on section 5.03(7)(c) of the Model Penal Code, a provision discussing the doctrine of withdrawal or abandonment, not renunciation. *Id.* The court correctly noted that the Code requires renunciation to be "complete and voluntary" and these conditions are not met where, as was the case in *Nee*, the defendants were partly motivated by changed circumstances that had increased the likelihood of detection. *Id.* at 1284 n.17 (emphasis omitted). One other published case (from New Jersey) has also held that renunciation must include a full confession. That decision, however, was based on New Jersey's stringent statutory elements of the defense, requiring that the defendant "inform[] the authority of the existence of the conspiracy *and his participation therein*." *State v. Hughes*, 521 A.2d 1295, 1296 (N.J. Super. Ct. App. Div. 1986) (emphasis added) (quoting N.J. STAT. ANN. § 2C:5-2(e) (West 2006)).

102. *See Nee*, 935 N.E.2d. at 1284–85 (quoting MODEL PENAL CODE § 5.03 cmt. at 457–58 (Official Draft and Revised Comments 1985)).

103. *Id.* at 1285 n.18.

104. *See United States v. Gonzalez*, 797 F.2d 915, 917 (10th Cir. 1986); *United States v. LoRusso*, 695 F.2d 45, 55 n.5 (2d Cir. 1982); *see also United States v. Britton*, 108 U.S. 192, 204–05 (1883) (stating that a consequence of the federal overt act requirement is to allow a *locus poenitentiae* for defendant to change his mind before the crime is complete; once overt act is committed by any coconspirator, withdrawal does not avoid penalty prescribed by statute). *See generally* 2 LAFAYE, *supra* note 5, § 12.4(b), at 310.

cannot “unring the bell.”¹⁰⁵ Even under the narcotics conspiracy statute, 21 U.S.C. § 846, which has been interpreted by the Supreme Court to require no overt act,¹⁰⁶ federal courts have refused to recognize the renunciation defense because the crime of conspiracy is considered complete once the agreement is formed.¹⁰⁷

While federal courts do not recognize renunciation, they do recognize the doctrine of “withdrawal.”¹⁰⁸ Withdrawal does not relieve an actor of liability for the underlying conspiracy; rather, it insulates the actor from having subsequent acts or statements of coconspirators attributed to him.¹⁰⁹ “Withdrawal,” for purposes of federal conspiracy statutes, occurs where there is cessation of activities toward completion of the enterprise by the withdrawing actor coupled with *either* notice of abandonment to coconspirators *or* revelation of the conspiracy to authorities.¹¹⁰ Mere cessation of activity without one of these forms of notice is insufficient to establish withdrawal.¹¹¹ The former method of notice—notice to coconspirators—may be proven by the commission of affirmative acts contrary to the objective of the conspiracy “communicated in a manner reasonably calculated to reach coconspirators.”¹¹²

There are four primary implications of the withdrawal doctrine under federal conspiracy law. First, if the conspiracy requires proof of an overt act, such as under 18 U.S.C. § 371, withdrawal prior to the commission of an overt act means that the withdrawing actor is not liable for the conspiracy.¹¹³ Second, withdrawal commences the statute

105. *United States v. Dallas*, 229 F.3d 105, 111 (2d Cir. 2000) (stating that “as long as the elements of the conspiracy offense have been established, the prior intent renders [the defendant] liable for conviction for conspiracy” even if he later disavows).

106. *United States v. Shabani*, 513 U.S. 10, 13 (1994) (stating that absent any contrary indications, it is presumed that Congress intended to follow the common law of conspiracy and dispense with the overt act element when Congress failed to include this requirement in the 1970 narcotics statute).

107. *Gonzalez*, 797 F.2d at 916–17; *LoRusso*, 695 F.2d at 55 n.5.

108. Adding to confusion in this area, many federal courts use the terms “withdrawal,” “abandonment,” and “repudiation” interchangeably. *See United States v. Read*, 658 F.2d 1225, 1232, 1235 (7th Cir. 1981); *United States v. Cont'l Group Inc.* 603 F.2d 444, 466 (3d Cir. 1979); *see also Hyde v. United States*, 225 U.S. 347, 371 (1912). For the purpose of clarity, we will use the term “withdrawal” throughout our discussion.

109. PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 81 (West 1984).

110. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 463–65 (1978).

111. *United States v. Hogan*, 986 F.2d 1364, 1375 (11th Cir. 1993) (citing *United States v. Finestone*, 816 F.2d 583, 589 (11th Cir. 1987)).

112. *U.S. Gypsum*, 438 U.S. at 464–65 (holding that price reductions contrary to the agreement communicated to coconspirators warranted a withdrawal instruction to jury).

113. *See United States v. Arias*, 431 F.3d 1327, 1340 n.18 (11th Cir. 2005); *United States v. Lothian*, 976 F.2d 1257, 1262 (9th Cir. 1992).

of limitations with respect to the withdrawing actor.¹¹⁴ Under federal law, withdrawal may thus be a complete defense to a conspiracy charge but only when coupled with a viable statute of limitations defense.¹¹⁵ Third, under the *Pinkerton* doctrine,¹¹⁶ the withdrawing conspirator is not liable for the substantive crimes of coconspirators committed after the date of withdrawal, even if those crimes are in furtherance of the conspiracy and reasonably foreseeable.¹¹⁷ Finally, statements made by coconspirators after the date of withdrawal are not admissible against the withdrawing conspirator under the hearsay exemption in subsection 801(d)(2)(E) of the Federal Rules of Evidence.¹¹⁸

Withdrawal is thus a far more limited doctrine than renunciation; unless it is undertaken before an overt act is completed by one member of the criminal enterprise or the statute of limitations has elapsed since the date of the actor's withdrawal, proof of withdrawal does not insulate the actor from criminal liability altogether, but rather limits the proof that may be admissible against him. Nevertheless, there are a number of disagreements among the federal circuits over the nature and proof of withdrawal. These controversies are significant for states contemplating a renunciation defense because they illustrate the serious public policy tensions inherent in this limited form of conspiracy excuse.

Regarding the second method of proving withdrawal—notice to authorities—there is currently a split among the federal circuits as to whether a purportedly withdrawing defendant must make a full and complete confession to law enforcement (the so-called “clean breast” doctrine), or whether simply alerting the police to the general nature and scope of the enterprise will suffice. The U.S. Courts of Appeals for the Second, Seventh, and District of Columbia Circuits follow the rigorous “clean breast” approach,¹¹⁹ while the U.S. Court of Appeals for the Eighth Circuit allows for proof of withdrawal upon a more general confession to authorities.¹²⁰ The circuits applying the more rigorous test

114. *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 837 (11th Cir. 1999) (citing *United States v. Antar*, 53 F.3d 568, 584 (3d Cir. 1995)); *United States v. Juodakis*, 834 F.2d 1099, 1105 (1st Cir. 1987).

115. *United States v. Fernandez-Torres*, 604 F. Supp. 2d 356, 359 (D.P.R. 2008) (citing Magistrate Judge Camille L. Velez-Rive's legal analysis).

116. *Pinkerton v. United States*, 328 U.S. 640, 646 (1946).

117. *United States v. Dallas*, 229 F.3d 105, 110 (2d Cir. 2000); *United States v. Fox*, 902 F.2d 1508, 1516 (10th Cir. 1990); *United States v. Killian*, 639 F.2d 206, 209 (5th Cir. 1981).

118. *See United States v. Piper*, 298 F.3d 47, 52–53 (1st Cir. 2002).

119. *United States v. Walls*, 70 F.3d 1323, 1327 (D.C. Cir. 1995); *United States v. D'Andrea*, 585 F.2d 1351, 1355 n.3 (7th Cir. 1978); *United States v. Borelli*, 336 F.2d 376, 388 (2d Cir. 1964).

120. *United States v. Grimmitt*, 236 F.3d 452, 455 (8th Cir. 2001) (establishing withdrawal for purpose of statute of limitations where defendant did not give thorough confession to authorities disclosing full details of her participation in conspiracy, but disclosed sufficient facts to allow officials to thwart enterprise).

of withdrawal have concluded that public policy is best served by requiring full disclosure to law enforcement in order to give the police maximum capacity to apprehend at-large suspects and thwart the criminal enterprise.¹²¹ In other words, one cannot absolve oneself of responsibility for a ticking time bomb by simply walking away from it or by informing authorities of its existence without providing them with sufficient details necessary to locate and disarm it.¹²²

A split among the federal circuits also exists on the question of who has the burden of proving withdrawal when it is alleged. This issue frequently arises in the context of a statute of limitations defense when the defendant claims that he withdrew from the conspiracy on a date prior to the indictment that exceeds the statute of limitations period. The U.S. Courts of Appeals for the Second, Sixth, Eighth, and D.C. Circuits treat withdrawal as a true affirmative defense, placing the burden of proof by a preponderance of evidence on the defendant.¹²³ These courts typically point to language in *Hyde v. United States*¹²⁴ that conspiracies are presumed to continue until their objects have been achieved or abandoned.¹²⁵ By contrast, the U.S. Courts of Appeals for the Third, Fourth, Seventh, and Ninth Circuits treat the defendant's obligation to show withdrawal as a burden of production only; if the defendant presents some evidence to warrant a withdrawal instruction, then the government must disprove withdrawal beyond a reasonable doubt.¹²⁶ The secrecy with which conspiracies are conducted and the absence of formality with which they are executed makes it very difficult to prove when an agreement has ceased.¹²⁷ Placing the burden of proof on the party raising withdrawal is a pragmatic recognition that the defendant is in the best position to know what steps he took to disavow or thwart the conspiracy. The government may be particularly ill-equipped to rebut fabricated claims of withdrawal when the theory of withdrawal

121. See *Brown v. United States*, 261 F. App'x 865, 866–67 (6th Cir. 2008) (holding that less than full statement of involvement to FBI did not satisfy standard); see also *United States v. Fernandez-Torres*, 604 F. Supp. 2d 356, 359 (D.P.R. 2008) (explaining that withdrawal must be “complete” and “in good faith” with a purpose to defeat or disavow conspiracy (internal quotation marks omitted) (quoting Magistrate Judge Camille L. Velez-Rive's legal analysis)).

122. *United States v. Patel*, 879 F.2d 292, 294 (7th Cir. 1989) (recognizing that withdrawal in the legal sense of the term should require much more than withdrawal in the lay sense of the term).

123. *Brown*, 261 F. App'x at 866; *United States v. Spero*, 331 F.3d 57, 61 (2d Cir. 2003); *United States v. Thomas*, 114 F.3d 228, 268 (D.C. Cir. 1997); *United States v. Boyd*, 610 F.2d 521, 528 (8th Cir. 1979).

124. 225 U.S. 347 (1912).

125. See *id.* at 369–70.

126. *United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992); *United States v. Urbanik*, 801 F.2d 692, 697 (4th Cir. 1986); *United States v. Steele*, 685 F.2d 793, 804 (3d Cir. 1982); *United States v. Read*, 658 F.2d 1225, 1236 (7th Cir. 1981).

127. *Patel*, 879 F.2d at 294.

advanced by the defendant involves notice to coconspirators rather than notice to authorities.

V. POLICY CONSIDERATIONS

In examining the many deviations in conspiracy law across the fifty states and among the federal circuits, one is reminded of the old joke about the definition of a camel; that is, “a horse designed by committee.” Because critics of conspiracy have picked away at the doctrine “piecemeal,” rather than by looking at the crime “in its entirety,”¹²⁸ the law of conspiracy in the United States looks like a camel—with wings! It would be both fairer to individual defendants and more conducive to fostering faith in the criminal justice system if the law of conspiracy were theoretically sound, rather than continuing to work around a set of distinctions that are internally incoherent.¹²⁹

Typically, we do not allow a defendant to escape punishment for a crime by reporting his conduct to law enforcement after the crime has been completed. A robber who feels remorse or fear for his safety after pulling a bank job cannot report his conduct to law enforcement, return his share of the money, and escape liability. In that situation, we depend on the judgment of prosecutors to conduct an investigation, assess the relative culpability of joint actors, and determine whether pursuing the cooperation of the confessor is in the best interests of justice. If so, statutory avenues for pursuing immunity or, more typically, entering into a cooperation agreement with the actor exchanging testimony for charging or sentencing concessions, are the preferred avenues for pursuing just results. We do not allow the bank robber—even one who plays the most minor of roles in a joint criminal enterprise—to “renounce” his crime. That is, acts and conduct demonstrating remorse are considered in mitigation of sentence, not in eradication of liability.

What is special about conspiracy liability compared to this bank robbery example? The predominant justifications advanced for accepting renunciation as a defense seem to be avoiding unfairness in punishment (“proportionality” concerns) and encouraging reporting and detection of crime (“preventive” concerns).¹³⁰ Neither of these justifications survives close scrutiny.

Renunciation was adopted by the Model Penal Code against the backdrop of English law, which did not require perpetration of an overt act for conspiracy liability¹³¹ and punished conspiracy as a felony.¹³²

128. Marcus, *supra* note 22, at 5 (quoting Johnson, *supra* note 27, at 1188).

129. See Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 J. CRIM. L. & CRIMINOLOGY 147, 171 (2007).

130. See *supra* notes 49 & 64 and accompanying text.

131. See *supra* note 31 and accompanying text.

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Conspiracy liability was thus considered harsh for at least two reasons: it had the potential to punish group “thoughts”¹³³ contrary to our tradition that some *actus reus* is fundamental to criminal culpability, and it led to severe penalties.¹³⁴ But most states today have added an overt act requirement to their conspiracy statutes¹³⁵ and have reduced the punishment for conspiracy by either classifying it as a misdemeanor,¹³⁶ providing different maximum sentences depending on whether the object of the conspiracy is a felony or misdemeanor,¹³⁷ or pegging the maximum sentence as some fraction (for example, half or one lower classification level) of the punishment for the completed crime.¹³⁸ These developments alone have been instrumental in curing some of the harshness of conspiracy liability. If states remain concerned that punishment for conspiracy is overly harsh compared to the danger presented by criminal associations, they can take other steps that would further promote proportionality such as limiting the object of a conspiracy to agreements to commit felonies¹³⁹ or requiring an overt act bordering on a substantial step toward completion of the crime.¹⁴⁰

Perhaps the most controversial application of conspiracy liability is the *Pinkerton* rule, which allows for the conviction of a defendant for a *substantive* offense committed by a coconspirator upon proof that the substantive offense was either within the scope of the conspiracy or in

AND ITS PROCESSES: CASES AND MATERIALS 673 (8th ed. 2007); ROLLIN M. PERKINS, CRIMINAL LAW 534 (1957).

133. Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 405–06 (1959).

134. The Model Penal Code continued the severe punishment scheme envisioned by the common law, authorizing punishment for conspiracy equivalent to the punishment for the object offense, unless the object was to commit a capital offense or a felony in the first degree, in which case the conspiracy was classified as a felony of the second degree. MODEL PENAL CODE § 5.05(1) (1962).

135. See *supra* note 33 and accompanying text.

136. See 2 LAFAYE, *supra* note 5, § 12.4(d), at 323–24; R.S. WRIGHT, THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS 223 (1887).

137. See, e.g., CAL. PENAL CODE § 182 (West 1999); COLO. REV. STAT. ANN. § 18-2-201 (West 2004); IND. CODE ANN. § 35-41-5-2 (LexisNexis 2009); IOWA CODE ANN. § 706.3 (West 2003); MICH. COMP. LAWS. SERV. § 750.157a (LexisNexis 2003).

138. See Buscemi, *supra* note 27, at 1183–88; see, e.g., GA. CODE ANN. § 16-4-8 (2011); LA. REV. STAT. ANN. § 14:26 (2007); MASS. GEN. LAWS. ANN. ch. 247 § 7 (West 2004); VA. CODE ANN. § 18.2-22 (2009).

139. See *supra* note 30 and accompanying text.

140. See *supra* note 38 and accompanying text. Some states that require a substantial step toward completion of the criminal objective distinguish the concept of substantial step for purposes of conspiracy liability from the substantial step required for attempt liability; the latter, but not the former, requires a showing of conduct beyond mere preparation strongly corroborative of criminal purpose. See, e.g., *State v. Dent*, 869 P.2d 392, 397 (Wash. 1994) (interpreting WASH. REV. CODE 9A.28.11.4(d)).

furtherance of the conspiracy and reasonably foreseeable.¹⁴¹ Under this latter method of proof, conspiracy becomes not only a form of inchoate liability, but also a shortcut to impose vicarious liability on a defendant absent proof that he actually aided and abetted the substantive offense committed by another. Although a majority of states still follow *Pinkerton*,¹⁴² some states such as New York and Massachusetts do not.¹⁴³ *Pinkerton* has been widely criticized by scholars¹⁴⁴ and rejected by the Model Penal Code¹⁴⁵ because it allows the government to punish the defendant for a crime he did not intend to commit. Yet the renunciation doctrine simply is not necessary to prevent the widely perceived inequities of the *Pinkerton* rule. Once a coconspirator *withdraws* from a conspiracy, he remains liable for the conspiracy, but not for any subsequent acts of his coconspirators.¹⁴⁶

The second rationale advanced for the renunciation defense is encouraging the reporting of nascent criminal enterprises so that potentially dangerous activity can be prevented. According to this argument, unless renunciation is recognized as a defense, conspirators will have no incentive to report their activities to law enforcement. Therefore, the police will be handicapped in capturing other participants and preventing the completion of their criminal plans.¹⁴⁷

This argument assumes a certain amount of sophistication on the part of criminals that is neither supported by empirical evidence nor common sense.¹⁴⁸ Criminal suspects typically have a wide and complex variety of motivations for cooperating with law enforcement, including remorse, pressure from loved ones, fear of confederates, possible arrest on unrelated charges, or a desire to minimize their own exposure. Suggesting that, in the absence of a renunciation defense, coconspirators will withdraw from the agreement (ceasing activity and informing their coconspirators) but *not* inform law enforcement or take steps to thwart the crime seems far-fetched and presupposes a keen appreciation of the

141. *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946); *see also* Marcus, *supra* note 22, at 6.

142. Marcus, *supra* note 22, at 6.

143. *See* *People v. McGee*, 399 N.E.2d 1177, 1181 (N.Y. 1979); *Commonwealth v. Stasiun*, 206 N.E.2d 672, 678–79 (Mass. 1965).

144. *See* Mark Noferi, *Toward Attenuation: A “New” Due Process Limit on Pinkerton Conspiracy Liability*, 33 AM. J. CRIM. L. 91 (2006); Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984).

145. MODEL PENAL CODE §2.06(3) cmt. at 298–99 (Official Draft and Revised Comments 1985).

146. *See supra* note 117 and accompanying text.

147. *See supra* note 64 and accompanying text.

148. *See, e.g.,* *People v. Sconce*, 279 Cal. Rptr. 59, 64 n.5 (Ct. App. 1991) (referring to “the legal fiction [that] the conspirator is knowledgeable in the law of conspiracy”).

differences between withdrawal and renunciation unlikely to be possessed by the average layman. Moreover, as witnessed by the numerous state and federal cases in which defendants alerted authorities to a conspiracy but were *not* provided with a renunciation instruction at trial,¹⁴⁹ coconspirators already have an incentive to mitigate their sentence for the conspiracy itself by being the first one in the door of the police station to work out a deal with authorities.

In the absence of empirical evidence, it is impossible to determine whether the renunciation defense serves the incentivizing function the ALI supposes. If the renunciation doctrine provides any form of incentive whatsoever, it is equally possible that it encourages conspiracies more than it discourages following through with them. That is, in the unlikely event that suspects are even aware of the presence or absence of a renunciation defense in their respective jurisdictions, they might be more willing to enter into negotiations with others about criminal undertakings if they know they can back out at any time, report the conspiracy, and escape criminal exposure. In our school hostage plot described above, the teenager may be more willing to engage in preliminary discussions about shooting up the school if he knows there are no criminal consequences to his participation should he subsequently abandon the enterprise. Nonetheless, his original participation in the meetings and planning has encouraged and emboldened others, which is exactly the social harm conspiracy law is designed to address.

The policy arguments on each side of the renunciation defense were debated by the United Kingdom Law Commission in 1977, fifteen years after the ALI's enactment of the Model Penal Code; England decided to continue its common law tradition by *not* recognizing the defense.¹⁵⁰ In its recommendations to the Commission, a subcommittee of barristers and judges ("The Working Party") identified the primary arguments for and against the renunciation defense. The chief argument in favor, as recognized by the ALI, is encouraging individuals to abandon the enterprise.¹⁵¹ But in this regard, the Working Party recognized an inherent contradiction between saying that an inchoate offense such as conspiracy presents social dangers sufficiently advanced that they justify intervention by police (for example, probable cause for an arrest or search warrant) but *not* sufficiently culpable to warrant conviction

149. See, e.g., *United States v. Grimmett*, 236 F.3d 452, 455 (8th Cir. 2001); *Commonwealth v. Nee*, 935 N.E.2d 1276, 1281 (Mass. 2010).

150. See *Criminal Law Act, 1977*, c. 45, §§ 1–5 (Eng. & Wales), *superseded by* *Criminal Justice (Terrorism and Conspiracy) Act, 1998*, ch. 40 (U.K.).

151. D.C. PEARCE, *LAW COMM'N, CODIFICATION OF THE CRIMINAL LAW: INCHOATE OFFENSES*, WORKING PAPER NO. 50 (Jun. 5, 1973), *in* 37 *MOD. L. REV.* 67, 70 (1974).

and punishment.¹⁵² That contradiction sends mixed signals to law enforcement. Second, the Working Party believed that because the crime of conspiracy is complete upon formation of the agreement, issues of abandonment should be considered only upon mitigation of penalty.¹⁵³ In its final report, the Law Commission followed the recommendation of the Working Party and decided not to recommend the defense, concluding that “[w]e believe that provision of a defence could only be justified if there were decisive arguments in its favour,” and that “any effort [a defendant] might make to nullify [the effects of the agreement] should instead be reflected by mitigation of penalty.”¹⁵⁴

While the Model Penal Code takes the position that a renunciation defense advances public safety interests, the precise contours of the defense the ALI constructed will not deter crime as much as the drafters supposed. To satisfy a renunciation defense under the Code and in every state other than New Jersey that has adopted the defense, the coconspirator does not need to turn in his cohort(s) to authorities, he needs only to cease participation in the plan and thwart the enterprise.¹⁵⁵ In our school terror example, the teenager could renounce under the Model Penal Code by secretly taking the plans and other supplies away from his confederates the day before the planned attack and dumping them in the river, without alerting authorities. While the immediate criminal enterprise may have been thwarted, the suspects remain at large to plan a similar attack on a future date.

Accordingly, if a jurisdiction is inclined to recognize the renunciation defense, it should not only insist on the Model Penal Code’s actual thwarting standard—not permitting a defendant to qualify for the defense if the object crime occurs—but should also include a provision, such as in the New Jersey statute, requiring that the renouncing conspirator report the conspiracy to law enforcement. This

152. *Id.* at 71.

153. *Id.* at 72–73.

154. LAW COMMISSION, REPORT No. 102, ATTEMPT, AND IMPOSSIBILITY IN RELATION TO ATTEMPT, CONSPIRACY AND INCITEMENT 68–69, 68 n.364 (1980). In LAW COMMISSION, REPORT No. 76, REPORT ON CONSPIRACY AND CRIMINAL LAW REFORM 32 (1976), the Commission had initially declined to make any recommendation whether to recognize a complete defense for withdrawal from conspiracy, declaring that the issue warranted input from the Working Party on attempts:

Until we do report, we think that the case of a genuine withdrawal from conspiracy, particularly where the withdrawal has led to the prevention of the contemplated crime, will in most cases be covered by the prosecutor’s discretion not to bring charges against the person withdrawing or by the court’s discretion as to sentence.

Id.

155. *See supra* notes 79–87 and accompanying text.

is the only way to guarantee that the future harm posed by a similar conspiracy is averted and to avoid difficult questions of the timeliness, completeness, and reasonableness of the defendant's efforts.

Perhaps the most compelling argument that can be made in favor of the ALI's position on renunciation is that it is consistent with the approach it took to abandonment of criminal attempts.¹⁵⁶ Yet the law should not strive to achieve a superficial consistency between doctrines serving distinct purposes. At common law in England, an attempt was complete upon performance of any proximate act towards its objective; a voluntary¹⁵⁷ change of mind did not "undo" the crime.¹⁵⁸ While this is still the law in many countries, the Model Penal Code recommends a defense of "renunciation" of criminal attempt, which has been enormously influential and today appears to be followed in a majority of jurisdictions in the United States.¹⁵⁹

The scholarly discourse favoring a defense of abandonment of attempts has generally proceeded along two lines. First, a voluntary decision to forego a planned crime essentially undercuts the *mens rea* for the crime itself by raising doubt as to whether the defendant ever truly intended to "carry through" with the act.¹⁶⁰ Second, a voluntary abandonment raises an inference of non-dangerousness, and dangerousness should be the linchpin of moral culpability with respect to inchoate offenses.¹⁶¹

Even if one accepts either of these two rationales under the law of attempts, the analogy to conspiracy is imperfect. As noted above, conspiracy requires a dual intent: an intent to agree and an intent to commit the object of the agreement. Even if a subsequent change of heart somehow calls into question the second intent, it cannot undermine the first (the intent to agree). Second, conspiracy (unlike an incomplete attempt) is not a purely inchoate offense the gravity of

156. See MODEL PENAL CODE § 5.01(4) (Official Draft and Revised Comments 1985) ("[I]t is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.").

157. Abandonment is not voluntary if motivated by circumstances making the commission of the crime more difficult or by the threat of detection or apprehension by law enforcement. *Id.*; see also Martin Wasik, *Abandoning Criminal Intent*, 1980 CRIM. L. REV. 785, 787.

158. *Haughton v. Smith*, 3 All E. R. 1109 (1973).

159. 2 LAFAVE, *supra* note 5, § 11.5(b) at 246–47 (internal quotation marks omitted) (quoting MODEL PENAL CODE § 5.01(4)). According to LaFave, the statutory language frequently utilized in American jurisdictions to define the crime of attempt (one who commits an act toward completion of the crime "but fails in the perpetration thereof or is prevented or intercepted in executing such crime") by implication supports the defense of voluntary abandonment. *Id.* at 246 (emphasis omitted) (internal quotation marks omitted).

160. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 188 (1978); see also Wasik, *supra* note 157, at 790.

161. Wasik, *supra* note 157, at 791–92; see also FLETCHER, *supra* note 160, at 187.

which can only be calibrated with reference to the dangerousness of the actor. Conspiracy, unlike an incomplete attempt, results in social harm; other members of the conspiracy have been assisted and galvanized in their criminal enterprise by the defendant's ideas. Unless we are prepared to define the retributive goals of the criminal law solely through a subjectivist lens,¹⁶² there is social harm presented by the coconspirator's conduct that is worthy of punishment even if (and this is certainly subject to debate) subsequent acts of disavowal support an inference that the renouncing actor himself is no longer dangerous. Presupposing that moral culpability should include both subjective considerations of dangerousness and objective considerations of harm,¹⁶³ there are thus sound reasons to distinguish between conspiracy and attempt in the law's treatment of disavowal.

Professor George Fletcher argues that the scholarly debate about abandonment of attempts is of more theoretical significance than practical significance.¹⁶⁴ In a situation of incomplete (as opposed to unsuccessful)¹⁶⁵ attempts, it is rare for prosecutors to commence charges against someone who voluntarily abandons his enterprise, unless the attempt rises to the level of assaultive behavior—and in those situations, assault statutes will generally do the work even where attempt laws cannot. But with conspiracy law, renunciation has both theoretical and practical significance because other actors exist whose conduct needs to be addressed by the criminal law. As explained below, recognizing the defense of renunciation may actually undermine public safety by making it harder to prosecute the remaining participants to the conspiracy, even if the substantive offense has been averted.

Once renunciation is complete, the actor is *innocent* of the conspiracy and no longer has a motive based on self-interest to cooperate with law enforcement. Even if he makes a full confession and

162. See generally Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 74–75 (1991) (distinguishing “intent based” retributive theories from “harm based” retributive theories).

163. Professor George Fletcher proposes a hybrid approach to retributivism whereby the maximum punishment for a crime is established by the harm caused, but that punishment is reduced to the extent that the actor possesses a less culpable *mens rea*. George P. Fletcher, *What is Punishment Imposed For?*, 5 J. CONTEMP. LEGAL ISSUES 101, 108–09 (1994). Even a primarily subjectivist approach to criminal liability like the Model Penal Code requires the objective assessment of harm to play some role in defining criminal offenses. See MODEL PENAL CODE § 1.02(1)(a). Our approach to “renunciation”—which makes thwarting of a conspiracy relevant to mitigation of penalty but not to culpability—is consistent with a hybrid retributivist approach.

164. FLETCHER, *supra* note 160, at 185–86.

165. In an unsuccessful attempt, the perpetrator has taken every step necessary toward completion of the crime, but has failed in its perpetration (such as shooting a gun in the direction of an intended victim and missing). By definition, therefore, it is impossible to “abandon” an unsuccessful attempt. See 2 LAFAYE, *supra* note 5, § 11.5(b), at 242–44.

the police are successful in thwarting the enterprise, upon consulting with counsel he may refuse to testify. While the confession and even subsequent grand jury testimony may be considered declarations against interest excepted from the hearsay rule, they are nevertheless testimonial statements under *Crawford v. Washington*¹⁶⁶ that would be inadmissible at trial under the Confrontation Clause absent live testimony from the cooperator and an opportunity to cross examine. A renouncing conspirator thus may disappear or flee the jurisdiction, making his confession useless to law enforcement. Written plea agreements (testimony in exchange for a favorable sentencing recommendation on pending charges) help ensure the continued cooperation of the turncoat conspirator in a way that the renunciation doctrine simply cannot. This is not just a question of trusting prosecutors to exercise their discretion appropriately in determining whether to bestow leniency in return for cooperation; it is also a question of not taking away from prosecutors all possible leverage in criminal cases that are very difficult to prove absent live testimony from a participating witness.

Some may argue that a conspirator who “renounces” but thereafter declines to cooperate further with law enforcement could be compelled to testify through a grant of judicial immunity.¹⁶⁷ Yet the limitations of judicial immunity have been well documented in the literature.¹⁶⁸ First, absent special circumstances, an application for judicial immunity (unlike an informal cooperation agreement) is made in a public judicial

166. 541 U.S. 36, 65 (2004).

167. “Nearly all jurisdictions [in the United States] have . . . statutory provisions under which a court, upon application of a prosecutor, may grant [formal] immunity” to a witness who has asserted his Fifth Amendment protection against compelled self-incrimination. Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 4 (1992). The federal immunity statute, 18 U.S.C. § 6003 (2006), requires a senior Justice Department officer to approve the federal prosecutor’s application and requires the government to declare that the witness’s testimony “may be necessary to the public interest” and that the witness “has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.” *Id.* at 4–5 (quoting 18 U.S.C. § 6003(b)) (internal quotation marks omitted). In the federal system, like most states, a judicial order of immunity protects the witness from having his compelled testimony thereafter used against him or from the government making derivative use of this testimony by following up on any investigative leads gleaned therefrom and thereafter introducing such derived evidence against the witness. *See Kastigar v. United States*, 406 U.S. 441, 460 (1972) (citing § 6002); *cf. In re John Doe Grand Jury Investigation*, 539 N.E.2d 56, 58 (Mass. 1989) (explaining that the scope of judicial immunity bestowed under Massachusetts statute is considered transactional immunity in order to be coextensive with the witness’s right against self-incrimination under the U.S. Constitution and the Massachusetts Declaration of Rights).

168. *See, e.g.*, R. Michael Cassidy, “Soft Words of Hope:” Giglio, *Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1143 n.70 (2004); Hughes, *supra* note 167, at 5–6.

proceeding, thereby potentially shattering the important element of secrecy often necessary to successfully conclude a criminal investigation and prevent witness tampering, flight, or destruction of evidence. Second, a judicial immunity order merely requires the witness to testify at future judicial proceedings; unlike the typical written cooperation agreement, it does not obligate the witness to participate in any necessary undercover operations or to prepare for upcoming testimony by submitting to necessary and sometimes extensive debriefing interviews with law enforcement agents. Finally, the sole leverage on the witness from a grant of judicial immunity is a charge of contempt (if he fails to testify) or perjury (if he testifies falsely).¹⁶⁹ Participants in a conspiracy like our hypothetical school shooting plot might develop “cold feet” about testifying against their confederates—possibly through direct or indirect threats from the associates themselves. If that happens, the young man in our hypothetical may have convenient memory lapses on the witness stand or stretch the truth about the precise details of the planned attack in ways favorable to some or all of the defendants. Such subtle defalcations may be beyond the reach of law enforcement when operating under judicial immunity.¹⁷⁰ By contrast, a written cooperation agreement typically provides that, in exchange for certain charging or sentencing concessions, the cooperating defendant will assist law enforcement with its investigation into criminal activity (including submitting to interviews upon request and, if necessary, agreeing to participate in undercover activities such as wearing a wire) and will provide complete and truthful testimony against codefendants whenever called upon to do so. Violation of such an informal letter agreement typically returns the parties to the status quo ante and exposes the defendant to full punishment for his underlying crime.¹⁷¹ It is clear that indicting our school shooting suspect for conspiracy and thereafter *bargaining with him* over the terms upon which those charges will be resolved ensures his continued cooperation in a way that judicial immunity simply cannot.¹⁷²

CONCLUSION

169. See Hughes, *supra* note 167, at 5–6.

170. Cassidy, *supra* note 168, at 1143 n.70.

171. *Id.* at 1146–47.

172. To the extent that some may be concerned prosecutors will act in bad faith and fail to come through with sentencing concessions after a cooperating defendant has lived up to his end of the bargain and helped investigate and prosecute a conspiracy, a well-developed body of law (starting with *Santobello v. New York*, 404 U.S. 257, 263 (1971)) exists to require specific performance of cooperation agreements in such circumstances. See, e.g., *United States v. VanDam*, 493 F.3d 1194, 1199, 1206–07 (10th Cir. 2007); *State v. Lankford*, 903 P.2d 1305, 1311–13 (Idaho 1995).

In a post-Columbine, post-9/11 America, the special dangers of conspiracy loom large in our collective consciousness. Naturally, legislatures at the federal and state levels seek to provide law enforcement with the tools they need to ferret out dangerous combinations and to prevent the unthinkable damage they threaten to inflict. In our desperate search for security, some have looked to the decades-old innovation of the Model Penal Code—the renunciation doctrine—as an appropriate vehicle for incentivizing the reporting of nascent criminal activity.

For the reasons discussed in this Article, efforts in this direction are misguided and should be resisted. The renunciation doctrine is the product of a compromise—and a distinctly unprincipled one at that—designed to soften some of the harsher aspects of conspiracy liability. Contrary to the claims advanced by the ALI in support of the defense, renunciation is not an effective tool for preventing the dangers of group activity. The doctrine gives former conspirators a self-help remedy to escape criminal liability by meeting the elements of the defense—but providing help to law enforcement is not one these elements. To be truly effective in combating incipient criminal combinations, police and prosecutors need former conspirators not only to renounce their participation in the enterprise, but also to assist in the subsequent investigation and prosecution of others. The renunciation doctrine removes the incentive for former conspirators to do the hardest work of law enforcement—to root out and stem conspiracies, to punish the wrongdoers, and to prevent their thwarted efforts from going underground temporarily only to sprout out later in new and different directions. By considering renunciation as a form of mitigation and not a form of exoneration, law enforcement will be better equipped to leverage the cooperation of former coconspirators in the successful prosecution of their more dangerous confederates.

