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Criminal Law—Federal Conspiracy Law—Changing the Withdrawal Standard for Members of a Conspiracy

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CRIMINAL LAW—FEDERAL CONSPIRACY LAW—CHANGING THE WITHDRAWAL STANDARD FOR MEMBERS OF A CONSPIRACY

I. INTRODUCTION

Society widely accepts that throughout most of the twentieth century and all of the twenty-first century, the United States has had a mass incarceration problem.[1] As of 2017, the United States contained twenty-five percent of the world's total prison population despite only making up five percent of the global population.[2] The incarceration rate in the United States is seven times greater than other western democracies.[3] The criminal justice system itself is the main culprit, due to laws that create a dragnet of criminal prosecution.[4]

Among the worst of these charges is federal conspiracy law, a charge that the federal government included in twenty-five percent of its 2003 prosecutions.[5] Conspiracy doctrine is inherently vague, which leads to its overinclusive application.[6] That overinclusive application is worsened by its withdrawal defense.[7] The current standard of withdrawal is not only dangerous for defecting members of a conspiracy but also is ineffective in most situations.[8] This Note proposes that the federal courts adopt a new standard of withdrawal. A standard that permits an individual to withdraw from a criminal conspiracy by committing any act that frustrates the furtherance of the conspiratorial goal and disposes of the individual's position within the conspiracy such that the position is abandoned by the remaining conspiratorial members or is reinstated by the independent actions of the remaining members.

Section II of this Note provides a brief background of conspiracy doctrine and the withdrawal standard. Next, Section III lays out the inherent

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1. Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125, 126 (2017).

2. *Id.*

3. *Id.* at 129.

4. Paul Marcus, *The Crime of Conspiracy Thrives in Decisions of the United States Supreme Court*, 64 U. KAN. L. REV. 373, 375 (2015).

5. Steven R. Morrison, *The System of Modern Criminal Conspiracy*, 63 CATH. U. L. REV. 371, 372 (2014).

6. Rand Paul, *Conspiracy Laws Result in Cruel Prison Sentences, Particularly for Black Americans*, COURIER J. (July 14, 2020, 6:09 AM), https://www.courier-journal.com/story/opinion/2020/07/14/conspiracy-laws-result-cruel-prison-sentences-black-people/5427663002/.

7. *See* United States v. Wilson, 134 F.3d 855, 863 (7th Cir. 1998) (defining elements of withdrawal defense).

8. *See* United States v. Perez-Cubertier, 958 F.3d 81, 87 (1st Cir. 2020) (holding that the defendant fled the conspiracy for his safety but could not effectively withdraw under the current withdrawal standard).

vagueness of the conspiracy doctrine's design and explains how conspiracy doctrine's vague structure often leads to overinclusive culpability for conspiratorial members who have little, if any, direct influence on the conspiracy. It also explains how the current withdrawal standard exacerbates the conspiracy doctrine's inherent weakness. Section IV then discusses the dangers of the current withdrawal standard to defecting members of a conspiracy and the disparate application of the withdrawal standard and conspiracy doctrine on minorities and low-income communities. Finally, Section V introduces a new standard to correct the inherent flaws of the conspiracy doctrine's vague structure and overinclusive application. It also delineates how the proposed standard will mitigate the dangers of the current withdrawal standard and allow less culpable members of the conspiracy to easily exit through the mere cessation of criminal activity.

II. BACKGROUND

Like most American laws, conspiracy law has roots in English common law.[9] The earliest iterations of common law conspiracy embodied a form of malicious prosecution that possessed the possibility of both civil liability and criminal prosecution.[10] American conspiracy law remained largely in its ancestorial common law form until the American Civil War.[11] Congress passed the first conspiracy statute in 1867 which was later codified as 18 U.S.C. § 371 in 1948.[12] This statute has served as the "skeletal structure" of America's conspiracy doctrine.[13] Although 18 U.S.C. § 371 is the foundation of modern conspiracy doctrine and serves as the "catch-all" conspiracy statute, it is not the only conspiracy statute that Congress has passed.[14] Since the passage of 18 U.S.C. § 371, Congress has created several other conspiracy statutes relating to an array of separate substantive offenses.[15]

The most prevalent conspiracy statute of the twentieth century was arguably 21 U.S.C. § 846 conspiracy to commit a drug-related offense.[16] Although all federal conspiracy statutes vary by their relative substantive offense, the underlying structure of conspiracy doctrine is the same.[17] The core of every conspiracy is an agreement between two or more parties to commit

9. Morrison, *supra* note 5, at 372.

10. CONG. RSCH. SERV., FEDERAL CONSPIRACY LAW: A BRIEF OVERVIEW 3 (2020).

11. Sarah Hall et.al., *The Evolution of Criminal Conspiracy Law and 'Flipping the Script' in* United States v. Elizabeth Holmes, 44 CHAMPION 34, 34 (2020).

12. Shaun P. Martin, *Intracorporate Conspiracies*, 50 STAN. L. REV. 399, 402 (1998); CONG. RSCH. SERV., *supra* note 10, at 4; 18 U.S.C. § 371 (2022).

13. Morrison, *supra* note 5, at 388.

14. CONG. RSCH. SERV., *supra* note 10, at 2.

15. *Id.*

16. *See* 21 U.S.C. § 846.

17. CONG. RSCH. SERV., *supra* note 10, at 2.

a criminal act.[18] Some statutes also require proof of an overt act in furtherance of the conspiratorial goal.[19] Congress created the overt act requirement to operate as a safeguard that prevents a criminal conspiracy from officially forming until the occurrence of the overt act.[20] The overt act does not have to be illegal but can be a legal action designed to further the conspiratorial goal.[21] The conspiracy doctrine is anomalous because it is the only inchoate offense that does not merge with its substantive counterpart.[22] The conspiracy charge is a separate offense, and the government can try and convict someone separately from the substantive offense that formed alongside the conspiratorial agreement.[23]

The courts have placed a few constraints on conspiracy doctrine since its codification in 1948.[24] One such constraint, known as Wharton's rule, disallows the charge of conspiracy where the conspiratorial goal is objectively too large to have been accomplished by the number of conspirators charged.[25] Pre-codification, the courts created the doctrine of conspiratorial merger in 1946 to constrain sweeping conspiratorial prosecutions that merge multiple conspiracies into one larger all-inclusive conspiracy.[26] To merge multiple conspiracies, the prosecution must prove some tacit agreement between the members of the conspiracies and cannot prosecute members who are unaware of the other conspiracy's existence.[27]

Despite the conspiracy doctrine's few constraints, its twentieth-century application became more far-reaching when the court created *Pinkerton* liability in 1946.[28] Under traditional conspiracy liability, once the government charges a defendant with conspiracy, it can only hold the defendant liable for the conspiratorial agreement, the defendant's acts in furtherance of the conspiratorial goal, and the completion of the conspiratorial goal itself.[29] Under *Pinkerton* liability, however, the government can charge a defendant with every foreseeable act committed by every other conspiratorial member that furthers the common conspiratorial goal.[30]

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18. *Id.* at 4.
19. *Id.* at 8.
20. Beth Allison Davis & Josh Vitullo, *Federal Criminal Conspiracy*, 38 AM. CRIM. L. REV. 777, 791 (2001).
21. *Id.*
22. *Id.* at 778 (describing how conspiracy is charged as a separate offense).
23. *Id.*
24. CONG. RSCH. SERV., *supra* note 10, at 4.
25. *Id.* at 5.
26. Kotteakos v. United States, 328 U.S. 750, 755 n.6 (1946).
27. *Id.* at 767.
28. *See* Pinkerton v. United States, 328 U.S. 640, 647 (1946).
29. Michael Manning, *A Common Law Crime Analysis of* Pinkerton v. United States*: Sixty Years of Impermissible Judicially-Created Criminal Liability*, 67 MONT. L. REV. 89, 93 (2006).
30. *Id.* at 90.

The main policy reason for conspiracy doctrine's broad application is the theory that the more people involved in a criminal enterprise, the more dangerous and capable of successfully committing a crime the enterprise becomes.[31] Under this theory, every additional conspiratorial member increases the conspiracy's likelihood of success while also discouraging members from defecting.[32] This theory of liability is why the courts have expanded conspiracy doctrine's broad application through other doctrines like *Pinkerton* liability and why conspiracy law requires a defendant to prove an effective withdrawal to remove themselves from incurring further liability.[33]

The withdrawal defense for conspiracy has existed as long as the crime itself, but in the beginning, the prosecution had the burden of proving that a defendant had not withdrawn from the conspiracy. [34] The modern standard, which is slightly different, first arose out of *Hyde v. United States* in 1912, in which the Supreme Court shifted the burden to the defense to show that the accused withdrew from the conspiracy prior to its completion.[35] This standard went largely unchanged until 1964 when the court in *Borelli v. United States* held that, to withdraw, a defendant must commit an act disavowing the conspiracy in a way calculated to inform the other members of his withdrawal or make a clean breast to law enforcement by making a full confession.[36] This is the modern standard of withdrawal.[37]

The withdrawal defense is essential to a criminal defendant charged with conspiracy because it commences the statute of limitations for all pre-withdrawal criminal activity.[38] Under conspiracy liability, the statute of limitations does not begin until after the defendant has made an effective withdrawal.[39] In this way, the withdrawal defense acts as an affirmative defense for actions committed after the conspiratorial agreement.[40] The statute of limitations is generally five years for conspiracy charges but can vary if prescribed otherwise by statute.[41] Withdrawal can be a complete defense in situations

31. CONG. RSCH. SERV., *supra* note 10, at 1.
32. *Id.*
33. *Id.* ("Congress and the courts have fashioned federal conspiracy law accordingly.").
34. Cecelia M. Harper, *How Do I Divorce My Gang?: Modifying The Defense of Withdrawal for a Gang-Related Conspiracy*, 50 VAL. U. L. REV. 765, 788–89 (2016).
35. *Id.* at 786.
36. Ryan Thomas Grace, *Defining the Sprawling Arms of Conspiracy: The United States Court of Appeals for The Eighth Circuit Correctly Addressed the "Clean Breast" Doctrine as It Affects Withdrawal from a Conspiracy in* United States v. Grimmet, 35 CREIGHTON L. REV. 433, 456 (2002); United States v. Borelli, 336, 388 F.2d 376 (1964).
37. Grace, *supra* note 36, at 456.
38. *Id.* at 434.
39. *Id.*
40. Marcus, *supra* note 4, at 380–81.
41. Davis & Vitullo, *supra* note 20, at 793.

requiring the completion of an overt act to solidify the conspiracy if the defector withdraws before the completion of the overt act.[42]

Until the defendant withdraws or until the conspirators accomplish their goal, the factfinder can find the defendant guilty for all acts committed in furtherance of the conspiracy, the act of conspiracy itself, and all foreseeable acts by co-conspirators in furtherance of the conspiracy.[43] The *Borelli* holding also established the primary policy consideration in favor of the current withdrawal standard's rigidity: the time bomb theory.[44] The time bomb theory emerged from a footnote in *Borelli* and proclaimed that an individual could not benefit from walking away from criminal behavior that continues to operate after their withdrawal.[45] Like a time bomb waiting to explode, simply walking away is insufficient to stop the conspiracy from continuing or stopping the co-conspirators from committing criminal acts.[46]

III. THE CONSPIRACY DOCTRINE IS INHERENTLY VAGUE

The elements of conspiracy doctrine are vaguely defined, which leads to unintentional conspiratorial formations and overinclusive prosecution.[47] Conspiracy doctrine has been criticized for its vague definition and overly broad application.[48] In 1948, Justice Jackson stated, "[t]he modern crime of conspiracy is so vague that it almost defies definition."[49] The doctrine's design is purposefully vague so that it may encompass an endless array of potential conspiratorial formations.[50] However, the conspiracy doctrine's vaguely defined elements result in an inherently overbroad application that can lead to unintentional conspiratorial formations.[51]

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42. R. Michael Cassidy & Gregory I. Massing, *The Model Penal Code's Wrong Turn: Renunciation as a Defense to Criminal Conspiracy*, 64 FLA. L. REV. 353, 373 (2012).

43. Barton D. Day, *The Withdrawal Defense to Criminal Conspiracy: An Unconstitutional Allocation of the Burden of Proof*, 51 GEO. WASH. L. REV 420, 422 (1983).

44. *See* Grace, *supra* note 36, at 456; United States v. Borelli, 336 F.2d 376, 388 n.8 (1964).

45. United States v. Paladino, 401 F.3d 471, 479–480 (7th Cir. 2005); *Borelli*, 336 F.2d at 388 n.8.

46. *Paladino*, 401 F.3d at 479–480.

47. Paul, *supra* note 6.

48. *Id.*

49. *Id.* (quoting Justice Jackson); Krulewitch v. United States, 336 U.S. 440, 446 (1949).

50. Cassidy & Massing, *supra* note 42, at 354 (noting the conspiracy doctrine is "vague" and "elastic").

51. Emilie Kurth, *Drug Conspiracy Sentencing and Social Injustice*, 91 U. COLO. L. REV. 1215, 1227 (2020) (positing Kemba Smith unintentionally joined a criminal conspiracy).

A. Unintentional Conspiratorial Formations

The first element of a conspiracy, the agreement to conspire, has two sub-elements: (1) an agreement between two or more people (2) designed to achieve an illegal goal.[52] Aside from these two sub-elements, the conspiratorial agreement can substantively be about anything.[53] Although the agreement element's flexibility allows for the maximum coverage of many potential conspiratorial formations, it also allows individuals to unknowingly enter into unintentional conspiratorial agreements.[54] Because there is no definitive list of the situations that can form a conspiracy, individuals routinely find themselves embroiled in conspiracies to which they unintentionally agreed.[55] These situations often occur when there is no clear formal agreement to join or create a conspiracy.[56] For instance, an individual who agrees to begin a romantic relationship with someone engaged in criminal activity may actually be unintentionally agreeing to join or form a conspiracy with that person in the eyes of the law.[57] Because conspiratorial agreements arise either implicitly or explicitly, and the prosecution can prove the conspiracy entirely through circumstantial evidence, a provable relationship with another individual or group is enough to establish that the agreement occurred.[58]

The next two elements, knowledge of the conspiratorial goal and the intent to participate in the conspiracy, are not themselves vaguely defined.[59] However, these elements possess the same degree of over-inclusivity as the first element because they stem from the conspiracy's agreement, and an unintentional agreement—proven circumstantially—can lead to circumstantial proof of knowledge and intent.[60] An individual who does not know he or she agrees to join a conspiracy is also not likely to know of the conspiratorial goal or that their actions constitute participation in or furtherance of such goal.[61] For instance, a prosecutor can use evidence that a defendant possessed knowledge that her significant other is a drug dealer and occasionally gave

52. Davis & Vitullo, *supra* note 20, at 781.

53. *Id.* (defining how conspiratorial agreements only require the two sub-elements for the agreement to be formed).

54. Kurth, *supra* note 51, at 1227.

55. *Id.*

56. *See id.* (positing Kemba Smith's agreement to enter the conspiracy was informal).

57. *See e.g.*, *id.* at 1226–27 (describing story of Kemba Smith).

58. Davis & Vitullo, *supra* note 20, at 781–82.

59. *See id.* at 780.

60. *Id.* at 783 (describing how a conspirator's agreement to join the conspiracy, their intent to participate, and their knowledge of the conspiratorial goal can all be proven circumstantially).

61. *See* Kurth, *supra* note 51, at 1227 (positing Kemba Smith was unaware that she technically participated in a drug conspiracy because she never sold drugs).

him car rides to prove the requisite knowledge and participation elements of conspiracy.[62]

Likewise, the conspiracy doctrine's vague definition also applies to the overt act that solidifies the conspiracy.[63] The overt act can literally be *anything* done in furtherance of the conspiratorial goal, illegal or otherwise; again, this allows for the law to have maximum flexibility when determining which overt acts qualify and under what circumstances.[64] For example, purchasing legally permissible equipment, such as flashlights, masks, and rope for a robbery, can be considered an overt act if it furthers the conspiratorial goal.[65] Additionally, not every conspiratorial member must commit an overt act to solidify the conspiracy.[66] In fact, just one overt act solidifies the entire conspiracy for every member.[67] Moreover, a co-conspirator can perform the overt act without any other member's knowledge, which counts towards the overt act of those who have no knowledge of the act.[68] The vague definition of the overt act element further complicates unintended conspiratorial agreements by solidifying the agreement through an overt act that is potentially unknown to the unintentional conspirator.[69]

B. Overinclusive Prosecution

Another common critique of conspiracy doctrine is its over-inclusivity.[70] In 1940, Judge Learned Hand stated, "[s]o many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain."[71]

Conspiracy doctrine's overinclusive application can have devastating consequences for relatively innocent individuals.[72] Consider the story of Kemba Smith, a nineteen-year-old college student who believed she was entering into a romantic relationship with a man but ended up with a sentence

62. *Id.* at 1226–27 (describing Kemba Smith was charged with conspiracy for agreeing to a romantic relationship with her drug dealer boyfriend).

63. *See* Davis & Vitullo, *supra* note 20, at 791 (defining the definition of the overt act element).

64. *Id.*

65. *See* CONG. RSCH. SERV., *supra* note 10, at 8 (positing the overt act does not have to be an illegal act).

66. *Id.*

67. *Id.*

68. *See* Davis & Vitullo, *supra* note 20, at 791.

69. *See id.* (describing how an overt act may be performed by just one conspirator but operates on behalf of every other member).

70. Marcus, *supra* note 4, at 375.

71. *Id.*; United States v. Falcone, 109 F.2d 579, 581 (1940).

72. *See* Kurth, *supra* note 51, at 1216–17.

of twenty-four-and-a-half years in federal prison because of a drug conspiracy conviction.[73] Smith met Peter Hall when she was a nineteen-year-old college student, and the two eventually fell in love and developed a serious relationship.[74] Smith later found out that Hall was a drug dealer, and the relationship soured, but she could not end her relationship with Hall due to the physical and emotional abuse Hall inflicted upon her.[75] Smith's situation worsened when she became pregnant with Hall's child.[76] During the relationship, Smith never sold drugs herself but occasionally provided Hall transportation and answered his phone calls.[77] In an attempt to escape Hall, Smith eventually agreed to assist the FBI in gathering evidence against him, but Hall's associates murdered him before she could aid in the investigation.[78] Despite Smith's willingness to assist law enforcement and her lack of participation in Hall's drug dealing enterprise, she was sentenced as a co-conspirator and sent to federal prison.[79]

Smith's story perfectly exemplifies how the conspiracy doctrine fails by creating overinclusive prosecution of relatively innocent people.[80] Smith's agreement to join Hall's drug conspiracy was very informal because Hall disguised it as a romantic relationship.[81] It is unlikely that Smith knew that by entering a relationship with Hall, she would simultaneously agree to enter a drug conspiracy.[82] Nor is it likely that Smith had any knowledge of the conspiracy's goal or planned to participate therein.[83] By her own account, she never sold drugs during their relationship.[84] If there was an overt act, it indeed occurred without her knowledge, even though it operated on her behalf by solidifying her place in the conspiracy.[85] In fact, the only thing that Smith seemed to know was that she fell in love with a man who turned out to be a drug dealer, whom she occasionally assisted with rides and phone calls, and who threatened to harm her if she tried to leave.[86] Despite Smith's terrible situation, she served six years in federal prison until President Clinton granted her clemency.[87]

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73. *Id.*
74. *Id.* at 1216.
75. *Id.* at 1216–17.
76. *Id.* at 1217.
77. *Id.*
78. Kurth, *supra* note 51, at 1217.
79. *Id.*
80. *See id.* at 1218.
81. *See id.* at 1216–17.
82. *Id.* at 1227.
83. *Id.*
84. Kurth, *supra* note 51, at 1217.
85. *See id.* at 1225.
86. *Id.* at 1216–17.
87. *Id.* at 1217.

The conspiracy doctrine's overinclusive application is even more problematic when considered alongside the *Pinkerton* doctrine.[88] Under *Pinkerton*, the state can charge an individual involved in a conspiracy with all the other offenses committed by his or her co-conspirators.[89] *Pinkerton* liability applies to all federal conspiracies.[90] *Pinkerton's* only constraints are that the acts that extend liability vicariously to the other co-conspirators must further the agreed-upon conspiratorial goal and that the acts are also foreseeable to the other members.[91] These constraints provide almost no barriers to the doctrine's overinclusive coverage.[92] Evidence of this overinclusive prosecution is apparent even in the case from which the doctrine derives its name.[93]

In *Pinkerton v. United States*, the prosecution charged two brothers with tax evasion and several other substantive offenses.[94] However, during the trial, the defense proved that only one of the brothers had committed all of the substantive offenses by himself and that he had done so entirely without any aid from the other brother.[95] In fact, the brother who did not commit any of the substantive offenses had been incarcerated during this time.[96] However, despite this evidence, the court held that both brothers were guilty of all of the substantive offenses because of their involvement in a mutual conspiracy, reasoning that the brother who had committed the substantive offenses had acted foreseeably in the furtherance of the conspiracy.[97] This kind of attenuated vicarious liability is extremely dangerous when merged with the already vague and overinclusive application of conspiracy doctrine.[98]

For people like Smith, *Pinkerton* can significantly exacerbate the degree of liability that an unintentional conspirator faces for the conspiratorial acts of other members.[99] Under *Pinkerton*, Smith would have been liable for every criminal act Hall committed so long as those acts were foreseeably within the

88. *Id.* at 1225.

89. Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 J. CRIM. L. & CRIMINOLOGY 147, 147 (2007); Pinkerton v. United States, 328 U.S. 640, 647 (1946).

90. *See* Ohlin, *supra* note 89, at 148.

91. Manning, *supra* note 29, at 90.

92. *See generally id.* at 114 (reporting on the story of William Curtis who was convicted on two counts of murder). The murders were committed by one of Curtis's co-conspirators, but because of *Pinkerton* liability Curtis was charged and convicted the same as the perpetrator. *Id.* The elements of foreseeability and furthering the conspiratorial goal did nothing to shield Curtis from incurring liability for the murders. *Id.*

93. *Id.* at 91–92.

94. *Id.* at 91.

95. *Id.* at 92–93.

96. *Id.* at 92.

97. Manning, *supra* note 29, at 93–94.

98. Kurth, *supra* note 51, at 1226–27.

99. *Id.* at 1225.

scope of the conspiratorial goal.[100] For instance, if one of Hall's customers owed him money because of a delinquent debt and Hall used physical force to collect the money owed, then Smith would have been liable for the assault and battery of Hall's customer.[101] Even more extreme, if Hall had murdered the customer to send a message to all his other clientele about the consequences of not paying their debts, then a court could have found Smith guilty of the murder Hall committed. Both scenarios would have created vicarious liability for Smith because both scenarios are within the foreseeable scope of the conspiracy.[102]

C. The Current Standard for Withdrawal Does Not Mitigate the Conspiracy Doctrine's Problems

The current standard of withdrawal from a conspiracy only adds to doctrine's inherent problems.[103] Unlike the broad liability of conspiracy doctrine, the standard for withdrawal from a conspiracy is narrow and rigid.[104] As previously discussed, conspiratorial withdrawal as a defense requires an act disavowing the conspiracy that is either communicated to the police or the individual's co-conspirators.[105] However, this standard leaves massive gaps for individuals to fall through if their implication into the conspiracy is unintentional.[106] In an unintentional conspiracy, where an individual has no knowledge of any agreement or overt act, people like Smith are unaware that they need to formally withdraw from the conspiracy under a narrowly-defined standard.[107] How can someone quit a conspiracy when they do not know the events that created, solidified, or completed it?[108] For informal conspiratorial agreements like that of Smith, the current withdrawal standard is completely ineffective.[109]

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100. *Id.* (explaining the hypothetical application of *Pinkerton* liability to the facts in Smith).

101. *See id.* at 1227 (elaborating on variations of the Smith fact pattern to highlight the varying culpability of *Pinkerton*'s foreseeability element)

102. *See* Manning, *supra* note 29, at 89–90.

103. *See* CONG. RSCH. SERV., *supra* note 10, at 10–11.

104. United States v. Julian, 427 F.3d 471, 483 (7th Cir. 2005) (indicating that "it is not . . . easy to withdraw from a conspiracy" and that there are only two options).

105. *Id.*

106. Kurth, *supra* note 51, at 1217–18.

107. *Id.* at 1227.

108. *See id.* (arguing Kemba Smith had no knowledge of what her boyfriend was doing).

109. *See generally id.*

IV. THE WITHDRAWAL STANDARD IS DANGEROUS FOR CONSPIRATORIAL DEFECTOR

The current withdrawal standard requiring either notification of withdrawal to the remaining members of the conspiracy or a full confession to law enforcement is dangerous for defectors under either option.[110] An individual that commits an affirmative act disavowing the conspiracy in such a way as to notify the remaining members is in danger of the consequences of defecting from the conspiracy[111] as the remaining members of the conspiracy become worried that the defector may expose the conspiracy and implicate the remaining members to the authorities.[112]

The Seventh Circuit posited this scenario in *Paladino v. United States* as the justification for why the law requires a defector to notify his or her co-conspirators of their withdrawal.[113] The court stated: "By communicating his withdrawal to the other members of the conspiracy, a conspirator might so weaken the conspiracy, or so frighten his conspirators with the prospect that he might go to the authorities in an effort to reduce his own liability, as to undermine the conspiracy."[114] However, a defector who complies with this prong of the withdrawal standard is in grave danger of being murdered for the fear they instill in the remaining members.[115] There have been many instances where the remaining co-conspirators have harmed or even killed a defecting member for attempting to withdraw.[116] In fact, some criminal organizations, like the Aryan Brotherhood, have a firm policy of murdering any member that attempts to leave.[117]

The second prong of withdrawal requiring an individual to make a clean breast to law enforcement is even more dangerous than the first.[118] Under the first prong, the danger is that a withdrawing member may expose the

110. *See* United States v. Julian, 427 F.3d 471, 483 (7th Cir. 2005) (discussing the two options of withdrawal).

111. *See* Harper, *supra* note 34, at 765 (noting that some criminal organizations kill members that attempt to quit).

112. United States v. Paladino, 401 F.3d 471, 479–80 (7th Cir. 2005).

113. *Id.* at 479.

114. *Id.* at 479–80.

115. Stephanie Ingersoll, *DA: Woman Beaten, Burned Alive Because Friends Were Afraid She'd 'Snitch'*, LEAF-CHRON. (Sept. 17, 2018, 8:55 PM), https://www.theleafchronicle.com/story/news/local/clarksville/2018/09/17/amy-murphy-murder-trial-clarksville/1335248002/ (reporting young woman beaten and burned to death by co-conspirators because of the fear that she might inform law enforcement).

116. Harper, *supra* note 34, at 766 (positing that withdrawing from a criminal organization can be a death sentence for the defector).

117. *Id.* at 765.

118. David C. Pyrooz et al., *Look Who's Talking: The Snitching Paradox in a Representative Sample of Prisoners*, 61 BRIT. J. CRIMINOLOGY 1145, 1147 (2021) ("Those who snitch may be subject to serious consequences, such as intimidation or violence . . . .").

conspiracy to law enforcement and implicate the remaining members' involvement in the conspiracy, but under the clean breast standard, that factor becomes a certainty, as does the inherent danger.[119] The second prong of conspiratorial withdrawal forces the defecting member to become a criminal informant known colloquially as a "snitch."[120] The price for being a snitch can be a death sentence, as it already has been for many former informants.[121]

A. Dangers of Requiring a Defector to Notify Co-Conspirators

There are numerous instances of conspirators murdering defectors to prevent exposure of the criminal enterprise.[122] In 2013, federal agents apprehended Ross Ulbricht while attempting to hire an undercover law enforcement officer to murder one of his co-conspirators.[123] In 2015, police discovered Amy LeeAnn Murphy savagely beaten and burned alive because her associates feared she would expose them to the police.[124] In 2019, Anthony Gumina murdered his wife to keep her from testifying against him for crimes she had witnessed him commit.[125]

By requiring criminals to notify their co-conspirators of their intention to withdraw, the law asks these individuals to potentially write their own death sentence.[126] Despite the apparent dangers of requiring defecting members to notify their co-conspirators of their intent to withdraw, courts have repeatedly declined to allow defecting members the advantage of a

119. Jacob Gershman, *Why Life for 'Snitches' Has Never Been More Dangerous*, WALL ST. J. (June 20, 2017, 8:00 AM), https://www.wsj.com/articles/criminals-subvert-online-court-records-to-expose-snitches-1497960000, ("Across the country, close to 700 witnesses and informants . . . have been threatened, wounded or killed over a recent three-year period, including 61 murdered . . . .").

120. United States v. Bergman, 852 F.3d 1046, 1061–62 (11th Cir. 2017) (defining the clean breast standard of withdrawal).

121. Gershman, *supra* note 119.

122. *See, e.g.*, Van Smith, *Case of Drug-Dealing Stripper Murdered for Snitching Headed for Trial*, BALT. SUN (Oct. 3, 2012, 3:00 AM), https://www.baltimoresun.com/citypaper/bcp-cms-1-1382038-migrated-story-cp-20121003-mobs1-20121003-story.html (reporting woman being murdered for informing on her co-conspirators).

123. Adrianne Jeffries, *Feds Say Accused Silk Road Kingpin Ordered Six Murders to Protect His Internet Drug Empire*, VERGE (Nov. 21, 2013, 2:07 PM), https://www.theverge.com/2013/11/21/5130638/feds-say-accused-silk-road-kingpin-ordered-six-hits-ross-ulbricht.

124. Ingersoll, *supra* note 115.

125. Ryan Fahey, *Revealed: Husband of Missing California Mom-of-Three Heather Gumina Is Accused of Killing Her Because She Was 'Witness to a Crime and He Wanted to Prevent Her from Testifying in Court'*, DAILY MAIL (Sept. 11, 2019, 6:57 PM), https://www.dailymail.co.uk/news/article-7453231/Man-accused-killing-wife-stop-testifying-crime.html..

126. Harper, *supra* note 34, at 766.

clandestine escape.[127] In *United States v. Perez-Cubertier*, the court refused to find that the defendant had withdrawn as a matter of law even though the defendant abandoned his co-conspirators one year before the indictment by fleeing to another part of the country.[128] Perez attempted to withdraw for his own safety after the murder of his brother, who was also a co-conspirator.[129] However, the court concluded that Perez had ineffectively withdrawn because he left the conspiracy without informing his co-conspirators of his intent to do so.[130] In fact, the court clearly expressed that when a defendant flees from a conspiracy for his or her safety, the defendant has not disavowed or attempted to defeat the conspiracy.[131]

Conspiracy law leaves people like Perez with no other option but to become criminal informants to avoid criminal liability.[132] Perez's actions imply that his lack of notification to his co-conspirators about his withdrawal was for his protection, especially considering the recent murder of his brother.[133] Given the volatile nature of Perez's situation, he surely knew that going to the police was a dangerous proposition.[134] However, irrespective of defecting members' risks, the courts have continuously forced individuals like Perez to choose between physical and legal safety.[135]

This issue becomes even more problematic if the criminal conspiracy involves gangs or members of other criminal organizations.[136] Gangs and gang culture are almost always synonymous with guns, drugs, and violence.[137] There are an estimated 1,000,000 gang members in the United States.[138] Many of these individuals are minorities from impoverished communities, with an

127. *See e.g.*, United States v. Perez-Cubertier, 958 F.3d 81, 87 (1st Cir. 2020) (holding that defendant was denied the defense of withdrawal because he merely walked away from the conspiracy).

128. *Id.*

129. *Id.* at 86.

130. *Id.* at 87.

131. *Id.*

132. *Id.* (acknowledging that defendant could not notify his co-conspirators of his withdrawal because of the danger he would put himself in and fleeing the conspiracy was not an effective withdrawal).

133. *Perez-Cubertier*, 958 F.3d at 87.

134. *Id.* at 86 (acknowledging that after the defendant's coconspirator brother was murdered, he fled for his own safety rather than confess the conspiracy to law enforcement).

135. *See e.g.*, *id.* at 87 (implying Perez had to choose between complying with the withdrawal standard and risking his safety or fleeing the conspiracy to avoid danger).

136. *See* Harper, *supra* note 34, at 797 (describing that withdrawing gang members are known to suffer violent repercussions for attempting to quit the gang).

137. *See MS-13 Gang: The Story Behind One of the World's Most Brutal Street Gangs*, BBC NEWS (Apr. 19, 2017), https://www.bbc.com/news/world-us-canada-39645640 (MS-13 is known to be a violent international drug gang).

138. *Attorney General's Report to Congress on the Growth of Violent Street Gangs in Suburban Areas*, DEP'T OF JUST. (2008), https://www.justice.gov/archive/ndic/pubs27/27612/estimate.htm.

estimated thirty-five percent of all gang members being African American and forty-six percent being Hispanic.[139] Criminal organizations like street gangs and the mafia are well-known to inflict an automatic rule of death against defecting members.[140] MS-13 is an international gang that operates in forty-six states with approximately 10,000 members and is well known for brutal violence, including attacks with machetes.[141] Many of the cells within this criminal organization have an invariable code of death for exiting members.[142] A seventeen-year-old gang member from Chicago stated that his gang members have a policy of beating defectors with a baseball bat and cutting any gang-related tattoos from their bodies.[143] It is unreasonable to expect any individual to expose themselves as a defector when the cost of doing so could lead to violent and devastating consequences.[144]

B. Dangers of Requiring a Defector to "Snitch" on the Remaining Members of the Conspiracy

The second prong of conspiratorial withdrawal is just as dangerous as the first.[145] Both prongs exist solely to expose the criminal conspiracy to authorities.[146] However, where the first option leaves only the dangerous proposition of potential exposure of the conspiracy, the second option makes it a legally required certainty.[147] An individual attempting to withdraw through a clean breast to law enforcement must divulge every piece of knowledge they possess regarding the conspiracy.[148] If the withdrawing individual leaves out even one detail of the conspiracy or their involvement therein, the withdrawal is deemed ineffective and the individual is reimplanted into the conspiracy as a fully culpable member.[149]

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139. *National Youth Gang Survey Analysis: Demographics*, NAT'L GANG CTR., https://nationalgangcenter.ojp.gov/survey-analysis/demographics (last visited Mar. 16, 2023).

140. Harper, *supra* note 34, at 766.

141. BBC NEWS, *supra* note 137.

142. *Id.*

143. Jerry Thomas & Steve Johnson, *Getting Out of Gang Tougher Than Saying, 'I Quit'*, CHICAGO TRIB. (Sept. 12, 1991, 12:00 AM), https://www.chicagotribune.com/news/ct-xpm-1991-09-12-9103090026-story.html.

144. *Id.*

145. *See* Gershman, *supra* note 119 (reporting that criminal informants are in serious danger of being killed for their cooperation with law enforcement).

146. *See* United States v. Paladino, 401 F.3d 471, 479 (7th Cir. 2005).

147. *See* United States v. Grimmett, 236 F.3d 452, 455 (8th Cir. 2001) (defining the clean breast prong of withdrawal).

148. United States v. Wilson, 134 F.3d 855, 863 (7th Cir. 1997).

149. *Id.* (holding that to make an effective withdrawal under the clean breast prong the defector must make a full confession to law enforcement in good faith).

In *United States v. Harris*, the defendant was a member of the Crips, a famous street gang.[150] In 2007, after a search of his house, Harris cooperated with police and ultimately divulged his involvement in the gang.[151] However, the court ruled that merely confessing to his participation in the conspiracy was insufficient to constitute a withdrawal because Harris did not provide the police with enough information to stop the conspiracy.[152] In *United States v. Lash*, the court held that a withdrawing member who makes a limited disclosure must also make future disclosures to the police to effectuate a withdrawal.[153]

The witness protection program proves the government's knowledge about the dangers of becoming a criminal informant.[154] The witness protection program would not be necessary if informing on a criminal enterprise was not dangerous for the informant.[155] In the latter half of the twentieth century, it was popular news to see high-profile mafia trials like those of Jimmy Burke and Paul Vario and the witnesses that testified from within their own ranks.[156] However, the government had to put the witnesses into a nationwide protection program to secure that witness testimony.[157] The necessity behind this program is brutally simple: it exists to keep the witness alive![158] Without the witness protection program, these members of the American mafia that testified would have been subject to serious harm or even death.[159] However, despite the obvious risks that these criminal defectors face, the federal government does not offer witness protection to even a small fraction of

150. United States v. Harris, 695 F.3d 1125, 1138 (10th Cir. 2012).

151. *Id.*

152. *Id.*

153. United States v. Lash, 937 F.2d 1077, 1084 (6th Cir. 1991).

154. Kevin Bonsor, *How Witness Protection Works*, HOW STUFF WORKS (Mar. 30, 2021), https://people.howstuffworks.com/witness-protection.htm (describing how the witness protection program is designed to protect witnesses that will be in danger for cooperating with law enforcement).

155. *See* Joshua Rhett Miller, *Philadelphia Man Fatally Shot for Being a 'Snitch,' Grief-Stricken Mother Says*, N.Y. POST (Nov. 25, 2020, 11:10 AM), https://nypost.com/2020/11/25/philadelphia-man-fatally-shot-for-being-a-snitch-mother-says/ (reporting man being murdered for his presumed connection as an informant).

156. Adam Solomons, *The Mob's Most Infamous 'Rat': Super Snitch Broke Every Gangster Code and Hid for Years*, DAILY STAR (June 12, 2021, 10:54 AM), https://www.dailystar.co.uk/news/world-news/mobs-most-infamous-rat-super-24279062.

157. Margalit Fox, *Henry Hill, Mobster and Movie Inspiration, Dies at 69*, N.Y. TIMES (June 13, 2012), https://www.nytimes.com/2012/06/14/nyregion/henry-hill-mobster-of-goodfellas-dies-at-69.html.

158. *Id.* (reporting that the witness protection program is necessary to keep testifying witnesses alive).

159. Wyatt Redd, *How Sammy 'The Bull' Gravano Went From Mafia Killer to FBI Informant*, ATI (Mar. 9, 2022), https://allthatsinteresting.com/sammy-gravano (reporting that without the aid of the witness protection program Sammy "The Bull" Gravano would have been at risk of being murdered for testifying against the mafia).

conspiratorial offenders.[160] A 2017 Department of Justice report categorized conspiracy with a handful of other public order offenses and reported that within that single year there were 7,523 offenders.[161] Since the program's inception in 1970, around 7,500 witnesses entered into federal witness protection.[162] Contrasting the sheer volume of conspiratorial offenders annually with the total number of witnesses enrolled in the program, it is clear that only the tip of the conspiratorial iceberg is receiving government protection for becoming a criminal informant.[163] Thus, while our government openly recognizes the dangers of breaking away from a criminal enterprise, it expects most individuals to sever their criminal ties on their own, leaving them vulnerable to murder for their compliance.[164]

"Snitching" is a colloquial term describing individuals who cooperate with law enforcement.[165] Becoming known as a snitch is a classification often earmarked for violent retribution.[166] As previously illustrated, gangs and other organized crime are extremely dangerous to withdrawing members.[167] Yet, the danger associated with these types of groups increases considerably for those perceived as snitches.[168] However, under the second prong of withdrawal, the law exacerbates the danger by requiring the one thing that makes any withdrawal a possible death sentence—snitching to the police.[169] Snitches face deadly consequences for informing on their fellow criminals.[170] For example, in 2006, eighteen-year-old Chris Poole was shot and killed in his apartment after a friend discovered he had been cooperating with law enforcement.[171] In another instance in 2017, Daniel Deltoro was shot and killed in front of his three-year-old son because of his testimony against a former gang

160. Bonsor, *supra* note 154.

161. MARK MOTIVANS, FEDERAL JUSTICE STATISTICS, 2017-2018 2 (2021), https://bjs.ojp.gov/content/pub/pdf/fjs1718.pdf.

162. Bonsor, *supra* note 154.

163. *See* MOTIVANS, *supra* note 161 (reporting there have only been 7,500 witnesses protected by the program since 1970 and there were 7,523 convictions for the sub-group that conspiracy charges are a part of).

164. Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 689 (2004) ("The use of violence against snitches is neither new nor surprising. Criminal gangs and organizations routinely use violence to prevent snitching and punish informants.").

165. Pyrooz et al., *supra* note 118, at 1145.

166. Bret D. Asbury, *Anti-Snitching Norms and Community Loyalty*, 89 OR. L. REV. 1257, 1264–65 (2011).

167. Natapoff, *supra* note 164, at 689.

168. *Id.*

169. CONG. RSCH. SERV., *supra* note 10, at 10–11.

170. *See e.g.*, Miller, *supra* note 155 (reporting man being murdered for his presumed connection as an informant).

171. Albert Samaha, *"I Killed Him Because He Was Snitching"*, BUZZ FEED NEWS (Sept. 30, 2015, 6:59 PM), https://www.buzzfeednews.com/article/albertsamaha/was-a-mississippi-man-murdered-because-of-a-criminal-informa.

member in a murder trial.[172] At the trial of Deltoro's murderer, the prosecutor told the jury that the cost of snitching is violence or death in gang culture.[173]

Exposed informants are in danger from other criminals who may inflict vengeance upon them for their cooperation with law enforcement, and this threat of danger is often prevalent for an informant in prison.[174] This is a difficult paradox for a defector who withdraws by making a full confession to law enforcement.[175] Although the withdrawal will prevent the defector from incurring future liability, it will generally not keep the defector-turned-informant from serving time in prison.[176] Under the theory of conspiratorial withdrawal, individuals can only remove themselves from incurring future criminal liability but cannot exculpate themselves from already-committed crimes or the act of conspiracy.[177] The crime of conspiracy does not merge with the substantive offense upon indictment and remains its own separate offense.[178] Thus, every conspirator using the clean breast standard is still liable for at least the conspiracy and any criminal activity that occurred therein.[179] This creates a significant problem for defecting members who become informants because inmates marked as snitches can often be harmed or even murdered in prison.[180]

Consider the famous case of James "Whitey" Bulger, a long-time police informant who fled police pursuit for charges of murder in the early 1990s and managed to evade police for sixteen years before being apprehended in 2011.[181] After being incarcerated, his legacy as a police informant caught up with him, even after almost two decades had passed.[182] An inmate murdered Bulger in prison for being a snitch.[183] The assailant cut out Bulger's eyes and

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172. *Former Gang Member Was Murdered for Snitching: Oakland Prosecutor*, BAY CITY NEWS (Apr. 23, 2019), https://www.nbcbayarea.com/news/local/prosecutor-says-former-gang-member-was-murdered-for-snitching/158116/.

173. *Id.*

174. *See generally* Pyrooz et al., *supra* note 118..

175. CONG. RSCH. SERV., *supra* note 10, at 10–11 (describing that a conspiratorial defector that withdraws by making a full confession to law enforcement may still be charged with the agreement to enter a conspiracy and all prior criminal acts).

176. Day, *supra* note 43, at 422–23 (positing that conspiracy charges do not merge with their substantive offenses and cannot be vitiated by a subsequent withdrawal).

177. *Id.* at 422–32.

178. Neal Kumar Katyal, *Conspiracy Theory*, 112 Yale L.J. 1307, 1309 (2003).

179. Day, *supra* note 43, at 422–32.

180. *See e.g.*, Rich Schapiro, *Plot thickens in Whitey Bulger Murder Case with Transfer of 2 Prisoners*, NBC NEWS (Aug. 1, 2021, 5:00 AM), https://www.nbcnews.com/news/crime-courts/plot-thickens-whitey-bulger-murder-case-transfer-2-prisoners-n1275543 (reporting James Bulger was a well-known informant that was murdered shortly after being incarcerated because of his reputation as an informant for law enforcement).

181. *Id.*

182. *Id.*

183. *Id.*

tongue and beat Bulger so severely that he was unrecognizable.[184] Even though sixteen years had passed since Bulger had been actively aiding law enforcement, his reputation as a snitch still caused his death.[185] The danger that the current withdrawal standard places upon defecting members and would-be informants is plainly unconscionable.[186] If withdrawing members cannot communicate their withdrawal to co-conspirators for fear of being killed,[187] and if their only other option is to become a snitch and face potential death in the streets or prison,[188] then what choice remains for defecting members to comply with the law while also maintaining their safety? Even worse, the current withdrawal standard disproportionately places this nightmare choice in the hands of society's most underprivileged citizens.[189]

C. The Withdrawal Standard Disproportionality Affects Low-Income and Minority Communities

The clean breast standard of conspiratorial withdrawal has pernicious effects on low-income and minority communities.[190] Evidence exists linking the mass incarceration of poor people and minorities to the weaponized use of conspiracy doctrine.[191] From 1980 to 1990, a time plagued by the racially-based mass incarceration of African Americans, conspiracy prosecutions

184. Patrick Knox, *Total Mutilation Whitey Bulger's face was completely 'unrecognisable' after prison killers gouged out the gangster's eyes and tried to hack off his tongue*, THE SUN (Nov. 1, 2018, 12:46 PM), https://www.thesun.co.uk/news/7634962/whitey-bulger-death-face-prison-murder-eyes-gouged-out/.

185. Lee Brown, *Inmates Knew James 'Whitey' Bulger Was Coming to Prison Where He Was Murdered Just 6 Minutes After Cell Unlocked*, N.Y. POST (Aug. 24, 2022, 4:30 PM), https://nypost.com/2022/08/24/whitey-bulgers-prison-killers-knew-he-was-coming/ (reporting that inmates at the prison knew of Bulger's arrival and intended to kill him even before he was transferred).

186. Natapoff, *supra* note 164, at 689 (claiming that informants are known to suffer violent repercussions for aiding law enforcement).

187. *See generally* Samaha, *supra* note 171.

188. *See* Schapiro, *supra* note 180 (reporting well-known criminal informant that was murdered in prison because of his reputation for aiding law enforcement).

189. Kurth, *supra* note 51, at 1221.

190. *See* Alexandra Natapoff, *Secret Justice: Criminal Informants and America's Underground Legal System*, PRISON LEGAL NEWS, (June 15, 2010), https://www.prisonlegalnews.org/news/2010/jun/15/secret-justice-criminal-informants-and-americas-underground-legal-system/.

> No single tactic of law enforcement has contributed more to violence in the inner city than the practice of seeding the streets with informers and offering deals to 'snitches.' . . . [R]elying on informers threatens and eventually cripples much more than criminal enterprise. It erodes whatever social bonds exist in families, in the community, or on the streets—loyalties which, in past years, kept violence within bounds.

Id. (quoting JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1997)).

191. Kurth, *supra* note 51, at 1221.

accounted for somewhere between thirty-five percent and sixty-seven percent of federal criminal convictions.[192] Conspiracy is one of the most frequently prosecuted federal offenses.[193] Because of conspiracy doctrine and *Pinkerton* liability, prosecutors can threaten conviction for the defendant's substantive criminal acts and all the foreseeable crimes of his or her co-conspirators.[194] This severe level of potential liability creates an immense amount of leverage for prosecutors to secure both plea agreements as well as more potential informants.[195] In 1977, a study found that prosecutors use conspiracy law violations sixty-three percent of the time to gain evidentiary leverage against defendants; the study also found that prosecutors used conspiracy charges forty-five percent of the time as leverage in plea negotiations.[196]

Furthermore, because the clean breast approach requires a defendant to implicate every known conspirator, prosecutors can exponentially increase not only the number of informants at their disposal but also the number of potential convictions they might obtain.[197] Federal drug conspiracy convictions have especially devastated low-income and minority communities.[198] In some jurisdictions, courts have convicted African American men of drug charges twenty to fifty times greater than their white counterparts.[199] "In many larger cities, approximately 80 percent of young African American men now have criminal records."[200] In fact, seventy-five percent of America's prison population is African American or Latino.[201] Considering that a study done in 2003 showed that conspiracy charges were filed in twenty-five percent of all federal prosecutions for that year alone, it is hard to understate how devastating conspiracy doctrine and the act of snitching are on minority communities.[202]

Snitching negatively impacts low-income communities because the informant is often required to snitch on fellow members of his or her community.[203] Snitching as an institutional practice ruins community and family relationships and, as previously explained, can lead to violent reprisals directed at the informant or the informant's friends and family.[204] Despite the pernicious effects of the criminal informant system and conspiracy doctrine,

192. Morrison, *supra* note 5, at 372.
193. Davis & Vitullo, *supra* note 20, at 778.
194. Katyal, *supra* note 178, at 1338.
195. *Id.*
196. Morrison, *supra* note 5, at 372.
197. Katyal, *supra* note 178, at 1328–29.
198. Kurth, *supra* note 51, at 1221–22.
199. *Id.*
200. *Id.*
201. Natapoff, *supra* note 190.
202. Morrison, *supra* note 5, at 372.
203. Natapoff, *supra* note 190.
204. *Id.*

prosecutors nationwide use conspiracy laws to execute dragnet prosecutions.[205] Some economically depressed communities have gone as far as to unite and advocate for community solidarity over police cooperation.[206] The movement even has a name—"stop snitching" —that represents a call to cease this type of community exploitation by police and other government agencies.[207] However, the government seems unlikely to cease its procurement of criminal informants because the use of informants accounts for a plethora of contemporary criminal convictions, some of which would not occur without the aid of informants.[208] When the Tenth Circuit contemplated banning the use of criminal informants, the Department of Justice protested the proposal because informants play an integral part in modern prosecutions.[209]

V. THE POLICIES THAT JUSTIFY CONSPIRACY DOCTRINE AND THE CURRENT WITHDRAWAL STANDARD ONLY WORSEN THE LAWS' APPLICATION

Conspiracy doctrine derives its support from the strength in numbers theory.[210] This theory posits that conspiracies are inherently more dangerous than individual crimes because the cooperation of multiple criminal members creates a "division of labor," "efficient organization," and a reduced chance of withdrawal.[211] Courts use the strength in numbers theory to justify the harsh application of conspiracy doctrine and *Pinkerton* liability.[212]

The policy rationale behind the withdrawal defense is to negate the strength in numbers theory by allowing conspiratorial members to defect.[213] The time bomb theory of liability governs the withdrawal defense.[214] Time bomb theory and the current withdrawal standard originated from the *Borelli* holding, and time bomb theory is the policy justification for the current withdrawal standard's design.[215] Under the time bomb theory, an individual that

205. *See* Alice Speri, *In New York Gang Sweeps, Prosecutors Use Conspiracy Laws to Score Easy Convictions*, INTERCEPT (July 12, 2016, 12:25 PM), https://theintercept.com/2016/07/12/in-new-york-gang-sweeps-prosecutors-use-conspiracy-laws-to-score-easy-convictions/ (reporting how large sweeping conspiracy convictions in New York serve as an example of how prosecutors use conspiracy charges).

206. *'Stop Snitching' Movement Confounding Criminal Justice*, NPR (May 8, 2008, 9:00 AM), https://www.npr.org/templates/story/story.php?storyId=90280108.

207. *Id.*

208. *See* Katyal, *supra* note 178, at 1328–29.

209. *Id.*

210. Harper, *supra* note 34, at 785.

211. Linda Cantoni, *Withdrawal from Conspiracy: A Constitutional Allocation of Evidentiary Burdens*, 51 FORDHAM L. REV. 438, 438–39 (1982).

212. Harper, *supra* note 34, at 783–85.

213. Cantoni, *supra* note 211, at 438.

214. United States v. Paladino, 401 F.3d 471, 479–80 (7th Cir. 2005).

215. *See* Grace, *supra* note 36, at 456.

initiates a criminal mechanism cannot benefit from a withdrawal defense by simply walking away from the criminal mechanism he or she helped create.[216] The only way to defeat the constraints of the time bomb theory is to effectively withdraw under one of the two prongs of the current withdrawal standard.[217]

Because of this rigid approach, the mere cessation of criminal activity is not considered an affirmative act of withdrawal.[218] Only by coupling mere cessation with a full confession to law enforcement can the defector qualify for withdrawal from the conspiracy under the clean breast standard. [219] Moreover, under the first prong, the mere cessation of criminal activity qualifies as a withdrawal only when the defector reasonably communicates their intent to withdraw to the other co-conspirators.[220] However, as discussed previously, both options have significant drawbacks to potential defectors.[221] Thus, mere cessation that does not satisfy either of the two prongs is always automatically considered an ineffective withdrawal.[222]

This creates a strange contradiction because the mere cessation of criminal activity negates the strength in numbers theory as much as an effective withdrawal.[223] When a defecting member withdraws through mere cessation, they reduce the division of labor, decrease the organization's efficiency, and encourage more defection.[224] Also, there are many instances when mere cessation alone would completely negate the defecting member's entire contribution to the conspiracy. For example, if the getaway driver never shows up on the day of the robbery, he or she is no longer helping the conspiracy. Assuming that the driver has not committed any other crimes and their only contribution was to provide transportation, then not showing up on the day of the robbery and simply walking away from the conspiracy would completely negate the driver's role in the entire scheme. Yet, even when every consideration of the strength in numbers theory is satisfied, and the cessation would completely negate the defecting member's entire participation, mere cessation is still not considered an effective withdrawal.[225]

The current standard requires affirmative acts to defeat or disavow the conspiracy.[226] Both of these types of affirmative acts fall separately within the

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216. *Paladino*, 401 F.3d at 479.
217. United States v. Wilson, 134 F.3d 855, 863 (7th Cir. 1998).
218. *Id.*
219. *Id.*
220. *Id.*
221. *See supra* Section IV.A–B.
222. United States v. Julian, 427 F.3d 471, 483 (7th Cir. 2005).
223. *See* Harper, *supra* note 34, at 785 (defining the strength in numbers theory).
224. *See id.*
225. United States v. Paladino, 401 F.3d 471, 479–80 (7th Cir. 2005).
226. *Id.*

two prongs of the standard.[227] The first prong requires the defecting member to disavow the conspiracy to the other members to diminish the conspiracy's support.[228] The clean breast prong requires the defecting member to defeat the conspiracy by aiding law enforcement.[229] The public policy purpose of both prongs is to potentially eliminate the conspiracy.[230] This is also why mere cessation does not qualify as an act of withdrawal because the defecting member only intends to remove themselves from the conspiracy and does not attempt to defeat or publicly disavow it.[231]

The current withdrawal standard is flawed in denying a defense based on mere cessation of criminal activity.[232] The current standard disregards the conspiracy's functional inner workings and, instead, focuses merely on its perpetual existence.[233] By focusing on the conspiracy's perpetual existence instead of the remaining members' actions that are sustaining the conspiracy, the current doctrine wrongly focuses liability for the conspiracy on the least culpable member—the person trying to get out of the conspiracy.[234] The law imposes a ruthless ultimatum on defecting members: either bear the risks of complying with the current withdrawal standard and its inherent dangers or assume the liability of the conspiracy's continued existence by walking away.[235]

There is no safe choice under the standard for individuals in dangerous situations, and the safest choice does nothing to negate the defector's liability.[236] This results in the current standard discouraging withdrawal and instead encouraging the continuation of the status quo.[237] If telling the police on one's co-conspirators will get the withdrawing member killed,[238] and if running away will not stop prosecutors from charging that member with every other member's crime,[239] then why attempt to do anything other than continue the

227. United States v. Wilson, 134 F.3d 855, 863 (7th Cir. 1998).

228. *Paladino*, 401 F.3d at 479–80.

229. United States v. Bergman, 852 F.3d 1046, 1061–62 (11th Cir. 2017).

230. *Paladino*, 401 F.3d at 479–80.

231. *Id.*

232. *See id.* (holding mere cessation is not considered an effective withdrawal).

233. *See id.* (holding that mere cessation of criminal activity is denied as a withdrawal because the conspiracy continues to operate after the defector walks away).

234. *See id.* (holding that a defector that attempts to withdraw through the mere cessation of criminal activity is no longer aiding the conspiracy, but he or she is still equally liable as every other member for the conspiracy's criminal activity).

235. *See id.* (positing defectors must choose one of the two options of the current withdrawal standard to effectively withdraw from the conspiracy; mere cessation of criminal activity does not vitiate the liability of the conspiracy for the defecting member).

236. *See Paladino*, 401 F.3d at 479–80 (implying mere cessation is the safest option but does not negate the defector's liability for the actions of the remaining conspiratorial members).

237. Harper, *supra* note 34, at 765.

238. *Id.* at 766.

239. United States v. Perez-Cubertier, 958 F.3d 81, 87 (1st Cir. 2020).

conspiracy?[240] The current standard does not reward people for immediately quitting all criminal behavior and abandoning any planned future acts of crime.[241] A better approach would be to hold each conspirator exclusively responsible for them self and reward them for choosing the quickest possible route to cease committing crimes.

VI. THE COURTS SHOULD ADOPT A NEW STANDARD OF WITHDRAWAL

This Note proposes a new standard. The proposed standard will correct the conspiracy doctrine's inherent flaws that lead to vague and unintentional conspiratorial formations. The proposed standard reduces the danger that a withdrawing member of a conspiracy might face for defecting, mitigate the exacerbating effects that *Pinkerton* liability has on conspiracy prosecutions, and diminish the dangerous and pernicious effects of snitching on withdrawing members and low-income and minority communities.

A. The Three Elements of The Proposed Standard

Implementing a new standard of withdrawal mitigates the concerns raised in this Note.[242] The law should state that an individual may withdraw from a criminal conspiracy by committing any act that frustrates the furtherance of the conspiratorial goal and disposes of the individual's position within the conspiracy such that the position is abandoned by the remaining conspiratorial members or is reinstated by the independent actions of the remaining members.

This standard has three distinct elements. First, the defecting member must perform an act that frustrates the conspiratorial goal. Second, the act that frustrates the conspiratorial goal must dispose of the defecting member's position within the conspiracy. Finally, after the defecting member has committed his or her act, one of two things must occur: the remaining members of the conspiracy must either abandon the role from which the defecting member just withdrew or replace the defecting member with another actor. If the defector's actions satisfy these three elements, courts should hold that the defecting member has effectively withdrawn from the conspiracy.

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240. Harper, *supra* note 34, at 765.

241. *See Paladino*, 401 F.3d at 479–80 (holding mere cessation of criminal activity does not qualify as a withdrawal).

242. *See supra* Sections I and II.

1. The Defector Must Act to Frustrate the Conspiratorial Goal

The first element, the frustrating act, operates similarly to the current standard but not precisely the same.[243] Under the current standard, the act must be affirmative, meaning that it must be something other than not acting.[244] One cannot act in a way to defeat or disavow the conspiracy through passive action or inactivity.[245] Under this new standard, one can effectively accomplish all elements by essentially doing nothing. For example, one could not show up to participate in their role in a bank robbery conspiracy, and the very act of staying home would be sufficient to constitute an act of withdrawal.

This first element is both practical and functional because not acting to further the conspiracy ultimately frustrates the conspiratorial goal. In the prior getaway driver example, robbing the bank was likely the agreed upon conspiratorial goal; thus, one of the robbers not showing up the day of the robbery would frustrate the furtherance of that goal for the rest of the conspiratorial members. Imagine the following acts occur on the day of the robbery: (1) the getaway driver never shows up with the car; (2) the person assigned to crowd control is not present to control the guest and staff in the bank; (3) or the person assigned to open the vault quits before it is open. Any of these occurrences would severely frustrate the remaining co-conspirators' ability to accomplish their criminal goal.

2. The Act of Frustration Must Dispose of the Defector's Role in the Conspiracy

The second element shifts the focus of the withdrawal to the remaining members to objectively determine whether the defector has completed an effective withdrawal. This element requires that the frustrating act disposes of the defecting member's position within the conspiracy. The two methods of disposal fall within element three. When elements two and three are combined, they provide an objective analysis that determines the defector's withdrawal status by analyzing whether the frustrating act effectively disposed of the defector's prior position within the conspiracy.

243. United States v. Julian, 427 F.3d 471, 483 (7th Cir. 2005) (defining the first element of the current standard).

244. United States v. Patel, 879 F.2d 292, 294 (7th Cir. 1989).

245. *Paladino*, 401 F.3d at 479–80 (holding that a mere cessation of criminal activity does not constitute a withdrawal).

3. The Remaining Co-conspirators Must Either Replace the Defector or Abandon the Defector's Role.

The third element allows for disposal to occur in two ways. The remaining members can simply do nothing and allow the position played by the defector to become abandoned. In other words, the role or position previously occupied by the defecting member ceases to exist. Going back to the bank robbery example, suppose the person that does not show up on the day of the robbery is the getaway driver, and instead of getting another driver, the remaining robbers decide to take the bus. In this variation of the example, the remaining members abandoned the defecting member's position when they executed a plan that did not include a getaway driver.

Alternatively, the remaining members can replace the defecting member with a different conspirator. Under this option, the defecting member's position disappears once the remaining members replace the position the defecting member previously held. The remaining members effectively replace the defector when someone else assumes the position left behind after the withdrawal. This example would function much like the last example, except under this variation, the remaining members hire another getaway driver for the job and continue with the robbery as planned.

B. The Differences Between the Current Standard and The Proposed Standard

The standard proposed in this Note varies dramatically from the current standard.[246] The primary difference between the two lies in the first element's application.[247] The current standard requires an affirmative act which means the defecting member must exhibit some action that can objectively prove that they made a withdrawal.[248] The first element of the current standard is paramount to the reasoning set forth in the time bomb theory, in which a non-action is never considered an affirmative act.[249] The new standard deviates markedly from the prior application by allowing any act, affirmative or otherwise. The importance of this variation on the act requirement is that it creates a flexible application that will allow passive acts to initiate a withdrawal. By changing the act requirement, the new standard creates a broader and more easily satisfied process for withdrawal to occur.

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246. *Patel*, 879 F.2d at 294 (defining the current standard of withdrawal from a conspiracy).

247. United States v. Wilson, 134 F.3d 855, 863 (7th Cir. 1998) (defining the first element of the current standard).

248. *Paladino*, 401 F.3d at 479–80 (holding that under the current standard the affirmative act must be one that defeats or disavows the conspiracy).

249. *Id.*

That this act can be doing no act whatsoever also deviates markedly from the current standard.[250] Under the current approach, the defecting member's affirmative act must either defeat or disavow his or her contribution to the conspiracy.[251] However, under the new standard, the defecting member must only frustrate the conspiratorial goal. The differences between the current and proposed elements are two-fold. First, where the current standard requires the defecting member to commit an act that defeats or disavows,[252] the proposed standard only requires acts that frustrate. This difference creates more flexibility and a broader application. Acts that defeat the conspiracy or take away its support are much more restricted because of the result they must achieve.[253] However, only requiring acts to frustrate the conspiracy allows the defecting member to have many choices because it sets a lower bar for the defecting member to satisfy.

The last elements of the two standards are only similar in that they both provide a dual option to withdraw the defector.[254] However, the comparison ends there, and the differences are dramatic. Under the current standard, the defecting member's affirmative act that disavows or defeats the conspiracy must either be reasonably communicated to his or her co-conspirators, or the defecting member must make a clean breast to law enforcement.[255] The current approach only provides these two options, and both focus entirely on the actions of the defecting member.[256] The proposed standard is different in two very important ways.

First, the proposed standard changes the nature of the analysis by focusing entirely on the actions of the remaining members rather than the defector. Unlike the current standard, which only focuses on what the defector is doing,[257] the proposed standard looks at the actions of the remaining members to objectively determine whether the defector withdrew. Once the defector has initiated his or her withdrawal, the remaining members' actions will determine whether the withdrawal occurred; this is because the remaining members must decide whether to abandon the defector's position or replace them. The remaining conspirators cannot avoid making this decision once the defector has initiated his or her withdrawal because the remaining conspirators doing nothing would effectively be considered abandonment. For example, if

250. United States v. Julian, 427 F.3d 471, 483 (7th Cir. 2005) (defining the current standard of withdrawal).

251. *Paladino*, 401 F.3d at 479–80.

252. *Id.*

253. *Id.* (holding that under the current standard the affirmative act must achieve defeating or disavowing the conspiracy).

254. *See Julian*, 427 F.3d at 483 (defining the current standard).

255. *Id.*

256. *Paladino*, 401 F.3d at 479–80.

257. *Id.*

Joe sells drugs for Pete on Easy Street and one day Joe stops showing up, then Pete must either decide to replace Joe or abandon his drug business on Easy Street. Either option will objectively prove that Joe's former position in the conspiracy no longer exists.

The second major difference between the last element is that the proposed standard does not have a communication requirement and does not force a defector to aid law enforcement.[258] The proposed standard changes the communication of notice by allowing the defector's withdrawal to be implied. Even if the remaining members did not receive notice of the defector's withdrawal, expressly or otherwise, it would not matter. Under the proposed standard, the communication of the withdrawal is deliberately passive for two reasons. First, defectors with minor roles, such that none of the remaining members would notice his or her withdrawal, are allowed to withdraw unnoticed. If none of the remaining members notice that the defector left the conspiracy, the defector's position is abandoned.

The second reason for this approach to the communication of the withdrawal is that it allows defecting members with more prominent roles in the conspiracy to remove themselves from the conspiracy without having to notify the remaining members. Co-conspirators will surely notice the absence of a defecting member with a prominent position in the conspiracy. For those conspiracies with some element of danger for withdrawing members, allowing the defecting member to withdraw without notice and potentially save them self from retributive attacks is important. Under the current standard, the only way for a defector to accomplish a withdrawal without notice is to become a criminal informant and risk the dangers of snitching.[259]

The proposed standard does not require a defecting member to become a criminal informant to withdraw from the conspiracy. However, turning oneself in to law enforcement and informing on the remaining conspirators is an act that frustrates the conspiratorial goal. In fact, both withdrawal options under the current standard would qualify as acts that frustrate the conspiratorial goal.

When a defector becomes a criminal informant, he or she has deliberately exchanged his or her position within the conspiracy for a position that aids law enforcement.[260] Regardless of what the remaining members know,

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258. *See id.* (defining the current standard of withdrawal).

259. *See id.* (describing the option of a clean breast to law enforcement as a means of withdrawal).

260. *See* Richard Winton, *3 Arrested, 1 Million Fentanyl Pills Seized in Undercover Sting, Authorities Say*, L.A. TIMES (Mar. 10, 2023 1:27 PM), https://www.latimes.com/california/story/2023-03-10/one-million-fentanyl-pills-seized-three-mexican-nationals-arrested-after-drug-deal-at-el-segundo-dennys (reporting that an undercover informant aided law enforcement by posing as a legitimate buyer during a transaction for drugs).

the defecting member's position has changed.[261] Thus, when the defector becomes an informant, the remaining members must either abandon the defector's position or replace it. Suppose the defecting member continues to operate in the conspiracy to provide law enforcement with evidence. In that case, the remaining members will have unknowingly abandoned the defecting member's position in the conspiracy because that position no longer exists. The defecting member no longer serves the conspiratorial goal; he or she now serves to aid law enforcement.

C. The Proposed Standard Replaces Time Bomb Theory with the Independent Action Theory

The policy reasoning behind the proposed standard differs from the current standard in several ways.[262] The most pronounced difference between the two standards is that the proposed standard allows for the mere cessation of criminal activity to constitute an act of withdrawal.[263] As explained in Section I, under the current approach, the mere cessation of criminal activity is not considered an act of withdrawal because of the time bomb theory.[264] Thus, federal courts have refused to consider the mere cessation of criminal activity as an act of withdrawal for more than fifty years.[265] However, under the proposed standard, it is possible for mere cessation of criminal activity to satisfy all of the elements of an effective withdrawal. When a defector simply walks away from the conspiracy and ceases to commit the crime, he or she will have frustrated the conspiratorial goal, resulting in the remaining members either abandoning the role or replacing the defector.

This approach replaces the time bomb theory of liability with the independent action theory. Unlike the current standard that examines only the actions of the defecting member,[266] the independent action theory looks at the independent actions of both the defecting member and the remaining members. In this way, the proposed standard uses the defector's actions and the remaining members' actions to objectively prove that the defecting member had withdrawn. The pivotal difference between the two theories is that while

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261. *See generally id.* (inferring the drug dealer's lack of knowledge about the informant's true role as an undercover operative).

262. *See* United States v. Patel, 879 F.2d 292, 294 (7th Cir. 1989) (describing the time bomb theory of conspiratorial liability which is the primary policy justification of the current standard of withdrawal).

263. *Paladino*, 401 F.3d at 479–80 (holding that the current standard rejects the mere cessation of criminal activity as an effective withdrawal).

264. *See supra* Section I.

265. Grace, *supra* note 36, at 456 (asserting that courts have been rejecting the mere cessation of criminal activity as a withdrawal since the Borelli holding in 1964).

266. *Id.* (positing that the current standard only analyzes whether the defecting member of the conspiracy has performed an affirmative act which defeats or disavows the conspiracy).

the time bomb theory looks backward into the conspiracy by focusing on criminal activity that has already occurred,[267] the independent action theory looks at the present to ascertain what is keeping the conspiracy moving forward.

The time bomb theory posits that one cannot simply walk away from his or her prior contributions to a conspiracy because those contributions will continue to operate after the defector's cessation.[268] However, it is not what was done in the past that keeps the conspiracy moving forward, but instead, the continued independent criminal actions of the remaining members. A conspiracy does not advance its goals if the members quit. The independent action theory recognizes this by focusing liability for future conspiratorial acts solely on the members that did not walk away. Likewise, the independent action theory allows members who did walk away to withdraw since they are no longer aiding in the conspiratorial goal.

Furthermore, even though implementing the proposed standard would render time bomb theory obsolete, the proposed standard would also similarly cover the same situations that necessitated the implementation of time bomb theory.[269] Under the proposed standard, an individual that places a time bomb or initiates some other criminal mechanism that will continue to operate after his or her withdrawal cannot benefit from withdrawal through mere cessation because the defector's contribution to the conspiracy will continue to operate after their withdrawal.[270]

This position is equally supported under the independent action theory because a criminal mechanism, like a time bomb, will not require any action from the remaining members to continue to operate. The acts which the defector put in place will continue to operate unassisted by the remaining members and thus cannot be abandoned or replaced.[271] In this way, the proposed standard and the independent action theory provide the same degree of culpability as the current approach for these situations.[272] However, under the new approach, defectors are also given a significantly greater opportunity to withdraw through the mere cessation of criminal activity for situations that do not necessitate the time bomb theory.

Also, both approaches negate the strength in numbers theory that serves as the conspiracy doctrine's primary policy consideration.[273] The mere

267. *Paladino*, 401 F.3d at 479–80.

268. United States v. Patel, 879 F.2d 292, 294 (7th Cir. 1989).

269. *Id.* (describing the time bomb scenario used to illustrate the policy justification compared to the time bomb theory of liability).

270. *Id.*

271. *Paladino*, 401 F.3d at 479–80 (comparing the time bomb theory scenario discussed in Paladino with the proposed standard in this Note).

272. *Id.*

273. Harper, *supra* note 34, at 785.

cessation of criminal activity negates the strength in numbers theory because a defector who ceases criminal activity will reduce the conspiracy's division of labor, decrease the organizational efficiency of the conspiracy, and encourage even more defection through his or her absence.[274] Thus, the proposed standard equally negates the policy justifications of conspiracy doctrine as sufficiently as the current approach does.

An important difference between the two standards is the degree to which they incentivize conspirators to withdraw. The defector's options are minimal under the current approach, and the two options can potentially create a life-threatening situation for the defector and their family.[275] Arguably, the only way a defector is incentivized to withdraw under the current approach is if the defector wanted to become a criminal informant or notify his or her conspirators of his or her withdrawal.[276] However, it is doubtful that most defectors would wish to choose either of these options considering the potential dangers they pose. Moreover, in dangerous withdrawal situations, the current standard only encourages the defector to maintain the status quo to avoid danger.

The proposed standard gives a defector a broader range of options to effectuate the withdrawal. This flexibility allows defectors in dangerous predicaments to make a more prudent withdrawal, possibly without notice. This will encourage a defector to withdraw in dangerous situations by allowing the defector to withdraw safely.

D. The Proposed Standard Will Mitigate Some of Conspiracy Doctrine's Vagueness and Over-Inclusivity

Adopting a new standard of withdrawal would mitigate the conspiracy doctrine's inherent vagueness and over-inclusivity.[277] Because conspiracy doctrine's liability operates fluidly to account for the multitude of potential circumstances in which a conspiracy could arise, the procedure for withdrawing from a conspiracy should also operate fluidly to account for the multitude of ways conspiratorial bonds are potentially broken.[278] If becoming a conspirator can be as easy as being at the wrong place at the wrong time or implicitly agreeing to something that one does not know of, then getting out of

274. *Id.* (defining the individual considerations of the strength in numbers theory).

275. *See supra* Section II.

276. *Paladino*, 401 F.3d at 479–80 (describing the two current options of withdrawal).

277. *See* Paul, *supra* note 6 (discussing the criticism of conspiracy doctrines vague definition).

278. Davis & Vitullo, *supra* note 20, at 778 ("The offense of conspiracy is construed broadly by courts and is therefore applied by prosecutors to a variety of situations.").

that same conspiracy must be as easy as not showing up as expected.[279] For people like Smith, the conspiratorial agreement masquerades itself as an agreement to form a romantic relationship rather than a conspiracy.[280] These types of conspiratorial agreements are obscure and informal; thus, the law needs a quick and easy withdrawal standard providing people like Smith with a readily available means of escaping their unintentional complicity.[281] In this way, the proposed standard counteracts the conspiracy doctrine's broad entrance with an equally broad method of exit.

Conspiracy doctrine risks being tremendously overinclusive without the counterbalance of a broad exit. People who do not know they are in a conspiracy or are knowledgeable of the law of conspiratorial withdrawal are likely to make an ineffective withdrawal and incur liability after their involvement in the conspiracy has ended,[282] for example in the case of Perez, who fled the conspiracy after his brother's murder.[283] Although Perez likely knew he was in a conspiracy, it is far less likely that he understood the nuanced process by which he could effectuate a withdrawal.[284] Whatever the case, Perez walked away from the conspiracy for two years, believing that he had quit and was no longer liable for the acts of the remaining members.[285] However, because the current standard does not provide the quick escape that Perez desired, he was held liable for two years' worth of crimes committed by a conspiracy he was no longer part of.[286]

The proposed standard prevents this overinclusive prosecution because it rewards people like Perez for quitting their criminal behavior with a broad method of withdrawal. By providing a broad method of withdrawal, the proposed standard focuses liability on what the defector has done or is continuing to do rather than the criminal acts of the remaining members. In this way, the proposed standard eliminates over-inclusive liability for conspiratorial offenses for any member willing to quit committing crimes. Under the proposed approach, only conspirators continuing to commit crime will be held liable for the continuing acts of the conspiracy.

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279. *See id.* at 783 (asserting that if there is no express agreement to join the conspiracy, then mere association is enough).

280. Kurth, *supra* note 51, at 1227 (stating that Kemba Smith believed she was forming a romantic relationship when in fact she was joining a drug conspiracy).

281. *Id.* (positing that Kemba Smith was unintentionally involved in a drug conspiracy).

282. United States v. Perez-Cubertier, 958 F.3d 81, 87 (asserting that Perez fled the conspiracy and then tried to establish a withdrawal defense based upon his prior actions).

283. *Id.* at 86.

284. *Id.* at 87.

285. *Id.* at 86 (reporting that Perez claimed to withdrawal in 2008 and was indicted in 2010).

286. *Id.*

The proposed standard is arguably more important for negating overinclusive *Pinkerton* liability.[287] Under general conspiracy doctrine, the proposed standard would prevent overinclusive liability for completing the conspiratorial goal.[288] In terms of *Pinkerton* liability, the proposed approach would eliminate *Pinkerton* liability for every member of the conspiracy who stops committing crime.[289] It would not eliminate *Pinkerton* liability for crimes that occurred before the withdrawal, but it would prevent *Pinkerton* liability for crimes that occurred after the defector walked away from the conspiracy.[290] Again, by allowing mere cessation of criminal activity to constitute a withdrawal, the law will only apply *Pinkerton* liability to those conspiratorial members who continue to commit crime.

The negation of *Pinkerton* liability is even more important for people like Smith, who do not know they are involved in a conspiracy.[291] Allowing relatively innocent parties to quickly exit a conspiracy before incurring liability for all the foreseeable acts of the other members is a much more just application of withdrawal. The new approach is still contingent on the unintentional conspirator's exit, and this occurrence can be precarious for someone unaware of their conspiratorial circumstance.[292] However, under the new approach, there is a broader method of allowing that fortuitous exit, something the current standard neglects.[293]

E. The Proposed Standard of Withdrawal is Safer for Defectors

Using a new standard for withdrawal would substantially mitigate the danger under the current standard.[294] By allowing defecting conspiratorial members to withdraw through the cessation of criminal activity, the defecting member can remove themselves from the conspiracy without having to notify

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287. Ohlin, *supra* note 89, at 147 ("Under this venerable doctrine, first announced by the Supreme Court in 1946, a conspirator's actions may be attributed to all members of the conspiracy, subjecting them to criminal liability for the substantive crimes of their co-conspirators.").

288. Cantoni, *supra* note 211, at 439 ("The withdrawal defense affords conspirators the opportunity to reduce the impact of group danger by limiting their liability for crimes committed by co-conspirators in furtherance of the conspiracy subsequent to the withdrawal.").

289. *Id.* ("Otherwise, under the *Pinkerton* rule, all co-conspirators would be bound regardless of their knowledge or participation in those crimes.").

290. *See id.* (asserting that a withdrawal never vitiates liability that a defecting member has already incurred).

291. Kurth, *supra* note 51, at 1227.

292. *See id.* (asserting that people like Kemba Smith do not know they are in a conspiracy makes the knowledge of needing to make a formal withdrawal difficult).

293. *See* United States v. Paladino, 401 F.3d 471, 479–80 (describing the current standard of withdrawal).

294. *See supra* Section IV.A–B.

his or her co-conspirators.[295] This method of withdrawal provides a defector in a dangerous situation with a much safer option. The proposed standard does not require a defector in a dangerous criminal organization to notify the people who may likely kill him or her for quitting.[296] It does not completely remove the danger of withdrawing from the conspiracy, but it gives the defecting member the ability to disappear from his or her co-conspirators. For people like Perez who flee from a conspiracy for their own safety, the proposed approach recognizes the dangers and allows the defector to quickly withdraw.[297]

Defecting gang and organized crime members desperately need the proposed standard.[298] The current approach creates more harm than good for groups like the Aryan Brotherhood or MS-13 which have an automatic rule of murdering defectors.[299] Members of these organizations absolutely cannot notify their co-conspirators of their withdrawal without ensuring retributive actions, and for many of them, snitching may be even more dangerous.[300] The proposed standard handles these types of withdrawals more efficiently because it removes the notification requirement. The proposed approach also helps to mitigate the impact of gang presence in society by encouraging gang members to take the quick and easy way out, save themselves from future liability, and thereby diminish the gang ranks.

F. Society Mitigates the Danger of Snitching and Its Negative Effects on Low-Income and Minority Neighborhoods by Changing the Withdrawal Standard

Another significant difference between the proposed and current standards is that a defector is not required to become a criminal informant to withdraw under the proposed approach.[301] Again, this leads to a much safer method of withdrawal for those defecting members who may suffer harm or

295. United States v. Sadiki Komunyaka, 658 F.3d 140, 143 (2nd Cir. 2011) (positing that the current standard denies the mere cessation of criminal activity as a withdrawal).

296. United States v. Wilson, 134 F.3d 855, 863 (positing the current withdrawal standard requires defectors that do not become informants for law enforcement to notify the remaining members of the conspiracy of their intent to withdrawal).

297. *See* United States v. Perez-Cubertier, 958 F.3d 81, 87 (asserting that the defendant fled the conspiracy for his own safety after the murder of his brother).

298. *See* Harper, *supra* note 34, at 765 (claiming that many gangs have an automatic rule of killing defecting members which makes notifying these groups of one's withdrawal a dangerous proposition).

299. *See id.*

300. *See id.* at 797 (claiming that many criminal organizations seek retributive action against criminal informants).

301. *See* United States v. Julian, 427 F.3d 471, 483 (defining the clean breast standard of conspiratorial withdrawal).

even death under the current approach.[302] The proposed standard does not dissuade defectors from aiding law enforcement, and becoming a criminal informant still satisfies the elements of withdrawal under the proposed approach. The only difference is the proposed standard does not require it. Under the proposed approach, no defector is required to endanger themselves by becoming a snitch, and those who become informants do so of their own volition. This change would also greatly serve incarcerated defectors who, under the current standard, bear the mark of a snitch in an environment teaming with potential retribution.[303]

By removing snitching as an element of withdrawal, society would also mitigate some of the pernicious effects of snitching in low-income and minority neighborhoods.[304] Law enforcement's widespread and persistent efforts to procure informants ravages these communities under the current approach,[305] and although removing the clean breast standard would not altogether remove the problem of targeting these communities for access to criminal informants, it is at least a step in that direction. Although it is true that many people in these communities may still decide to cooperate with police regardless of a change in withdrawal, under the proposed standard, such cooperation would be entirely of their volition.[306] Thus, even though adopting a new withdrawal standard does not completely fix the danger of snitching and its communal degradation, it at least removes the coercion imposed by the current standard and leaves only those individuals that voluntarily decide to cooperate with the police.

Changing the withdrawal standard also does not stop the police from solving crimes or catching criminals; it simply removes the requirement of compelling defectors to help them.[307] Under the proposed standard, police still have every method of investigation available to them for conspiratorial offenses that they do for the plethora of non-conspiratorial offenses. Police can solve an extraordinary number of cases involving rape, murder, arson, burglary, kidnapping, extortion, and fraud without needing a legal standard that requires one of the perpetrators to aid the investigation.[308] It is dubious at best

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302. *See supra* Section IV.A–B.

303. *See* Schapiro, *supra* note 180 (reporting a well-known criminal informant that was murdered in prison because of his reputation for aiding law enforcement).

304. Natapoff, *supra* note 164, at 689 (arguing that snitching creates a threat of safety in minority communities and fosters community degradation).

305. *Id.* at 689–90.

306. Grace, *supra* note 36, at 456 (arguing that unlike the current standard that requires conspiratorial defectors to aid law enforcement to withdrawal, the proposed withdrawal standard does not).

307. *See id.* (positing that the second prong of the current withdrawal standard requires a defecting member to make a full confession to law enforcement).

308. John Gramlich, *What the Data Says (and Doesn't Say) About Crime in the United States*, PEW RSCH. CTR. (Nov. 20, 2020), https://www.pewresearch.org/fact-tank

to suggest that society would be any less safe by requiring police to use the same tools to stop conspiracies as they do for all other crimes.

G. The Law of Conspiracy and Withdrawal Are Already Trending in this Direction

Some changes to conspiratorial withdrawal have supported the position of the proposed standard.[309] One change occurred in 1998, in *United States v. Grimmett*, when the Eighth Circuit changed the withdrawal standard clean breast doctrine.[310] Traditionally, the clean breast doctrine requires a full confession to law enforcement to effectuate a withdrawal.[311] However, the Eighth Circuit held in *Grimmett* that a more limited confession was sufficient to withdraw a defector from the conspiracy.[312] The reasoning for this change in precedent was the determination that a defector need only sever their conspiratorial ties to make a withdrawal.[313] Under the Eighth Circuit's new approach, a confession only needs to be detailed enough to show that the defector has separated from the conspiracy.[314] This is similar to the proposed standard because it focuses heavily on objective actions that evidence the defector's separation from the conspiracy.[315] Like the *Grimmett* standard, the approach proposed in this Note analyzes the defector's cessation of criminal activity to answer the same question posed in *Grimmett*—did the defector separate from the conspiracy?[316]

Another change that recently affected conspiracy doctrine is the change in conspiratorial drug offense sentencing.[317] There is currently a circuit split on the degree of liability a conspirator incurs for his or her role in a drug conspiracy.[318] The traditional approach is that each conspirator is responsible for the total quantity of drugs the conspiracy sells as a whole.[319] However, the First, Fourth, and Ninth Circuits apply a different approach that only holds a conspirator liable for the quantity of drugs they individually contributed to

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/2020/11/20/facts-about-crime-in-the-u-s/ ("In 2019, police nationwide cleared 45.5% of violent crimes that were reported to them and 17.2% of the property crimes that came to their attention.").

309. *See* Grace, *supra* note 36, at 434–35 (arguing that a full confession is not needed to make an effective withdrawal).

310. *Id.* at 439. *See generally* United States v. Grimmett, 150 F.3d 958 (8th Cir. 1998).

311. Grace, *supra* note 36, at 439.

312. *Id.* at 434.

313. *Id.*

314. *Id.*

315. *See* Grace, *supra* note 36.

316. *Id.* at 434.

317. Kurth, *supra* note 51, at 1220.

318. *Id.*

319. *Id.*

the conspiracy.[320] This difference is similar to this Note's proposed standard because it shifts the focus of liability from the group to the individual.[321] Like the newer approach to conspiratorial drug liability,[322] this Note's proposed standard suggests that the withdrawal standard should not focus liability on the continued existence of the conspiracy but rather on the individual contribution of the defecting member and when that contribution ended. This newer approach's design provides the appropriate culpability based on the defector's degree of conspiratorial engagement.

The proposed standard closely resembles the changes that have already occurred to the crime of attempt.[323] Attempt in its original form qualifies as a committed offense after the first act in furtherance of the attempted crime.[324] After committing the first act of the attempted crime, there was no going back.[325] However, today, the law of attempt is much more forgiving and allows perpetrators to renounce their attempt by walking away before the crime is fully committed.[326] The current legal standard for intent is a fact-sensitive analysis of what the defendant did as well as what the defendant did not do.[327] The standard proposed in this Note is very similar to the changes in the law of attempt. By analyzing the defector's actions to determine when they ceased committing crime and stopped incurring criminal liability, the law more accurately assigns liability to only those criminals who refuse to walk away.

The current withdrawal standard for an act of incarceration already functions much like the proposed standard.[328] Several factors determine whether incarceration constitutes an act of withdrawal.[329] Most pertinent to the changes suggested in this Note are the following: (1) the defector's continued criminal activity while imprisoned; (2) evidence at trial of the defector's resumption of conspiratorial activity after release; (3) the responsibility the defector bears for the later acts of remaining or new conspiratorial members; and (4) whether the defector communicated a need for bail to the remaining members.[330] The withdrawal standard for incarcerated conspirators is a much more fact-sensitive approach that focuses almost exclusively on the defector's degree of continued criminal engagement.[331] If a conspirator is removed from

320. *Id.*
321. *Id.*
322. *Id.*
323. Cassidy & Massing, *supra* note 42, at 381.
324. *Id.*
325. *Id.*
326. *Id.*
327. *See generally id.*
328. Marjorie A. Shields, *Imprisonment as Constituting Withdrawal from Conspiracy*, 100 A.L.R.6th 335, § 2 (defining the current standard of withdrawal for acts of incarceration).
329. *Id.*
330. *Id.*
331. *Id.*

the conspiracy because of incarceration and no longer engages in crime or communicates with the remaining members of the conspiracy, then the court will grant the defecting member a withdrawal defense.[332] The proposed approach functions almost identically to the incarceration standard by looking exclusively at the cessation of criminal involvement as the essential goal of withdrawal. Like the incarceration standard, the proposed approach only grants a withdrawal to defectors that cut all ties to the conspiracy while denying withdrawal to individuals still operating the conspiracy.

VII. CONCLUSION

A new standard of withdrawal can partially mitigate the vague and overinclusive nature of the conspiracy doctrine. A new standard would be more effective and far less dangerous for potential defecting members. Changing the withdrawal standard will also mitigate the pernicious effects of snitching on low-income and minority communities and the dangers posed to would-be criminal informants. Lastly, changing the withdrawal standard is necessary to assess conspiratorial liability more properly by considering the independent actions of the remaining members who perpetuate the existence of the conspiracy after the defecting member has withdrawn. By incorporating a standard that allows for the mere cessation of criminal activity as a withdrawal defense, the law would incentivize criminals to cease their criminal endeavors immediately and reward those who recognize the wisdom of leaving crime in the past.

*Matthew N. Rose**

332. *Id.*

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