

RESOLUTION 02-16-2008

DIGEST

Criminal Conspiracy: Repeal of Statute

Repeals Penal Code section 182, the criminal conspiracy statute.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

This resolution is identical to 05-10-2000 and 06-13-2001, both of which were disapproved.

Reasons:

This resolution repeals Penal Code section 182, the criminal conspiracy statute. This resolution should be approved in principle because inchoate conspiracy does not create social harm, denies due process, and does not prevent crime.

Penal Code section 182 punishes “inchoate” conspiracy — that is, agreeing to commit a crime that never happens. Most crimes are punished because they cause harm to society. By contrast, inchoate conspiracy is not punished because it is itself socially harmful, but because it evidences *an intent* to do a socially harmful act. (See, e.g., Martin J. King, *Criminal Speech: Inducement and the First Amendment*, FBI Law Enforcement Bulletin (April 2008) [“the proscribed conduct in an inchoate offense is not prohibited because of its harmful effect but because it sufficiently demonstrates a purpose to act in furtherance of a criminal intent.”]). This punishment of unfulfilled intent reveals a fundamental flaw that goes to the heart of criminalizing inchoate conspiracy: it denies the possibility of changing one’s mind. Criminal culpability depends on an assumption of free will, that the defendant actually chose to commit the crime (or at the very least to *attempt* it). Conspiracy, by contrast, punishes even a defendant who ultimately would have decided not to go through with, or even attempt, the planned crime.

Inchoate conspiracy also raises serious notice and due process concerns, given that what one “conspirator” believes is a harmless conversation with a third party can be converted into “conspiracy” by the overt act of that third party — even if that act is legal, and even if the defendant never knew about it. Indeed, Justice Jackson once described the crime of inchoate conspiracy as “so vague that it almost defies definition,” and warned that “loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.” (*Krulewitch v. United States* (1949) 36 U.S. 440, 445-46 (Jackson, J., concurring)).

Finally, the inchoate conspiracy statute does not make us safer or prevent crime. A common argument in support of conspiracy is that certain crimes present a danger so imminent as to create a need to address them before they are even attempted. But such high-risk situations are better addressed by identifying those concerns than by creating an inchoate version of *every crime in the Penal Code*. This is how other jurisdictions address imminent harm, including most European countries. It is also how California has addressed it: The Legislature has criminalized specific behaviors that present a great risk of crime — such as, for example, possessing an unregistered firearm or a bomb — so that criminals can be apprehended before they commit further, violent crimes.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to repeal Penal Code §182:

1 §182
2 ~~(a) If two or more persons conspire:~~
3 ~~(1) To commit any crime.~~
4 ~~(2) Falsely and maliciously to indict another for any crime, or to procure another to~~
5 ~~be charged or arrested for any crime.~~
6 ~~(3) Falsely to move or maintain any suit, action or proceeding.~~
7 ~~(4) To cheat and defraud any person of any property, by any means which are in~~
8 ~~themselves criminal, or to obtain money or property by false pretenses or by false promises~~
9 ~~with fraudulent intent not to perform such promises.~~
10 ~~(5) To commit any act injurious to the public health, to public morals, or to pervert~~
11 ~~or obstruct justice, or the due administration of the laws.~~
12 ~~(6) To commit any crime against the person of the President or Vice President of~~
13 ~~the United States, the governor of any state or territory, any United States justice or judge,~~
14 ~~or the secretary of any of the executive departments of the United States.~~
15 ~~They are punishable as follows:~~
16 ~~When they conspire to commit any crime against the person of any official~~
17 ~~specified in paragraph (6), they are guilty of a felony and are punishable by imprisonment~~
18 ~~in the state prison for five, seven, or nine years.~~
19 ~~When they conspire to commit any other felony, they shall be punishable in the~~
20 ~~same manner and to the same extent as is provided for the punishment of that felony. If~~
21 ~~the felony is one for which different punishments are prescribed for different degrees, the~~
22 ~~jury or court which finds the defendant guilty thereof shall determine the degree of the~~
23 ~~felony defendant conspired to commit. If the degree is not so determined, the punishment~~
24 ~~for conspiracy to commit the felony shall be that prescribed for the lesser degree, except in~~
25 ~~the case of conspiracy to commit murder, in which case the punishment shall be that~~
26 ~~prescribed for murder in the first degree.~~
27 ~~If the felony is conspiracy to commit two or more felonies which have different~~
28 ~~punishments and the commission of those felonies constitute but one offense of~~
29 ~~conspiracy, the penalty shall be that prescribed for the felony which has the greater~~
30 ~~maximum term.~~
31 ~~When they conspire to do an act described in paragraph (4), they shall be~~
32 ~~punishable by imprisonment in the state prison, or by imprisonment in the county jail for~~
33 ~~not more than one year, or by a fine not exceeding ten thousand dollars (\$10,000), or both.~~
34 ~~When they conspire to do any of the other acts described in this section, they shall~~
35 ~~be punishable by imprisonment in the county jail for not more than one year, or in the state~~
36 ~~prison, or by a fine not exceeding ten thousand dollars (\$10,000) or both that imprisonment~~
37 ~~and fine. When they receive a felony conviction for conspiring to commit identity theft, as~~
38 ~~defined in Section 530.5, the court may impose a fine of up to twenty five thousand dollars~~
39 ~~(\$25,000).~~
40 ~~All cases of conspiracy may be prosecuted and tried in the superior court of any~~

41 ~~county in which any overt act tending to effect such conspiracy shall be done.~~
42 ~~(b) Upon a trial for conspiracy, in a case where an overt act is necessary to~~
43 ~~constitute the offense, the defendant cannot be convicted unless one or more overt acts are~~
44 ~~expressly alleged in the indictment or information, nor unless one of the acts alleged is~~
45 ~~proved; but other over acts not alleged may be given in evidence.~~

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: National Lawyers Guild, Los Angeles Chapter

STATEMENT OF REASONS:

Existing law: Creates an additional crime of conspiracy when two or more persons conspire to do the acts enumerated in paragraphs 1 through 6 of paragraph (a) of Penal Code §182.

This Resolution: Will repeal Penal Code §182 and abolish the crime of conspiracy in California.

The Problem: The conspiracy charge in California is not needed for any legitimate purpose. If a supposed conspirator has truly committed any real crime, the "conspirator" can be readily punished under other and fairer statutes. Our laws are very broad as to definition of a principal in any criminal activity. Further, we have very adequate and reasonable laws punishing even an attempt to commit any real crime, and punishing solicitation to commit a crime.

Conspiracy is an anticipatory, inchoate, non-crime type of criminal charge, subject to heavy abuse. It is often used to punish mere speech and thought, and is used largely where actual criminality cannot be charged or proved. No more is required than a supposed agreement, often an implied one, to commit a criminal act, plus an overt act in its furtherance (typically non-criminal, such as making a telephone call or buying a plane ticket). Moreover, when conspiracy is charged, each defendant is held responsible and can be found guilty for the actions and speech of each co-conspirator in asserted furtherance of the conspiracy. Obviously, the evidentiary objection of hearsay becomes laughably irrelevant, and all the defendants can readily be sent sliding down the slippery slope to conviction.

Traditionally, conspiracy charges have been used often to damage or destroy free speech and popular movements. For many years strikes by trade unions in England were regarded as criminal conspiracies. All too readily, American prosecutors could, and often did, accuse unpopular political movements or persons of conspiring to overthrow the government.

Indeed, a conspiracy to commit any crime, even a misdemeanor or infraction, can be charged and punished to bootstrap a minor crime into a felony; and the minor crime itself need not be committed.

Clarence Darrow has said:

"Now, there is one beauty about a conspiracy case, there is one thing that made it valuable to ancient tyrants, and that makes it equally valuable to modern tyrants, and that is that you do not need much of any theory to carry it on, and this makes it possible for (the prosecutor) to try the case.

". . . If there happens to be someone you are after, then you make a charge of conspiracy, and you are allowed to prove what the defendant said, and did, and what everyone else said and did over any length of time that you see fit . . . and there you get your conspiracy.

"Conspiracy is the child of the Star Chamber Court of England, and it has come down to us, like most bad things ... from the remote past, without much modification.

". . . (W)henever a political disturber was in someone's way, then they brought a charge of conspiracy".

IMPACT STATEMENT:

This proposed resolution will make Penal Code §§182.5, 183 and 184 moot and does not affect any other law, statute or rule.

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RESPONSIBLE FLOOR DELEGATE: Tina Rasnow

COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

This resolution proposes to eliminate Penal Code section 182, the crime of conspiracy. The current statute serves a legitimate purpose in that it deters criminal activity, especially the type of criminal conduct that typically involves planning and sophistication. The statute allows law enforcement to make an arrest prior to the offense reaching completion, thus potentially saving lives and preventing injuries to people and property. The statute also seeks to ensure that those who plan to carry out an overt criminal act will not escape prosecution if no other criminal act was committed in the course of the conspiracy.

Currently, if co-conspirators are found to be planning a terrorist attack, potentially endangering many lives, law enforcement can intervene to make arrests before any harm can be done. Eliminating this statute from our laws would put the citizens of California at greater risk of becoming victims of criminal activity.