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FROM HEARSAY TO ETERNITY: PENDENCY
AND THE CO-CONSPIRATOR EXCEPTION IN
CALIFORNIA—FACT, FICTION, AND A NOVEL
APPROACH

John Bilyeu Oakley*

Twice in three years the Supreme Court of California has
struggled to define the concept of the "pendency" of a conspir-
acy for the purpose of applying the "co-conspirator exception"
to the hearsay rule. For reasons which lie at the very roots of
the co-conspirator exception and its incestuous kin, the sub-
stantive law of conspiracy, these efforts have been unsuc-
cesful. The formulation of a workable standard for determining
the pendency of a conspiracy in an evidentiary context requires
more, however, than a mere return to the status quo ante of
three years ago. Rather, it requires recognition that for well
over 100 years California law, in keeping with the common law
of evidence in the United States generally, has misperceived
the crucial differences between the substantive law which gov-
erns the consequences flowing from a finding of fact that an
individual was party to a conspiracy, and the evidentiary law
which governs the proof by which the trier of fact may be per-
suaded to make so grave a finding. This article offers a compar-
ative analysis of the theories and purposes of the two species
of conspiracy law, substantive and evidentiary, as well as an
explication of the co-conspirator exception as it has evolved
under California law. The purpose of the article is not only to
stimulate revision of the supreme court's recent brace of pen-
dency cases, but also to suggest a rational and workable basis
for the consistent adjudication of future questions concerning
the co-conspirator exception and the pendency of conspiracies.

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1. People v. Leach, 15 Cal. 3d 419, 541 P.2d 296, 124 Cal. Rptr. 752 (1975); People
v. Saling, 7 Cal. 3d 844, 500 P.2d 610, 103 Cal. Rptr. 688 (1972). If the existence of a
conspiracy can be established by independent evidence, California's "co-conspirator
exception" to the hearsay rule permits evidence of statements made by one conspirator
to be admitted against a co-conspirator, provided that the statements were made in
furtherance of the conspiracy and before its termination—that is, while the conspiracy
was pending. See CAL. EVID. CODE § 1223 (West 1966), set out at note 9 infra.
I. SUMMARY OF RECENT SUPREME COURT PENDENCY CASES

The currently contorted posture of pendency law in California is attributable to two supreme court cases involving murder-for-hire conspiracies. In the 1972 case of People v. Saling, the defendant had conspired with Murphy to murder Murphy’s wife. The principal witness for the prosecution was Carnes, a co-conspirator who had not been present at the scene of the murder. To prove that the conspiracy had in fact resulted in the contemplated murder, and that the defendant had physically participated in the murder, the prosecution sought to introduce hearsay evidence, defined by the Evidence Code as “evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” Such evidence is inadmissible “[e]xcept as provided by law.” The hearsay at issue in Saling consisted of two declarations describing the details of the murder, both of which were made by co-conspirators of the defendant after the murder had occurred. First, Carnes testified to the content of the declaration made to him three days after the murder by Jurgenson, a fourth conspirator who, together with Murphy and the defendant, had actually committed the murder. Second, the prosecution introduced tape recordings of two conversations between Murphy and Carnes which had taken place three weeks after the murder.

The supreme court ruled in Saling that the evidence of the declaration made three days after the murder was admissible pursuant to Evidence Code section 1223, California’s codification of the co-conspirator exception; evidence of the declara-

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2. 7 Cal. 3d 844, 500 P.2d 610, 103 Cal. Rptr. 698 (1972).
4. CAL. EVID. CODE § 1200(a) (West 1966).
5. Id. (b). Where appropriate, this article refers to “hearsay” less formally to connote an extrajudicial statement itself, rather than evidence thereof offered in court.
7. Id. at 848, 500 P.2d at 612, 103 Cal. Rptr. at 700.
8. Id. at 852-53, 500 P.2d at 615, 103 Cal. Rptr. at 703.
9. CAL. EVID. CODE § 1223 (West 1966) provides:
Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:
(a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;
(b) The statement was made prior to or during the time that the party was participating in that conspiracy; and
(c) The evidence is offered either after admission of evidence sufficient
tions made three weeks after the murder, however, was not within the scope of the co-conspirator exception and hence had been erroneously admitted. Since there was a reasonable probability that the inadmissible evidence had been prejudicial, the judgment of conviction was reversed.

The crucial distinction between the admissible and the inadmissible evidence was that approximately two weeks after the murder Murphy had completed payment of the remuneration which he had promised to Carnes and the defendant. The court held that the "trier of fact"—here presumably the trial court operating under Evidence Code section 403—could permissibly find that the conspiracy was still pendent three days after the murder because the payment of compensation to the hired conspirators had yet to be effected:

It has long been the law in this state that a conspirator's statements are admissible against his coconspirator only when made during the conspiracy and in furtherance thereof. The conspiracy usually comes to an end when the substantive crime for which the coconspirators are being tried is either attained or defeated. It is for the trier of fact—considering the unique circumstances and the nature and purpose of the conspiracy in each case—to determine precisely when the conspiracy has ended. Particular circumstances may well disclose a situation where the conspiracy will be deemed to have extended beyond the substantive crime to activities contemplated and undertaken by the conspirators in pursuance of the objectives of the conspiracy.

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10. 7 Cal. 3d at 853, 500 P.2d at 616, 103 Cal. Rptr. at 704.
11. Id. at 856, 500 P.2d at 618, 103 Cal. Rptr. at 706. Saling was subsequently retried and again convicted. This time the judgment was affirmed on appeal in an unpublished opinion, People v. Saling, 2 Crim. No. 24226 (Cal. Ct. App., Dec. 3, 1974), and a petition for hearing by the supreme court was denied January 29, 1975.
12. In Saling itself there is no indication given as to when payment was effected, other than the statements quoted at text accompanying notes 14-15 infra, that payment occurred after Jurgenson's declaration to Carnes and before Murphy's tape-recorded conversation with Carnes. There is a lengthy restatement of the facts of Saling in People v. Leach, however, which facts the court noted were "drawn from both our opinion in [Saling] and a fresh review of the record therein." People v. Leach, 15 Cal. 3d 419, 429 n.8, 541 P.2d 296, 302 n.8, 124 Cal. Rptr. 752, 758 n.8 (1975). It is in Leach that the court states that payment in Saling occurred "[a] fortnight or so after Jurgenson's narration." Id. at 430, 541 P.2d at 302-03, 124 Cal. Rptr. at 758-59.
13. 7 Cal. 3d at 852, 500 P.2d at 615, 103 Cal. Rptr. at 703 (citations omitted).
Since the money Murphy had offered for the murder of his wife not only "motivated the defendant and Jerry Carnes to participate in the plan" but was "one of its main objectives as far as defendant and Carnes were concerned," and since neither Saling nor Carnes had received payment at the time Jurgenson spoke to Carnes three days after the murder, the court concluded that "Jurgenson's statements to Carnes were admissible as being made during the conspiracy." The recordings of the Murphy-Carnes conversation, however,

were clearly made not only after Catherine Murphy had been killed but also after payment had been made to defendant and Jerry Carnes. It does not appear that the statements were otherwise made during any activity in pursuance of any significant objective of the conspiracy.  

As Mr. Justice Sullivan was at pains to point out in his solitary dissent to Saling, "[A]ccording to the logic of the majority . . . a conspiracy might last forever." The operative premise of this logic is that the "objectives" of a conspiracy include the individual interests of hired participants in obtaining the promised remuneration which motivated their participation in the conspiracy. When such promises are repudiated outright by the promisor or otherwise remain unfulfilled to the satisfaction of the promisee, there arises under the "logic of the majority" the spectre of an endless conspiracy, a legal fiction in which a conspiracy long dissipated in reality is treated as without end for evidentiary purposes. Thus it seemed after Saling that a conspiracy might in legal contemplation be deemed to be "continuing" for so long as any hired participant personally—even unilaterally—felt entitled to receive additional compensation for his conspiratorial activities.

People v. Leach, the first case before the supreme court in which the Saling rule has come home to roost, demonstrated that Mr. Justice Sullivan's evidentiarily endless conspiracy is no mere chimera. Leach, like Saling, involved a murder-for-hire conspiracy in which evidence of the post-murder hearsay declarations of a conspirator had been admitted at the trial of a co-conspirator. In Leach, however, the hired killer had been

14. Id. at 853, 500 P.2d at 615, 103 Cal. Rptr. at 703.
15. Id. at 853, 500 P.2d at 616, 103 Cal. Rptr. at 704.
16. Id. at 858, 500 P.2d at 619, 103 Cal. Rptr. at 707 (dissenting opinion).
17. 15 Cal. 3d 419, 541 P.2d 296, 124 Cal. Rptr. 752 (1975).
apprehended shortly after the murder. The instigators of the crime were the wife and daughter of the victim, Kramer. They had promised their triggerman a post-mortem payment, but following his arrest cared only to avoid implicating themselves in the crime. The hireling, Leach, was thus abandoned to his fate at the hands of the authorities, "left, in the timeless fashion of forsaken former conspirators, to 'twist slowly, slowly in the wind.'" Once he realized which way the wind was blowing, Leach was less than content with his lot. Over a period of several months, beginning about half a year after the murder, Leach confided the details of the murder to a jailhouse trustee, Hagler. Leach hoped Hagler, who was soon to be released, would agree to pressure the Kramer women into paying Hagler what was owed to Leach, with Hagler then to use at least part of the funds for Leach's benefit by funneling the money to a relative, retaining counsel, or arranging an escape.

Hagler instead reported Leach's admissions and aspirations to the jail officials. Relayed to the officers who had investigated the Kramer murder, Leach's admissions confirmed existing suspicions that Leach had been party to a murder-for-hire conspiracy. One of the officers subsequently approached the Kramer women in the guise of a jailhouse friend of Leach, and by demanding that they arrange for legal counsel for Leach or suffer exposure by Leach, induced the women to make a series of highly incriminatory tape recorded admissions.

Apparently in reliance upon the Saling doctrine that a conspiracy involving a hired participant continues until that participant's personal "objective," remuneration, is either fulfilled or abandoned, the trial court in Leach ruled that all of the admissions by Leach and the Kramers had been during and in furtherance of a "continuing" conspiracy, notwithstanding that Leach's admissions came a half a year, and the Kramers'
admissions some 15 months, after the commission of the sole substantive crime contemplated by that conspiracy. The trial court thus invoked the co-conspirator exception to allow each admission to be used against each of the declarant’s co-conspirators.

The supreme court held that this was an erroneous application of the co-conspirator exception. The court’s discomfort with Saling was manifest. In response to what it termed the “misunderstanding” of Saling by the lower courts, the court essentially limited Saling to its facts, excising the inferential Saling doctrine that conspiracies remain pendent until all accounts among conspirators are squared.

The court’s surgeon in Leach was also the author of Saling: Chief Justice Wright. In what was avowedly a retrospective “explication” of Saling, he first undertook to review at length the facts of Saling, going so far as to look beyond his own opinion in the earlier case and to draw facts directly from the record in Saling. There followed a restatement of “[t]he Saling rule on termination of conspiracies.” The Chief Justice stressed that Saling had construed the applicability of Evidence Code section 1223 (the co-conspirator exception to the hearsay rule) as contingent not only upon the pendency of the conspiracy at the time of the declaration, and the furtherance of the conspiracy by that declaration, but also upon a prima facie showing by independent evidence that a conspiracy did in fact exist.

The “narrow scope” of the Saling rule on the termination

26. The court’s opinion specifies that Leach’s admissions occurred from June through October, 1971, id. at 426, 541 P.2d at 300, 124 Cal. Rptr. at 756, but states only in passing that the Kramers’ admissions were elicited fifteen months after Leach’s arrest. Id. at 437, 541 P.2d at 308, 124 Cal. Rptr. at 764. The court does state that the last arrest in the case was made on March 14, 1972. Id. at 433, n.11, 541 P.2d at 305 n.11, 124 Cal. Rptr. at 761 n.11. The transcripts of the tape recordings of the Kramers’ admissions show them to have occurred on March 10-11, 1972. People’s Exhibit No. 1014, People v. Leach, No. A-421988 (L.A. Super. Ct.), Leach committed the murder early Christmas morning, 1970. 15 Cal. 3d at 424, 541 P.2d at 299, 124 Cal. Rptr. at 755.

27. 15 Cal. 3d at 438, 541 P.2d at 308, 124 Cal. Rptr. at 764.
28. Id. at 432, 541 P.2d at 304-05, 124 Cal. Rptr. at 760-61.
29. Id. at 428, 541 P.2d at 302, 124 Cal. Rptr. at 758.
30. Id. at 429-30, 541 P.2d at 302-03, 124 Cal. Rptr. at 758-59.
31. Id. at 429 n.8, 541 P.2d at 302 n.8, 124 Cal. Rptr. at 578 n.8. See note 12 supra.
32. Id. at 430, 541 P.2d at 303, 124 Cal. Rptr. at 759.
33. Id. at 431, 541 P.2d at 303, 124 Cal. Rptr. at 759. See the quotations from Saling accompanying notes 13-15 supra.
34. Id. at 430 & n.10, 541 P.2d at 303 & n.10, 124 Cal. Rptr. at 759 & n.10.
of conspiracies was then underscored by according "special emphasis" to two crucial aspects of Saling.\textsuperscript{35} First, according to the court in Leach, "Saling did not purport to declare that all conspiracies in which one conspirator is hired by another are to be deemed as a matter of law to continue until the hireling is paid to his satisfaction."\textsuperscript{36} Rather, Saling had turned on its "'particular circumstances,'"\textsuperscript{37} which included not only the fact that "neither Carnes, the testifying witness, nor Saling, the defendant against whom the evidence was offered, had been paid in full at the time of Jurgenson's declaration," but also "the facts that Murphy's offer of money had been the motivation for the participation of both Saling and Carnes, and that the declaration had occurred 'only three days after the murder.'"\textsuperscript{38}

Second, the "particular circumstances" which sufficed in Saling to establish the continuing nature of the conspiracy at the time of Jurgenson's post-murder declaration, had been independently shown to exist by evidence apart from the content of the declaration itself.\textsuperscript{39}

In applying the reworked Saling rule to the facts of Leach, the court made clear that Leach's greatest gloss upon Saling was the tying of the independent evidence requirement directly to the pendency and furtherance requirements. The Saling court had applied the independent evidence rule to reject the prosecution's contention that Murphy's declaration to Carnes, which had occurred after Carnes had received payment, had nevertheless been made during the pendency of a purported "insurance conspiracy."\textsuperscript{40} However, the rule had been rather

\textsuperscript{35} Id. at 432, 541 P.2d at 304, 124 Cal. Rptr. at 760.

\textsuperscript{36} Id.

\textsuperscript{37} Id., quoting People v. Saling, 7 Cal. 3d 844, 852, 500 P.2d 610, 615, 103 Cal. Rptr. 698, 703 (1972).

\textsuperscript{38} Id., quoting People v. Saling, 7 Cal. 3d 844, 852, 500 P.2d 610, 615, 103 Cal. Rptr. 698, 703 (1972).

\textsuperscript{39} Id.

\textsuperscript{40} The Saling court wrote:

The People make an alternative argument . . . that the recorded conversations were admissible as being made during a conspiracy to collect the proceeds of the insurance policies on the life of Catherine Murphy . . . [and] contend that since such a conspiracy did not end until the insurance proceeds were paid, the statements made by a coconspirator prior to that time were admissible.

People v. Saling, 7 Cal. 3d 844, 854, 500 P.2d 610, 616, 103 Cal. Rptr. 698, 704 (1972). Evidence adduced at trial indicated that there were insurance policies in the total amount of $25,665 on the life of Catherine Murphy; that an uninsured motorist clause in Murphy's automobile insurance provided $15,000 coverage for injury or death resultant-
routinely stated. There was only the thinnest of inferences in *Saling* itself that independent evidence was required not only of the original existence of a conspiracy to which the defendant and the declarant were parties, but also of the *continuing pendency* of that conspiracy at the time the declaration was made. In restating *Saling*’s acknowledgement of the independent evidence requirement, *Leach* comprehensively reformulated that requirement. Noting that “[t]he independent evidence requirement is set forth somewhat awkwardly in subdivision (c) of Evidence Code section 1223,”¹ the court declared:

(1) the independent evidence requirement is set forth somewhat awkwardly in subdivision (c) of Evidence Code section 1223,”¹ the court declared:

(T)hree preliminary facts are required to be established under section 1223 if evidence of the declaration of a co-conspirator is to be admissible: (1) that the declarant was participating in a conspiracy at the time of the declaration; (2) that the declaration was in furtherance of the objective of that conspiracy; and (3) that at the time of the declaration the party against whom the evidence is offered was participating or would later participate in the conspiracy. Section 1223 permits none of these facts to be estab-

The court went on to note that the only mention of insurance in the recorded conversations themselves consisted of Murphy being asked about his insurance and Murphy’s observation in response that he would recover only $5000, although if he had “wanted to use my car I’d get fifty [sic; fifteen?] grand,” and that he “wasn’t doing this for insurance.” *Id.* at n.10, 500 P.2d at n.10, 103 Cal. Rptr. at n.10. The veracity of this assertion by Murphy is somewhat suspect. Since he misrepresented the amount of insurance on his wife as $5000 rather than the $25,000 established at trial, he may well have wanted the money—but without sharing it with his co-conspirators in the murder. This raises in a different context the very problem which provoked Mr. Justice Sullivan’s dissent in *Saling* and led to the difficulties encountered by the *Leach* court in holding the co-conspirators’ statements in *Leach* inadmissible notwithstanding *Saling*: the extent to which the personal motivations of a particular conspirator for entering into a conspiracy are to be imputed to the conspiracy generally as if they were the objectives which all the conspirators were striving in common to accomplish. See *id.* at 857, 500 P.2d at 618-19, 103 Cal. Rptr. at 706-07 (dissenting opinion). If Murphy was motivated, at least in part, to murder his wife so as to recover insurance on her life, but concealed this motive from his conspirators by misrepresenting the amount of insurance in force, can the conspiracy as a whole reasonably be deemed to be continuing for so long as it takes Murphy to collect the insurance about which his co-conspirators do not know, and in which they will not share?

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¹ People v. Leach, 15 Cal. 3d 419, 430-31 n.10, 541 P.2d 296, 303 n.10, 124 Cal. Rptr. 752, 759 n.10 (1975).
lished through the evidence of the declaration itself, save insofar as the content of the evidence must be considered in determining whether the declaration was in furtherance of what is established prima facie by independent evidence to have been the object of the conspiracy. 42

It was this expanded requirement of independent evidence which proved dispositive in *Leach*. Despite the fact that “the circumstances of the murder and the evidence found on Leach at the time of his arrest were surely sufficient to make out a prima facie showing of conspiracy,”43 the court held that what *Saling* requires, and what is totally lacking in this case, is independent evidence that the conspiracy between Leach and the Kramers was still operative at the time of their respective admissions, notwithstanding the accomplishment of the primary objective of the conspiracy with the death of Howard Kramer.44

Indeed, the court noted, the evidence of the admissions themselves failed to establish that the conspiracy remained in existence for more than a few weeks following Leach’s incarceration.45 And even if, contrary to the evidence,46 the collection of

42. Id.
43. Id. at 443, 541 P.2d at 305, 124 Cal. Rptr. at 761.
44. Id.
45. Id. at 437 & n.12, 541 P.2d at 307-08 & n.12, 124 Cal. Rptr. at 763-64 & n.12.
46. The *Leach* court resoundingly denounced resort to a supposed “insurance conspiracy” as a device for fictitiously prolonging the evidentiary life of any conspiracy to commit an act which may result in the incidental payment of insurance to one or more of the conspirators. Citing the *Saling* court’s refusal to accept Murphy’s beneficiary status under insurance policies on his wife’s life as establishing prima facie the existence of an “insurance conspiracy” even though Murphy had forged his victim’s signature to obtain the insurance, the court in *Leach* concluded:

[T]he same result must obtain when the record reflects in addition nothing more than that the insurance in force was in due course actually collected by the murderous beneficiary. To hold otherwise would have the artificial effect of making virtually every interspousal murder conspiracy a prima facie insurance conspiracy as well, since many spouses have some sort of reciprocal life insurance in force . . . . A murderer playing the part of a bereaved spouse is hardly likely to refuse to accept the payment of such insurance notwithstanding that the collection of insurance proceeds may in no way have been the motive or objective of the murder conspiracy.

. . . . The objective of the conspiracy was to kill Howard Kramer, not to collect insurance, and Leach cared not a whit whence his remuneration came, be it by insurance fraud, bank robbery, or dope peddling.

15 Cal. 3d at 434-35, 541 P.2d at 306, 124 Cal. Rptr. at 762.

The court held that under such circumstances it saw “no basis for ‘further breach of the general rule against the admission of hearsay evidence,’ ” noting in passing that
insurance were deemed to have been a second principal objective of the conspiracy, there was no showing of when the insurance proceeds had in fact been collected.\textsuperscript{47}

The \textit{Leach} gloss on \textit{Saling} is best summed up by the court itself:

\begin{quote}
[I]t appears that the trial court erroneously read \textit{Saling} as holding that once there is independent evidence that one conspirator was induced to enter the conspiracy by a promise of payment, then as a matter of law the conspiracy is to be deemed continuing until such time as other evidence indicates payment has been received. Such a presumption that conspirators who stand in an unenforceable debtor-creditor relationship are going to be motivated by a continuing common desire to make a full and satisfactory accounting, and are going to act in concert towards this objective in continuation of their conspiracy to commit the crime for which payment was promised, belies common sense and adds but another layer of tarnish to the already dull finish of conspiracy doctrine.\textsuperscript{48}
\end{quote}

\section*{II. Expiication of the Co-Conspirator Exception}

Conspiracy doctrine is indeed dull, in every sense of the word: unresponsive, sluggish, boring, cloudy, indistinct, and sometimes simply stupid.\textsuperscript{49} It would be less dull if it were more reflective: if courts would pause on occasion to consider the

\textquote[People v. Leach, 15 Cal. 3d 419, 435-36, 541 P.2d 296, 307, 124 Cal. Rptr. 752, 763 (1975).]{"no special statutes are involved, such as those making it a crime to commit arson with intent to defraud an insurer." Id. at 435, 541 P.2d at 306, 124 Cal. Rptr. at 762. The court—notwithstanding its attempt to reconcile \textit{Leach} with \textit{Saling}—emphasized its commitment to curtailing use of the co-conspirator exception to admit evidence of statements made after the substantive criminal objective of a conspiracy has been achieved or abandoned:

\begin{quote}
We . . . decline to treat a conspiracy to commit a particular criminal offense as necessarily entailing a second conspiracy to collect the insurance proceeds which will be paid as a matter of course upon the successful commission of the contemplated offense. “[T]he looseness and pliability of the doctrine [of conspiracy] present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case.”
\end{quote}

\textquote[Id. at 435, 541 P.2d at 307, 124 Cal. Rptr. at 763.]{Id. at 435, 541 P.2d at 307, 124 Cal. Rptr. at 763. The court’s concluding quotation is from Krulewitch v. United States, 336 U.S. 440, 449 (1949).}

\textquote[Id. at 436, 541 P.2d at 307, 124 Cal. Rptr. at 763.]{47. People v. Leach, 15 Cal. 3d 419, 435-36, 541 P.2d 296, 307, 124 Cal. Rptr. 752, 763 (1975).}

\textquote[Id. at 436, 541 P.2d at 307, 124 Cal. Rptr. at 763.]{48. Id. at 436, 541 P.2d at 307, 124 Cal. Rptr. at 763.}

\textquote[See the definition of the adjective “dull” in \textit{American Heritage Dictionary of the English Language} 403 (W. Morris ed. 1969), and the accompanying comment: “Dull implies loss of sharpness through use . . . . Figuratively, dull implies lack of intelligence or slowness of perception . . . .”]{49. See the definition of the adjective “dull” in \textit{American Heritage Dictionary of the English Language} 403 (W. Morris ed. 1969), and the accompanying comment: “Dull implies loss of sharpness through use . . . . Figuratively, dull implies lack of intelligence or slowness of perception . . . .”}
origins and evolution of a doctrine which has grown like Topsy to overshadow the criminal law. Time is, of course, a luxury in the hurly-burly judicial world of crowded trial dockets and virtually automatic appeals. Thus this article proposes to add some polish to the “dull finish of conspiracy doctrine,” and, at least with respect to the co-conspirator exception, remove enough tarnish for the courts to see in the reflections of future cases a clearer image of the logic and the limits of the co-conspirator exception.

The exception is principally used by the state in criminal prosecutions, as part of the process whereby the state seeks to establish that a particular individual has forfeited his or her right to personal liberty. Even though every arguable misapplication of the co-conspirator exception may not assume the magnitude of federal constitutional error,50 liberty is still at stake. There is thus special relevance in the call to order of Mr. Justice Cardozo:

In delimiting the field of liberty, courts have professed for the most part to go about their work empirically and have rather prided themselves on doing so. They have said, we will not define due process of law. We will leave it to be “pricked out” by a process of inclusion and exclusion in individual cases. That was to play safely, and very likely at the beginning to play wisely. The question is how long we are to be satisfied with a series of ad hoc conclusions. It is all very well to go on pricking the lines, but the time must come when we shall do prudently to look them over, and see whether they make a pattern or a medley of scraps and patches.51

A. **Rationale for the Substantive Law of Conspiracy**

The rationale for treating the act of conspiring itself as a crime independent of the substantive crimes contemplated by the conspirators is the principle that “collective action toward an antisocial end involves a greater risk to society than individual action toward the same end.”52

Concerted action both increases the likelihood that the

criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish . . . [and] makes more likely the commission of crimes unrelated to the original purpose for which the group was formed.53

It follows that "the agreement is the essential evil at which the crime of conspiracy is directed."54 In an effort to create a measure of deterrence against such agreements over and above whatever deterrent effect may be attributable to the general criminal law's prohibition of the substantive crimes contemplated,55 and in recognition of the probative difficulties posed by organized crime in a technological society,56 courts have invoked agency theories of the civil law to impose nearly absolute vicarious responsibility for the acts of co-conspirators.57

B. Genesis of the Co-Conspirator Exception

Like the proverbial chicken and the egg of which she seems at once both product and progenitrix, the imposition of vicarious liability for the substantive acts of co-conspirators is historically so closely associated with the fostering of the co-conspirator exception to the hearsay rule that it cannot clearly

55. Developments, supra note 52, at 922, 925.
56. Id. at 999.
57. See, e.g., Pinkerton v. United States, 328 U.S. 640 (1946); 1 B. Witkin, CALIFORNIA CRIMES §§ 121-25 (1963); Developments, supra note 52, at 993-1000.

Although the substantive liability of a conspirator for the acts of co-conspirators is subject to "pendency" and "furtherance" requirements nominally identical to those discussed at length in the context of the co-conspirator exception to the hearsay rule, see text accompanying notes 95-112 infra, these requirements have been applied with extreme laxity. Generally, they have been subsumed under vague notions of the "scope" of a conspiracy and the foreseeable consequences of joining a conspiracy. Thus, the United States Supreme Court has held that a co-conspirator may escape vicarious responsibility if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.

Pinkerton v. United States, 328 U.S. 640, 647-48 (1946). As Mr. Witkin has noted with his customary incisiveness: "Despite the repeated affirmation of this accepted principle, cases actually holding that an act was outside the scope of the conspiracy are scarce." 1 B. Witkin, supra § 122.
be established which concept hatched the other. That the hearsay exception embodies the same agency concepts as the rule of vicarious liability for the substantive crimes of co-conspirators is manifest from the traditional elements of the exception:

[T]he prosecution in a conspiracy case is permitted to introduce out-of-court statements prejudicial to the defendant as long as they were made by alleged co-conspirators of the defendant and three prerequisites are met: the statements must have been made during the course, or pendency, of the alleged conspiracy; they must have been made in furtherance of the conspiracy's objectives; and they must be buttressed at trial by independent evidence of both the existence of the conspiracy and the defendant's participation in it.58

These three prerequisites all have their analogies not only in the substantive law of criminal conspiracy but also in civil agency law.59 Moreover, the co-conspirator exception as an accepted feature of American law is generally traced to United States v. Gooding,60 a criminal case in which the substantive law of civil agency and its evidentiary correlates were specifically invoked.61

C. Substantive Agency Theory and the Evidentiary Agency Rationale for the Co-Conspirator Exception

Unfortunately for reasoned jurisprudence, the agency relationship between defendant and co-conspirator which was fairly inferable as fact in Gooding has been entirely fictitious in most subsequent applications of the co-conspirator excep-

60. 25 U.S. (12 Wheat.) 460 (1827).
61. The Gooding case involved criminal prosecution of the owner of the slave ship General Winder. The challenged hearsay had been introduced in the form of evidence given by one Coit, who testified that he had been solicited to serve as mate aboard the General Winder on a slaving expedition. Coit had been assured by the captain that the defendant Gooding would see to it that Coit was paid "in the event of a disaster attending the voyage." Gooding v. United States, 25 U.S. (12 Wheat.) 460, 468 (1827).

In upholding the admissibility of this evidence, the Court was none too fastidious
tion. Gooding involved a business venture which was every bit as commercial as it was illicit, and which was accordingly organized and operated along conventional business lines. As a result, the conspirators shared a classic civil agency relationship. Especially in view of the authoritarian master-servant about segregating the substantive and the evidentiary aspects of its ruling. The Court began by rejecting the contention that "the doctrine of the binding effect of such declarations by known agents is, and ought to be, confined to civil cases." Id. The Court invoked the principle that "[i]n general, the rules of evidence in criminal and civil cases are the same." Id. But in the very same breath, the Court went on to draw analogies between the civil and the criminal law in the substantive area of vicarious liability, comparing the civil rule that "[w]hatever the agent does, within the scope of his authority, binds his principal, and is deemed his act," id., with the vicarious liability imposed under the criminal law upon one "who commands, or procures a crime to be done," and "in cases of conspiracy and riot." Id. at 469. Finally, the Court issued its seminal ruling in terms which suggest that the substantive aspects of the declarations in question, as verbal acts themselves part of the offense of slave-trading, were an essential element of their admissibility:

The evidence here offered was not the mere declarations of the master . . . totally disconnected with the objects of the voyage. These declarations were connected with acts in furtherance of the objects of the voyage, and within the general scope of his authority as conductor of the enterprise. . . . [His declarations] were, therefore, in the strictest sense, a part of the res gestae, the necessary explanations attending the attempt to hire . . . [and] as much within the scope of the authority, as the act of hiring itself. Our opinion of the admissibility of this evidence proceeds upon the ground, that these were not the naked declarations of the master, unaccompanied with his acts in that capacity, but declarations coupled with proceedings for the objects of the voyage, and while it was in progress. We give no opinion upon the point, whether mere declarations, under other circumstances, would have been admissible. The principle which we maintain is stated with great clearness by Mr. Starkie, in his Treatise on Evidence (2 Stark. Evid. part 4, p. 60): "Where," says he, "the fact of agency has been proved, either expressly or presumptively, the act of the agent, co-extensive with the authority, is the act of the principal, whose mere instrument he is, and then, whatever the agent says, within the scope of his authority, the principal says, and evidence may be given of such acts and declarations, as if they had been actually done and made by the principal himself."

Id. at 469-70; cf. Davenport, The Confrontation Clause and the Co-Conspirator Exception, supra note 58, at 1406 & n.100.


63. It is ironic that were Gooding to be tried today in California, it would not be necessary to resort to the co-conspirator exception to gain admission of the hearsay there involved. The facts of Gooding, see note 61 supra, would seem indisputably to make the declaration an "authorized admission," admissible as such under the stricter civil agency exception to the hearsay rule codified as Evidence Code section 1222. See note 181 infra.

Section 1222 provides, in pertinent part, that an "authorized admission" is a statement "made by a person authorized by the party [against whom the statement is offered] to make a statement or statements for him concerning the subject matter of the statement." CAL. EVID. CODE § 1222(a) (West 1966). The text of section 1222,
precepts obtaining in the early 19th century, it was entirely appropriate in Gooding to treat the co-conspirator *cum declarant* as the "mere instrument" of the defendant. As routinely applied in modern times, however, the co-conspirator exception makes a mockery of the archetypal agent-principal relationship in which the co-conspirators are the defendants' marionettes, their every act and declaration directly instigated by the defendants.  

Indeed, the lines of authority which pervade a criminal conspiracy would have to be capable of reversing field with the celerity of electrical current if agency notions were truly to be honored when virtually any declaration by any member of a conspiracy is used to administer an evidentiary shock to any other member of the conspiracy who happens to be held to ground in a court of law.

The elastic concepts of "agency" embodied in current conspiracy law have eroded the original agency rationale for the co-conspirator exception almost to the point of elimination. Indeed, the continuing invocation of agency concepts such as pendency and furtherance in cases in which the defendant clearly had no authority or control over the declarant suggests that a distinction must be drawn between the *agency theory* for the co-conspirator exception—that is, the substantive principles by which declarants may be held to be agents of the accused and hence within the purview of the co-conspirator exception—and the *agency rationale* by which such an exception to the hearsay rule is purportedly justified. A commentator has made the point well:

The *agency argument* ... fails because it shows no reason for exempting conspirators' utterances from the hearsay rule. To say that the substantive law does so only begs the question. The rules of agency govern the substantive law of conspiracy; they decide who is a member of the conspiracy. As such they are involved in determining *against whom* the evidence may be admitted. The point is

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that they are not relevant in determining why it should be admitted.66

A second commentator, also stressing that "the exception is in fact an evidentiary, and thus procedural instrument, and must be treated as such," aptly concluded, "It is one thing to say that because we hate all conspirators, we will treat conspirators especially harshly. But it is quite another thing to say that because we hate conspirators, we will treat harshly everyone accused of conspiracy."66

Policy Distinction: The Co-conspirator Exception and Substantive Conspiracy Law

The hearsay rule embodies judicial concern for the trustworthiness of hearsay evidence, which is not generally subject to the various courtroom devices for testing the reliability of a witness's perception and representation of facts.67 By precedent more hoary even than that pertaining to co-conspirators' statements, one class of extrajudicial declarations has always been admissible: the admissions of a party-opponent.68 Whether such admissions are simply excluded from the hearsay rule by definition or are recognized as hearsay but deemed admissible nonetheless, the rationale for their admission, although variously expressed,69 is basically that the party-opponent

66. Davenport, The Confrontation Clause and the Co-Conspirator Exception, supra note 58, at 1390-91. See also Note, Preserving the Right to Confrontation, supra note 64, at 755.
69. Admissions often have the character of declarations against interest. See Morgan, Admissions As An Exception to the Hearsay Rule, 30 Yale L.J. 355, 358-59 (1921); Comment, The Hearsay Exception for Co-Conspirators' Declarations, supra note 64, at 533. However, their admissibility has never been made contingent on satisfaction of the conditions governing the against-interest exception. The unrestricted admissibility of admissions of a party-opponent has been explained in terms of the adversary theory of litigation, see Fed. R. Ev. 801(d)(2), Advisory Comm. Note, at 328 (C. Boardman ed. 1973); estoppel of the declarant, see Comment, The Hearsay Exception for Co-Conspirators' Declarations, supra note 64, at 531-32; and the ability of the declarant to explain or rebut his statement without the aid of cross-examination, 4 J. Wigmore, Evidence § 1048, at 4-5 (Chadbourne rev. 1972) [hereinafter cited as J. Wigmore].
has no need to subject his own statement to extrinsic tests for reliability, such as cross-examination, observation of demeanor, administration of an oath, and consequent liability to prosecution for perjury. Since he is himself the declarant, the party-opponent well knows the reasons, if any, for doubting the accuracy of his admission, and can by his own testimony or other evidence bring these reasons to the attention of the trier of fact.\(^7\)

If the universal practice under Anglo-Saxon law of admitting into evidence the admissions of a party-opponent is accepted as valid, it follows that the agency rationale does suffice to justify the co-conspirator exception when applied, as in Gooding, to facts falling within classical civil agency doctrine. The degree of control over the agent required to constitute such an agency, together with rigorous application of the requirements that the declaration of the co-conspirator have taken place during the pendency of the agency and have been in furtherance of its object, place the defendant in almost as good a position to evaluate the trustworthiness of the declaration, and to contradict it if it is untrue, as he would be in were the declaration his own admission.\(^7\)

Under ordinary circumstances, however, the substantive agency theory for defining to whom the co-conspirator exception is applicable, and the evidentiary agency rationale for explaining why it should be so applied, have long since parted company. The social policies served by substantive conspiracy law have led to the imposition of vicarious responsibility for the acts of co-conspirators virtually without regard for the defendant's ability to control those acts. While this may be a logical means of deterring persons from joining conspiracies, it does not comport with the hearsay rule's purpose of assuring that only reliable evidence be used to determine if the defendant was in fact a conspirator and, if so, what in fact were the acts of his co-conspirators for which he is to be held vicariously responsible.

The substantive law of conspiracy pays heed to notions of pendency and furtherance only insofar as they place rational limits on the policy of deterrence through imposition of vicarious liability, and thus prevent visiting arbitrary retribution on

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70. 4 J. WIGMORE, supra note 69, § 1048, at 4-5.
co-conspirators for the rest of their lives.\textsuperscript{72} Because of the social policy of deterring conspiracies by forcing conspirators to assume onerous risks of vicarious liability, courts are wont to uphold jury findings of substantive liability on almost any state of facts conceivably suggestive that the co-conspirator's act was during the conspiracy and in furtherance of some common objective of the conspirators.\textsuperscript{73} Courts have unthinkingly transposed into evidentiary terms the increasingly lax substantive notions of what constitutes a conspiratorial agreement, who shall be deemed parties to such an agreement, and what acts they risk becoming accountable for vicariously. This, coupled with continual reduction of the threshold quantum of independent evidence sufficient to establish such preliminary facts so as to invoke the co-conspirator exception, has given the exception itself a momentum which has entirely outstripped the braking effect of the anachronistic agency rationale and its requirements of pendency, furtherance, and independent evidence.

D. Critique of Alternative Rationales

Assumption of Risk

The modern mode of application of the co-conspirator exception seems to evidence judicial adherence to several rationales other than agency. Perhaps most prevalent in the cases themselves are the unstated notions of waiver and assumption of risk which seem to underlie such rote-like recitations of the substantive agency theory as: "Declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to statements of a party."

In cases implicitly premised on waiver of the hearsay rule and assumption of the risk of being tried on untrustworthy evidence, no pretense is made that the agency relationship in the case at hand is such as to provide guarantees that the

\textsuperscript{72} Cf. note 57 \textit{supra}.


\textsuperscript{74} Lutwak v. United States, 344 U.S. 604, 617 (1953).
evidence admitted under the co-conspirator exception is trustworthy notwithstanding its hearsay character. Rather, the attitude is that the co-conspirator’s declaration is a verbal act—despite its being admitted for the truth of the matter asserted—the risk of which is assumed by the defendant along with the risk of liability under the substantive law for the criminal acts of co-conspirators.

Under close scrutiny, the implications of this glib equation of vicarious liability for substantive acts with like liability for evidentiary verbal acts admitted for the truth of the matters asserted prove to be profound. The agency theory of the substantive law of conspiracy, harsh as it may be, does no more than declare that one who has been proven beyond a reasonable doubt to have been a member of a conspiracy is to be held responsible for crimes which have been proven beyond a reasonable doubt to have been committed by another member of the conspiracy. To apply this agency theory to the evidentiary law of conspiracy, as is done when the co-conspirator exception is invoked on the basis of a conspiratorial agency which is too fictitious to furnish any circumstantial guarantee of the trustworthiness of hearsay evidence, is to sanction successive anomalies. First, one who is shown prima facie to have been a member of a conspiracy is treated as bound by the statements of his confederates, no matter how unreliable the hearsay evidence of those statements may appear to be by conventional legal standards; and second, such hearsay evidence, despite being presumptively doubtful itself, may be counted in the calculus of the proof beyond a reasonable doubt by which his membership in the conspiracy and his liability for the crimes of his co-conspirators is supposed to be established. Thus the assumption-of-risk rationale is, if not outrightly irrational, certainly a draconian means of deterring the formation of conspiracies. One whose conduct permits any inference of association with persons who may conceivably be conspirators risks being haled before a jury which will be allowed to consider what the law otherwise deems to be intrinsically untrustworthy evidence. Under such circumstances, the jury may well return a verdict false in some or all respects if the defendant was really a non-conspirator, or a peripheral conspirator lacking the real

75. See Comment, *The Hearsay Exception for Co-Conspirators’ Declarations*, supra note 64, at 539.

agency relationship to the declarants necessary to enable him to identify and expose inaccuracies in their declarations.\textsuperscript{77}

\textit{Res Gestae}

The waiver and assumption-of-risk rationale must be deduced by implication; it is never articulated as such when, with a passing reference to agency, the co-conspirator exception is applied to a case in which the purported agency is manifestly fictitious. The most common judicially stated non-agency rationale for the co-conspirator exception is that the declaration was part of the "\textit{res gestae}" of the conspiracy. The words \textit{res gestae} are frequently treated as a talisman by which conceptual difficulties with the co-conspirator exception may be conclusorily overcome in good judicial conscience. They have been invoked with such inconsistency that one astute commentator has forsaken efforts at reconciliation and has simply declared that the words strike him as "a confusing term of art" creating a "muddy area" in the law.\textsuperscript{78} Hardly more charitable characterizations of the rubric of \textit{res gestae} were forthcoming from Professor Morgan, who found it pervading the case law on vicarious admissions like a "fog,"\textsuperscript{79} and Professor McCormick, who summarized it "as a pass-word to the admission of evidence."\textsuperscript{80}

As a practical matter, determined courts classify co-conspirators' statements as \textit{res gestae} when a patent lack of agency makes it impossible to invoke the co-conspirator hearsay exception in its conventional form. Paralleling the development of the expansive substantive law of conspiracy, with its sweeping vicarious liability rule, the co-conspirator exception has been applied under the agency theory with little regard for the furtherance requirement, which has effectively been eliminated by construing it as the practical equivalent of pendency.\textsuperscript{81} However, pendency itself has generally remained a prerequisite to application of the co-conspirator exception pursuant to the agency theory.\textsuperscript{82} Thus, it is when courts have

\textsuperscript{77} Cf. United States v. Fradkin, 81 F.2d 56, 59 (2d Cir. 1935).
\textsuperscript{78} Davenport, \textit{The Confrontation Clause and the Co-Conspirator Exception}, supra note 58, at 1384-85 n.42.
\textsuperscript{79} Morgan, \textit{The Rationale of Vicarious Admissions}, 42 Harv. L. Rev. 461, 467 (1929) [hereinafter cited as Morgan, \textit{The Rationale of Vicarious Admissions}].
\textsuperscript{80} C. McCormick, supra note 67, § 274, at 587.
\textsuperscript{81} See, e.g., \textit{Model Code of Evidence} rule 508 (1942); \textit{id.}, comment, at 250; \textit{id.}, Foreword, at 49; \textit{Uniform Rules of Evidence} rule 63(9) (pamph. ed. 1953); \textit{Developments}, supra note 52, at 985-86.
been inclined to admit co-conspirators' declarations which occurred after the termination of a conspiracy that they have resorted to \textit{res gestae}.^{83}

Like admissions, the \textit{res gestae} class of extrajudicial declarations is as much a negative definition of hearsay as an exception to the hearsay rule. Declarations legitimately classified as \textit{res gestae} fall within the larger class of declarations which are admitted as verbal acts rather than for the truth of the matter asserted, because there is some probative value to the fact that a statement was made, entirely apart from the truth of the matters stated.\textsuperscript{84} In conspiracy cases \textit{res gestae} properly denotes only those declarations probative by their very existence of the fact of a conspiratorial agreement. However, loose usage of the doctrine to circumvent the pendency requirement of the agency theory has, in some jurisdictions, reduced the use of \textit{res gestae} as a rationale for admitting the declarations of co-conspirators to little more than an assertion that the content of the declaration so admitted is relevant to the alleged conspiracy.\textsuperscript{85}

\textit{Commentators' Analyses}

Since courts have generally offered such unsatisfactory rationales for free application of the co-conspirator exception, commentators have long recognized the exception as a challenging problem. It is testimony to the momentum the exception has acquired as a useful tool in conspiracy prosecutions that most commentators have conceived of their task as to devise a rationale that fits the practice, rather than to suggest restrictions that would make application of the rule consistent with its ostensible agency and \textit{res gestae} rationales. For years Professor Morgan was more or less alone in arguing that declarations commonly deemed admissible as vicarious admissions of a party-opponent frequently were dangerously lacking in realistic indicia of reliability. However, Morgan recognized that many such declarations did have evidentiary value, even where there was no real agency relationship between the defendant and the declarant. Morgan suggested that a safer and more rational way to achieve the ends legitimately served by the co-conspirator exception would be to expand the hearsay rule re-

\begin{itemize}
  \item \textsuperscript{83} See Annot., 4 A.L.R. 3d 671, 737-39 (1965).
  \item \textsuperscript{84} See Lutwak v. United States, 344 U.S. 604, 618 (1953).
  \item \textsuperscript{85} Development, supra note 52, at 986.
\end{itemize}
garding declarations against interest, freeing it from the anachronistic limitation which excluded declarations against penal rather than proprietary or personal interests, and eliminating the requirement that the declarant be unavailable to testify as a witness. 88

Professor Wigmore accepted at face value the co-conspirator exception's complete incorporation of the substantive agency theory of vicarious liability, with little apparent discomfort at the inapplicability of the rationale to the law of evidence. Wigmore was prepared to postulate that even under the fictitious agency concepts of modern conspiracy law, there is generally some sort of residual identity of interest which imparts to declarations by co-conspirators the same sort of reliability imputed to admissions. Underlying Wigmore's views on the subject was a clear distaste for the exclusionary aspects of the hearsay rule in general. 87

The middle ground between Morgan and Wigmore was occupied by Professor McCormick, who like Wigmore tailored his rationale to fit the rule as applied, but who like Morgan sought to articulate the rationale in terms of the interests of the declarant rather than of the defendant. McCormick recognized that courts generally applied the co-conspirator exception according to substantive agency principles, but argued that insofar as these principles entailed adherence to the furtherance prerequisite, they were erroneous. McCormick supported a per se rule that a declaration concerning any aspect of a conspiracy made by a conspirator during the pendency of that conspiracy was against the declarant's interest and should accordingly be deemed trustworthy enough to be admissible. 88 McCormick failed, however, to explain why this rationale would not support treating the declarations of conspirators as admissible against anyone, rather than only the co-conspirators of the declarant.

E. The Necessity Rationale and the Right to Confrontation

Two trends have marked modern efforts to fashion a reasonable co-conspirator exception. First, there has come the recognition that all ostensible rationales for the exception in terms

86. See Morgan, The Rationale of Vicarious Admissions, supra note 79, passim.
87. See 4 J. Wigmore, supra note 69, §§ 1077, 1079, 1080(a), at 158-61, 180, 186, 198-201.
88. C. McCormick, supra note 67, § 244, at 522-23.
of the purposes of the hearsay rule are unpersuasive and unrealistic; this has led to the proposal of a new rationale more responsive to the actual motivations of the courts applying the exception.

[T]he co-conspirators’ exception has expanded rather than shrunk which is not typical of rules without a reason. The true reason for the exception explains both its growth and the parallelism of that expansion to the expansion of the law of conspiracy. That reason is simple: there is great probative need for such testimony. Conspiracy is a hard thing to prove. The substantive law of conspiracy has vastly expanded. This created a tension solved by relaxation of the law of evidence. Conspirators' declarations are admitted out of necessity.89

The emergence of the necessity rationale has focused attention on how necessity may be served without treating accused conspirators unfairly through wholesale admission of unreliable evidence. In line with Morgan's concept of analyzing the individual circumstances of co-conspirators' declarations to determine their reliability, it has been proposed as a correlate to the necessity rationale that trial courts should exercise their discretion to filter out particularly unreliable declarations from the generally admissible mass of co-conspirators' statements.90

The second trend in the development of a workable rule and rationale governing evidentiary use of co-conspirators' declarations has been the recognition that satisfaction of some sort of minimum standards of reliability is a constitutional prerequisite to the admissibility of hearsay evidence. Although tentative indications that the hearsay rule of the common law was to be deemed incorporated by reference in the sixth amendment’s right to confrontation have been disavowed, the United States Supreme Court has indicated the necessity of particularized analysis of the reliability of hearsay evidence, even where the evidence is of a class generally excepted from the hearsay rule.91 This development has sparked new efforts at reformulating the co-conspirator exception in

89. Levie, Hearsay and Conspiracy, supra note 65, at 1166.
90. Id. at 1166-67.
91. Dutton v. Evans, 400 U.S. 74, 87-90 (1970) (Stewart, J.) (plurality opinion); id. at 97-100 (Harlan, J., concurring) (reaching same result under less exacting due process test).
III. APPLICATION OF THE CO-CONSPIRATOR EXCEPTION UNDER CALIFORNIA LAW

Thus far this article has sought to examine in general terms the origins of the co-conspirator exception; the purposes it serves; the various rationales for the exception proposed by those seeking to demonstrate a rational link between its purpose and its application; and the modern trends of analysis and decision which seek to reconcile in contemporary practice the conflict between the substantive policy of penalizing conspirators, and the evidentiary policies—to some extent of constitutional dimension—against premising proof of conspiracy on untrustworthy evidence. The article has purposely made only incidental mention of California law in the course of this survey, for it is California law which is now to be examined in greater detail as a particular thread in the nationwide fabric of evidence law.

A. Independent Evidence

California's adherence to the independent evidence requirement of the co-conspirator exception has previously been discussed in the context of the Leach case and the attempted reconciliation of Leach with Saling. California's independent evidence requirement conforms to the national norm, save for Leach's added insistence on independent evidence of any subsidiary objectives of an allegedly "continuing" conspiracy.

In the ensuing discussion of further contrasts and comparisons between California law and that generally prevailing in other American jurisdictions, Leach and Saling are left to one side, the better to demonstrate at the conclusion that the reasoning of Saling, even as rewoven in Leach, does not conform to the seemly pattern of the pertinent law.

B. Furtherance

Although undoubtedly influenced by the national debate

92. See Davenport, The Confrontation Clause and the Co-Conspirator Exception, supra note 58, passim. See also Note, Preserving the Right to Confrontation, supra note 64, at 753-56.
93. See text accompanying notes 40-44 supra.
94. See text accompanying note 44 supra.
on the co-conspirator exception, California’s treatment of the exception has remained somewhat independent of the national tendency towards expanding the exception. While most jurisdictions have struggled in modern times to ease or eliminate the furtherance requirement as formulated by what is regarded as outmoded precedent, California courts have expressly applied it, despite the legislature’s apparent intent to sanction its elimination. Section 1870 of the Code of Civil Procedure of 1872, which remained in effect until its repeal by the Evidence Code in 1966,95 codified the co-conspirator exception as follows: “[E]vidence may be given upon a trial of the following facts: . . . After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy . . . .”96 Although section 1870 quite clearly preserved the independent evidence requirement,97 its only other requirement, that the declaration be one “relating to the conspiracy,” seems to have demanded no more than mere relevancy. Yet to the confusion of the commentators,98 California courts have always conditioned the admissibility of the declarations of co-conspirators on their having been made during the pendency and in furtherance of the conspiracies in question, notwithstanding the seemingly less restrictive text of section 1870. And while the earliest pendency and furtherance cases concerned post-termination declarations which were inadmissible under both requirements,99 it was soon squarely decided that furtherance was a requirement of independent force and effect from that of pendency.100

The distinction between furtherance and pendency has been retained in modern California law, although it is the rare case which articulates the distinction clearly. When a declaration has occurred after the termination of the conspiracy, the disabling requirements of pendency and furtherance are gener-

95. See Cal. Stats. (1965), ch. 299.
96. CAL. CIV. PRO. CODE § 1870(6) (West 1955).
98. See Morgan, The Rationale of Vicarious Admissions, supra note 79, at 465 & n.8; Levie, Hearsay and Conspiracy, supra note 65, at 1169 & n.49.
99. People v. Irwin, 77 Cal. 494, 502, 20 P. 56, 58 (1888); People v. Aleck, 61 Cal. 137, 138 (1882); People v. English, 52 Cal. 212, 213 (1877); People v. Moore, 45 Cal. 19, 21 (1872).
ally invoked in a single judicial breath;\(^{101}\) and when a declaration occurs during a conspiracy and is relevant enough to be offered against the defendant, its role in furtherance of the conspiracy is usually so self-evident as to warrant no more than a conclusory reference to the furtherance requirement in stating the manifest admissibility of the declaration pursuant to the co-conspirator exception.\(^{102}\) However, the question of furtherance independent of pendency has been presented where a co-conspirator has made statements upon his apprehension which incriminate the defendant, who at the time of the declarations may still have been pursuing the aims of the conspiracy individually or through other co-conspirators.\(^{103}\)

California's continuing commitment to the furtherance requirement was emphatically demonstrated by its express inclusion in Evidence Code section 1223,\(^{104}\) the successor to the pertinent part of section 1870 of the Code of Civil Procedure.\(^{105}\) The eclipse of the furtherance requirement in most American jurisdictions had been recognized by both the Model Code of Evidence,\(^{106}\) and the Uniform Rules of Evidence,\(^{107}\) which, while retaining the pendency requirement, substituted a relevancy requirement for that of furtherance. In proposing the Evidence Code, the California Law Revision Commission rejected this formulation of the co-conspirator exception and recommended one which "restate[d] existing California law," including the furtherance requirement.\(^{108}\)

C. Pendency

California's treatment of the pendency requirement has been similarly independent of the national norm in at least one

\(^{101}\) See, e.g., People v. Gilliland, 39 Cal. App. 2d 250, 262-63, 103 P.2d 179, 185-86 (1940).


\(^{104}\) See note 9 supra.


\(^{106}\) Model Code of Evidence rule 508(b)(1942).

\(^{107}\) Uniform Rules of Evidence rule 63(9) (pamph. ed. 1953).

The co-conspirator exception respect. It has long been established in California that independent evidence is required of any subsidiary objective relied upon to continue a conspiracy beyond the commission of the contemplated substantive crime.  

California law—at least prior to Saling—never embraced the concept that a conspiracy, once proven prima facie to have existed, is presumed to continue until such date as the defendant can prove it was terminated. Nor has it otherwise sought to evade the pendency requirement under the bogus banner of res gestae. When evidence of some sort of continuing conduct by one or more conspirators more or less related to the original object of the conspiracy has been presented in a case, however, California courts have shown themselves no less susceptible to confusion than the courts of other jurisdictions. The problem arises from a frequent failure to distinguish questions of the substantive law of conspiracy, the relevance of otherwise admissible evidence, and the admissibility of hearsay evidence. The cases thus tend to treat as a single body of law and source of precedent the rulings of courts faced with three separate classes of pendency questions.

All three classes of cases involve acts or declarations which occurred after the arguable termination of the alleged conspiracy. What differs is the nature of these acts and declarations, and the purpose for which the evidence of such acts or declarations is offered. When these differences go unrecognized, rules fashioned in one class of cases may be applied unthinkingly to achieve quite different and possibly unjustified ends in another class of cases.

Substantive Liability Cases

The first class involves cases where the issue is whether the

drafted the Federal Rules commented that “the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established,” and thus adhered to “the accepted pattern” of both pendency and furtherance requirements, citing inter alia, section 1223 of the California Evidence Code.  


110. Cf. Coates v. United States, 59 F.2d 173, 174 (9th Cir. 1932); Developments, supra note 52, at 961 & n.297.

111. See text accompanying notes 78-85 supra.

defendant is to be held vicariously liable under the substantive
law of conspiracy for the act of a co-conspirator. The defendant
contends on appeal that any conspiracy in which he might have
been involved had terminated by the time of the co-
conspirator's act. The court's concern in such cases is with the
usual pendency and furtherance tests of substantive conspiracy
law and its purpose of deterring to the fullest rational extent
the formation of conspiracies. Thus the appellate court rules
that as long as there was some evidence that there was an
unaccomplished and unabandoned common object of the con-
spirators, and that the co-conspirator's act was a reasonably
foreseeable consequence of the agreement to pursue such ob-
ject, it was legally permissible for the jury to resolve adversely
to the defendant the purely factual issues of pendency and
furtherance.

Unfortunately, such rulings have since early in California's
statehood generally been phrased as if this determination of
substantive liability were no different from the determination
of the admissibility of a co-conspirator's declaration.113 It is
testimony to this long entrenched conceptual confusion that
one of the cases cited most frequently on pendency problems
and the co-conspirator exception is the substantive case of
People v. Holmes.114 In Holmes, the problem was whether
members of a labor union were liable as co-conspirators for the
death of a workman who, having ignored prior entreaties to
desist from working for a non-union contractor, was accosted
and assaulted by a mob of union members. The defendants
contended that there was no evidence of any agreement to use
violence, that

the only agreement shown was to go to deceased and ask
him to quit work . . . and that anything occurring there-
after was an independent act and had nothing to do with
the common design; that whatever conspiracy there ex-
isted was at an end, and that defendants were no more
responsible thereafter than they would be bound by state-
ments of any coconspirator after the termination of the
conspiracy.115

The court acknowledged the "well-settled" rule that "after the
conspiracy is terminated, and the crime has been committed,

113. See, e.g., People v. Pool, 27 Cal. 572, 575-76 (1865).
114. 118 Cal. 444, 50 P. 675 (1897).
115. Id. at 458, 50 P. at 680 (citations omitted).
the admissions of co-conspirators are not admissible against others," but ruled that the "facts and circumstances here raised a question for the jury to decide as to when the conspiracy, if any there was, terminated . . . ."116 Noting that groups of union members had twice approached the deceased with requests that he cease work, and that the third time they had arrived en masse and assaulted him "as soon as deceased came down off the scaffolding within reach," the court concluded, "[I]t was for the jury to say whether this violence was not a part of the original design."117

The problem with the undiscriminating equation of the pendency and furtherance tests for substantive liability for the acts of co-conspirators with the nominally similar tests for the application of the co-conspirator exception is that quite different policies are in issue, as this article has previously sought to demonstrate in analyzing the inadequacies of the agency rationale for the co-conspirator exception.118 The operative consideration for deciding the pendency and furtherance questions in the substantive context is simply whether the act of the co-conspirator was a risk which the defendant can legitimately be deemed to have assumed as a natural consequence of his joining the conspiracy. Technical considerations of whether the conspirators had any shared objective beyond the commission of the contemplated substantive crime thus play little part in determining pendency for purposes of imposing vicarious substantive liability. For instance, it is well established that even when armed conspirators already have consummated or abandoned their contemplated crime, each remains vicariously liable for violent acts committed by any individual conspirator in attempting immediately thereafter to avoid apprehension.119

Relevancy Cases

The second class of cases presenting pendency problems involve certain acts (including verbal acts) committed by co-

116. Id. at 459, 50 P. at 680.
117. Id.
118. See text accompanying notes 65-73 supra.

The court in Corkery made especially clear the policy of deterrence through assumption of risk which underlay the vicarious substantive liability imposed upon the defendant in that case. Rejecting the defendant's claim that his flight from the robbery
conspirators after the arguable termination of the conspiracy. Evidence of these acts is offered at the defendant's trial for conspiracy, or for the substantive crime committed by the conspirators, because these subsequent acts are supposedly probative of the defendant's guilt of the charged crime. The issue here is really not pendency at all, but relevancy. The evidence of the subsequent acts is not offered to establish the defendant's substantive liability for those acts nor, insofar as the subsequent acts were declaratory, is evidence of the acts admitted for the truth of the matters asserted. The subse-

constituted an abandonment of or withdrawal from his conspiracy to commit robbery, thereby relieving him of liability for the further acts of his co-conspirator, the court said:

It should be clear that an abandonment of an intention to commit a criminal offense should be a free and voluntary act on the part of the person seeking to commit it. . . . [I]t is patent that the withdrawal from the attempt should not be immediately caused by a desire to escape identification, detection or arrest. In other words, where an overt act has disclosed the intention of a person to commit a criminal offense, his subsequent intention to abandon, or to withdraw from, the commission of such offense, or its consequences, should be manifested by his own free and voluntary act, as distinguished from conduct induced or prompted by outside or foreign influences.

Id. at 297, 25 P.2d at 258.

120. Two vintage cases from the court of appeal show some fleeting recognition of two aspects of this distinction between pendency and relevancy. In People v. Lorraine, 90 Cal. App. 317, 330, 265 P. 893, 898 (1928), see text accompanying note 137 infra, the court acknowledged that evidence of the act of a co-conspirator did not raise a hearsay problem, but it made virtually nothing of its distinction between hearsay evidence and evidence of acts. The court treated evidence of the act of a co-conspirator as if the defendant were being charged with liability therefor, and upheld admission of the evidence only insofar as the act in question was "done under circumstances bearing the reasonable inference that it was a part and in furtherance of the original common design." Id. The court relied on the Stanley-Irwin line of cases which had failed altogether to appreciate the hearsay distinction. Id. See text accompanying notes 129-33 infra. Thus the insight of Lorraine was buried beneath unsound precedent unthinkingly applied.

In People v. Collier, 111 Cal. App. 215, 295 P. 898 (1931), the court made the complementary observation that acts of co-conspirators offered as evidence of the existence of a conspiracy are distinguishable from acts of co-conspirators for which the defendant is sought to be held criminally liable.

Repeating the "rule . . . that evidence of the separate acts and declarations of one co-conspirator is admissible against all the other conspirators after the conspiracy has been established," the court nevertheless discerned that "the real question involved . . . is whether this testimony was relevant. The question of the relevancy of testimony is frequently confused with the question of the weight and sufficiency of that testimony to prove a particular issue." Id. at 236, 295 P. at 906 (emphasis added). The court stressed that the fact of conspiracy can rarely be proved, "otherwise than by the establishment of independent facts bearing more or less closely or remotely upon the common design," thus justifying "greater liberality" in admitting circumstantial evidence tending to show the existence of a conspiracy. Id. at 236, 295 P. at 906.
quent acts are offered as proof of a crime and the defendant's personal or vicarious responsibility therefor; the fact that they occurred after the charged crime does not affect their admissibility unless they occurred at so remote a time that they lack relevance to the charge being tried.\textsuperscript{121}

As the United States Supreme Court has observed in an opinion considering precisely this problem, \textit{Lutwak v. United States},\textsuperscript{122} cases holding that

the declarations of a conspirator do not bind the co-conspirator if made after the conspiracy has ended . . . [have] dealt only with declarations of one conspirator after the conspiracy has ended. They have no application to \textit{acts} of a conspirator or others which were relevant to prove the conspiracy. True, there is dictum in \textit{Logan v. United States} [144 U.S. 263, 309 (1892)], frequently repeated, which would limit the admissibility of both acts and declarations to the person performing them. This statement of the rule overlooks the fact that the objection to the declarations is that they are hearsay. This reason is not applicable to acts which are not intended to be a means of expression. The \textit{acts} [at issue herein], being relevant to prove the conspiracy, were admissible, even though they might have occurred after the conspiracy ended.\textsuperscript{123}

The Court did not specifically discuss in \textit{Lutwak} the admissibility of post-conspiracy declarations which are not of-

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\textsuperscript{121} Of course, even if relevant, evidence of such acts may be inadmissible if its probative value is outweighed by the possible prejudicial effect of its admission. \textit{See Cal. Evid. Code} §§ 210, 352 (West 1966); \textit{C. McCormick, supra} note 67, § 229, at 479.

\textsuperscript{122} 344 U.S. 604 (1953).

\textsuperscript{123} \textit{Id.} at 618.

The facts before the Court in \textit{Lutwak} provide an apt illustration of the way in which the post-conspiracy acts of a co-conspirator can be relevant at a trial for that conspiracy.

In this case, the essential fact of the conspiracy was the existence of phony marriage ceremonies entered into for the sole purpose of deceiving
fered for the truth of the matter asserted, but such evidence appears to have figured in that case. Any lingering doubt as to the admissibility of such declarations under federal law was dispelled by the Court's recent decision in Anderson v. United States.

[A]s the Court emphasized in Lutwak, the requirement that out-of-court declarations by a conspirator be shown to have been made while the conspiracy charged was still in progress and in furtherance thereof arises only because the declaration would otherwise be hearsay. The ongoing conspiracy requirement is therefore inapplicable to evidence, such as that of acts of alleged conspirators, which would not otherwise be hearsay. . . .

. . . Out-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted. . . . [T]hose statements [were introduced] simply to prove that the statements were made . . . . [T]he prosecution was not contending that anything . . . said . . . was true . . . .

. . . The prior testimony was accordingly admissible simply if relevant in some way to prove the conspiracy charged.

the immigration authorities and perpetrating a fraud upon the United States. Acts which took place after the conspiracy ended which were relevant to show the spuriousness of the marriages and the intent of the parties in going through the marriage ceremonies were competent—such as the fact that the parties continued to live apart after they came to the United States; that money was paid the so-called wives as a consideration for their part in the so-called marriages; and that suits were started to terminate whatever legal relationship there might have been upon the record. Id. at 617 (emphasis in original).

124. There was testimony in Lutwak that after their admission to the United States—at which time the conspiracy was deemed to have ended—the conspirators who had participated in fraudulent marriages held themselves out to be unmarried or as married to persons other than their putative spouses at the time of entry. 344 U.S. at 609. Such representations of marital status, although declaratory in form, were presumably admissible against all the conspirators as verbal acts rather than as hearsay evidence of the truth of the matter asserted in the declarations. The government did not contend that the marriages in question had not formally occurred or were illegal, but simply that they had been entered into in bad faith. See 344 U.S. at 620-21 (Jackson, J., dissenting). The post-entry misrepresentations of marital status by the Lutwak conspirators were false, and hence had relevance as verbal acts tending to establish the existence of the prior, pre-entry naturalization fraud conspiracy. See note 126 infra.

126. Id. at 219-21.

The post-conspiracy declarations at issue in Anderson were made during testimony at a state judicial hearing into the validity of an election. The declarants and others were later charged under federal law with conspiracy to commit election fraud,
Unfortunately, the Supreme Court of California has been no more proof against confusing the evidentiary status of the acts and the declarations of co-conspirators than was the United States Supreme Court prior to Lutwak. This article has already discussed the erroneous equation in earlier cases of the dissimilar pendency considerations pertaining on the one hand

and the jury was instructed that it could use the prior, perjured testimony against all the defendants if it found that at the time of that testimony the charged conspiracy was still in progress. Rather than decide the pendency question, which turned on a complex question of statutory construction, the Supreme Court decided the issue on the "simpler, and more settled grounds . . . [of] the basic principles of evidence and conspiracy law set down in Lutwak." Id. at 218.

The election contest testimony of Tomblin and Browning . . . was not admitted into evidence in the [conspiracy] trial to prove the truth of anything asserted therein. Quite the contrary, the point of the prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false . . . . The primary justification for the exclusion of hearsay is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is introduced into evidence. Here, since the prosecution was not contending that anything Tomblin or Browning said at the election contest was true, the other defendants had no interest in cross-examining them so as to put their credibility in issue . . . .

Since these prior statements were not hearsay, the jury did not have to make a preliminary finding that the conspiracy charged . . . was still in progress before it could consider them as evidence against the other defendants. The prior testimony was accordingly admissible simply if relevant in some way to prove the conspiracy charged.

Id. at 219-21 (citations omitted).

In the course of holding that these prior statements were not hearsay, the Court noted in Anderson that "evidence is not hearsay when it is used only to prove that a prior statement was made and not to prove the truth of the statement," 417 U.S. at 220 n.8, even though the relevance of the statement to the conspiracy charge is dependent on it appearing from other admissible evidence that the matters asserted in the statement were in fact not true. It bears considerable emphasis that while ostensibly false statements may be relevant and admissible evidence as acts rather than as declarations offered to prove the truth of the matter asserted, the converse does not hold. Statements lacking any intrinsic "operative" significance, see C. McCormick, supra note 67, § 228, at 463-64, cannot be offered merely as acts rather than as evidence of the truth of the matters asserted, on the theory that since the statements appear to be true in the light of other evidence, ergo there is some relevancy in the very fact that the statements were made. The relevancy of such statements-as acts is wholly dependent on the trier of fact finding, in effect, that the statements are true. For the reasons which follow such statements-as-acts must be deemed as a matter of law to be either irrelevant or more prejudicial than probative. Cf. Comment, The Hearsay Exception for Co-Conspirators' Declarations, supra note 64, at 537-38.

Obviously, neither the mere fact that a statement was made nor the matter asserted in it can be considered in determining the truth of the statement and hence the relevance of the act of making the statement to the criminal charge for which the party against whom it is offered is being tried. This would be a classic instance of raising the statement-as-act into relevancy by its own bootstraps. Cf. Glasser v. United States, 315 U.S. 60, 74-75 (1942).

If the matter asserted in the statement is in effect an accusation that the party committed the charged crime—i.e., if the statement cannot be deemed true if the party
to substantive criminal liability for the acts of co-conspirators, and on the other hand to the admissibility of hearsay declarations of co-conspirators. This confusion was exemplified by the tendency of the California Supreme Court, like the United States Supreme Court and contemporaneous commentators, to articulate the pendency and furtherance requirement of conspiracy law in a single omnibus rule encompassing all acts and declarations deemed "binding" on the accused, regardless of the substantive or evidentiary nature of the particular "liability" involved. Thus it is hardly surprising to find venerable California authority compounding the substantive-evidentiary confusion in conspiracy law by declaring inadmissible, for failure to satisfy the pendency requirement, non-hearsay evidence of post-conspiracy acts and declarations of co-conspirators offered to prove the existence of a conspiracy, which conspiracy was either the crime charged or the theory under which the accused was alleged to be vicariously responsible for the crime charged.

is found to be innocent of the crime charged—then the relevance of the statement-as-act is entirely dependent on the antecedent resolution of the ultimate issue of the guilt of the party against whom the statement-as-act is offered. Such a statement-as-act is accordingly irrelevant as a matter of law, since it can hardly be probative of an issue which must be decided prior to any consideration of the statement-as-act.

If the statement merely asserts matter collateral to the ultimate issue in the case, there remains the problem of the trier of fact performing a "mental gymnastic," Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (L. Hand, Cir. J.) amounting to a quadruple somersault. First, the trier must scrupulously not consider the content of the statement as evidence bearing on the trier's determination of whether the content of the statement is true and the statement-as-act thus relevant; second, the trier must then assess the probative weight of the fact of the statement as evidence of any of the ultimate issues in the case while, thirdly, steadfastly ignoring the content of the statement, notwithstanding the circumstance that, fourthly, the fact of the statement as an act has relevance only because the trier has independently found the content of the statement to be true. No such feat is demanded when, as in Anderson, a statement's relevancy as an act is dependent on the statement's being false, since the trier is unlikely to err by considering the statement as evidence of the truth of the matters asserted when the trier has previously found the statement to be false.

These are but particularly troublesome and difficult to articulate examples of the fact that declarations offered as verbal acts rather than as hearsay evidence of the truth of the matters asserted generally present problems of prejudice to which the trial courts must be alert. In the context of a particular declaration offered merely as a verbal act it may be wholly unrealistic to expect a jury to disregard the content of the assertion. See Lutwak v. United States, 344 U.S. 604, 623 (1953) (Jackson, J., dissenting). Trial courts must be ready in such situations to apply Evidence Code section 352 (exclusion of unduly prejudicial evidence), lest the characterization of statements as acts become a subterfuge for getting jury convictions based on hearsay evidence. Cf. People v. Aranda, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965).

127. See text accompanying notes 65-73, 113-19 supra.
128. See Logan v. United States, 144 U.S. 263, 309 (1892); People v. Aleck, 61
The first such California case appears to have been *People v. Stanley.* The defendant had been tried separately for a robbery allegedly committed in concert with three others, and had been convicted of a lesser included offense. The trial court had admitted over objection evidence of the flight of one of the defendant's co-conspirators after arrest. Relying on *People v. Moore,* a hearsay case, and two treatises, the court reversed the judgment, declaring:

The rule is well settled that the acts of an accomplice are not evidence against the accused, unless they constitute a part of the *res gestae,* and occur during the pendency of the criminal enterprise, and are in furtherance of its objects.

The flight of the accomplice in this case occurred after the criminal enterprise had ended, and was not in furtherance of its object, nor a part of the *res gestae.*

The evidence was therefore inadmissible.

The holding in *Stanley* was expansively reaffirmed in

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129. 47 Cal. 113 (1873).

One earlier case made a similar mistake in confusing the agency limitations of the co-conspirator exception—pendency, furtherance, and independent evidence—with the relevance of post-conspiracy acts and declarations of co-conspirators offered to prove either the existence of a conspiracy or the commission of certain crimes by the conspirators. *People v. Trim,* 39 Cal. 75 (1870), concerned a defendant charged with the statutory crime of committing arson with the intent to defraud an insurer. The court held declarations made after the fire by a co-conspirator who requested payment from the insurer admissible because, under the terms of the statute, the offense was not complete until the fraud against the insurer had been consummated or abandoned; but in so holding, the court unnecessarily discussed the pendency, furtherance, and independent evidence requirements. The declarations were not admitted as hearsay to prove the truth of the assertions. Given the intent required under the statute, the request for payment was an "operative" verbal act and as such was relevant evidence of the crime charged and the underlying conspiracy. Due to the specialized nature of the substantive crime in issue, *Trim* has been cited only once in California law as authority for the pendency of a conspiracy. *People v. Fay,* 82 Cal. App. 62, 255 P. 239 (1927), purported to rely on *Trim* for the apparent proposition that arson conspiracies never end until the abandonment of endeavors to collect insurance. *Id.* at 68, 255 P. at 242.

130. 45 Cal. 19 (1872).

131. 47 Cal. at 118.

Despite its purported reliance on the pendency and furtherance requirements of the substantive law of conspiracy and the co-conspirator exception to the hearsay rule, the court in *Stanley* appears also to have believed that any probative value of the evidence was somehow outweighed by its prejudicial effect. Although the defendant therein could not be convicted of robbery unless the prosecution proved that some one of the conspirators had actually committed the robbery, the court seemed to feel that since the conspiracy had been amply shown it was unfair to bring in the evidence of the co-conspirator's flight, which as proof of the conspiracy was cumulative, and as
People v. Irwin, which involved a murder allegedly perpetrated by a conspiracy that included the defendant within its ranks. The trial court had instructed the jury that if it found some of the defendant's alleged co-conspirators "'guilty of falsehood, evasion, and silence, when questioned during the death of [the victim], you may consider [these], or any other criminating circumstances found in the testimony, as tending in some measure to establish the fact of a criminal conspiracy as charged.'" The supreme court, relying solely on Stanley, declared such evidence to have been erroneously admitted. "No falsehood, evasion, or silence of a conspirator, occurring after the death of [the victim], was admissible in evidence against the defendant under any circumstances."

Since Irwin, courts have become less hostile to prosecutorial use of conspiracy as a shortcut to convictions for participation in organized, sophisticated criminal activity which might otherwise not be susceptible to proof beyond a reasonable doubt. It is a curiosity, however, that courts intent on draconian application of conspiracy laws have nonetheless perpetuated the erroneous belief that evidence of the acts of co-conspirators is necessarily hearsay and hence admissible to establish the existence of a conspiracy only when these

proof of the robbery would have been admissible only against the fleeing co-conspirator, had he been tried jointly with the defendant.

It is well settled that the flight of a person suspected of crime is a circumstance to be weighed by the jury, as tending, in some degrees, to prove a consciousness of guilt, and is entitled to more or less weight, according to the circumstances of the particular case. . . . At most it is but a circumstance tending to establish a consciousness of guilt in the person fleeing: and it would be extending the principle to a great length to hold that the flight of one person tends to establish the guilt of another person. We have been referred to no case which goes to that extent.

Id. (citation omitted).

In a companion case to Stanley arising out of the same robbery, the court provided support for a probative value/prejudicial effect construction of Stanley by holding, on a more complete record of the evidence adduced at trial, that the evidence of the co-conspirator's flight was admissible for the purpose of showing the opportunity of the conspirators, who had been arrested directly after the crime, to dispose of the unrecovered fruits of the robbery. The holding in Stanley was limited to "the facts as then presented." People v. Collins, 48 Cal. 277, 279 (1874). If the pendency holding in Stanley was thus mischievous dicta, it was not authoritatively recognized as such until it had been adopted by other cases and had thereby become firmly entrenched in the law. Compare People v. Irwin, 77 Cal. 494, 502, 20 P. 56, 58 (1888) with People v. Lorraine, 90 Cal. App. 317, 332-33, 265 P. 893, 899-900 (1928).

132. 77 Cal. 494, 20 P. 56 (1888).

133. 77 Cal. at 506, 20 P. at 60.
acts have occurred during the pendency of the conspiracy. This pervasive misconception has resulted in a long line of wrongly reasoned but rightly decided cases by courts which were anxious to uphold convictions based on evidence of the acts of co-conspirators committed after the conspiracies had arguably terminated. As a result of their misapprehension of the nature of hearsay evidence, such courts have felt obliged to rule, on various sets of facts, that arguably terminated conspiracies were in contemplation of law still pendent at the time of the co-conspirators' acts. Thus they have unnecessarily held in connection with the admissibility of relevant, non-hearsay evidence of the existence of a conspiracy: (1) that a conspiracy to "loot" an estate by probating a forged will continued through the charged crime of perjury at the probate proceeding to subsequent acts such as attempted subornation of perjury before the grand jury, because the subornation was "necessary for the conspirators to avoid detection, keep themselves out of the state prison, and keep up the deception they were practicing on the probate court in order to realize anything from their crimes"; 134 (2) that a conspiracy to coerce a woman into marrying a spurned suitor continued after the kidnaping and rape (the charged crime) of the prosecutrix, and included the subsequent attempt of a co-conspirator to induce the prosecutrix to marry the rapist by representing to her that she was unworthy of anyone else; 135 (3) that a conspiracy to commit robbery "was not ended until the spoils had been divided" and hence encompassed the "movements and activities," presumably directed to avoiding arrest, of the defendant's co-conspirators after the robbery in question; 136 (4) that a conspiracy to commit grand theft included "a scheme to evade arrest and escape punishment" and hence encompassed evasive acts of co-conspirators who, after the theft, registered in a hotel under false names; 137 (5) that a conspiracy which initially contemplated multiple crimes continued after commission of the only crime shown by any evidence actually to have been committed by conspirators; 138 (6) that a conspiracy to commit murder encompassed a co-conspirator's

134. People v. Rodley, 131 Cal. 240, 254, 63 P. 351, 356 (1900).
136. People v. Dean, 66 Cal. App. 602, 608, 226 P. 943, 946 (1924); accord, People v. Fay, 82 Cal. 62, 68, 255 P. 239, 242 (1927) (grand theft; evidence that stolen bonds were later sold, and stolen checks were later cashed).
evasive acts and declarations after the charged crime of murder had been completed because “the purpose of the criminal enterprise extended beyond the act of killing [the victim] and included a plot also to escape punishment therefor by inducing the authorities to believe that [the decedent] was the unfortunate victim of a traffic accident’’; 139 (7) that a conspiracy to bribe city officials to appoint a particular chief of police expected to be friendly to gambling interests continued after the fact of the desired appointment, because the bribes consisted in part of promises of a future share in increased bookmaking receipts; 140 and (8) that a conspiracy to commit grand theft not only extended through the division of the spoils but also, when such division did not yield a co-conspirator the promised amount, encompassed still later acts undertaken “in compliance with a promise to pay an accessory a specified sum for his participation in the crime . . . .” 141

Hearsay Cases

The third class of cases in California law dealing with the acts or declarations of co-conspirators after the arguable termination of the alleged conspiracy consists of the only such cases actually involving hearsay. In this class of cases the declaration of a co-conspirator is admitted at trial to prove the truth of the matter asserted, and the question on appeal is whether the declaration satisfies the pendency requirement of the co-conspirator exception. These cases offer the only body of precedent bearing directly on the pendency issues posed by Saling and Leach.

Almost all of these cases have two common characteristics: their age and their reversal of the trial court. Many of the very early cases were relatively simple, concerning conspiracies which were not even contended to have continued through the time of the declarations in issue. 142 Nonetheless, these initial cases established the principle of unavailing insistence on the pendency requirement to which the California Supreme Court steadfastly adhered in the face of later efforts by resourceful

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142. See, e.g., People v. Gonzales, 71 Cal. 569, 575, 12 P. 783, 786 (1887); People v. Aleck, 61 Cal. 137, 138 (1882); People v. English, 52 Cal. 212, 213 (1877); People v. Moore, 45 Cal. 19, 21 (1872).
prosecutors to demonstrate the continuation of conspiracies despite the accomplishment of their principal objectives.\textsuperscript{143}

Although occasional cases have summarily reaffirmed the pendency requirement in passing on the admissibility of co-conspirators' hearsay declarations,\textsuperscript{144} few modern cases actually dealing with hearsay evidence have had to resolve seriously contested questions whether particular conspiracies were still pendent at the time of co-conspirators' statements. As previously discussed, most such purported rulings on the circumstances constituting conspiracies are undermined by the courts' failure to discriminate between pendency and relevancy problems.\textsuperscript{145}

At least one of the cases that lumped together "acts and declarations" for pendency purposes,\textsuperscript{146} however, actually involved a co-conspirator's declaration which by any analysis was hearsay pure and simple—"I killed her; I hit her seven times with a ball peen hammer"\textsuperscript{147}—and which under contemporaneous law was admissible only if uttered within the pendency of the conspiracy in issue. This case involved a murder-for-hire conspiracy in which the murder attempt was unsuccessful, not withstanding the assailant's declaration to the contrary. In upholding the admissibility of that declaration

\begin{footnotesize}
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\item[143.] See, e.g., Del Campo v. Camarillo, 154 Cal. 647, 652-53, 98 P. 1049, 1052-53 (1908); People v. Dilwood, 94 Cal. 89, 91, 29 P. 420, 421 (1892); People v. Irwin, 77 Cal. 494, 504-05, 20 P. 56, 59-60 (1888). See also People v. Opie, 123 Cal. 294, 296, 55 P. 989, 989-90 (1899).
\item[145.] See text accompanying notes 120-141 supra.
\item[146.] See text accompanying notes 120-141 supra.
\item[147.] In all fairness, it must be conceded that some such cases contain statements which surrender the appearance of hearsay only under the most searching scrutiny. See especially People v. Suter, 43 Cal. App. 2d 444, 454, 111 P.2d 23, 29 (1941).
\item[149.] Id. at 651, 281 P.2d at 325.
\item[149.] Brown antedated the decision in People v. Spriggs, 60 Cal. 2d 868, 870-75, 389 P.2d 377, 378-81, 36 Cal. Rptr. 841, 842-45 (1964), that declarations against penal interest were admissible as an exception to the hearsay rule. The ruling in Spriggs was codified as part of the Evidence Code. Cal. Evid. Code § 1230 (West 1966). Although it was held in Leach that the declaration against interest exception is inapplicable insofar as a hearsay statement may incriminate someone other than the declarant, see People v. Leach, 15 Cal. 3d 419, 438-42, 541 P.2d 296, 308-12, 124 Cal. Rptr. 752, 764-68 (1975), the declaration against interest exception as expanded by Spriggs and section 1230 would admit the purely self-incriminatory declaration at issue in Brown. Although the theory was not broached in Brown, it also is arguable that under the rather unusual circumstances of that case the declaration in issue was admissible as a "spontaneous statement" or an "excited utterance." See Cal. Evid. Code § 1240 (West 1966).
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against the objection that the conspiracy had terminated with the unsuccessful attempt on the victim's life, the court relied principally on evidence that in the aftermath of that attempt the conspirators had continued working toward their unattained goal. The court went on, in dicta, to cite non-hearsay "pendency" cum relevancy cases for their holdings that, in some circumstances, conspiracies may extend in time past the commission of the contemplated substantive crime.

In a similar vein, but more dubious in result and reasoning, is another murder-for-hire case, which summarily upheld the admissibility of a post-murder co-conspirator's declaration. The court relied exclusively on relevancy cases for the proposition that the conspiracy continued through a meeting of the conspirators 26 days after the murder, at which property taken from the decedent's body was distributed. Other cases actually involving a hearsay declaration by a co-conspirator after the arguable termination of the conspiracy also have slight precedential value. In some such cases, rulings on pendency were dicta, since the evidentiary error was found nonprejudicial. In another case, the pendency ruling was altogether unnecessary due to a ground for admissibility independent of the co-conspirator exception.


Returning to its earlier overview of the co-conspirator exception in national law, this article will now attempt to assay California law in general, and the Saling and Leach cases in particular, from the perspective of the two national trends previously noted. California's recent codification of the co-

150. Id. at 656-57, 281 P.2d at 328.
156. See text accompanying notes 89-92 supra.
THE CO-CONSPIRATOR EXCEPTION

conspirator exception in Evidence Code section 1223, and the widespread resort to the exception in modern California law—indeed in many instances where no hearsay was actually involved—is testimony to the fact of a felt need in both the legislative and judicial branches for the exception's lubricative effect on the prosecution of organized criminal activity. Yet in codifying the co-conspirator exception, California also codified an unusually vigorous furtherance requirement. While California's historic commitment to the furtherance requirement has not resulted in confining the application of the co-conspirator exception to realistic agency situations, the cases do reflect the recognition that residual adherence to 'agency rules is better than leaving defendants without protection, [since] defendants are never in greater danger than when a superficially clever court sees through the agency rationale and fails to replace it with anything else.' But as has aptly been observed, when

agency rules are kept to protect defendants, the strain distorts them. There is pressure to admit all conspirators' declarations and there is counter-pressure to protect defendants. Since neither of these forces is related to the law of agency, the cases concerning the co-conspirators' exception are notoriously unsatisfactory.

No case could illustrate this proposition better than Saling.

A. Erroneous Reasoning of Saling

When Saling is measured against the foregoing survey of California law relating to the pendency, furtherance, and independent evidence requirements of the co-conspirator exception, it is apparent that Saling was consistent with prior law only insofar as it reaffirmed, at least in its Leach incarnation, the independent evidence requirement and that requirement's dual applicability both to the original conspiracy contemplating a particular substantive crime and to any subsidiary conspiracy alleged to have continued after the commission or abandonment of that substantive crime.

There is, however, undeniable inconsistency between the strict furtherance requirement posited by both precedent and

157. See text accompanying notes 95-108 supra.
158. Levie, Hearsay and Conspiracy, supra note 65, at 1167.
159. Id.
160. See text accompanying notes 40-42 supra.
statute in California,\textsuperscript{161} and \textit{Saling}'s refusal to apply that requirement "mechanically."\textsuperscript{162} As Mr. Justice Sullivan's dissent pointed out, even assuming there was a continuing conspiracy encompassing the declarant, the co-conspirator's statement held admissible in \textit{Saling} was a narrative of past facts which could hardly have furthered either the \textit{fait accompli} (the murder) or the promised payment.\textsuperscript{183} Moreover, the statement involved in \textit{Saling} was made by a declarant who was never shown to have had any interest in the subsidiary conspiratorial purpose, postulated for pendency purposes, of paying off the other participants.\textsuperscript{184}

Declarant Jurgenson's only apparent interest in the satisfaction of his co-conspirators' monetary expectations was his presumable interest in avoiding apprehension; and that objective was expressly disavowed by \textit{Saling} as a permissible basis for deeming a conspiracy to continue past the commission or abandonment of the contemplated crime.\textsuperscript{185} Since a continuing or subsidiary conspiracy to avoid apprehension is not judicially cognizable in California, the only conspiracy which Jurgenson, as a co-conspirator, could have furthered by his declaration was the original conspiracy to commit murder. Thus \textit{Saling}'s furtherance holding reduces to the manifestly unsound proposition that a murderer's narration of the facts of his crime to a

\begin{itemize}
\item \textsuperscript{161} See text accompanying notes 95-108 supra.
\item \textsuperscript{162} People v. Saling, 7 Cal. 3d 844, 852 n.8, 500 P.2d 610, 615 n.8, 103 Cal. Rptr. 698, 703 n.8 (1972).
\item \textsuperscript{163} \textit{Id.} at 858, 500 P.2d at 618-19, 103 Cal. Rptr. at 706-07 (dissenting opinion).
\item \textsuperscript{164} \textit{Saling} specifies that money was "clearly" the motive for the participation of Saling and Carnes in the conspiracy, 7 Cal. 3d at 852, 500 P.2d at 615, 103 Cal. Rptr. at 703, but omits any mention of the motive of the declarant, Jurgenson. Thus no basis was shown for assuming Jurgenson's \textit{continued} participation in the conspiracy to commit murder insofar as that conspiracy was deemed to embrace Saling and Carnes' efforts to obtain payment from Murphy. Yet Evidence Code section 1223, see note 9 supra, expressly limits the co-conspirator exception to declarations "made by the declarant \textit{while participating} in a conspiracy . . . ." (Emphasis added). By stressing that the witness Carnes as well as the defendant Saling had at the time of Jurgenson's declaration, an unfulfilled conspiratorial objective of receiving payment for the murder, while omitting any mention of the declarant Jurgenson's having shared this subsidiary conspiracy to achieve it, \textit{Saling} seemingly turned the co-conspirator exception on its head. The co-conspirator exception derives its name from the fact that the extrajudicial declarant, not the witness who testifies in court to the fact of the declaration, must be shown to have been the co-conspirator of the defendant at the time of the declaration. Jurgenson could be deemed a part of the continuing \textit{Saling} only if remuneration were to be presumed to be the motive of any conspirator who has no other apparent reason for participating in a conspiracy.
\item \textsuperscript{165} People v. Saling, 7 Cal. 3d 844, 853, 500 P.2d 610, 616, 103 Cal. Rptr. 698, 704 (1972), adopting the holding of Krulewitch v. United States, 336 U.S. 440 (1949).
\end{itemize}
co-conspirator in that murder furthers the purpose of their conspiracy to commit the already committed murder.

It must respectfully be asserted in all candor that it was a non sequitur non pareil to declare in *Saling* that

Jurgenson's statements to Carnes were clearly made in furtherance of the conspiracy to kill Catherine Murphy, as it was necessary that Carnes be made aware of the departure from the original scheme in order that he, in the best interests of himself and his co-conspirators, be able to maintain the integrity of their security until they received payment for their participation in the crime.\(^{166}\)

The furtherance infirmities of *Saling*, since they stem in part from Jurgenson's status in the ostensibly continuing conspiracy, are suggestive of the even more fundamental pendency problems posed by *Saling*'s concept of a murder conspiracy continuing until payment for the murder has been effected in accordance with the expectations of some of the conspirators. It is necessary to look beyond the four corners of the cases cited in *Saling* to appreciate the full complexity of the question of when a conspiracy has terminated for purposes of the co-conspirator exception.

As has been demonstrated,\(^{167}\) there was little controlling precedent to enlighten the court in *Saling* as to the circumstances under which a conspiracy may be deemed, for evidentiary purposes, to have continued past the commission of its sole contemplated substantive crime. Nevertheless, most of the applicable authority, although old, was entirely unsympathetic to attempts to satisfy the pendency requirement with real and imagined objectives or motives secondary to the commission of the substantive crime contemplated by the conspiracy. This line of cases was ignored in *Saling* and reliance was placed instead on spurious precedent: cases dealing not with the co-conspirator exception but rather with the relevancy of non-hearsay evidence. Citing *People v. Collier*\(^{168}\) and *People v. Lorraine*,\(^{169}\) *Saling* held that since the defendant had been

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\(^{166}\) *Id.* at 852 n.8, 500 P.2d at 615 n.8, 103 Cal. Rptr. at 203 n.8.

\(^{167}\) *See* text accompanying notes 142-53 supra.


\(^{169}\) 90 Cal. App. 317, 327, 265 P. 893, 897 (1928). Curiously enough, *Collier* and *Lorraine* are the only two cases of their type to evidence some recognition, in portions not cited by *Saling*, that the relevancy of co-conspirators' acts as evidence of a conspiracy is a question independent of the probative status of either the hearsay declarations or the substantive criminal acts of co-conspirators. *See* note 120 supra.
“motivated” by promised payment to join the murder conspiracy, the receipt of that money was one of the “main objectives” of the conspiracy insofar as the defendant was concerned.110 By the terms of Saling, until this personal “main objective” of the defendant was fulfilled, all his co-conspirators in the murder remained his co-conspirators for evidentiary purposes, regardless of whether they shared the defendant’s continuing personal objective or played any conscious role in achieving it. Thus a declaration made after a murder by a participant in the murder was deemed admissible against the defendant at his trial for that murder.

In light of the analysis presented herein, it is submitted that Saling’s interpretation and application of the pendency requirement eviscerated an important limitation on the co-conspirator exception and permitted that exception to be invoked in far too sweeping a fashion. The holding in Saling is inconsistent with the traditional and wholly legitimate concern of the hearsay rule, as construed and implemented by both the decisional and statutory law of California, that evidence not subject to cross-examination and other in-court assurances of reliability be excluded altogether, absent some circumstantial guarantee of trustworthiness. The gloss placed on Saling by Leach, while it limits the value of Saling as precedent by stressing the independent evidence requirement, fails to repudiate Saling’s fundamentally flawed premise: that statements by conspirators made after the accomplishment or abandonment of a conspiracy’s substantive criminal objective are sufficiently trustworthy to warrant evidence of such statements being admitted in derogation of the hearsay rule. The California Supreme Court should “drop the other shoe.” Saling should be pro tanto overruled.

B. Rationale for Future Application of the Co-Conspirator Exception

The overruling of Saling would acknowledge both the need for due limitation of the co-conspirator exception and the intent of the legislature to provide that limitation. But the California Supreme Court need not pretend that the exception can ever be persuasively justified on the theory that agency relationships among co-conspirators will assure the impeachment

110. People v. Saling, 7 Cal. 3d 844, 852, 500 P.2d 610, 615, 103 Cal. Rptr. 698, 703 (1972).
of any unreliable hearsay evidence admitted. The most defensible rationale for the exception is simply its sheer necessity in view of the difficulty of proving conspiratorial crimes. The interest of society in successfully prosecuting conspiracies has, in the legislature's judgment, warranted relaxing in some instances the normal standards of evidence so as to shift from judges to juries the primary responsibility for determining the reliability of hearsay evidence of conspiratorial crime. General legal principles give way to the jury's common sense and collective conscience in the determination of particular factual issues. Thus when hearsay evidence is admitted under the co-conspirator exception, its reliability is ultimately determined as part of the jury's resolution of whether, at the close of all the evidence, there remains a reasonable doubt as to a defendant's guilt. This legislative policy judgment can hardly be deemed capricious in view of the similar balancing of values implicit in countless judicial invocations of the co-conspirator exception under the common law of evidence.

C. Requirements for Future Application of Co-Conspirator Exception

Recognition of the necessity rationale for the co-conspirator exception does not, however, mandate abandonment of the agency-related requirements of independent evidence, furtherance, and pendency. These requirements do serve the protective function of ensuring that grossly unreliable evidence will be excluded from admission notwithstanding the co-conspirator exception. From their incorporation into Evidence Code section 1223, it is manifest that the continued prophylactic effect of these safeguards was an essential element of the legislature's adoption of the exception. Although they have evolved into lenient forms rendering admissible the statements of co-conspirators who are not agents of the defendant in any civil sense, when these requirements are met there remains a fair chance that the defendant will be in a position to counter the prejudicial effect of a hearsay declaration admitted to prove the truth of what is in fact a false assertion.

The Single Common Object Concept

As both Saling and its antecedent cases demonstrate, the

171. See text accompanying notes 89-90 supra.
pendency requirement has been much less fixed in form and meaning than the relatively strict independent evidence and furtherance requirements applied under California law to limit the scope of the co-conspirator exception.\(^{172}\) If consideration is extended to cases purporting to deal with pendency regardless of the technically controlling nature of the resulting holdings, precedent provides a decidedly mixed bag of situations held to constitute continuing conspiracies.\(^{173}\) The confusion surrounding the pendency requirement may best be dispelled by California courts focusing their attention in future cases on what is not only the key analytic concept in the demarcation of the pendency of a conspiracy for evidentiary purposes, but also the most important element in the interrelationship between pendency and the other requirements of furtherance and independent evidence: identification of the "object" of a conspiracy. "Object" is used here in the specialized sense of the act which the conspirators have joined together to accomplish. The crucial concept in analyzing the pendency status of a conspiracy is that each conspiracy should, for purposes of applying the co-conspirator exception,\(^{174}\) be viewed as having just one object

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173. See text accompanying notes 134-41 supra.

174. It should be stressed that the idea of a single common object as here presented is attuned solely to the purpose of sound circumscription of the co-conspirator exception, and may be so applied without affecting existing rules of substantive liability for the acts of co-conspirators. The determination of the pendency of a conspiracy for evidentiary purposes need not necessarily control the determination of the pendency of that conspiracy for purposes of imposing on the conspirators substantive liability for the acts of their co-conspirators, nor does the single object concept for evidentiary pendency require alteration of the settled rule that only a single substantive charge of criminal conspiracy lies against a member of a conspiracy having multiple objects. See, e.g., People v. Kobey, 105 Cal. App. 2d 548, 564, 234 P.2d 251, 260 (1951). Furthermore, authoritative adoption of the suggested rule that subsequent conspiracies by co-conspirators do not, for purposes of the co-conspirator exception, extend the pendency of the original conspiracy would leave open the perplexing question whether the substantive vicarious liability of a conspirator for the acts of his co-conspirators extends not only to whatever subsidiary substantive crimes those conspirators may actually commit, but also to the co-conspirators' crime of subsidiarily conspiring among themselves to commit such substantive crimes.

Although separable problems of pendency are posed by the substantive and the evidentiary law of conspiracy, there is currently pending before the Supreme Court of California a conspiracy case presenting a pendency question that falls neatly in the crack between substantive liability and evidentiary procedure. People v. Saling, Crim. No. 18869 (hearing granted July 23, 1975), involves the issue of when a conspiracy is to be deemed terminated for purposes of the running of the statute of limitations pertaining to prosecution for that conspiracy. See People v. Saling, 48 Cal. App. 3d 724, 735-41, 122 Cal. Rptr. 1, 7-12 (1975) (advance sheets), vacated and hearing
shared in common by all those party to that conspiracy. The success of the conspirators in achieving this object, or their abandonment of their efforts to that end, should be determinative of the pendency of a conspiracy.

The "single common object" proposal is not meant to deny that there are many conspiracies which have in fact multiple common objects. Conspirators do frequently conspire simultaneously to commit several different crimes, or agree anew to commit additional crimes in the course of effectuating their original conspiracy. But there is nothing gained and much confusion engendered by evidentiarily treating such circumstances as constituting a single conspiracy to commit multiple crimes or otherwise having multiple objectives. If all the conspirators share the several objectives, breaking down their joint efforts into separate but simultaneous or contemporaneous conspiracies has no effect on the applicability of the co-conspirator exception as to any statement by any conspirator during the life of any of the conspiracies. The importance of segregating into separate conspiracies the efforts of conspirators towards separate objects lies in the fact that it would prevent use of the co-conspirator exception as to a defendant who

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175. One paragraph of Penal Code section 182's punishment provisions recognizes the possibility of a conspiracy with multiple objects: "If the felony is conspiracy to commit two or more felonies which have different punishments and the commission of such felonies constitute but one offense of conspiracy, the penalty shall be that prescribed for the felony which has the greater maximum term." CAL. PEN. CODE § 182 (West 1970). Otherwise, however, section 182 refers exclusively to conspiracies having but a single object. Moreover, both the overt act provision, id., and the co-conspirator exception itself, CAL. EVID. CODE § 1223(a) (West 1966), use the definite rather than the indefinite article in referring respectively to "some act . . . to effect the object [of a conspiracy]" and a "statement . . . in furtherance of the objective of that conspiracy." (Emphasis added).
was not involved in the formulation and pursuit of a particular objective. In such a case, the pendency requirement would make the co-conspirator exception inapplicable to any declarations by co-conspirators after the single common object of the conspiracy had been attained or abandoned.

Whether an object is in fact shared by all the conspirators allegedly party to a particular conspiracy should be ascertained by what is literally an objective rather than a subjective standard. The single common object of a conspiracy is the act which all the parties thereto are seeking jointly to accomplish. Particularly relevant to this concept of unanimity of objective is the distinction drawn by the dissent in *Saling* between the object of a conspiracy and the motives of the conspirators. The object of a conspiracy is what the conspirators have agreed to try to accomplish; why each conspirator has felt impelled to join the conspiracy is a different matter not pertinent to the pendency of the conspiracy. It needs little elaboration to demonstrate the problems which would abound were the pendency of conspiracies to be controlled by whether individual conspirators had abandoned or were continuing to pursue their underlying motives, especially since the motives might well reduce to impulses incapable of complete satiation: greed, lust, racism, or the placation of any number of other psychological bedevilments. To the extent that some of those party to a conspiracy may jointly see the object of that conspiracy as merely a means of achieving some other tangible objective, the single common object concept allows the pendency of the separate conspiracy, with its collateral objective and limited membership, to be determined in the proper context of that separate conspiracy alone.

The cogency of the single common object concept stems from the attention it focuses on the interrelationship between the pendency requirement and the independent evidence and furtherance requirements. It must be remembered that it is the rare case in which a defendant has already been convicted of having participated in a conspiracy with the declarant whose hearsay statements are sought to be used against the defendant. Generally the existence of a conspiratorial relationship between defendant and declarant is hotly disputed, and is the major issue upon which the defendant's guilt or innocence

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turns; often the defendant denies ever having been associated with the declarant in any manner whatsoever. The state must tip this balance of accusation and denial in its favor before it may avail itself of hearsay evidence: it must go beyond mere allegation of the defendant's role in a conspiracy to establish prima facie by independent evidence that the defendant did in fact participate in a conspiracy with the declarant. Only then is the state entitled to use hearsay evidence in seeking to prove beyond a reasonable doubt what it had previously established prima facie through non-hearsay evidence.

As previously indicated, the requirement of prima facie proof of a conspiracy between the defendant and the declarant, together with the other agency-related requirements of pendency and furtherance, does not render the "agency rationale" adequate to account for the co-conspirator exception. The exception finds its only tenable justification in the need for evidentiary accommodation of the prosecution of conspiracies. What the requirement of an independently established, prima facie relationship between the defendant and the declarant does assure, regardless of whether that relationship is ultimately determined to have been conspiratorial, is a rational probability that the defendant will be able to identify and expose any inaccuracies in the hearsay, notwithstanding the unavailability of the declarant for cross-examination. This probability is enhanced by limiting the hearsay which can be admitted in light of the prima facie relationship between defendant and declarant to statements in furtherance and within the pendency of that relationship.

It is inevitable that restrictions like pendency and furtherance may in some circumstances appear to be arbitrarily applied. When a relationship is such that a defendant is deemed able to explain a declarant's statement on one subject, it is difficult to conceive of that ability to explain evaporating when the same declarant contemporaneously addresses another subject not in furtherance of his relationship with the defendant. The problem of apparent arbitrariness is even more acute when the limitation is based on chronology rather than subject matter. Especially when drawing lines in terms of time, the law can never persuasively justify the resulting differences in treatment of conduct just instants apart, and must content itself by mak-

177. See text accompanying note 171 supra.
ing the line definite and easily perceived. Where a prima facie conspiratorial relationship between the defendant and the declarant has been shown, it could hardly be argued in support of the pendency limitation that the defendant's ability to explain his co-conspirator's declarations changes radically at the moment pendency lapses. But the pendency requirement recognizes that this ability does attenuate over time; for lack of a more flexible yet feasible alternative, this consideration dictates a cut-off point at which the applicability of the co-conspirator exception ceases absolutely. 178

This article's survey of the relevant cases indicates that the arbitrariness inherent in application of the furtherance and pendency requirements is only compounded by resort to expansive notions of continuing conspiracies with so many objects that virtually any statement by a co-conspirator may be found to be within the pendency of the conspiracy and in furtherance of some one of its objects. The single common object concept is proposed as an antidote to this tendency, which subverts the legislature's sound intention that the co-conspirator exception be justly limited in application. In order to be in furtherance of a conspiracy, a declaration ought to further what has been established prima facie, by independent evidence, to have been the single common object of that conspiracy. In order to be within the pendency of a conspiracy, a declaration ought to have been made before the conspiracy's single common ob-

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178. A court confronted with the vagaries of the co-conspirator exception can take comfort in the pithy observation of one of the most eminent justices of this nation's highest court on the necessity and perplexities of legal line-drawing:

In our approach towards exactness we constantly tend to work out definite lines or equators to mark distinctions which we first notice as a difference of poles. It is evident in the beginning that there must be differences in the legal position of infants and adults. In the end we establish twenty-one as the dividing point. There is a difference manifest at the outset between night and day. The statutes of Massachusetts fix the dividing points at one hour after sunset and one hour before sunrise, ascertained according to mean time. When he has discovered that a difference is a difference of degree, that distinguished extremes have between them a penumbra in which one gradually shades into the other, a tyro thinks to puzzle you by asking where you are going to draw the line, and an advocate of more experience will show the arbitrariness of the line proposed by putting cases very near to it on one side or the other. But the theory of the law is that such lines exist, because the theory of the law as to any possible conduct is that it is either lawful or unlawful. As that difference has no gradation about it, when applied to shades of conduct that are very near each other it has an arbitrary look.

ject, as established prima facie by independent evidence, has been attained or abandoned.

Restriction of the Co-Conspirator Exception to Criminal Conspiracies

The final condition proposed by this author for application of the co-conspirator exception is a rule which may be viewed functionally either as a further procedural refinement of the pendency requirement—requiring the single common object determinative of pendency to be an unlawful object—or as an altogether new requirement added to the three traditional requirements of furtherance, pendency, and independent evidence. The co-conspirator exception should be applied only to the declarations of co-conspirators in criminal conspiracies. 179

179. As defined by the Penal Code, a criminal conspiracy must have as its object a crime or other specified quasi-criminal act. Thus, CAL. PEN. CODE § 182 (West 1970) provides in pertinent part:

If two or more persons conspire:
1. To commit any crime.
2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime.
3. Falsely to move or maintain any suit, action or proceeding.
4. To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises.
5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.
6. To commit any crime against the person of the President or Vice President of the United States, the governor of any state or territory, any United States justice or judge, or the secretary of any of the executive departments of the United States.

They are punishable as follows: . . .

CAL. PEN. CODE § 183 (West 1970) further provides: “No conspiracies, other than those enumerated in the preceding section, are punishable criminally.”

It has thus become well established under California law that “the object of [a criminal] conspiracy must be an unlawful act.” 1 B. Witkin, CALIFORNIA CRIMES § 114, at 108 (1963) (emphasis in original). While unlawful acts are not necessarily criminal, cf. Developments, supra note 52, at 940-42, the vague language of section 182 relating to acts other than crimes which may be the object of criminal conspiracies has been narrowly construed, generally by reference to the criminal law. See, e.g., Lorenson v. Superior Court, 35 Cal. 2d 49, 59-60, 216 P.2d 859, 865-66 (1950); Davis v. Superior Court, 175 Cal. App. 2d 8, 14-16, 345 P.2d 513, 518-19 (1959).

Although the phrase [in section 182] referring to an act injurious to public health or morals has occasionally been cited as the basis of a conviction, it is doubtful whether it serves any significant purpose. The object of the conspiracy will almost invariably be within the terms of some specific criminal statute, and therefore can be charged under the more inclusive provision on conspiracy to commit “any crime.”

1 B. Witkin, supra § 116, at 110. Evidence Code section 1223, in referring to “a
This is the only way to implement the co-conspirator exception consistently with the intent of the legislature. In view of the social dangers posed by organized crime, the legislature, following a well-trodden judicial path, has seen fit to relax the hearsay rule in criminal conspiracy prosecutions. In construing the requirements upon which this relaxation of the hearsay rule is conditioned, the very purpose for that relaxation ought not to be ignored.

The concept of civil conspiracy serves an entirely different function from that of criminal conspiracy. Civil conspiracy is merely a substantive device for imposing vicarious liability for civil wrongs actually suffered. It is well settled in civil conspiracy law that no cause of action lies for civil conspiracy per se; to be the basis for recovery, a civil conspiracy must actually result in some damage legally actionable independently of the conspiracy. The concept of civil conspiracy increases the probability of a victim of civil wrong actually recovering damages to recompense him for the harm caused, by increasing the number of persons who may be held liable for the harm. Thus the concept of civil conspiracy promotes the important social policy of providing fair, orderly, and efficacious procedures for the settlement of grievances. While this policy may be the hallmark of civilization, it is quite different from the value judgments underlying the law of criminal conspiracy and the co-conspirator exception.

Accordingly, there seems to be no reason why a civil conspiracy should operate to invoke the co-conspirator exception. Certainly there is no legislative policy of enhancing the probability of successful recovery for a tort by allowing the fact that a tort has occurred to be established through hearsay evidence, even when the tort may have been the result of a civil conspiracy. If the civil conspiracy has the substance and cohesion of an actual civil agency, Evidence Code section 1222 provides...
for the introduction of adoptive admissions. There is no need to resort to the co-conspirator exception, with its fictional gloss on the civil law of agency—a gloss tolerated only because of the greater danger entailed in allowing the full rigor of the hearsay rule to extend a significant measure of immunity to criminal conspirators.

D. Constitutional Considerations

The proposed orientation of the pendency requirement towards the single common object of a criminal conspiracy completes this article’s suggested reformulation of the co-conspirator exception under California law. This reformulation has been framed as a counterpoint to an analysis of the exception as applied in American law generally. That analysis of national law concluded with the identification of two modern trends. One of those trends, the recognition of the necessity rationale for the exception, has already figured prominently in the foregoing reformulation of California law. It remains only to comment briefly on the second such trend, the recognition of the constitutional need for the minimal reliability of evidence admitted under exceptions to the hearsay rule.182

It cannot be said that evidence admitted under the co-conspirator exception in accordance with this article would in no event raise confrontation clause problems. But it is certain that the future application of the protective quasi-agency requirements of independent evidence, furtherance, and pendency in accordance with the principles set forth herein would greatly reduce the probability of convictions being secured upon unreliable evidence.183 The touchstone for administration

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182. See text accompanying notes 91-92 supra.
183. The focus of contemporary confrontation law has shifted from examination of the possible equivalency of the hearsay rule and the Federal Constitution’s confrontation clause, to case-by-case determination of the constitutional reliability of evidence otherwise admissible under exceptions to the hearsay rule. See generally Dutton v. Evan, 400 U.S. 74 (1970); Davenport, The Confrontation Clause and the Co-Conspirator Exception, supra note 58; Garland & Snow, The Co-Conspirators Exception to the Hearsay Rule, supra note 59, at 14-22; Note, Preserving the Right to Confrontation, supra note 64, at 756. Thus satisfaction of the standards set forth herein for the application of the co-conspirator exception cannot guarantee that a particular hearsay declaration will pass constitutional muster. The burden of detecting evidence which technically complies with an exception to the hearsay rule but nevertheless seems circumstantially to bear a high probability of being inaccurate falls in the first instance on the trial courts. Besides the solemn duty of enforcing the procedural
of the co-conspirator exception in California courts should be the defendant’s apparent ability to assess and challenge, without the benefit of confronting the declarant, the trustworthiness of a purported co-conspirator’s hearsay declaration. If this fundamental precept is fully understood and faithfully implemented by the trial courts, with due regard for the demonstrated danger of confusing the policies underlying the substantive law of conspiracy with the policies permitting the admission in certain circumstances of hearsay evidence in criminal prosecutions, California’s obligation to afford defendants due process of law will be as well met in conspiracy cases as in others.

guarantee of the state and federal constitutions, the trial courts are charged with a more basic discretion to promote the administration of justice by excluding evidence with a high potential for prejudice. Cal. Evm. C n. § 352 (West 1966); cf. People v. Beagle, 6 Cal. 3d 441, 451-54, 492 P.2d 1, 7-9, 99 Cal. Rptr. 313, 319-21 (1972). This discretion should be exercised to exclude unreliable hearsay evidence notwithstanding the admissibility of such evidence under an exception to the hearsay rule. Cf. note 126 supra.

It hardly bears noting that the converse is not the case. The legislature has not authorized the courts to admit seemingly reliable evidence notwithstanding its inadmissibility under the hearsay rule. Nor would it be particularly desirable, were the courts possessed of the legislature’s power to repeal the hearsay rule, to institute instead a system of case-by-case judicial determination of the reliability of proffered evidence. Even if only the minimal reliability required by the confrontation clause were the test under such a particularistic system, a period of standardless confusion and conflicting rulings by trial courts would probably be followed by the gradual development upon appeal of rules of admissibility even more amorphous than those now prevailing under the hearsay rule and its exceptions. Cf. Reynolds v. Superior Court, 12 Cal. 3d 834, 845 n.16, 528 P.2d 45, 52 n.16, 117 Cal. Rptr. 437, 444 n.16 (1974). A concomitant burden would be imposed on the appellate courts, which would have to accord less deference to trial court evaluations of reliability than to other exercises of “sound discretion.” See Davenport, The Confrontation Clause and the Co-Conspirator Exception, supra note 58, at 1381; Note, Preserving the Right to Confrontation, supra note 64, at 756. The likely result can be judged by reference to the complex fabric of analogous judge-made law concerning the admissibility of confessions. See, e.g., People v. Ditson, 57 Cal. 2d 415, 436-39, 369 P.2d 714, 725-27, 20 Cal. Rptr. 165, 174-76 (1962); People v. Atchley, 53 Cal. 2d 160, 169-70, 346 P.2d 764, 768-69 (1959). Offers of proof of hearsay generally are far more frequent at trial than attempts to introduce confessions, and the law governing the admissibility of confessions has had a long time to evolve. See 3 J. WIGMORE, EVIDENCE §§ 817-20, at 291-308 (Chadbourn rev. 1970). It thus seems indisputable that the appellate chore of supervising a system of case-by-case determination of the circumstantial reliability of hearsay evidence would be monumental. The sound administration of justice is likely to be far better served by retaining the initial filter of the hearsay rule and confining particularistic review of the reliability of proffered evidence to such constitutionally suspect evidence as passes through that filter.