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The Logic of Conspiracy—United States v. Spock, 416 F.2d 165 (1969).

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THE LOGIC OF CONSPIRACY—United States v. Spock, 416 F.2d 165 (1969). The Court of Appeals of the First Circuit in *United States v. Spock* reversed the conspiracy convictions of the four defendants—Dr. Benjamin Spock, Rev. William Sloane Coffin, Mitchell Goodman, and Michael Ferber—for aiding and abetting registrants to evade the military draft. However, Goodman and Coffin were remanded to the district court for a new trial. The decision is the most recent delineation of the elements requisite to a conspiracy. These elements provide the outer limits for a doctrine, the history of which exemplifies the "tendency of a principle to expand itself to the limits of its logic."[1] It is the purpose of this note to consider the doctrine of conspiracy, to delineate the approach adopted by the court in *United States v. Spock*, and to ask if the court's interpretation exceeded the limits of the logic of conspiracy.

I. LOGIC OF CONSPIRACY

A definition of conspiracy is helpful in orienting a discussion of the doctrine. Perkins has formulated the broadest definition: "[a] conspiracy is a combination for an unlawful purpose."[2] Beyond an introduction, definitions lose their value, because the elements of a conspiracy vary with the logic supporting them. Since the elements compose the concept being defined, it is inappropriate to begin with a restrictive definition.

The traditional assumption underlying conspiracy prosecution is that there is an increased danger to society in collective action:[3] the possibility of abandonment of the scheme is reduced by reliance on the cooperation of coconspirators, its execution is more likely to succeed with ready replacements, and the magnitude of

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[1] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921). This phrase was applied to the doctrine of conspiracy by Justice Jackson in a concurring opinion in Krulewitch v. United States, 336 U.S. 440, 445 (1949).

[2] R. PERKINS, CRIMINAL LAW 529 (1957) [hereinafter cited as PERKINS]. The most common judicial definition appears in Pettibone v. United States, 148 U.S. 197, 203 (1893):

> A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means . . . .

Perkins, finding the phrasing repetitious, produced the more terse definition. Holmes' reference to conspiracy as a "partnership in criminal purposes," Pinkerton v. United States, 328 U.S. 640, 644 (1946), is often adopted in popular discussion. *See, e.g.*, Orton v. United States, 221 F. 2d 632, 633 (4th Cir. 1955).

[3] *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 923 (1959). The authors refer to the "specified object" rationale which focuses on the objects specifically contemplated by the conspiracy, and the "general danger" rationale which looks to the dangers inherent in the grouping. *Id.* at 925. The latter is more relevant to the underlying logic of conspiracy, for the former is a concern in the commission or planning of all crimes.

the potential harm may be proportional to the number of persons involved.[4] Once effectively organized, the grouping may serve as a focus for further unlawful activity.[5] Since the unlawful combination is seen as posing greater danger to society than individual criminal conduct, its members are subjected to punishment for collective involvement rather than specific action.[6]

The logic of conspiracy varies with the nature of the elements on which the concept is based. When the additional danger to society of collective action is considered the underlying rationale for prosecuting individuals as a conspiracy,[7] two elements form the basis of the conspiracy—(a) relationship among individuals sufficient to produce collective action, and (b) an unlawful purpose, such that the dimension added is danger.[8]

The continuum of possible interpretations of conspiracy moves from the broadest formulation of the requisite elements, applicable to all instances of alleged conspiracy, to a narrower concept of conspiracy which distinguishes instances in which first amendment rights are involved:

> *Form a.* Any *agreement*, for the full range of unlawful purposes, is a relationship sufficient to present the added danger of collective action.

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[4] R. PERKINS 535. *See also* People v. Comstock, 147 Cal. App. 2d 287, 305 P.2d 228 (1956); Woods v. United States, 240 F.2d 37 (D.C. Cir. 1957).

[5] *Criminal Conspiracy*, *supra* note 3, at 925. *See also* United States v. Rabinowich, 238 U.S. 78, 88 (1915). As Judge Coffin summarized in his dissent to *United States v. Spock*:

> [T]he core idea underlying the conspiracy theory is that disciplined, concerted action poses a greater threat to society than does individual or uncoordinated group effort in that larger numbers permit a division of labor, and discipline makes withdrawal from the enterprise less likely.

416 F.2d at 184.

[6] R. PERKINS 535. Perkins discusses some instances where unlawful combinations do not have any element of added danger, *i.e.*, when the substantive offense requires concerted action and none participate but the necessary parties.

[7] *Criminal Conspiracy*, *supra* note 3, at 983. The author adds that in practical rather than logical terms, the rationale behind conspiracy may be solely the evidentiary and jurisdictional advantages. The more appealing of these advantages were listed in *Tea-party Theory of Conspiracy*, 44 MARQ. L. REV. 73 (1960): (1) quantum of proof frequently less; (2) statute of limitations for the substantive offense extended by charge of continuing conspiracy; and (3) coconspirator exception to the hearsay rule. While this practical rationale must be recognized, it is a result of the rules which have developed governing conspiracy prosecution rather than part of the logic of the doctrine itself.

[8] A third element, individual adherence to the illegality, is discussed in *Spock*, 416 F.2d at 176-80. Analytically, this element, rather than being essential to the creation of the conspiracy, is used as a check to assure that each member of a group is committed to the unlawful purpose posited as element b. That added element is especially crucial when the organization has mixed legal and illegal ends, as in Scales v. United States, 367 U.S. 203 (1961).

Form b. Any *combination*, for the full range of unlawful purposes, is a relationship sufficient to present the added danger of collective action.

Form c. Any combination, for the full range of unlawful purposes, is a relationship sufficient to present the added danger of collective action; but members of a combination who submit their opposition to current definitions of unlawful conduct to the marketplace of ideas may reduce their potential for added danger. To the extent that the potential is decreased, a less restrictive alternative should be employed.

Form d. Any combination, for the full range of unlawful purposes, other than those which submit their opposition to current definitions of unlawful conduct to the marketplace of ideas, results in added danger to society.

This continuum is not intended to exhaust the possible formulations applicable to conspiracy. Nor does it offer any judgment as to which of the formulations is preferable. It does, however, outline distinctions which are relevant and underline the problems which any court considering a conspiracy charge must resolve.

The threshold requirement for a conspiracy is the relationship among members of the alleged conspiracy. If a relationship sufficient to cross this threshold is not established, no conspiracy exists. *Form a* refers to this relationship as an agreement, *form b* as a combination. The distinction is more than one of semantics; it is a matter of logical sufficiency.[9] Agreement has a broad scope which can reach from parallel responses in thought or action to a common concern, through a shifting cluster of individuals sharing some ideas, to a cohesive organization with explicit goals. The unity of idea or purpose, the meeting of the minds in contract terms, is necessary to a conspiracy. Proponents of *form a* would find this unity sufficient to constitute a conspiracy as well.[10]

Proponents of *form b*, while admitting that an agreement comprises a necessary condition, find only an actual combination sufficient to yield a conspiracy.[11] A combination, in contrast, is the product of an agreement, and connotes an intent to come together

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[9] A *necessary* condition is a condition which must be met, but which may not, of itself, produce the result. A *sufficient* condition, when met, produces the result.

[10] *See, e.g.*, United States v. Falcone, 311 U.S. 205, 210 (1940):

> The gist of the offense of conspiracy as defined by sec. 37 of the Criminal Code, 18 USCA § 88, is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy.

[11] R. PERKINS 530. Perkins, who supports the proposition that the conspiracy is the resulting combination, still sees a meeting of the minds, *i.e.*, a unity of design and purpose, as necessary to the conspiracy. *See also* Krulewitch v. United States, 336 U.S. 440, 447-8 (1949) (Jackson, J., concurring); People v. Campbell, 132 Cal. App. 2d 262, 281 P.2d 912 (1955).

regarding the subject of agreement, whether or not action follows.[12] Since a combination is the result of the agreement,[13] the agreement still is necessary. The sufficiency of agreement, therefore, is the issue which distinguishes *forms a* and *b*.

Both approaches are found in court decisions, though judges frequently are unclear in their opinions which formulation they are adopting. The practical effect of the distinction is reflected in the type and amount of proof required. As a minimum, parallelism of thought or reaction is sufficient to establish agreement. A combining, or coming together in idea or act, negates any reliance on parallelism and forces the prosecution into an area infinitely more difficult of proof.[14]

The distinction between agreement and combination turns on a question of logical sufficiency. The emphasis of *forms c* and *d*, or the effect of using first amendment rights to submit opposition to definitions of unlawful conduct to the marketplace of ideas, is rather a matter of emotional or political orientation. These forms involve the extent to which one sees society threatened or endangered by certain conduct or expression.[15] The range of judicial response runs from consistent application of *form a* or *form b* without reference to these added variables, through a feeling that such variables may reduce potential danger and thus call for extra protection, to an assertion that the involvement of first amendment dissent per se negates added danger and compels the highest protection.

Once beyond the point where it is recognized that cases involving first amendment rights of speech and association used to oppose definitions of unlawful conduct are distinguishable, the line is clearly drawn between those who will recognize that these cases

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[12] *See* Fraina v. United States, 255 F. 28 (2d Cir. 1918): "The essence of a conspiracy is the combination, and the act of combining should ordinarily be first made to appear, before proving the acts and declarations of the co-conspirators." *Id.* at 34.

[13] Perkins explains most succinctly:

> Since the conspiracy is the combination resulting from the agreement, rather than the mere agreement itself it follows that the verb conspire where used in law, has reference to the formation of the combination. "To conspire" means "to combine" and not merely "to agree."

PERKINS 530. The agreement alone is insufficient: "The essence of the crime is the unlawful combination." *Id.* at 565.

[14] It is precisely this difficulty of proof which has given rise to special rules of evidence which allow a freer use of inference and circumstance. *See, e.g.*, Glasser v. United States, 315 U.S. 60, 80 (1942).

> "The evidence of conspiracy is largely circumstantial, but . . . the nature of a conspiracy is such that it can rarely be proved any other way." White v. United States, 394 F.2d 49, 51 (1968).

[15] This danger or threat is the second of the two elements discussed as constituting the basis of a conspiracy. *See* text accompanying note 8, *supra*.

may deserve a higher standard of protection, and those who find such protection compelled. Proponents of a less restrictive alternative usually will recognize that openness of dissent towards definitions of crime reduces the threat of a conspiracy to society, because the dissent can be countered by the government's arguments, and the occurrence of the substantive crime can be closely anticipated.[16] Advocates of this position require application of the least restrictive alternative only to the extent that the potential danger is reduced. Individual prosecution for the substantive offense is the most obvious less restrictive alternative, for it does not inhibit collective implementation of first amendment rights of speech and assembly. Though an infringement of rights of speech and assembly may appear in the prosecution of a single person for the substantive offense, the direct burden is limited to the accused. If members of a group identify closely with the individual prosecuted, the indirect infringement on rights of speech and assembly may be as great as the effect of a conspiracy prosecution.

Form d recognizes that the implementation of overt association and public expression within the first amendment guarantee may well be the preferred basis of a democratic society. As depicted in Wallace Mendelson's analysis,

> Democracy, then, is the *unfettered exchange of ideas* with public control of *action* in accordance with those thoughts which win acceptance in the marketplace of reason.[17]

This conclusion may be based on the belief that such an exchange is the best test of truth. Mr. Justice Holmes expressed that faith.

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[18]

The Supreme Court of the United States recently reiterated this value in *New York Times v. Sullivan* when it pronounced a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open . . . ."[19]

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[16] *See* U.S. v. Robe, 389 U.S. 258, 265-68 (1967); Aptheker v. Secretary of State, 378 U.S. 500, 512-14 (1964); Shelton v. Tucker, 364 U.S. 479, 488-89 (1960); Krulewitch v. United States, 336 U.S. 440, 457 (1949) (Jackson, J., concurring).

[17] W. MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 52 (2d ed. 1966).

[18] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes & Brandeis, JJ., dissenting).

[19] 376 U.S. 254, 270 (1964). Although the suit was for libel, the case involved political criticism and may, therefore, be analogous to a conspiracy prosecution for acts or words of dissent.

As a basis of democracy and a test of truth, the implementation of freedom of expression offers society an added value, early recognized by Cato:

> Without freedom of thought there can be no such thing as wisdom; and no such thing as publick (sic) liberty, without freedom of speech . . . .[20]

Finding an added value to society in such a conspiracy, rather than an added danger, the reason for applying the doctrine of conspiracy is not present and first amendment protection is compelled.[21]

The continuum of formulations provides a framework for an analysis of the opinion in *Spock* and an opportunity to determine whether the logic adopted by the court prohibited it from considering the relevant elements of the alleged conspiracy.

II. UNITED STATES V. SPOCK: THE DECISION

Benjamin Spock, Michael Ferber, Mitchell Goodman, and William Sloane Coffin were convicted under a single indictment for conspiracy in violation of the Military Selective Service Act of 1967[22] and sentenced to two years imprisonment with varying fines. In essence it was charged that they conspired to "counsel, aid and abet" young men to avoid the military draft.

The basis of their actions was opposition to United States involvement in the war in Vietnam. The chronology of their individual actions encompassed the drafting and signing of the *Call to Resist Illegitimate Authority*,[23] the press conference publicizing the *Call*,[24]

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[20] Cato, *Letters*, quoted in M. SUMMERS, FREE SPEECH AND POLITICAL PROTEST vii (1967).

[21] Judge Coffin in his dissent in *Spock*, 416 F.2d at 185, is tempted to agree, but refuses:

> One is tempted to say the law should recognize no overt conspiracy in the sensitive area of public discussion and opinion. But this would be to go too far. Were this so, "going public" would confer an immunity on both nefarious joint undertakings and an absolute protection to criminal enterprise not vouchsafed by the First Amendment even for individual speech.

[22] Military Selective Service Act of 1967, 50-Appendix U.S.C. § 462(a) (Supp. IV, 1969):

> Any person . . . who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said sections], or of said rules, regulations or directions . . . or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . .

[23] 416 F.2d at 168. Spock participated in drawing up *A Call to Resist Illegitimate Authority*, and a cover letter requesting signatures, funds, and a commitment of personal effort to ending the war in Vietnam. Coffin and Spock signed the cover letter and were among the original signers of the *Call*, which later was signed by Goodman and several hundred others. A copy of the *Call* appears in the appendix to the opinion in *Spock*, 416

the surrender and burning of draft cards at Arlington Street Church in Boston,[25] the October 20th antiwar demonstration in Washington,[26] and a march and sit-in at the Whitehall Induction Center in New York.[27]

The opinion expresses a pervasive concern with attempting to make the evil separable from the good in an organization with mixed legal and illegal aims, without inhibiting legitimate organization in an orderly society.[28]

In positing the importance of the first amendment rights of free speech and free association,[29] the court focuses on the nature of the larger grouping from which the four defendants were drawn:

> This intertwining of legal and illegal aspects, the public setting of the agreement and its political purposes, and the loose confederation of possibly innocent and possibly

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F.2d at 192. It was addressed "To the young men of America, to the whole of the American people, and to men of good will everywhere." It denominated the American war in Vietnam as immoral, unconstitutional, illegal, and violative of international agreements, treaties, and principles of law endorsed by the United States. It also challenged denial of exemption to men whose religious or philosophical beliefs led them to oppose the war as an unconstitutional denial of both religious liberty and equal protection of the laws. On the belief "that every freeman has a legal right and a moral duty to exert every effort to end this war, to avoid collusion with it, and to encourage others to do the same," the signers found the forms of resistance listed (in a form including or suggesting illegal resistance) courageous and justified, and offered their active support.

[24] *Id.* at 177. On October 2, 1967, a press conference was held to publicize the *Call.* Coffin, Goodman and Spock released statements consistent with the *Call.* Goodman advanced his own document, *Civil Disobedience*, which gave as its purpose, "[t]o take away from the government the support and bodies it needs." Coffin was one of the signers of *Civil Disobedience.*

[25] *Id.* at 168, 178. On October 16 a draft card burning and surrender took place at the Arlington Street Church in Boston. It was arranged in part by Ferber. Coffin participated in receiving the draft cards.

[26] *Id.* at 177. On October 20 the four defendants attended an antiwar demonstration in Washington, organized by Goodman and Coffin, where they attempted to turn over their collection of draft cards to the Attorney General. At the Washington demonstration Goodman stated the desire of the older generation to form an alliance with young men which "we will persist in, at least as long as the war lasts, in which we will encourage them and aid and abet and counsel them in every way we know how." At the same demonstration Coffin likewise referred to and approved a joint undertaking: "We hereby publicly counsel these young men to continue in their refusal to serve in the armed forces as long as the war in Vietnam continues, and we pledge ourselves to aid and abet them in all the ways we can." Spock spoke, warning against division in the ranks of the resisters.

[27] On December 5 Spock and Goodman participated in a march and sit-in at the Whitehall Induction Center. Both were arrested. The court did not mention, and apparently did not rely on, the events at the Whitehall Induction Center. The event was cited in the briefs of both sides.

[28] 416 F.2d at 173.

[29] *Id.* at 169, 170.

> guilty participants raise the most serious First Amendment problems.[30]

The solution adopted by the court is the addition of a third element, specific individual intent, to the two traditionally required elements of a conspiracy, *i.e.*, agreement and illegal purpose.[31]

In finding an agreement, the court cited the evidence regarding the *Call*, the cover letter, and the press conference—the factual basis of the government's claim of agreement. Concluding that the evidence disclosed more than parallel conduct, the court found the jury justified in inferring an agreement from these instances of concerted activity.[32]

For evidence of illegal purpose the court looked solely to the *Call*, and "its own clues as to what its subscribers may have intended the words to mean."[33] It held that the jury was justified in finding a "call to unlawful refusal,"[34] but was again troubled by the dual purposes of the defendants' actions:

> The Call had a "double aspect: in part it was a denunciation of governmental policy and, in part, it involved a public call to resist the duties imposed by the Act."[35]

Finally, the element added by the court, specific illegal intent of each defendant, is discussed extensively. A standard for judging the requisite intent is set—"strictissimi juris"[36]—to distinguish those guilty of the crime of conspiracy from others in a group with mixed legal and illegal aims. Specific illegal intent of each defendant, the court found, may be manifested by: (1) prior or subsequent unambiguous statements; (2) subsequent commission of the illegal activities contemplated by the agreement; (3) subsequent legal act, if such act is "clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated."[37] The factual inquiry was broad, looking beyond the *Call* and press conference, which were the focus in finding the agreement and unlawful purpose, to the complete list of antiwar ac-

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[30] *Id.* at 169.

[31] The court commented:

> Application of such a standard should forcefully answer the defendant's protests that conviction of any of them would establish criminal responsibility of all of the many hundreds of persons who signed the Call. Even if the Call included illegal objectives, there is a wide gap between signing a document such as the Call and demonstrating one's personal attachment to illegality.

Id. at 173.

[32] *Id.* at 175.

[33] *Id.* at 176.

[34] *Id.*

[35] *Id.*, the court quoting from the Unitarian Universalist Association, amicus on behalf of Ferber.

[36] *Id.* at 172. Defined as: "[o]f the strictist right or law." BLACK'S LAW DICTIONARY 1591 (4th ed. 1951).

[37] *Id.* at 173.

tivities in which the defendants were involved.[38]

Applying the above tests, the court failed to find the requisite specific illegal intent for Spock and Ferber.[39] Coffin and Goodman, however, were remanded for retrial on the prejudicial error of the judge below in submitting specific questions to the jury.[40]

III. UNITED STATES V. SPOCK: THE LOGIC

A court should be compelled by the logic it adopts to reach a result consistent with that logic. If it fails to do so, the opinion may yield a confusing precedent.

The majority in *United States v. Spock* ostensibly adopts the logic of *form c* and recognizes that the involvement of first amendment rights requires special protections.[41] Because of the importance of first amendment rights they specifically approve the application of a less restrictive alternative if there is one by which the substantive evil can be prevented.[42] The logic of *form d*, whereby open discussion yields a positive value to society rather than a danger, was rejected.[43]

The disposition of the individual cases is consistent with the court's logic. Ferber and Spock were acquitted. Although the cases of Goodman and Coffin were remanded for new trials, it does not appear that they will be reprosecuted.[44] Careful analysis of the opinion, however, indicates that the court reached its conclusion by reasoning inconsistent with the logic it claimed:

(1) In indicating the appropriateness of a less restrictive alternative because of first amendment involvement, the court relied on a weighing process. As Judge Coffin indicates in his dissent, however, its attention focused on only one side of the balance.[45] It

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[38] *Id.* at 176-79. For specific intent, the court looked to the Arlington Street Church ceremony, the Washington demonstration and Goodman's *Civil Disobedience*, as well as the *Call* and the press conference.

[39] *Id.* at 179. Spock's actions supposedly lacked the clear character necessary to imply specific intent. Ferber, although he made incidental use of some of the other defendants' purposes, did not show a commitment to all of them. The court found that while he might be guilty of a smaller conspiracy, he should not be convicted for the larger one.

[40] *Id.* at 180-83. The use of such questions was held to be a simple way to force a verdict of guilty, by making guilt the logical result of the answers given to the questions. The jury, as the conscience of the community, should be permitted to make its decision independent of the logical compulsion of the jury instructions.

[41] *Id.* at 170.

[42] *Id.*

[43] *Id.*

[44] This was the opinion expressed by Leonard B. Boudin, attorney for Dr. Spock, in a letter dated September 29, 1969. Marshall Tamor Golding, attorney for the Department of Justice, gave no clear indication of plans for retrial in this letter of September 26, 1969.

[45] 416 F.2d at 189.

considered the nation's interest in raising an army; the right of the government, because of the potency of conspiratorial conduct, not to have to wait for the commission of the substantive offense; the incitement of defendants' actions; and the fact that Congress has authorized the crime of conspiracy as a sanction. There is no discussion of the efficacy of less restrictive alternatives.[46] Nor were specific aspects of first amendment involvement weighed. The court concludes:

> The First Amendment cases merely present a more difficult problem of insuring that the government does not use its procedural advantages to expand the strict elements of the offense.[47]

(2) After finding that the government's interest in opposing a less restrictive alternative was overwhelming, the court set out a method of protecting first amendment rights when the conspiracy doctrine is applied. However, their reasoning and their language appear to yield a broader liability than is provided for a non-first amendment conspiracy prosecution.

Rather than raising the threshold requirement of a combination, for a conspiracy or at least an agreement, the court summarily accepted the jury's finding of an agreement and turned to the evidence of specific intent to ensure the culpability of the individual members of the alleged conspiracy. The court presumed that an agreement was sufficient to yield a conspiracy,[48] and then accepted the jury's finding of an agreement from instances of allegedly concerted activity.

> The Call was not what is known in law as an integrated document, limited to the four corners of the instrument. The jury could properly infer that it could not occur in the abstract, with no parents, and no active participants in a joint undertaking. We hold that they could look to Spock as one of the drafters, and to Spock and Coffin as two of the four signers of the solicitation letter, and in light of the press conference held to publicize the Call in which Goodman took a prominent part, they could find that Goodman included himself as an active member.[49]

Consequently, the court deprives "agreement" of much of its significance in a case where the agreement or combination among the

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[46] *Id.* at 190 (Coffin, J., dissenting).
Nowhere does the court indicate why either approach (individual or collective prosecution for the substantive crime) could not have served the societal interest equally as well. If "less restrictive alternative" is to have any real meaning courts should examine with specificity the utility of the rifle before resort is had to the shotgun.
Id.

[47] *Id.* at 172.

[48] *See* text accompanying notes 9-10, *supra.*

[49] 416 F.2d at 175.

parties is crucial to the finding of a conspiracy.[50]

Treating the agreement, even when established, as an insufficient predicate[51] is inconsistent with the emphasis in the law of conspiracy upon the relationship among individuals. To look at individual acts for specific intent does not focus on the conspiracy. The Court listed certain facts which might be evidence of specific intent: prior or subsequent unambiguous statements by defendant, subsequent commission by defendant of the illegal act contemplated by the agreement, or subsequent legal acts of defendant clearly undertaken to make the later activity effective.[52] The last two refer to the agreement, but the concentration on specific intent regarding the agreement weakens this essential aspect of conspiracy. The focus of the *Spock* court is on the individual rather than the conspiracy; and the subsequent actions of the defendants, and not the agreement, become crucial. The result is a form of substantive offense prosecution[53] which carries penalties intended for the additional danger caused by the collective action of a conspiracy.

IV. CONCLUSION

The underlying assumption of the doctrine of conspiracy, that increased danger to society results from collective action, requires that two elements form the offense—(a) relationship among individuals sufficient to produce collective action, and (b) an unlawful purpose which adds the dimension of increased danger. The court in *Spock* presumed a sufficient agreement for a conspiracy and granted that first amendment rights call for special protection. However, the court chose to protect the alleged conspirators in circumstances involving first amendment rights by considering the specific individual intent. If this were linked with sufficient evidence of an agreement, then the result might have been consistent. However, the derogation of the element of an agreement places the individual in the position of being tried for a substantive offense rather than the alleged crime of conspiracy. The doctrine that emerges has, arguably, exceeded the limits of its logic, and has increased the threat of conspiracy prosecution as a weapon to control political dissent.[54]

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50 *Id.* at 187 (Coffin, J., dissenting).

51 *Id.* at 190 (Coffin, J., dissenting).

52 *Id.* at 173.

53 *Id.* at 190 (Coffin, J., dissenting).

54 As Judge Coffin expressed in his dissent:

> This is a landmark case and no one, I take it, supposes that this will be the last attempt by the government to use the conspiracy weapon. The government has cast a wide net and caught only two fish. My objection is not that more were not caught but that the government can try again on another day in another court and the court's rationale provides no meaningful basis for predicting who will find themselves within the net. Finally there is the greater danger that the casting of the net has scared away many whom the government had no right to catch.

Id. at 191 (Coffin, J., dissenting).