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CONSPIRACY DOCTRINE AND SPEECH OFFENSES: A REEXAMINATION OF YATES v. UNITED STATES FROM THE PERSPECTIVE OF UNITED STATES v. SPOCK

Thomas Church, Jr.†

The current decade has witnessed the application of conspiracy law to public enemies as disparate as Daniel Ellsberg¹ and John Mitchell.² With the recent Watergate conspiracy trial—based on an indictment which named a sitting President as an unindicted co-conspirator—³ it is reasonably clear that whatever the particular merits or demerits of the conspiracy device, it remains a primary mode of dealing with crimes highly charged with political overtones. But one particularly significant application of conspiracy law—one which has characterized a disproportionately large number of twentieth century trials of a political nature⁴—has been conspicuous by its absence during the past few years: federal prosecutors have not appended a conspiracy charge to a crime involving political speech since the trials of the Chicago Seven⁵ and Dr. Benjamin Spock et al.⁶ in the late sixties.

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³ Cf. N.Y. Times, June 7, 1974, at 1, col. 8; id., March 2, 1974, at 1, col. 5.
⁴ See cases cited notes 8-10 infra.
⁵ United States v. Dellinger, Crim. No. 69-180 (N.D. Ill., Feb. 14-15, 1970), rev'd, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973). This case was brought under the "anti-riot" provisions of the Civil Rights Act of 1968. 18 U.S.C. § 2101 (1970). The indictment charged defendants, inter alia, with both the substantive offense of crossing state lines "with intent to incite, organize, promote, and encourage" a riot (472 F.2d at 364) and conspiracy to cross state lines for that purpose. Id. at 348; see J. Lukas, THE BARNYARD EPITHE T AND OTHER OBSCENITIES (1970).
Compounding the complexities of conspiracy law with those of speech crime produces constitutional problems of considerably greater magnitude than those of either area applied separately. Their convergence, for reasons which should become clear in the following pages, should be viewed at best with considerable uneasiness. Although it is probably unrealistic to suppose that the current lull in speech conspiracy proceedings portends a trend, the lull at least provides an opportunity to piece together the lessons of the past decade and relate them to the still authoritative Supreme Court precedents set in an earlier era of political upheaval.7

Prosecutions linking conspiracy to seditious speech offenses have most often occurred in times of societal unrest. The most notable examples emerged in this century—during World War I and the accompanying period of preoccupation with criminal anarchy,8 immediately following World War II with the specter of international Communism corrupting American society from within,9 and recently with the wrenching internal divisions brought about by the anti-Vietnam war and black liberation movements.10 In terms of generating still viable constitutional precedents, the most significant federal attempt to use the conspiracy device to regulate the content of political speech has been the Smith Act of 1940.11 Although not originally designed to be a bulwark against what was later perceived to be a global Communist conspiracy, the Smith Act proved eminently adaptable to meet the supposed threat.12 It is to the Smith Act cases, particularly to \textit{Yates v. United States},13 that one must look for the controlling Supreme Court.

\footnote{7}Yates \textit{v. United States}, 354 U.S. 298 (1957); Dennis \textit{v. United States}, 341 U.S. 494 (1951); \textit{see Part II infra.}


\footnote{13}354 U.S. 298 (1957). Defendants in \textit{Yates} were "second-string" Communist Party
determination of the limits of conspiracy law when applied to speech offenses. *Yates* continues to serve as the standard by which lower courts evaluate Smith Act crimes and, of considerably more current importance, speech offenses wholly unrelated to the Smith Act.

Scholarly attention has consistently focused almost single-mindedly on the first amendment aspects of speech conspiracy cases, with the accompanying procedural problems of conspiracy law relegated to a kind of legal limbo. But a strong case can be made for the proposition that many of the free speech difficulties attributed to speech conspiracy proceedings were a result less of inherent first amendment transgressions of the substantive speech crimes themselves, than of improper and slipshod application of the conspiracy device to an area of the criminal law peculiarly ill-adapted to its proper functioning.

Anomalies in the conspiracy law standards set down in *Yates*, critically overlooked in the general rush to praise or decry the Supreme Court's concurrent demolition of the advocacy provisions of the Smith Act, surfaced in *United States v. Spock* with considerably more ominous overtones. Although the United States Court of Appeals for the First Circuit narrowed crucial aspects of the *Yates* holding in its *Spock* decision, other expansive language of the earlier opinion was applied indiscriminately in *Spock*, a case with significant factual differences. *Spock* provides a warning that the proverbial time bomb of loose and expansive precedent set down in *Yates* should be defused before another period characterized by excessive fear of subversion provides the opportunity for its detonation. Analysis of the *Yates* decision and its subsequent interpretation in *Spock* should serve to illuminate many of the fundamental problems inherent in speech conspiracy charges and to provide some guidance for more meticulous future application.

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leaders charged with the Smith Act offense of advocating the violent overthrow of the government and organizing a group so to advocate. See notes 42-45 and accompanying text infra.


15 416 F.2d 165 (1st Cir. 1969).

16 See notes 85-91 and accompanying text infra.

17 See notes 121-26 and accompanying text infra.
I

THE CRIME OF CONSPIRACY

The gravamen of the conspiracy offense is an agreement by two or more persons to commit an unlawful act. Since it is the prior agreement that is made criminal, conspiracy proceedings may be initiated in advance of any illegal action beyond formation of the agreement. Conspiracy in this sense is an inchoate crime in which prosecution is aimed at prevention of unlawful action. Most conspiracy prosecutions, however, originate after commission of a substantive offense—the rationale for this use of the device being the state's interest in punishing those enmeshed in illegal group endeavors who are so removed from any specific criminal act as to be immune from liability as a principal or accessory.

The criminalization of such ambiguous, if not in practice undefinable, behavior is justified by the assumption that a joint illegal intent is significantly more dangerous than a similar intent on the part of an individual. Thus, it is only when the separate intents of two or more persons are unified in the act of agreement that they are punishable:

So long as [the unlawful] design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself . . . . The agreement is an advancement of the intention which each has conceived in his mind; the mind proceeds from a secret intention to the overt act of mutual consultation and agreement.

It is true that agreement may constitute a physical act, at least if the decision to agree is accomplished through the spoken or written word. But it is not primarily the speaking or writing of the words of assent with which the state is concerned: "the criminal act of the

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18 See W. LaFave & A. Scott, Criminal Law 453 (1972) [hereinafter cited as LaFave & Scott].
19 Current statutory definitions often require the commission of an "overt act"—any legal or illegal act in furtherance of the conspiratorial objective. This requirement was not present at common law and seldom places any real restrictions on the point at which the judicial machinery can be initiated in conspiracy prosecutions. See G. Williams, Criminal Law 663-713 (2d ed. 1961); Pollock, Common Law Conspiracy, 35 Geo. L.J. 328 (1947).
21 See LaFave & Scott 459-60.
modern crime [of conspiracy] is not the communication of agreement, but the act of agreement itself, that is, the continuous and conscious union of wills upon a common undertaking."23 The "act" of agreement, then, can be viewed not so much as a physical act in the traditional sense, than as a conscious relationship existing among those sharing an illegal purpose.

The tension between agreement as the "act" of mental assent and agreement as a particular kind of combination or relationship is pervasive in both judicial and scholarly commentary on conspiracy.24 Much of this ambiguity is based on an inherent confusion of the actus reus of the crime of conspiracy—the agreement—with the mens rea—individual intent to commit a crime: the two elements are often inseparable; sometimes they are termed two parts of the agreement; more frequently they are viewed as distinct agreement and intent elements of the crime.25 Legal semantics aside, what must be proved to establish a conspiracy charge is the existence of an agreed-upon joint undertaking by two or more individuals directed at an illegal act; in deference to traditional usage, this element will be termed "agreement" in the pages that follow. Additionally, the prosecution must establish the consent of each individual charged to participate in that endeavor, that is, the element of "intent." If the undertaking encompasses both legal and illegal activities—as was held to be the case with respect to the Communist Party in the Smith Act cases, for example26—the individual intent to be proved must be intent to further the specifically illegal objects of the conspiracy. The level of abstraction present in the preceding discussion of the criminal act of conspiracy points directly to its most pervasive problem: conspiracy is an ill-defined legal construct that has been aptly described by the late Justice Jackson as being "so vague that it almost defies description."27

23 Developments in the Law 926.
25 See LaFave & Scott 464-66.
26 See Part I infra.
27 Krulewitch v. United States, 336 U.S. 440, 446 (1949) (concurring opinion). Justice Jackson also noted that
[a] co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other.

Id. at 454.
If conspiracy is difficult to define in theory, it is even more problematic to establish at trial. The crime, in the trenchant understatement of one of its leading critics, is "heavily mental in composition."28 Because conspiracy incriminates what is essentially a state of mind, convincing proof is obviously rather difficult to come by. The prosecution must establish both a common design aimed at an illegal act and the intent on the part of each of the accused to participate in the specifically illegal aspects of that endeavor. Seldom will there exist a written document of agreement; even if such direct evidence does exist, its coming into the hands of the authorities is highly unlikely. When conspiracy proceedings are initiated in their preventative role prior to accomplishment of the illegal objective, clear evidence of the elements of the offense becomes even more elusive.

Judges have attempted to deal with the difficulties involved in establishing a conspiracy charge by modifying evidence rules and loosening standards of proof. Thus, some of the basic protections of the hearsay rule are not available to the conspiracy defendant. After the prosecution has made out a prima facie case for the existence of a conspiratorial agreement, any statement made by one conspirator is admissible against any other conspirator.29 Moreover, in some areas of conspiracy law—most notably in antitrust litigation—the already ill-defined agreement requirement is further weakened by allowing a finding of conspiracy to rest heavily on what is termed "consciously parallel action."30 The practical effect is clear: unfair conviction is obviously more likely when a conspiracy defendant can be held accountable for words that he may not have authorized spoken by others, and when he can be held to have "agreed" with other persons to pursue a joint course of conduct principally on the basis of his awareness that their respective actions were in fact "parallel." The due process clauses of the fifth and fourteenth amendments require that guilt be personal rather than associational,31 and it is precisely this

28 Harno, Intent in Criminal Conspiracy, 89 U. Pa. L. Rev. 624, 635 (1941). "In the long category of crimes there is none, not excepting criminal attempt, more difficult to confine within the boundaries of definitive statement than conspiracy." Id. at 624.
30 Although conscious parallelism is not, in itself, sufficient to establish conclusively a conspiratorial agreement, it is generally given substantial weight as circumstantial evidence of such an agreement. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540-41 (1954).
31 The Supreme Court has declared that [i]n our jurisprudence guilt is personal, and when the imposition of punishment on
requirement of individual guilt that can suffer most from the excesses of an over-zealous prosecutor or a pliant judge. These problems, together with the already-noted vague definition of the crime, combine to validate Judge Learned Hand's apt characterization of conspiracy as the "darling of the modern prosecutor's nursery," often to the very real detriment of fair and justifiable procedures.

Because of the dangers inherent in conspiracy law, caution should accompany its application to the simplest substantive offense. Even conspiracy to rob a bank, despite the relatively clear focus provided by an unambiguous conspiratorial objective, can involve considerable complication and opportunity for unfairness to the defendants. When the crime of conspiracy—already one step removed from observable action—is applied to a substantive crime involving speech uttered with a necessary intent or having a particular tendency, the law and its traditional safeguards are even further removed from the concrete world of observable action into what can easily become a morass of highly subjective and ultimately unreliable inferences.

As stated above, a conspiratorial agreement must aim at conduct constituting a crime. Since only very limited kinds of speech may be made criminal consistent with the protections of the first amendment, an indictable speech conspiracy must involve an agreement specifically aimed at expression in one of those particular categories. The difficult question of whether a particular instance of public expression may be punishable consistent with statutory or constitutional guidelines, however, is distinct from the equally perplexing question of whether the illegal aspects of that expression may be attributed to each individual of the group alleged to be conspiratorially responsible for it. It is the latter due process question of conspiracy law, often critically ignored in the emphasis on first amendment problems of crimes penalizing speech, which is the central concern of the present discussion. The relevant query is: "Was conspiratorial liability for allegedly illegal speech assigned to the defendants according to proper substantive and procedural standards?" It will be argued that *Yates* provides deficient standards by which to assign conspiratorial liability in speech cases. When

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a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.


32 *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).
applied to a significantly different factual situation such as that of Spock, those faulty standards become even more destructive of the personal guilt guarantees of the due process clauses.

II

THE DENNIS AND YATES SPEECH CONSPIRACY STANDARDS

The speech-related sections of the Smith Act consist of the so-called "advocacy" and "membership" clauses. The former makes it a crime to advocate violent overthrow of the government of the United States, the latter, to become a member of a group that would so advocate. Dennis v. United States, decided in 1951, represented the first major effort of the federal government to prosecute members of the Communist Party under conspiracy counts applied to these provisions. It resulted in a major Supreme Court opinion setting out the constitutional limits of the Smith Act's application. The indictment, handed down in 1948, charged that Dennis, along with eleven other members of the National Board of the Communist Party,

unlawfully, willfully, and knowingly conspired with each other and with other persons unknown to the grand jury (1) to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and willfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence.37

The defendants were found guilty as charged, the Court of Appeals for the Second Circuit upheld the conviction without significant modification, and the Supreme Court of the United

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33 The Act punishes anyone who "knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . by force or violence" with a fine of up to $20,000, imprisonment for as many as 20 years, or both. 18 U.S.C. § 2385 (1970).
34 A person who "becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, [who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence], knowing the purposes thereof" is subject to the same penalty as the advocate of violent overthrow. Id.
36 Id.
37 Id. at 561 n.1.
38 183 F.2d 201 (2d Cir. 1950).
States, in a set of opinions providing a striking example of judicial obfuscation and confusion, affirmed.

A major obstacle to analysis of the *Dennis* case in terms of conspiracy law is the virtual absence of an authoritative definition of exactly what kind of speech the Smith Act punishes. Both the charge of conspiring to advocate violent revolution and the charge of conspiring to organize a group for this purpose depend at bottom on the meaning given to the term “advocate.” Obviously, without an unambiguous definition of the substantive offense—the particular speech for which the defendants might be held criminally liable—any coherent evaluation of the conspiracy standards applied to that crime is almost impossible. The closest either the court of appeals or the Supreme Court majority came in *Dennis* to a definition of the speech prohibited by the Smith Act was a declaration by Chief Justice Vinson of what is not the focus of that Act: the Smith Act “is directed at advocacy, not discussion.”

Not surprisingly, a bewildering series of lower court interpretations followed on the heels of *Dennis*. The trial court in a Smith Act action against “second string” Communist Party leaders in California subscribed to a particularly expansive interpretation of *Dennis*. It was the ultimate appeal of this case to the United States Supreme Court in 1957 that produced the current controlling precedent on issues involving conspiracy and seditious speech offenses, *Yates v. United States*. Unlike the *Dennis* defendants, who as members of the National Board of the Communist Party constituted a clearly definable group, those charged in *Yates* were a disjointed collection of middle range officials, operating in different California cities in varied slots within the Party hierarchy. They were charged under the Smith Act with the same two counts put forward against Dennis and his co-defendants: conspiracy (1) to advocate violent revolution and (2) to organize a group to advocate violent revolution. The trial judge read the Supreme Court ruling in *Dennis* as permitting “advocacy” to be made out “simply by showing that what was said dealt with forceable overthrow and that it was uttered with a specific intent to accomplish that purpose.” Because he failed to

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43 *Id.* at 317. The *Yates* court of appeals also interpreted the *Dennis* standard broadly:
charge the jury that the crime required a finding of advocacy in the form of incitement to violent acts, the charge that was delivered by the trial judge in *Dennis* but not made an explicit requirement in Chief Justice Vinson's subsequent majority opinion, the Supreme Court overturned all the *Yates* convictions.\(^4^4\) Additionally, the Court interpreted the term "organize" in the second count narrowly. Since the Communist Party was held to have been "organized" no later than 1945, its formation fell outside the applicable statute of limitations, and charges on that count were quashed.\(^4^5\)

Most significant from the perspective of the relevant standards for speech conspiracy crimes, the *Yates* Court, in a majority opinion by Justice Harlan, took the crucially important step of reviewing the evidence presented at the trial to determine if the case against any of the defendants was "so clearly insufficient that their acquittal should be ordered."\(^4^6\) The Court ultimately ordered acquittals for five of the fourteen defendants and in so doing laid down implicit standards of evidence for the guidance of lower courts in similar cases.\(^4^7\) These standards, particularly those relating to conspiratorial intent, present substantial problems.

As has been previously noted,\(^4^8\) any evaluation of the conspiracy law standards applied in *Dennis* is made almost impossible by the absence of a clear definition of the substantive offense—sedition advocacy—to which the conspiracy charge was appended. Probably the major accomplishment of the *Yates* court was its articulation of the elements of the crime of advocating violent revolution: "those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something."\(^4^9\) The crime of advocacy of revolution must therefore consist of incitement to present or future violent acts. And, as a necessary implication apparently ignored by the Court, a conspiracy count appended to the advocacy charge so defined then

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\(^{4^4}\) 354 U.S. at 312-27.

\(^{4^5}\) Id. at 312.

\(^{4^6}\) Id. at 328-29.

\(^{4^7}\) Id. at 327-54; see text accompanying notes 53-62 infra.

\(^{4^8}\) See note 39 and accompanying text supra.

\(^{4^9}\) 354 U.S. at 324-25 (emphasis in original).
requires a finding (1) that there existed an agreed-upon joint undertaking by two or more individuals directed at violence-inciting speech, and (2) that each defendant consented to support the joint effort to produce that specific form of illegal expression.

The Government's theory of conspiracy in *Yates* was not fundamentally different from its previously successful approach in the *Dennis* case. The Communist Party became the "agreed-upon joint undertaking," thereby satisfying the agreement requirement. Individual intent to further the illegal aspects of the agreement, in the Government's view, was established by membership and leadership in the Party. The Government's thesis, then, was based on two evidentiary assumptions: (1) that the Communist Party consisted of a joint undertaking directed at least in part at violence-inciting speech, and (2) that all members, or at least all leaders, shared and intended to support that specific speech-related goal.

The Supreme Court rejected the Government's theory not because of any inherent doctrinal insufficiency, but rather because of the lack of evidence offered in its support. It found the Government's "sporadic showing" of illegal advocacy by the Party insufficient "to justify viewing the Communist Party as the nexus between [the] petitioners and the conspiracy charged." Since the Party was not shown to be sufficiently involved in illegal speech to constitute the necessary joint illegal undertaking, membership or leadership in the Party was obviously irrelevant to the question of whether the defendants had conspired to further unlawful expression.

Although the record did not support the Government's theory, the Supreme Court relied on more conventional conspiracy doctrine to uphold its contention that there was sufficient evidence to allow a new trial for certain of the defendants. Justice Harlan's reasoning in the majority opinion proceeded in three steps. He

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50 In the Government's view, [t]his fact of petitioners' undoubted Party leadership, when considered in conjunction with the Party's highly disciplined character and its extreme secrecy ... suffices to show that each of the petitioners had the knowledge and the intent with which they were charged. Brief for the United States at 106, *Yates v. United States*, 354 U.S. 298 (1957).

51 354 U.S. at 330.

52 That the Court was well prepared to support the Government's theory, on a proper record indicative of illegal Party advocacy, was to be made clear in subsequent cases. See *Scales v. United States*, 367 U.S. 203 (1961). The *Scales* Court found "no great difference between a charge of being a member in a group which engages in criminal conduct and being a member of a large conspiracy, many of whose participants are unknown or not before the court." *Id.* at 226 n.18.

53 354 U.S. at 331-33.
first asserted that the existence of a joint undertaking to advocate violent overthrow was supported in the record. Specifically, testimony describing Party classes in San Francisco and Los Angeles "where there occurred what might be considered to be the systematic teaching and advocacy of illegal action which is condemned by the statute," was held to be indicative of the possibility that illegal "advocacy of action" was in fact occurring. Second, he cited evidence "linking these nine petitioners to that sort of advocacy." Testimony concerning the relationship of the boards upon which the nine sat to the Party schools was cited, as was the "close association" of various of the nine with teachers in the schools. As the third and last step in the argument, Justice Harlan asserted that all of these nine petitioners were shown either to have made statements themselves, or apparently approved statements made in their presence, which a jury might take as some evidence of their participation with the requisite intent in a conspiracy to advocate illegal action.

These two final steps, particularly the last, raise some fundamental questions as a matter of conspiracy law, independent of whatever free speech problems may inhere in the first step.

In essence, the Court appears to be saying that a defendant may be found guilty of conspiracy to incite violent revolutionary action by a showing that (1) such incitement was taking place, (2) the defendant was in some way associated with those involved in the incitement, and (3) he "apparently approved" a statement made in his presence indicative of illicit intent. If the schools were in fact producing, or were directed toward producing, specifically illegal speech, the agreement element of conspiracy would present few problems: the ongoing enterprise of the Party schools was clearly the result of joint action, of an agreement concluded by someone. The serious questions in the case concern whether or not those individuals on trial could be held personally responsible for whatever illegal advocacy went on in the schools. The problem, in other words, was with the element of intent: whether the defendants had consented to participate in the undertaking aimed at illegal speech.

54 Id. at 331. For purposes of the present discussion it will be assumed that at least part of the speech arising out of the Party schools was in fact punishable under relevant statutory and constitutional requirements.
55 Id. at 332.
56 Id. at 333.
57 Id.
The Court required some evidence establishing the "requisite intent," but exactly what this intent element encompasses is not altogether clear. The Supreme Court in *Dennis* had previously added, through statutory interpretation, a requirement that those found guilty of Smith Act speech crimes possess "specific" intent to bring about violent overthrow of the government.\(^{58}\) Presumably, then, after *Dennis*, individuals found guilty of conspiracy to commit those crimes must be shown not only to possess intent to participate in joint *advocacy* of violent overthrow, but also intent to participate in the overthrow itself. Clearly the two intents are not the same—intent to advocate violent revolution cannot be inferred directly from the intent to overthrow.\(^{59}\)

Whatever intent was being discussed in the *Yates* Court's third step, however, the record would seem incapable of establishing any intent at all. Mere presence at a meeting at which someone else made an incriminating statement, regardless of what was said, is hardly a satisfactory demonstration of any intent beyond the simple intent to be at the meeting. Traditional rules for conspiracies having purely illegal purposes may permit such an inference of intent from statements of persons alleged to be co-conspirators: presence at a meeting at which bank robberies were being planned might be supportive of an inference of intent to rob banks, for example. But the meetings in *Yates* consisted almost entirely of protected political discussion; they were neither planning sessions for future acts of revolution nor were they devoted to preparing for the expression of illegal speech advocating revolution. The meetings described in the Government's summary of the *Yates* evidence, which presumably emphasized those facts believed to be the most damning, were so innocuous as hardly to suffice in incriminating the speakers, let alone a mere listener.\(^{60}\)

\(^{58}\) "We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence," 341 U.S. at 499.

\(^{59}\) In the words of a subsequent circuit court opinion construing the Smith Act:

> While it is certainly within the realm of fancy that men who eventually want violent insurrection will presently teach the necessity of such behavior, it is hardly strong proof of such teaching. For would-be revolutionaries are at least as likely, as an abstract proposition, to adopt the tactic in years of unpopularity of decrying the use of violence and posing as peaceful social reformers . . . .

> The use of lawful speech, an agreement to share abstract revolutionary doctrine, and an agreement to use force against the Government in the future do not add up to a conspiracy presently to use illegal language.


\(^{60}\) Two meetings were given the most emphasis. At one, an 83 year old woman, "Mother" Bloor, told those present that "the day of the revolution was nigh" and that "arms"
Two intents are elements of the conspiracy offense charged against the Yates defendants: intent to further illegal advocacy of revolution in the form of incitement to violent acts, and the specific intent added by Dennis, intent to overthrow the government through violence. Presence at a meeting at which either illegal advocacy of revolution or the revolution itself was being plotted might support an inference of either intent, although such an inference would surely be rebuttable. But the Yates meetings were not singlemindedly—if at all—directed to criminal preparation. The major portion of the meetings described in the record consisted of undeniably legal political discussion. Because of that fact alone, criminal intent cannot be implied from presence at such a meeting simply because the meeting was conducted under the auspices of the Communist Party.

Intent in conspiracy law is intimately tied to due process requirements of finding individual rather than associational guilt. Once the Supreme Court refused the Government's theory that the Communist Party itself comprised the conspiracy, both agreement and individual intent to further illegal speech had to be clearly demonstrated in order to implicate a defendant vicariously in criminal activity in which he did not directly participate. The key element in the process which permits this rather indirect assignment of criminal responsibility is the intent of each conspirator to further the joint illegal endeavor—in this case advocacy of revolution.

were in readiness. She said she hoped to “live to see this bloody battle through,” predicting it would be “a wonderful revolution” with “blood flowing in the streets.” Brief for the United States, supra note 50, at 16. The Government neglected to add other testimony to the effect that Mother Bloor also discussed “the great loss that this country had incurred upon the death of Mr. Roosevelt”—that “we had lost our best friend, that he has stood [sic] beside us, and that we don’t know about Truman, that we are going to give him a trial.” Record, vol. 19, at 8002-03, Yates v. United States, 354 U.S. 298 (1957).

The other testimony, apparently regarded as particularly persuasive by the Government, involved words by one defendant in the presence of several others that he “wanted to see the overthrow of this lousy system just as much as anybody else present, but there was a time and place for militant action and it had not arrived yet.” Brief for the United States, supra note 50, at 41. An implication of intent to overthrow, even on the part of the speaker, is hardly supportable on this kind of record. An intent to incite violent revolution on the part of a person merely present when the words were spoken is clearly not demonstrated.

Circumstantial evidence provides the basis for most conspiracy convictions. See LAFAVE & SCOTT 457-58; Developments in the Law 984.

An earlier Supreme Court decision had articulated the standard as follows: The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

See note 31 supra.
tion in the form of incitement to violent acts. The Supreme Court’s words in *Dennis* may have belied its actions, but the words still describe the appropriate role of the Supreme Court in reviewing such problematic cases:

Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution.64

In *Yates* there was indeed doubt regarding “the intent of the defendants,” but the Court’s “scrupulous care” was conspicuous by its absence.

The *Yates* case affords a reasonably clear definition of the limits of the crime of revolutionary advocacy proscribed by the Smith Act and, by implication, of the intent that must therefore be present to make out a conspiracy charge. Unfortunately, the majority opinion does not clearly set out the necessity to establish intent to further revolutionary *advocacy* as an element distinct from the intent to participate in violent overthrow. And the evidence standards set down for the establishment of intent—regardless of which intent is being discussed—are demonstrably insufficient to allow imputation of guilt in a case so proximate to the restricted area of first amendment freedoms. These deficiencies might not warrant serious concern if the significance of *Yates* were confined to the Smith Act. As experience has demonstrated, the *Yates* decision effectively reduced the advocacy clause of that statute to impotence.65 But *Yates* represents the last occasion on which the Supreme Court gave systematic treatment to a speech conspiracy case. As such, it is of considerable contemporary importance, and its shortcomings cannot safely be relegated to the anthologies.

Both majority and dissenting opinions by the Court of Appeals for the First Circuit in *United States v. Spock*66 looked to the Communist cases,67 particularly *Yates*, as controlling precedent,

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64 341 U.S. at 516.
65 Almost every advocacy clause case pending when *Yates* was handed down resulted in a dismissal, either by motion of the Government, or by the district court, “thus ending its enforcement for the foreseeable future.” Nathanson, supra note 14, at 159. Similar emasculation of the membership clause was brought about by *Noto v. United States*, 367 U.S. 290 (1961). For a complete history of Smith Act prosecutions since *Dennis* see Mollan, supra note 40.
66 416 F.2d 165 (1st Cir. 1969).
even though the *Spock* case dealt with a very different sort of "political criminal" from those in *Dennis* or *Yates*. Because the case never reached the Supreme Court, the law set down is of tentative general applicability. But the case does provide the only contemporary interpretation of the Smith Act cases. Most important, however, *Spock* represents the most systematic statement we have of the kind of evidence necessary to establish intent in a speech conspiracy case. Unfortunately, the stringency of its intent requirements is accompanied by a singularly loose and amorphous conception of the agreement aspect of conspiracy. Because of the clear importance of *Spock* as a contemporary example of governmental action against domestic radicals, both its strengths and weaknesses deserve careful examination, particularly if its lessons are to serve as a starting point for a more authoritative future Supreme Court pronouncement on the application of conspiracy to speech crimes.

III

*United States v. Spock*

Dr. Benjamin Spock and four others—Reverend William Sloane Coffin, Jr., Mitchell Goodman, Michael Ferber, and Marcus Raskin—were indicted in 1967 under provisions of the Military Selective Service Act of 1967. The indictment charged that the defendants conspired among themselves and with others to

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counsel, aid and abet diverse Selective Service registrants to . . . neglect, fail, refuse and evade service in the armed forces of the United States and all other duties required of registrants under the Universal Military Training and Service Act . . . and the rules, regulations and directions duly made pursuant to said Act . . . to . . . fail and refuse to have in their personal possession at all times their registration certificates [and] . . . valid notices of classification [and conspired to] . . . unlawfully, willfully and knowingly hinder and interfere, by any means, with the administration of the Universal Military Training and Service Act.

The Government's case against the defendants centered on a number of undisputed facts. A document entitled *A Call to Resist*

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68 See text accompanying notes 87-99 infra.
69 See text accompanying notes 100-26 infra.
Illegitimate Authority (hereinafter termed the Call) was written in part by Coffin and Spock, and signed by them, Goodman, and ultimately several hundred others. The Call, an accompanying cover letter requesting signatures and support, and a document written by Goodman entitled Civil Disobedience Against the War were publicized at a press conference in New York City at which Goodman, Spock, Coffin, and others spoke. There it was announced that further activities were planned, including nationwide turn-ins of draft cards to be surrendered to the Attorney General of the United States. Ferber and Coffin participated in a subsequent ceremony at the Arlington Street Church in Boston at which draft cards were burned or turned in. Four days later, Ferber, Spock, Goodman, and Coffin attended a Washington demonstration at which an unsuccessful attempt was made to tender to the Attorney General some of the draft cards received in ceremonies similar to the Boston episode.72

Because the Call, the cover letter, and the Civil Disobedience document constituted the crux of the case, they deserve detailed descriptions.73 The Call, addressed “[t]o the young men of America, to the whole of the American people, and to all men of good will everywhere,” began with a general condemnation of the war in Vietnam on both legal and moral grounds. It then asserted that “every free man has a legal right and a moral duty . . . to avoid collusion with it, and to encourage others to do the same.”74 There followed a description of the ways various individuals were resisting the war—some legal and some patently illegal.75 Probably the key section of the document was directed toward these acts of resistance:

We believe that each of these forms of resistance against illegitimate authority is courageous and justified. . . .

We will continue to lend our support to those who undertake resistance to this war. We will raise funds to organize draft resistance unions, to supply legal defense and bail, to support

72 416 F.2d at 168.
73 The Call and cover letter are set out in their entirety in the appendix to the First Circuit's opinion. Id. at 192-94.
74 Id. at 192.
75 Among those already in the armed forces some are refusing to obey specific illegal and immoral orders . . . some are absenting themselves without official leave. Among those not in the armed forces . . . some are refusing to be inducted. Among both groups some are resisting openly and paying a heavy penalty, some are organizing more resistance within the United States and some have sought sanctuary in other countries.

Id. at 192-93.
families and otherwise aid resistance to the war in whatever ways may seem appropriate.\textsuperscript{76}

The cover letter stated:

Those who have signed, including ourselves, have pledged themselves to extend material and moral support to young men who are directly resisting the war. Many of us are further committed to joining those young men in acts of civil disobedience.\textsuperscript{77}

It requested signatures and additional funds, and for the addressee "to commit [him]self to the fullest possible extent to the tasks of resisting the war and bringing it to a halt."\textsuperscript{78} The most significant section of Goodman's \textit{Civil Disobedience Against the War} stated: "Now publicly we will demonstrate, side by side with these young men, our determination to continue to [aid, abet and counsel them against conscription]."\textsuperscript{79}

The trial jury found all defendants but Raskin guilty as charged.\textsuperscript{80} The other defendants immediately appealed to the United States Court of Appeals for the First Circuit, an action which resulted in the reversal of all convictions on grounds unrelated to the present analysis.\textsuperscript{81} Upon review of the evidence, the appeals court also directed acquittals for Spock and Ferber on grounds of lack of evidence;\textsuperscript{82} the evidence was deemed sufficient to justify a retrial for Goodman and Coffin,\textsuperscript{83} although the Government never chose to reinstitute proceedings.\textsuperscript{84}

\textsuperscript{76} \textit{Id.} at 193.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.} at 175. \textit{See} text accompanying note 92 \textit{infra.}
\textsuperscript{80} 416 F.2d at 168.
\textsuperscript{81} The trial judge had put ten special questions to the jury to be answered "Yes" or "No." These questions were posed in addition to the general issue of "guilty or not guilty." The first question asked:

\begin{quote}
Does the Jury find beyond a reasonable doubt that defendants unlawfully, knowingly and wilfully conspired to counsel Selective Service registrants to knowingly and wilfully refuse and evade service in the armed forces of the United States in violation of Section 12 of the Military Selective Service Act of 1967?
\end{quote}
\textit{Id.} at 180. Subsequent questions substituted for the words "counsel" and "abet" the word "aid," and then dealt similarly with "notices of classification" and "registration certificates." The final question dealt separately with the conspiracy count of the indictment. \textit{Id.}

The circuit court held that the procedure constituted prejudicial error, expressing particular concern over

the subtle, and perhaps open, direct effect that answering special questions may have upon the jury's ultimate conclusion. There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step. A juror, wishing to acquit, may be formally catechized.

\textit{Id.} at 182.

\textsuperscript{82} \textit{Id.} at 178-79.
\textsuperscript{83} \textit{Id.} at 176-78.
\textsuperscript{84} \textit{See} J. Mitford, \textit{The Trial of Dr. Spock} xiii (2d ed. 1970).
The circuit court's evaluation of the evidence to determine if any of the defendants should be acquitted without possibility of retrial was similar to the task undertaken by the Supreme Court in *Yates*. And, as in the *Yates* case, this action resulted in enunciation of evidentiary standards for similar speech conspiracy cases. As will be discussed below, the standards relative to intent represent a genuine improvement over the generalities of *Yates*. Unfortunately, the same cannot be said for the court's analysis of conspiratorial agreement.

The circuit court placed special emphasis on the intent element because it viewed the agreement charged as "both bifarious and political within the shadow of the First Amendment." The court announced the following test for determining the sufficiency of evidence of intent:

> [W]e hold that an individual's specific intent to adhere to the illegal portions [of the agreement] may be shown in one of three ways: by the individual defendant's prior or subsequent unambiguous statements; by the individual defendant's subsequent commission of the very illegal act contemplated by the agreement; or by the individual defendant's subsequent legal act if that act is "clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated."

This three-part rule for defining evidence sufficiently indicative of intent in a speech conspiracy case represents the first time an appellate court has seriously grappled with the issue. Although purporting to follow *Dennis* and *Yates*, it is evident that the *Spock* majority tightened considerably the standards by which conspiratorial intent can be satisfactorily established. Indeed, the court majority was quite clear in repudiating use in speech cases of precisely the kind of evidence held permissible in *Yates* to establish intent—statements of another person.

Adopting the panoply of rules applicable to a conspiracy having purely illegal purposes, the government introduced numerous

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85 354 U.S. at 327; see note 45 and accompanying text supra.
86 416 F.2d at 173.
87 Id. (citation and footnote omitted).
88 The majority opinion cited the intent requirements laid down in *Heuman* v. United States, 298 F.2d 810 (9th Cir. 1961), as precedent for the newly-announced evidence standards. 416 F.2d at 173 n.19. *Hellman*, however, arose under the membership clause of the Smith Act (18 U.S.C. § 2385 (1970)), rather than the advocacy clause (*id.*), under which *Dennis* and *Yates* were prosecuted. The only intent required to be demonstrated under the membership clause is intent to overthrow, not intent to incite overthrow. *Scales* v. United States, 367 U.S. 203, 221-22 (1961). Thus the intent standard of *Hellman* dealt with action and not with the intent to speak relevant to *Spock*.
89 See note 60 and accompanying text supra.
statements of third parties alleged to be co-conspirators. This was improper. The specific intent of one defendant in a case such as this is not ascertained by reference to the conduct or statements of another even though he has knowledge thereof . . . . The metastatic rules of ordinary conspiracy are at direct variance with the principle of strictissimi juris.90

The Spock court applied these standards in such a way as to allow retrial of Goodman and Coffin because of their own "prior or subsequent unambiguous statements."91

The statements held to constitute sufficient support for intent were at least superficially unambiguous. The political tract entitled Civil Disobedience Against the War written by Goodman and signed by both stated:

The draft law commands that we shall not aid, abet or counsel men to refuse the draft. But as a group of the clergy has recently said, . . . when young men refuse to allow their conscience to be violated by an unjust law and a criminal war, then it is necessary for their elders—their teachers, ministers, friends—to make clear their commitment . . . to aid, abet and counsel them against conscription. Most of us have already done this privately. Now publicly we will demonstrate, side by side with these young men, our determination to continue to do so.92

Both Goodman and Coffin also made statements paralleling this tract in public speeches.93 Statements of this sort, unlike the Call, directly describe the speaker's intent with respect to the object of the conspiracy charged—counseling, aiding, and abetting draft law violations.94 Evidence of this nature was conspicuously absent from

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90 416 F.2d at 173 (footnote omitted).
91 Id.
92 Id. at 175 (emphasis in original).
93 Goodman, for example, stated at the Washington demonstration that members of the older generation were present because we want specifically to form an alliance with these 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. Id. at 177 (emphasis supplied by court).
94 A discussion of the first amendment ramifications of using public speech as evidence of conspiratorial intent is beyond the scope of this analysis. It need only be stated here that public speech so directly indicative of an illegal intent is no more deserving of first amendment protection than a public declaration of a revolutionary to the effect that "I have set off one bomb; I intend to set off more." The argument that use of such evidence in a criminal trial would produce a "chilling effect" on other persons' exercise of protected free speech amounts to little more than the assertion that public speakers who either have committed or intend to commit illegal acts should not be inhibited in publicly admitting their illegal acts and intentions. There is little to recommend such a position as a first amendment mandate protective of free debate on issues of public concern. Judge Coffin appeared to criticize the majority's intent formulation in terms of "chilling effect." 416 F.2d at 188. But it
Smith Act conspiracy trials. As noted previously, the major consideration of intent was given to the intent to overthrow, with the conspiratorial intent to incite overthrow apparently assumed to follow by implication.\textsuperscript{95} It goes without saying, however, that the speech held "unambiguous" and clearly indicative of illicit intent must be just that. Public statements embodying unpopular views or vocal support for lawbreakers do not constitute evidence of intent to solicit or counsel law violation.\textsuperscript{96}

The second type of evidence set out by the Spock court to be sufficiently demonstrative of conspiratorial intent is personal commission of the offense alleged to be the object of the agreement.\textsuperscript{97} In the context of Spock, the necessary incriminating evidence would have to be of solicitation to draft evasion. This type of evidence raises few problems since it is relatively clear that if a person in fact solicits draft law violations, he intended to do so. Quite obviously, however, if sufficient evidence of commission of a substantive crime exists, there is little need for recourse to a conspiracy prosecution since action on the substantive offense would be considerably more direct. Most speech conspiracy prosecutions have been largely devoid of any evidence that those accused had themselves committed the substantive crime allegedly agreed to. Indeed, it is often precisely because of this lack of evidence that the conspiracy device is brought into use.\textsuperscript{98}

The third kind of evidence specified—evidence of an individual defendant's subsequent legal acts "clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated"\textsuperscript{99}—is more problematic, if only because the

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\textsuperscript{95} See notes 87-88 and accompanying text supra.

\textsuperscript{96} See Bond v. Floyd, 385 U.S. 116 (1966). Julian Bond expressed "admiration" for those who burned their draft cards. The Supreme Court indicated that since he could not be punished under the Selective Service laws for such expression, he could not be expelled from the Georgia House of Representatives because of it. The Bond case was discussed by the Spock majority. 416 F.2d at 171-72.

\textsuperscript{97} See note 87 and accompanying text supra.

\textsuperscript{98} There was, for example, little or no evidence in either Dennis or Yates that any of those indicted had themselves advocated violent revolution in the form of incitement to acts of violence. The argument was that they directed or were "linked" to such advocacy through their positions of Party leadership. Yates v. United States, 354 U.S. 298, 328-33 (1957); Dennis v. United States, 341 U.S. 494, 579 (1951) (Black J., dissenting); see notes 37, 50-52 and accompanying text supra.

\textsuperscript{99} 416 F.2d at 173; see note 87 and accompanying text supra.
court's language is unclear regarding precisely of what intent the subsequent legal acts must be demonstrative. If the act must indicate intent to advocate or solicit selective service violations, then the evidence would be appropriate. If the evidence need only be indicative of intent to bring about the "illegal activity which is advocated" and not the advocacy itself, the test falls into the same difficulty as the intent formulations of Yates: just as intent to advocate violent revolution is not coequal with simple intent to bring about overthrow, intent to solicit draft law violations is not directly analogous to intent to "render effective" draft law violations. The discrete speech element of the crime to which the conspiracy charge is appended must be encompassed in the intent element, or a defendant may be found guilty of one crime upon evidence of intent to commit another. Since this third type of evidence was not introduced in Spock, difficulties with this aspect of the test are not manifest in the outcome. Any further use of the Spock intent standards should clarify the ambiguity.

Disagreement with other parts of the Spock opinion should not obscure its accomplishment of tightening the intent standards of Yates. The three-part typology of acceptable evidence of conspiratorial intent, with the needed clarification related above as to the third category, could well serve as a model for future speech conspiracy cases.

The Spock standards concerning conspiratorial agreement are considerably less satisfactory. To begin with, they are never explicitly set forth. But far more disturbing are the implicit assumptions regarding agreement that must have been made by the court of appeals in order to find even a possibility of culpability on the part of any of the defendants.

The Call was clearly the crucial ingredient in all theories of agreement advanced by both the Government and the appellate court majority. A fundamental ambiguity regarding this document pervaded the Government's case on agreement and the subsequent circuit court discussion of the issue as well. The Government apparently could not decide whether the Call (a) constituted the agreement, (b) was part of the agreement, (c) was merely evidence that an agreement existed, or (d) was an act in furtherance of a prior agreement. Thus the brief submitted to the court by the Government asserted that the Call "constituted, in addition to an agreement, an instrument for furthering the agreement's purpose of encouraging draft resistance."100 Somewhat later in the brief,
however, it was stated that "[t]he 'Call to Resist,' the October 2 press conference, and the plans for the confrontation in Washington were all part of an agreement to encourage and support young men who were resisting the draft." These characterizations of the Call differ substantially from the Government's theory of agreement put forward at the trial which posited the Call, press conference, and the Washington demonstration as planned results of a prior agreement.

Although much of the ambiguity in the Government's treatment of the Call may have resulted from simple semantic imprecision, the fundamental problem of which that confusion is indicative constitutes one of the most crucial issues raised by Spock: the legal significance that can be assigned to the composition of, or formal adherence to, what is essentially a combination political "broadside" and pledge of support for those who either have broken the law or may contemplate such action.

The circuit court majority opinion is based on the unstated assumption that such a document can in fact constitute a conspiratorial agreement, punishable as such when intent is independently demonstrated. The court cited the Call, cover letter, and press conference as evidence of "several instances of concerted activity from which the jury could infer an agreement." Yet implications from other parts of the opinion make it clear that the fundamental agreement was embodied in the Call itself, the "act" of agreement being the signing of the Call. The Call was the only evidence discussed by the court in considering the question of "whether the agreement contemplated or included illegal activity." In rejecting the defendants' contention that the Government's theory of agreement would incriminate all those who signed the Call, the court did not contend that a signature on the Call could not constitute conspiratorial agreement, but rather put forward its intent requirement as protective of signers who did not intend to further the Call's allegedly criminal objectives. In addition, Ferber's directed acquittal on the basis of lack of agreement appears to be directly attributable to the fact that he did not sign the Call.

The defendants, as well as the circuit court dissent, argued on three levels that a true conspiratorial agreement was not made out

101 Id. at 42 (emphasis added).
102 Id. at 31-35.
103 416 F.2d at 175-76.
104 Id. at 174-76.
105 Id. at 172-73.
106 See id. at 179.
because the individuals being prosecuted did not constitute a conspiratorial group. They argued, first, that the alleged confederation was completely public, whereas "every conspiracy is by its very nature secret."107 Second, they insisted that the confederation was "ill-defined, shifting, with many affiliations";108 it was, in other words, noncohesive and completely undisciplined, whereas at least minimal cohesion is essential to any conspiracy. Third, the defendants urged that the agreement charged was so sprawling that it was incapable of differentiating between the culpable and the nonculpable.109

With respect to the first argument, clearly, the fact that a conspiracy is open does not require the government to wait until a substantive offense is perpetrated before acting. In the words of the court, going "public" does not "pasteurize" an illegal endeavor.110 Such openness does, however, at least partially undermine the rationale for use of conspiracy—the danger of accomplished harm is less when the conspiratorial activities are open for inspection and subject to imposition of attempt proceedings should danger be deemed imminent. And the justification for the loosening of evidence standards is weakened when the elements to be proved are not of the covert nature usually associated with conspiratorial endeavors. The point is not that open or public conspiracies are in some way immune from prosecution, but that they do constitute a special situation in which, at least in past cases,111 additional factors have often been present which serve as added justification for application of the conspiracy device to what at least appears to be nonconspiratorial activity.

107 Id. at 185 n.2 (Coffin, J., dissenting), quoting Grunewald v. United States, 353 U.S. 391, 402 (1957).
108 416 F.2d at 186 (Coffin, J., dissenting).
109 “There is no more reason to infer that these defendants were guilty of conspiracy than to draw the same conclusion—obviously an absurd one—with respect to all persons who joined in the public statements and demonstrations.” Brief for Dr. Benjamin Spock at 27, United States v. Spock, 416 F.2d 165 (1st Cir. 1969).
110 416 F.2d at 169-70.
111 The Spock majority cited several cases involving "public conspiracies" that were in fact prosecuted. Id. at 169-70 & n.8. Some of the indictments in those cases focused either on specific meetings or on the publication of particular documents easily traceable to joint effort of the accused. Pierce v. United States, 252 U.S. 239 (1920); Schenck v. United States, 249 U.S. 47 (1919); United States v. Gordon, 138 F.2d 174 (7th Cir.), cert. denied, 320 U.S. 798 (1943); Wells v. United States, 257 F. 605 (9th Cir. 1919). Other cases involved reasonably cohesive organizations which served as a focus for the organizational activity absent in Spock. Anderson v. United States, 273 F. 20 (8th Cir.), cert. denied, 257 U.S. 647 (1921); Haywood v. United States, 266 F. 795 (7th Cir.), cert. denied, 256 U.S. 689 (1920). Pierce, Schenck, and Wells also involved cohesive organizations.
One such factor common to the previously punished "public" conspiracies was existence of a degree of cohesiveness or discipline within the conspiratorial group—the kind of minimal cohesion embodied in a political party, for instance, or in a less formal group planning a specific meeting or publication.\textsuperscript{112} Since the \textit{Spock} conspiracy lacked even this modicum of cohesiveness, the defendants argued that it could not be punished, particularly in light of its accompanying openness.\textsuperscript{113} The court majority was able to rebut this contention by citing a line of cases in which cohesiveness was very nearly absent from the activity of the conspirators.\textsuperscript{114} However, the precedents chosen—antitrust and other economic conspiracy cases—were not analogous to the facts of \textit{Spock} in any other respect. The antitrust cases did not involve open or public conspiracies; they did not concern speech; they were often civil rather than criminal actions; and most important, their rather extensive holdings were supported by additional justifications not present in \textit{Spock}.\textsuperscript{115}

The dangers involved in using Sherman Act antitrust conspiracy cases for guidance in nonrelated cases, particularly on the question of agreement, are widely recognized.\textsuperscript{116} Even accepting the economic cases cited by the majority as valid precedent on the issue of cohesiveness,\textsuperscript{117} the degree of economic concert inherently necessary for the schemes therein involved indicated a kind of united effort not present in \textit{Spock}. Discipline and some cohesiveness

\textsuperscript{112} See note 111 \textit{supra}.

\textsuperscript{113} 416 F.2d at 175.

\textsuperscript{114} See, e.g., \textit{Direct Sales Co. v. United States}, 319 U.S. 703 (1943) (conspiratorial agreement to violate federal narcotics laws inferred from evidence that mailorder drug company made frequent sales of unusually large quantities of morphine sulfate to doctor over extended period); \textit{United States v. Falcone}, 109 F.2d 579 (2d Cir.), \textit{aff'd}, 311 U.S. 205 (1940) (conspiracy to operate illegal stills inferred from agreement among distributors of sugar, yeast, and containers to sell to still operators).

\textsuperscript{115} Economic conspiracy cases, especially those brought under the Sherman Act (15 U.S.C. §§ 1-7 (1970)) presented situations in which economic factors dictated near unanimity of action on the part of those participating in restraint of trade. A price fixing agreement, for example, is of necessity ineffective unless all parties maintain the same price. It is arguable that this kind of clearly observable unanimity of action may indicate at least tacit agreement. \textit{See} \textit{Interstate Circuit, Inc. v. United States}, 306 U.S. 208 (1939). Additional concreteness has usually been lent to such amorphous undertakings by a clear economic "stake in [the venture's] outcome." \textit{United States v. Falcone}, 109 F.2d 579, 581 (2d Cir.), \textit{aff'd}, 311 U.S. 205 (1940). Neither of these factors was present to give substance to the noncohesive agreement in \textit{Spock}.

\textsuperscript{116} The loosening of agreement requirements in Sherman Act cases is by no means generally applauded. \textit{See} authorities cited note 30 \textit{supra}. But "although they may be justified in that area, [loosened standards] are ever likely to be extended to the general law of conspiracy." \textit{Developments in the Law} 934.

\textsuperscript{117} \textit{See} notes 114-15 \textit{supra}.
ness are not, as implied by the Spock majority, 118 necessary only to keep a conspiracy secret; without minimal cohesiveness there is no conspiracy. To discount the importance of these elements is to undermine a major justification of conspiracy law: the harm feared in conspiracy lies in the dangerous propensities of group criminal action. 119 If the "conspirators" are nothing more than a collection of separate individuals, there can be no "jointness" of action and no rationale for applying conspiracy law. The requirement of combination or relationship logically requires at least a modicum of cohesiveness. 120

The most telling argument against the finding of agreement, and the one to which the majority devoted the most space, 121 was that the agreement charged was so wide-ranging that it was incapable of discriminating between the culpable and the nonculpable. Because the majority looked to the Call as the essential element of the conspiratorial agreement, and because the Call was interpreted as including both legal and illegal aspects, the majority had to meet the objection that all signers of the Call might thereby be held liable as conspirators, even if they subscribed only to its purely legal aspects. The majority dealt with this argument by drawing a direct parallel to the Smith Act membership clause cases in which the Supreme Court relied on the requirement of specific intent to overthrow the government as the means of protecting innocent members of the Communist Party who did not intend to further its illegal goals. 122 The three-part specific intent formulation discussed previously 123 was then set out by the Spock majority as adequate protection of the innocent "[w]hen the alleged agreement is both bifarious and political within the shadow of the First Amendment." 124

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118 416 F.2d at 170 n.9.
119 See text accompanying notes 21-22 supra.
120 See G. Williams, supra note 19, at 666-69.
121 416 F.2d at 172-74.
In Scales the Court held that protection for the innocent could be adequately accomplished by requiring that the defendants' specific illegal intent be proved to the degree demanded in Noto v. United States .... "[C]riminal intent ... must be judged strictissimi juris, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share."
416 F.2d at 172-73; see note 31 supra.
123 See text accompanying note 87 supra.
124 416 F.2d at 173.
The essential deficiency in the majority's approach is its facile analogy of the agreement implied by membership in the Communist Party to the agreement implied by affixing one's signature to the Call. Technically, the crime defined by the membership clause cases is not conspiracy at all, since it requires no agreement but simply active membership in an organization which advocates violent overthrow plus intent to effect that overthrow. It could, however, be argued that active and knowing membership in an organization such as the Communist Party may be taken to be the functional equivalent of agreement, given the special nature of the Party, its "ironclad" discipline, and its undemocratic procedures for making and enforcing policy. The membership clause cases do require an active commitment to what is a cohesive, disciplined political organization with reasonably clear-cut illegal goals. In this precise context, specific intent may be enough to protect innocent Party members. But membership in an organization such as the Communist Party is far different from the amorphous agreement represented by the Call.

The majority's rationale collapsed when it first identified signing the Call and cover letter with conspiratorial agreement. Even if participation in the press conference served as additional evidence of agreement, such an action could not begin to resemble the affirmative commitment embodied in, for example, active knowing membership in the Communist Party. The almost complete lack of cohesion among the several hundred signers of the Call means that any societal danger from the group arose from the parallel—but not united—intentions of the signers; and consciously parallel action should not support the use of conspiracy in the absence of some degree of group identity or cohesiveness, at least not in a case such as Spock.\footnote{125} Most basically the Call cannot constitute the "continuous and conscious union of wills upon a common undertaking"\footnote{126} that must serve as the criminal act of conspiracy. That some of the Spock defendants harbored an intent to engage in illegal advocacy is relatively clear; that these individual intents were united continuously and consciously into a joint endeavor merely by the act of signing the Call or speaking at the press conference is not at all clear. Without this second element, the crime of conspiracy cannot be made out.

Even if the Call itself did not present \textit{prima facie} proof of

\footnote{125} The "consciously parallel action" formula for agreement is problematic in the antitrust area as well. \textit{See} note 30 \textit{supra}.

\footnote{126} \textit{Developments in the Law} 926.
agreement, as was implied by the court majority, it still is possible that the Call, together with the other circumstantial evidence presented at the trial, might have served as sufficient indirect proof of a prior agreement to support a jury conviction. As discussed previously, the logic of agreement requires a definable relationship or combination existent among several individuals aimed at an illegal act. The difficulty of inferring existence of any sort of culpable agreement from the evidence submitted in Spock centers on the issue of finding a definable relationship or combination—a question not discussed in the majority opinion, apparently because signing the Call was viewed as sufficient evidence of concerted endeavor to constitute the act of agreeing.

The record supports a finding that some illegal action was taking place: specifically, the Arlington Street Church meeting and the Washington draft card turn-in very probably constituted commission of the substantive crime of counseling or aiding and abetting draft law violation. There was also evidence of some cooperation, but only in nonculpable activities—the writing of the Call, for example, and the agreement to speak at the press conference. In addition, there was evidence of intent, at least as to some of the defendants, to engage in future illegal acts of criminal solicitation. But the key point is that there was no unifying agreement to connect these various elements. The illegal acts in evidence were not logically the product of joint action of the alleged conspirators; the only evidence of cooperation, combination, or relationship among the defendants culminated in action pursuant to wholly legal ends. In short, there was no support for finding a definable criminal combination. Evidence of cooperative action in legal activities plus individual intent to commit illegal acts does not add up to a conspiratorial agreement to pursue jointly those illegal objectives.

127 See text accompanying notes 23-26 supra.
128 That the church meeting might be used as the focus of a more specific and discrete conspiracy indictment was conceded by the dissent. 416 F.2d at 186 (Coffin, J., dissenting).
129 See notes 90-92 and accompanying text supra.
130 See text accompanying note 59 supra. An analogous situation would be presented by evidence of a meeting of bank robbers at which several of them announced that they had robbed banks in the past and intended to continue to do so. Subsequent robberies committed by individuals who so spoke would not justify an inference of conspiratorial agreement unless independent evidence suggested cooperation in executing those robberies. The words spoken at the meeting would be demonstrative of individual intent but not of agreement. The Spock press conference was of no more legal significance on the question of agreement. A distinction must be made between “agreement” in terms of similarity of viewpoint on
ends does not establish conspiratorial agreement. Conspiracy, as composed of both mental assent and combination, is simply not demonstrated by the record in United States v. Spock.

It is no small irony that this serious defect in the Spock conspiracy standards for agreement provoked considerable criticism of the one real accomplishment of the majority opinion—its three-part evidence standard for the finding of conspiratorial intent. Both the dissenting opinion and subsequent commentary decried the intent test on first amendment grounds because of an accurate perception that the majority had set a precedent for punishing individuals for conspiracy upon no more evidence than undeniably legal speech. The critics alleged that the decision was too broad and would therefore have a "chilling effect" on free speech.

These attacks were misdirected. If, as argued above, the Call had little or no legal significance as an indication of conspiratorial agreement, the majority set a precedent for allowing a finding of conspiracy solely on the basis of individual intent to commit an illegal act. This precedent is clearly a very dangerous one, but not primarily on first amendment grounds. Such a practice would constitute punishment for an illicit intent alone, in violation of the ancient common law requirement of a culpable act. Signing a document such as the Call cannot by itself constitute acquiescence in a conspiratorial agreement, and the punishment of conspiracy without agreement violates not only the underlying rationale of the crime but also due process requirements of individual guilt.

public issues, and a conspiratorial agreement involving a joint decision to pursue an illegal course of action.

131 See text accompanying note 87 supra.

132 Judge Coffin expressed his displeasure with the ramifications of the majority's test as follows:

What are the implications of the three methods of activating one's signature to the "Call" to status as a full-fledged conspirator? To say that prior or subsequent unambiguous statements change the color of the litmus is to say that while one exercise of First Amendment rights is protected, two are not. To say that actual commission of illegal acts ... renders culpable the more opaque original "agreement" is to say simply that the subsequent commission of one crime becomes suddenly the commission of two crimes. To say that "subsequent legal acts clearly undertaken for rendering effective the advocated illegal action" ... [render] retrospectively conspiratorial the earlier protected ambiguous advocacy is to say that two rights make a wrong.

416 F.2d at 187 (dissenting opinion).


134 See Nathanson supra note 14.
Conclusion

The *Spock* case sets the doctrinal deficiencies of *Yates* into bold relief. The precise intent standards set out by the circuit court in *Spock* demonstrate the internal weaknesses of the speech conspiracy doctrine of the Communist cases. And the breakdown in the *Spock* agreement standards serves to illustrate the inapplicability of the Communist cases—whatever their internal strengths and weaknesses—to the speech conspiracy cases that might be expected to occur in the near future. *Spock*, however, also provides some rather clear indications of the direction the Supreme Court might take in a future case of a similar nature.

The intent standards, as discussed at some length above, provide a suggestion of how the Court might remove the current possibility of a speech conspiracy defendant's being found guilty of a crime without the relevant mens rea. The problems with the agreement element of conspiracy, so conspicuous in *Spock*, demonstrate clearly the need for specificity in conspiracy charges, and the importance of disentangling agreement in terms of a joint illegal undertaking from a conception of agreement as the convergence of views on issues of public concern. Agreement, at least in speech conspiracy cases, must consist of that joint undertaking, not merely parallel action.

If the strengths and weaknesses of *Spock* are taken seriously by future prosecutors, there might even be hope for a continuance of the current lull in speech conspiracy prosecutions, particularly if some variation of the *Spock* intent test is made a constitutional requirement, and if the agreement standards are tightened so as to require agreement in traditional conspiracy terms. The rationale for conspiracy requires its confinement to speech cases in which the primary governmental concern is the punishment of individuals who (1) present a clear case of conspiratorial agreement and intent directed at illegal and dangerous speech and (2) cannot be effectively reached on a substantive charge. The recent past has demonstrated the danger to the integrity of the legal process from excessive use of the conspiracy device to reach political offenders—especially those charged with speech crimes.\(^{135}\) Prudence alone dictates what the first amendment may not: use of a

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\(^{135}\) That the 1969 Chicago Conspiracy Trial, for example, generated little public esteem for the American judiciary is widely acknowledged. See, e.g., Kalven, *Chicago Howler*, THE NEW REPUBLIC, March 7, 1970, at 21. Professor Kalven called the trial "a mess and a loss for the society as a whole." Id. at 23. See also J. Lukas, supra note 5; J. Mitford, supra note 84; J. Nelson & R. Ostrow, THE FBI AND THE BERRIGANS: THE MAKING OF A CONSPIRACY (1972).
less dangerous alternative to speech conspiracy proceedings, especially in light of the declining Government conviction rate in recent political conspiracy trials.\textsuperscript{136}

Above all, when conspiracy is applied to speech crimes, both short-term concern for insuring fairness to all defendants in criminal proceedings and long-term regard for preserving citizen confidence in the probity of the courts militate against any use of conspiracy to punish those who cannot be incriminated without perversion of the substantive and procedural safeguards embodied in conspiracy law, the due process clauses, and the first amendment. A statement by Mr. Justice Jackson aptly describes the standard which should restrain both the prosecutor in bringing speech conspiracy charges and the appellate courts—particularly the Supreme Court—in upholding them. It might also serve as the ultimate lesson of \textit{Yates} and \textit{Spock}:

There is . . . strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evildoing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. We should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation. And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction.\textsuperscript{137}

\textsuperscript{136} See N.Y. Times, Sept. 9, 1973, § 4, at E-3, col. 3.

\textsuperscript{137} Krulewitch v. United States, 336 U.S. 440, 457 (1949) (Jackson, J., concurring).