Parade 5/21/72

What Is Conspiracy?

by Martin B. Margulies

Sister Elizabeth McAlister and Father Philip F. Berrigan (brought from prison in shackles) were tried on conspiracy charges but found guilty only of letter smuggling.

It was the political trial of the decade, the long-awaited confrontation between FBI Director J. Edgar Hoover and the Catholic Left.

Father Philip F. Berrigan and six other antiwar activists stood in the dock at Harrisburg, Pa., accused of conspiring to vandalize draft boards, blow up government heating tunnels in Washington, and kidnap Presidential assistant Henry A. Kissinger.

But when the jury returned after a week's deliberations, it convicted just two of the defendants on relatively minor charges of smuggling letters out of prison. On the all-important conspiracy counts, it was hopelessly divided. Several jurors threw up their hands and admitted that they didn't understand the law of conspiracy. Neither, defense attorneys contended, did the judge.

Elusive concept

Small wonder that the jury was confused, for conspiracy is surely one of the most elusive, open-ended concepts in Anglo-American criminal law. Yet it has become a favorite of prosecutors across the country. In Los Angeles, Anthony Russo has been indicted for *conspiring* to help Daniel Ellsberg release the Pentagon Papers. Teenaged activist Leslie Bacon was indicted for *conspiring* to fire-bomb a Manhattan bank. In a celebrated trial in New York City last year, 13 Black Panthers were acquitted of *conspiring* to murder policemen. The Chicago Seven were charged with *conspiring* to incite a riot.

Why the popularity of the conspiracy charge among prosecuting authorities? To understand that, one must know a little of its background.

700 years old

Conspiracy has had a long and not always honorable history. It was first mentioned in an English statute just 700 years ago, but it is probably even older. In the first half of the 17th century, it was used often by the dreaded Court of Star Chamber, which served the Stuart kings in their quest for absolute power. It was during this period that it assumed its present form.

Over the following three centuries, men have been convicted for conspiring to commit seduction, hiss actors off the stage, lay false accusations of paternity, and raise the price of beer (in order to incite the people against the tax collectors, who were wrongly blamed for the increase).

And in 1809, in London's newly rebuilt Covent Garden Theater, theatergoers blew horns, shook rattles, rang bells and sang "Rule Britannia" and "God Save the King" during the performance, to protest a rise in ticket prices. To be sure, said the court afterward, the audience was entitled to ex-

press its disapproval of a play by booing or other means. "But if a body of men were to go to the theatre with the settled intention of damning a piece, such a deliberate preconcerted scheme would amount to a conspiracy."

Some of these cases seem humorous enough today, though the defendants probably didn't think so at the time. But they help illustrate why authorities have dubbed conspiracy "the prosecutor's darling."

In most of them, for example, the conspirators had done nothing whatever to carry out their purpose. But conspirators don't have to. The bare agreement is enough to make them guilty. In some states, it is true (and in the Federal courts), at least one conspirator must commit an "overt act" before he and his co-conspirators can be prosecuted. But the act can be completely innocuous. A phone call will do.

No crime

And in all these old cases, *the conspirators planned nothing criminal.* Seduction, slander, and raising prices were not crimes. Yet conspiracy can be punishable, even if the conspiratorial objective is not, if, as one court put it, the purpose is to do something "immoral," or which would "injure the public." In one of the earliest American decisions, for instance, a Maryland court ruled that directors and officers of the Bank of the United States could be prosecuted for conspiring to embezzle $1,500,000. Embezzlement, the court conceded, was not an offense in those days. But *conspiracy* to embezzle was. This principle has been reaffirmed many times since, though it raises grave constitutional questions today.

There are other reasons why prosecutors find conspiracy so much to their liking. One is its very vagueness.

Conspiracy (from the Latin *conspirare*, "to breathe together,") has been defined as "a combination for an unlawful purpose." But the purpose needn't be spelled out in a formal agreement, as in an ordinary contract. All that is required is a tacit understanding, a meeting of the minds. And this can be proved circumstantially, from the way the conspirators conduct themselves, and the things they do.

A person can't be convicted, say, both of attempted robbery and robbery. The two offenses are said to "merge." But he can be convicted for robbery and conspiring to rob. And the punishment for conspiracy is sometimes greater than for the completed act.

One needn't know the identity of one's co-conspirators, or even know that they exist. Take, for example, the standard narcotics ring, in which one major "pusher" may deal through dozens of middlemen, each with his own stable of street-vendors. All may be treated as part of a single conspiracy, as long as they are aware that there is some sort of overall enterprise. To understand the implications of this, consider:

- As long as the conspiracy lasts, each conspirator is responsible for the crimes of his co-conspirators, when these are done to accomplish the conspiratorial purpose. Suppose, for instance, bank robbers agree among themselves that there is to be no violence. But, during the robbery, one thief mauls a teller to prevent him from pressing the alarm. All are chargeable with battery—even those who were nowhere near the scene.
- Out-of-court statements by co-

conspirators, ordinarily excludable as "hearsay," are often admissable in evidence against one another.

- A conspiracy can be tried anyplace where an overt act occurred.
- A conspiracy lasts until all its purposes are accomplished, no matter how many years that takes.

Result: let a prosecutor establish a conspiracy—a nebulous thing—and he can prosecute any member, almost any time or anywhere, for any act committed by any other member, supporting his case with practically any statement made by any one of them.

As one lawyer, who asked not to be identified, remarked, "It certainly does save the prosecution a lot of homework."

Does the conspiracy law, in its present form, serve a valid purpose? Is it consistent with traditional Anglo-American notions of fair play?

On the one hand, society has good reason to frustrate criminal plans before actual harm is done. This is why all countries punish individuals for attempted crimes, once the preparations pass a certain stage, even though the crimes are never carried out. And perhaps it is true, as courts have said, that the mere existence of a conspiracy is dangerous, because people who plot together are likelier to act than one person scheming alone.

On the other hand, we have always been reluctant to sentence people for evil thoughts, or for deeds committed by someone else. Yet conspiracy law does just that.

The late Supreme Court Justice Robert Jackson, no radical by any stretch of the imagination, once warned against "the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense."

"Loose practice" in this area, wrote the justice, "constitutes a serious threat to fairness."

Justice speaks

More recently, Supreme Court Justice Potter Stewart, speaking for himself, Chief Justice Warren Burger, and Associate Justices Harry Blackmun and Byron White, noted the Court's "disfavor" toward "attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions."

And European countries, while they do punish certain unlawful combinations, have never found it necessary to develop anything so sweeping as conspiracy the way it is understood here. Yet no one who is familiar, say, with the French courts would accuse them of "coddling criminals."

Perhaps the answer lies in new statutes, establishing stricter standards of proof, and eliminating responsibility for acts committed by others. Then the more obnoxious features of the present law could be consigned to the history books, as relics of a harsher age than our own.