Conspiracy and the First Amendment

Throughout various periods of xenophobia, chauvinism, and collective paranoia in American history, conspiracy law has been one of the primary governmental tools employed to deter individuals from joining controversial political causes and groups. A number of the resulting cases have achieved a good deal of notoriety in legal annals for the first amendment doctrines they fostered, but courts and commentators have paid surprisingly little attention to the effect of conspiracy law itself on first amendment rights.

In the political conspiracy cases, the essential offense was that a group of individuals had banded together to engage in advocacy which the legislature had designated criminal. Reviewing courts did not question

1. See, e.g., Schenck v. United States, 249 U.S. 47 (1919) (individuals opposed to American involvement in World War I indicted for conspiring to cause insubordination in armed forces by circulating anti-draft documents); Whitney v. California, 274 U.S. 357 (1927) (leading socialist indicted and convicted for being a member of a conspiracy to advocate criminal anarchy). During the McCarthy era several leaders of the Communist Party were indicted for conspiring to advocate violent government overthrow. See Dennis v. United States, 341 U.S. 490 (1951); Yates v. United States, 354 U.S. 298 (1957).

2. See, e.g., Schenck v. United States, 249 U.S. 47 (1919), where the Court first elaborated the "clear and present danger" test, and Dennis v. United States, 341 U.S. 490 (1951), where the Court "modified" the clear and present danger test to read: "whether the gravity of the evil, discounted by its improbability, justifies such invasion of speech as is necessary to avoid the danger." Id. at 510. See also Yates v. United States, 354 U.S. 298 (1957). The Court there held that the advocacy of ideas could not be punished, though the first amendment permits punishment of advocacy of illegal action. In both Schenck and Dennis the Court affirmed the convictions of all the defendants; and in none of these cases did the Court subject the use of conspiracy law to regulate individuals engaged in unlawful expression to first amendment analysis.

3. See cases cited in note 1, supra. Advocacy of government overthrow, counseling draft resistance, and inciting to riot are forms of allegedly unlawful expression. In Speech,
the constitutional validity of applying conspiracy law to such conduct until Judge Coffin, dissenting in *United States v. Spock*, suggested that in certain circumstances the first amendment bars the use of conspiracy law. In his view it is constitutionally impermissible to use the conspiracy weapon to attack “agreements” in which: (1) the effort was completely public; (2) the issues were in the public domain; (3) the group was ill-defined; (4) the purposes of the “agreement” were both legal and illegal; and (5) the need for additional evidence to inculpate is recognized. Judge Coffin’s ground-breaking opinion is important as a first attempt to grapple with the conflict between conspiracy law and the first amendment. But there are two reasons why his five-part “outer limits” cannot serve as a rule to reconcile the conflict in future cases. First, such a rule would suffer from the same troublesome lack of clarity that characterizes conspiracy law itself. Second, Judge Coffin’s limits leave certain forms of associations unprotected when first amendment principles should require a contrary result.

I.

Professor Emerson, in his *Toward a General Theory of the First Amendment*, has offered at least four interrelated reasons for the priority of first amendment rights in the American legal system. First, the not only was the conspiratorial purpose framed in terms of expression, but the overt acts consisted of several public speeches, a document entitled “A Call to Resist Illegitimate Authority,” and a press conference. See *Mifflin*, *The Trial of Dr. Spock* 254-55 (1969). The overt acts alleged in *Dennis* and *Yates* were also framed in terms of expression such as teaching violent government overthrow. 4. In the *Spock* case, the majority noted that conspiracy law had been used historically as a means of deterring and punishing those who increase the likelihood of crime by concerted action. 416 F.2d at 171. The law of conspiracy—and the law of inchoate crimes in general—developed quite independently of first amendment case law, however, and the majority ignored the obvious point that historical acceptance of a legal practice does not forever establish its validity. See T. Emerson, *The System of Freedom of Expression* 402 (1970). 5. 416 F.2d at 185. 6. One is entitled to ask, for example, how many people have to be aware of the “effort” and the “issue” before it becomes “public.” Further, when is a group “ill-defined” as opposed to disciplined and coherent? Judge Coffin’s *ad hoc* formula may suit the facts of the *Spock* situation, but it is not very useful as a rule for future application. 7. For example, Judge Coffin states that the defendants in *Dennis v. United States*, 341 U.S. 494 (1951), would not be protected because their agreement was clandestine and their conspiratorial objective was a form of advocacy specifically outlawed by the Smith Act. 416 F.2d at 185, n.3. The objective of the *Dennis* conspiracy was, however, allegedly unlawful expression, and, as this Note illustrates, the first amendment should require that there be no conspiracy charge in such a case. 8. See T. Emerson, *Toward a General Theory of the First Amendment* 1-15 (1968), 72 Yale L.J. 877, 878-886; see also Emerson, *Freedom of Association and Freedom of
right of free expression is essential to an individual's self-realization, to the development of his "character and potentialities as a human being." Suppression of this right constitutes an affront to the dignity of the individual. Second, free expression is invaluable to a society devoted to the attainment of truth. In Learned Hand's words:

[The First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritarian selection. To many this is, and always will be folly; but we have staked upon it our all.

Third, free expression is a requisite for a democratic society because it provides "for participation in decision-making through a process of open discussion which is available to all members of the community." Finally, freedom of speech promotes the rational compromise essential to a viable democracy; it is "a method of achieving a more adaptable and at the same time more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus."

A legal system which strongly endorses freedom of expression and its underlying values should also protect the individual's right to associate with others of like mind in order to make his expression of opinion more effective. It is no feat of judicial invention for the Supreme Court to discern a right of free association in the nexus between freedom of speech and freedom of assembly. But since the first amend-

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10. Emerson, supra note 9, at 881.


13. Emerson, supra note 9 at 884. See also Bagehot, The Metaphysical Basis of Toleration, in 2 Works of Walter Bagehot 339, 337 (Hutton ed. 1889): "Persecution in intellectual countries produces a superficial conformity but also underneath an intense, instinct, implacable doubt." Suppression of expression promotes inflexibility and stultification; as a result, society is unable to adjust to changing circumstances. If a society values rational compromise, as a democratic one should, freedom of expression is essential.

14. See N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958): Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between freedoms of speech and assembly . . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.
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ment does not afford absolute protection to all forms of individual expression,\(^{15}\) it could hardly be claimed to offer full protection to all forms of association.\(^{16}\)

When the government seeks to regulate associations whose primary activity is expression, a tension results between the regulatory provisions and the first amendment. The resolution of this conflict depends on both the nature of the regulation and the nature of the expression. As a form of regulation, conspiracy law is extremely broad, and conspiracy trials are striking for their chaotic procedures which favor the prosecution’s case.

Analysis lends credence to Justice Jackson’s observation that the substantive law of conspiracy “is so vague that it almost defies definition.”\(^{17}\) At common law, an indictable conspiracy was apparently an agreement either to do an unlawful act or to do a lawful act by unlawful means.\(^{18}\) This peculiar notion that an agreement should be punishable even though its objective is legal is somewhat explained by the two rationales underlying conspiracy law—the “specific object rationale”\(^{19}\) and the “general danger rationale.”\(^{20}\)

Under the “specific object rationale” the conspiratorial agreement is viewed as an inchoate offense, analogous to an attempt.\(^{21}\) The agreement of a group theoretically makes it more probable that the conspiratorial objective will be completed than if one person acted alone. Under this rationale, the agreement is logically punishable only

Thus, freedom of association may often be as important in first amendment terms as freedom of expression itself. See Wyzanski, The Open Window and the Open Door, 35 CAL. L. REV. 336, 347 (1947).

15. See e.g., Schenck v. United States, 249 U.S. 47 (1919); Brandenburg v. Ohio, 395 U.S. 444 (1969). The term “expression” as used in this Note is not used in the same sense in which Professor Emerson uses the term. See Emerson, supra note 9. Professor Emerson divides all conduct into two classes: “expression” and “action.” “Expression” as he uses it, demands absolute protection from governmental regulation. Professor Emerson classifies incitement to violent acts as a form of “action.” In this Note, however, “expression” means all words (and even some expressive conduct; see note 90 infra) the illegality of which the courts may determine only through reference to one of the three first amendment tests: the clear and present danger test, the incitement test, and the balancing test. See p. 879 infra. Thus, words which incite to violent action would constitute “expression” for the purposes of this Note.


19. This term is borrowed from Note, Developments in the Law—Criminal Conspiracy, 72 HARV. L. REV. 920, 925 (1959) [hereinafter cited as Developments].

20. This term is also borrowed from Developments, supra note 19, at 925.

21. See WRIGHT, LAW OF CRIMINAL CONSPIRACIES 35, 62 (1887); 2 STEVEN, HISTORY OF THE CRIMINAL LAW 227. Justice Holmes pointed out, however, that conspiracy law attacks inchoate conduct at a far more incipient stage than does the law of attempts. Hyde v. United States, 225 U.S. 347, 357-58 (1912).
if the conspiratorial objective is a crime. Furthermore, as in the common law of attempts, the conspirator who completes the substantive crime is punishable for the agreement or for the completed offense, but not for both. Were the specific object rationale the only justification for punishing conspiracies, the scope of the crime would seem relatively clear, but the "general danger rationale" clouds the matter considerably.

Different theorists have based the "general danger" rationale on one of two propositions. First, and most prevalent, is the common law view that combinations can be punished, whether or not their objective is unlawful, on the theory that such group action creates a pervasive anxiety in society. Two individuals can be convicted for agreeing to do an act which, if accomplished by one individual, would not even be indictable. Not only have several commentators questioned this notion of the general danger rationale on historical grounds, but

22. Under the law of attempts, the inchoate stage of conduct cannot be punished unless the objective is unlawful. See generally Wechsler, Jones & Korn, The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute, 61 COLUM. L. REV. 571, 619 (1961). When considered alone, the "specific object" rationale supports the analogy between conspiracy and an attempt, and the two should be treated similarly for purposes of criminal regulation.

23. See, e.g., Remington & Joseph, Charging, Convicting and Sentencing the Multiple Criminal Offender, 1961 Wis. L. REV. 523 (1961). If conspiracy is treated purely as an attempt (as it should be if the specific object rationale is the only justification for the conspiracy), then the theory of attempts suggest that either the inchoate conduct or the completed offense may be punished, but not both. As Remington and Joseph note: The prohibition against conviction of both an attempt and the completed crime necessarily follows from the proposition that it is improper to convict [an individual] of crimes based on the same conduct unless each requires proof of a fact not required by the other. Since the attempt does not require proof of any fact not required for conviction of the completed crime, conviction for both is improper.

1961 Wis. L. Rev. at 546.

A broader reason for this result lies in the fact that every person who succeeds in committing a substantive offense has, at an earlier time, engaged in an inchoate stage of that offense. The notion is that it would be wrong to inflict double punishment on the person for engaging in several stages of the same continuous line of conduct. See Wechsler, Jones & Korn, supra note 22, at 1030.

24. Developments, supra note 19, at 925; see also Wechsler, Jones & Korn, supra note 22, at 964.

25. Wechsler, Jones & Korn, supra note 21, at 964. Quoting State v. Kemp, 126 Conn. 60, 78, 9 A.2d 63, 71, 72 (1939), Wechsler, Jones & Korn note: It is not essential . . . to criminal liability that the acts contemplated should constitute a criminal offense for which, without the elements of conspiracy, one alone could be indicted . . . [I]t will be enough if the acts contemplated are corrupt, dishonest, fraudulent, or immoral, and in that sense illegal. See also Goldstein, Conspiracy to Defraud the United States, 68 YALE L.J. 405, 413 (1959). This notion accounts for the somewhat surprising fact that an agreement to accomplish a misdemeanor may be punished as a felony. See Developments, supra note 19, at 911. See also State v. Coolidge, 106 Vt. 183, 191-192, 171 A. 244, 248 (1934). Further, a conspirator can be punished for both the agreement to commit an unlawful act and the accomplished offense itself. See Developments, supra note 19, at 969.

26. See, e.g., Sayre, Criminal Conspiracy, 35 HARV. L. REV. 393, 403 (1922). Sayre claims that Lord Denman's epigram was merely a "magic jingle" which had no basis in the common law.
the authors of the Model Penal Code rejected it because it fails “to provide a sufficiently definite standard of conduct to have any place in a penal code.”27 The Code defines conspiracy as “an agreement to commit a crime.”28 The authors of the Code suggest, however, that a conspiracy may create a “general danger” if the combination has “criminal objectives that transcend any particular offenses that may have been committed in pursuance of its goals.”29 In such cases and only in such cases, the conspirators may be punished for both the agreement and the offenses already achieved.30

The Code’s authors have constructed a more justifiable notion of the general danger rationale, but the federal courts and most state courts persist in following the common law notion,31 and fail to analyze conspiracy indictments to determine whether the general danger rationale is unjustified in the case at hand.32

A precise delineation of the scope of the crime of conspiracy is, then, extremely difficult. Procedurally, however, the defendant in a conspiracy trial clearly suffers distinct disadvantages—distinct enough to induce one court to term conspiracy the “darling of the modern prosecutor’s nursery.”33

It is incumbent upon the prosecution to establish the existence of the conspiratorial agreement. However, on the theory that conspiratorial agreements are secret and hence seldom susceptible to direct proof, courts relax the normal rules of evidence.34 Perhaps the best illustration of this phenomenon is the “conspirator rule,” under which hearsay declarations by one co-conspirator are admissible against all co-conspirators on the grounds that the admission of hearsay—though “inherently less reliable than other evidence”35—is thought necessary in order to have any evidence at all.36

27. See Wechsler, Jones & Korn, supra note 22, at 964.
28. MODEL PENAL CODE § 5.03(1) (Proposed Official Draft, 1962): (1) Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
   (a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
   (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.
29. Wechsler, Jones & Korn, supra note 22, at 960.
30. Id.
31. Id. at 965, 964. See also Note, The Objects of Criminal Conspiracy—Inadequacies of State Law, 68 HARv. L. REV. 1056 (1955).
32. See Goldstein, Conspiracy to Defraud the United States, 63 YALE L.J. 403, 413 (1959).
33. Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).
34. See Developments, supra note 19, at 984.
35. Id. at 989.
36. Levy, Hearsay and Conspiracy, 52 MICH. L. REV. 1159, 1160 (1954). The co-conspir-
Defendants in conspiracy trials suffer other disadvantages as well. The standard of relevancy is greatly reduced, and the volume of evidence produced by a trial of several defendants may overwhelm the jury. Furthermore, the jury may "infer an association among the defendants merely from the fact that they are being tried together." And finally, the Supreme Court has held that an individual found guilty of a conspiracy may also be held liable for the commission of the substantive offense even though he did not personally participate in that substantive offense.

Both substantively and procedurally, then, conspiracy law is a rather sprawling prosecutorial weapon. Yet, neither the Supreme Court nor the Spock majority have recognized any first amendment problems in the use of conspiracy law to attack associations engaged in expression.

II.

Conspiracy laws strike at conduct in a very nascent form. Though the federal conspiracy statute and many states require that the prosecution establish an overt act in furtherance of the conspiracy, this requirement is seldom more than a formality, and an indictment may be brought well before the conspiratorial objective is achieved. When the conspiratorial objective is unlawful expression, however, settled first amendment doctrine should require the dismissal of a conspiracy.
indictment brought prior to the completion of the conspiratorial objective. The reason for this result lies in the nature of expression as an offense.

While the Supreme Court has never held the right of free expression to be absolute, it has over the years gradually broadened its conception of the reach of first amendment protections. In doing so, the Court has employed three constitutional tests—the clear and present danger test, the incitement test, and the *ad hoc* balancing test. The operation of these tests is commonly understood and need not be reiterated.

What is especially significant about the tests here is that analysis of each reveals that, regardless of which test is used, the court, both at the trial level and on appeal, must examine the expression in the context of the surrounding circumstances of each case before it can decide whether that expression may be constitutionally punished. Thus, in *Edwards v. South Carolina* the Supreme Court reversed the breach of the peace convictions of black student demonstrators not on the basis of an incorrect first amendment test employed by the state court, but on the basis of its own “independent examination of the record.”

Under the clear and present danger test or the incitement test, the court must closely examine the speech, the manner of its delivery and the circumstances that obtained at the time of the speech in order to determine whether it may constitutionally be punished. Under the balancing test, however, the factors that go into the balance are often not the circumstances of the particular exercise of first amendment rights, but the more abstract general governmental interests advanced by the legislation and the adverse effect of the legislation on a class of expressive associations or conduct. But the balancing test has not been

42. The government could not validly level a conspiracy indictment against a combination engaged only in lawful expression, despite the implication of the “general danger” rationale. See *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); note 14 supra.

43. For a discussion of these tests see Emerson, *Toward a General Theory of the First Amendment*, supra note 9, at 907-16. The incitement test is the most current standard by which the Court will examine governmental regulation of expression. Cf. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969):

The constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.


45. 372 U.S. at 235. See also *Cox v. Louisiana*, 379 U.S. 559 (1965); *Speiser v. Randall*, 357 U.S. 513, 521 (1958). The *Edwards* Court claimed to distinguish the facts presented from those in *Feiner v. New York*, 340 U.S. 315 (1951), but actually the full-review approach of *Edwards* represents a radical departure from the *Feiner* Court’s refusal to examine both the record of the expression and the lower court’s reliance on the word of the arresting officer.
employed by a majority of the Court in cases involving direct regulation of the content of a public speech. The Court uses the balancing test when governmental regulation impinges indirectly upon first amendment freedoms of expression and association. Those members of the Court who have advocated the use of the balancing test in cases where expression is subject to direct limitation have, in essence, suggested a scheme of analysis quite similar to that required by the other two tests. The content of the expression, they claim, must be analyzed in the context of the surrounding circumstances, and the competing interests weighed to determine whether the regulation of speech is justified.

The important conclusion that the Court's three modes of analysis demand is that unlawful expression is itself an inchoate offense. The harm the legislature may act against, if there be any, lies not in the speech itself, but in the actions which the expression may precipitate.

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46. See Note, Civil Disabilities and the First Amendment, 78 Yale L.J. 842, 847 n.16 (1969). The Court has generally applied the balancing test to the so-called "indirect" cases where the content of the speech is not subject to direct governmental regulation:

[General regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the first or fourteenth amendment forbade Congress or the states to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.


In Street v. New York, 394 U.S. 576 (1969), the Court applied what, at first blush, appeared to be a balancing test to determine whether speech could be directly regulated. The Court considered four possible state interests in so regulating speech contemptuous of the American flag: 1) an interest in preventing incitement to violence; 2) an interest in punishing "fighting words" [a small category of speech held to have no social value in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)]; 3) an interest in protecting the sensibilities of passers-by; and 4) an interest in ensuring respect for the flag. Despite the appearance of a balancing test, however, the Court emphasized the incitement aspect of its analysis, found that Chaplinsky did not apply to the defendant's words, and gave virtually no weight to the other two state interests. In effect, the Street approach is the equivalent of the incitement test set forth in Brandenburg later that year.

47. Justice Frankfurter repeatedly urged that the balancing test be applied even to the so-called "direct" cases where the content of the speech was the basis of governmental restraint. A majority of the Court has not accepted this approach partially because recent majorities have not espoused the degree of judicial deference to the legislature in first amendment cases which Frankfurter advocated. Even if the Court did apply the balancing test to the "direct" cases, however, the important point is that such a test requires that the content of the expression exist on a record in order to determine whether the governmental interests in regulating that speech outweigh the value of the particular words. Justice Frankfurter evidenced this approach in his Dennis concurrence. Dennis v. United States, 341 U.S. 494, 516-55 (1951) (concurrency). There, in balancing the expression—advocacy of government overthrow—against the interest of the state in preventing such overthrow, Frankfurter deferred to the legislature's judgment that, in the existing political milieu, the balance should tip against the right of speech. In so deferring, Frankfurter explained that the Congress had determined that the defendants' speech presented a clear and present danger and that this determination was sufficient. Indeed, the Dennis majority's version of the clear and present danger test was nearly a balancing test. See Note, Civil Disabilities and the First Amendment, 78 Yale L.J. 842, 847 n.16 (1969).

48. See Emerson, supra note 9, at 889.
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If expression must be considered in its context before the state may constitutionally punish for it, both the expression and the context must exist in some form in which a court can examine them. The first amendment surely prohibits punishing an individual's commitment or stated promise to engage in expression at any stage prior to that expression. There is no reason to contemplate a different result when the commitment to later expression is the agreement of several persons. The fact that the legislature has called the agreement "conspiracy" and designated it a crime is irrelevant. At such an inchoate stage, it is simply impossible for courts to analyze the expression in the context of its surrounding circumstances; they are left with mere conjecture—hardly enough under Edwards.

This result is, of course, consistent with the Court's general principle—first stated in Near v. Minnesota—that the first amendment prohibits prior restraints of expression, that ideas must first reach the market place before the state can intervene in any manner. The Near Court itself, however, indicated that this doctrine was not absolute, and there have been rare instances when the Court has sustained prior restraints. The result in these cases, however, is rationalized by two factors not present when conspiracy law is utilized to restrict incipient expression.

First, prior restraints upheld in obscenity cases are justified by the fact that the regulatory bodies enforcing the restraints have always had adequate access to the expression concerned. In Times Film v. City of Chicago the Court upheld a statute requiring prior submission of motion pictures to a governmental board for its determination of the films' obscenity. In this case and in its few progeny, the expression already existed on the record, and the Court could analyze the

Expression is itself not normally harmful, and the objective of the limitation is not normally to suppress the communication as such. Those who seek to impose limitation on expression do so ordinarily in order to forestall some anticipated effect of expression in causing or influencing other conduct.

See also T. Emerson, The System of Freedom of Expression 403-04 (1970), where the author deals with expression as a form of solicitation, an inchoate offense. See also Wechsler, Jones & Korn, supra note 22, at 626-28.

49. 283 U.S. 697 (1931).

50. The exceptions to the general rule against prior restraints were: (1) in wartime certain dangerous speech might be curtailed; (2) obscene publications might also be subject to previous restraint; and (3) the security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. 283 U.S. at 716. For a discussion of the problems raised by the Near Court's exceptions, see Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Prob. 616 (1955).


52. In Freedman v. Maryland, 380 U.S. 51 (1965), the Court modified the Times Film doctrine by requiring immediate judicial review of an adverse determination by a state board of censors.
expression in constitutional terms on its face because the first amendment "tests" in the obscenity area are not based on the eliciting of any specific response from any specific audience.\(^3\) In non-obscenity cases, however, it is difficult to justify prior restraints at all. Although the Supreme Court has never sanctioned a prior restraint based on the content of a proposed public speech, one court of appeals has suggested that a public speaker may be enjoined from specified future expression if his past speeches incited violence or unlawful activity from a sympathetic audience.\(^4\) Nevertheless, past forms of expression do not offer courts the kind of record available in the obscenity case. Whereas courts can scrutinize alleged obscenity prior to distribution, in the public speaking cases there is normally no evidence of a speaker's contemplated expression prior to his actual speech.\(^5\) And even if there

53. In theory, obscenity is a form of inchoacy in that it may be regulated because of its reputed tendency to cause moral depravity in the society as a whole. See Roth v. United States, 354 U.S. 476 (1957). Though in defining obscenity the Court claims to ask whether the expression appeals to the prurient interests of a generalized community, the specific audience response is never examined. Instead, once the expression is defined as obscene, it is said to have no social value, and there is no need to subject it to a clear and present danger test, 354 U.S. at 484-487 (1957). Compare the Roth majority with id. at 508 (Black, J. and Douglas, J., dissenting). The Court's definition of obscenity, however, is not at all clear. Whereas in Roth obscenity was defined as expression which appealed to the prurient interests of the national community, in Ginsburg v. United States, 383 U.S. 469 (1966), the Court focused on the pandering aspect of the advertising rather than on the content of the expression itself. The Court has used a similar "no social value" approach when words constitute libel, Beauharnais v. Illinois, 343 U.S. 250 (1952), commercial advertising, Valentine v. Chrestensen, 316 U.S. 52 (1942), and "fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). By the Court's rationale, such words are not really expression at all, and they may be regulated as if they were action.

54. Kasper v. Britain, 245 F.2d 92 (6th Cir. 1957), cert. denied 355 U.S. 834 (1957). The defendant arrived in Clinton, Tennessee, to urge local citizens to ignore a federal court order to integrate the local high school. After two days of inflammatory speeches and picketing, city officials, fearful that Kasper's activities would incite violence, sought and were granted an ex parte restraining order which the defendant soon violated. In upholding Kasper's contempt conviction, however, the Sixth Circuit ignored the prior restraint doctrine, finding it sufficient that Kasper's speeches, prior to and after the restraining order, created a clear and present danger of violence. The "danger" in Kasper's speeches arose because his audience was sympathetic and appeared likely to follow his suggestion that they refuse to integrate the local school. No prior restraint could have been upheld had Kasper's speeches tended to incite a hostile audience to violence. See Rockwell v. Morris, 12 N.Y.2d 272 (1961); Kunz v. New York, 340 U.S. 200 (1951). See generally Note, Free Speech and the Hostile Audience, 26 N.Y.U.L. Rev. 389 (1951).

55. It is largely for this reason that the Kasper type of prior restraint is inconsistent with the first amendment requirement that the contested expression exist on the record before any regulation is permitted. While Kasper had indicated a strong likelihood that he would repeat his inciteful speeches, a proper reading of Edwards and other Supreme Court cases would seem to prohibit regulation of his intended expression until after the words had reached the market place. Unlike "fixed" expression, such as movies, Kasper's proposed speeches could not be fully analyzed in the context of the surrounding circumstances despite the fact that his past expression strongly suggested that his words would pose a clear and present danger in the future. Proper first amendment analysis, or what one commentator has called "First Amendment Due Process," implies that prior restraints should be permitted only when the expression already exists, in some tangible form, on a record. See Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518, 548-54 (1970). In the absence of such "fixed" expression, subsequent punishment should
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were such evidence, it would be a rare case in which the context for
the proposed expression was so clear that the "independent examina-
tion" required under Edwards could be made.56

Courts may uphold prior restraints, then, only when they have ade-
quate access to the contested expression and to the surrounding cir-
cumstances necessary to evaluate it. In this sense, such restraints are
actually not "prior," and do not strike at expression in its more in-
choate stages. This is a far cry from a conspiracy indictment leveled
against individuals at the stage where they have merely agreed to en-
gage in future expression; in such circumstances the court has no
foundation for determining that the proposed expression is unlawful.

The second factor present in judicially approved prior restraints
is that they are civil restraints—permit refusals57 or injunctions—
rather than prior criminal punishment for future expression. While
violation of the restraint may lead to contempt proceedings, the re-
straint itself never reaches the form of criminal punishment inherent
in any conspiracy conviction.

A criminal conspiracy conviction is thus qualitatively different from
any prior restraint that has received judicial sanction. In upholding
some forms of prior restraints, the courts have never implied that
criminal punishment at an extremely inchoate stage of expression is
consistent with the first amendment.58 Since prosecution of a group
for conspiracy to advocate prior to the actual advocacy is a prior re-
straint upon expression, the first amendment dictates that the govern-

be the only means of regulating expression which poses a "clear and present danger" to
society.

The Kasper result is improper on procedural grounds as well, for the district court had
issued an ex parte restraining order against the defendant's future speech, something the
Supreme Court has recently held to be improper. See Carrol v. President and Commiss-

56. In Rockwell v. Morris, 12 N.Y.2d 272, 282-83 (1961), the New York Court of Appeals,
in one of the most exhaustive judicial studies of the prior restraint doctrine, noted that
prior restraints on public speeches were only proper in the "very rare case" where it
could be established on a "proper record" that the proposed expression would fall outside
the protection of the first amendment. The court took care to point out that past ex-
pression could not suffice as evidence that future expression would be unlawful. The court
implied that a prior restraint could only be sustained if the court had access to the
text of the proposed speech as well as a clear indication of how the audience would react.


58. See, e.g., Carrol v. President and Commissioners of Princess Anne, 393 U.S. 175
(1968).

59. The only judicial view of conspiracy as a prior restraint is that of Justice Black
dissenting in Dennis v. United States, 341 U.S. 494, 579 (1951). He read the indictment
as preceding any advocacy on the part of the conspirators: "No matter how it is worded,
this is a virulent form of prior censorship of speech and press, which I believe the First
Amendment forbids." Id. at 579.
ment wait until the agreed upon expression has reached fruition before prosecuting. 60

III.

While it may be clear that the first amendment prohibits indictments for conspiracy to advocate prior to the actual advocacy, this principle offers little "breathing room" for controversial expressive and associational rights because the vast majority of conspiracy prosecutions begin after the conspirators have completed their desired objective. 61 The reasons underlying this principle, however, support a broader rule. Whenever the objective is unlawful expression, the first amendment should bar the use of conspiracy law whether the objective has been accomplished or not.

Though at bottom the constitutional claim against conspiracy law as applied to expressive combinations is one of overbreadth and its concomitant "chilling effect," the initial part of this claim relies on the vagueness of the offense called "conspiracy to engage in unlawful expression" and thus sounds of due process. The vagueness of the crime

60. Restrictions on expression in its incipiency are unconstitutional, at least in part, for the due process reason that prior punishment may not attach at a point where it is not clear to the potential offender that the contemplated expression will be a crime. The same argument could presumably be made about other offenses in which it is not clear until the commission of the act that it will constitute a crime. For example, since resistance or lack of consent by the victim is a necessity for a rape conviction, one could argue on due process grounds that a conviction for an incipient stage of rape (e.g., conspiracy to rape) is invalid because the aggressor could not tell until the moment of penetration whether or not the victim will "consent" in the legal sense.

Despite this similarity, prior restraints of expression raise serious issues of social policy not at all involved in the non-expression crimes. Procedures used to regulate expression are subject to a much stricter standard of precision and fairness than are procedures used to regulate other conduct because of the importance of expression in a democratic society. For example, in Speiser v. Randall, 357 U.S. 513 (1958), the Court held unconstitutional a statute denying a veterans' tax exemption to advocates of government overthrow because the statute placed the burden of demonstrating non-advocacy on the applicant. The Court stated:

The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact-finding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. Id. at 526. A similarly difficult burden of proof confronts the potential speaker prosecuted prior to his expression; he must, in effect, prove that his advocacy would not have been unlawful had it been allowed to take place.

Unlike prior restraints on other conduct, prior restraints on expression also stand in stark contradiction to the uniform trend of antipathy for censorship that was a prime impetus for the framing of the first amendment. See Emerson, The Doctrine of Prior Restraint, 20 LAW & CONTEMP. PROBS. 648, 650 (1955). It may well be that the framers intended the sole purpose of the first amendment's free speech clause to be the prevention of censorship and prior restraints. See Z. CHAFEER, FREE SPEECH IN THE UNITED STATES 9-12 (1914).

61. See Developments, supra note 19, at 949.
of conspiracy serves to inhibit individuals from expressing themselves and from associating with those who propose to engage in controversial expression in the future. The legal concept of the conspiratorial agreement is loosely stated, and usually proved by circumstantial evidence such that

an accused might be found in a net of conspiracy by reason of the relation of his acts to the acts of others, the significance of which he may not have appreciated and which may result from the application of criteria more delicate than those which determine guilt as to the usual substantive offense.

The difficulty in defining the agreement and determining which persons “agreed” in the legal sense is a serious dilemma in all conspiracy cases, but when the conspiratorial objective is expression the vagueness is multiplied by the vagueness of the highly ad hoc first amendment tests themselves. It is almost impossible to determine, prior to the occurrence of the advocacy, whether the proposed expression will be illegal precisely because the Court’s tests base a determination of constitutional illegality on the nature of the expression and the response it is likely to elicit under the circumstances. At the agreement stage, then, an individual might be unaware both that he is involving himself in a conspiracy and that the purpose of it is illegal.

It has been argued persuasively that every vagueness decision in the first amendment area is based on an overbreadth rationale. The due process vagueness and first amendment overbreadth doctrines are based in part on the belief that an amorphously stated offense category tends to deter perfectly legitimate—and in the free speech area, constitution-

62. In Dombrowski v. Pfister, 380 U.S. 479 (1965), the Supreme Court explained that the threatened application of a vague and overbroad law in the first amendment area inhibits persons from expressing themselves lawfully or from associating with others and thus creates a “chilling effect” thereby violating the first amendment.

63. Von Moltke v. Gilles, 332 U.S. 703, 728 (1948) (Frankfurter, J., concurring). See also Cousins, Agreement as an Element in Conspiracy, 29 VA. L. REV. 898 (1943). The author there notes that the definition of “agreement” has lost its shape largely because of the emphasis on the subordinate factors which may tend to prove association rather than on agreement to a common plan. Also, the judicially sympathetic application of conspiracy law in antitrust cases may have caused much of the vagueness of the term “conspiratorial agreement.” See Developments, supra note 19, at 1000.

64. Professor A. Goldstein has written:
If the prohibited purpose is clearly set forth in the conspiracy statute, the difficulties are solely those involved in applying the concept of an agreement. When ... the unlawful purpose is vaguely stated the contours of “conspiracy” become ever more vague, and the dividing line between intent, now designated “purpose,” and act, now termed “agreement,” tends to disappear.


ally protected—conduct. At issue in the case of conspiracy law is the effect that its use has on persons contemplating controversial but protected expression and association, and surely Judge Coffin is right that the effect is “a pronounced chilling effect—indeed that of a subzero blast—on all kinds of efforts to sway public opinion.”

Conspiracy law, when applied to associations engaged in expression, is overbroad because it can and does reach persons who have not themselves engaged in any illegal expression. Conspiracy law achieves this phenomenon by requiring only that the conspirators have “specific intent” to further the aims of the agreement. Once the prosecution has proved a conspiratorial agreement and an overt act in pursuance thereof, it must also show that the particular defendant intended to advance the criminal end. But, as Judge Coffin pointed out in Spock, “specific intent” is often based on extremely ambiguous factors. The Spock majority explained that specific intent to further the aims of the conspiracy could be demonstrated by any of the following: (1) that the defendant had, prior to or after the accomplishment of the conspiratorial objective, made “unambiguous” statements in support of that objective; (2) that the defendant had himself engaged in the accomplished conspiratorial objective; or (3) that the defendant had acted legally as a clear means of rendering effective the conspiratorial objective. With specific intent thus defined, conspiracy law presents serious first amendments problems when the conspiratorial objective is unlawful expression.

66. In the first amendment cases, the problem of vagueness tends to merge into the problem of overbreadth, and the two doctrines are frequently used interchangeably. In Dombrowski v. Pfister, 380 U.S. 479, 494 (1965), the Court combined vagueness and overbreadth to formulate the “chilling effect” doctrine. See Note, The First Amendment Overbreadth Doctrine, 34 Harv. L. Rev. 844, 872-75 (1970). Overbroad laws regulating speech create a “chilling effect” by deterring protected expression along with unprotected expression, effectively preventing expression which should be encouraged. Such laws may also be vague, leaving the individual who contemplates expression uncertain whether his proposed expression will fall within the ambit of the statute. As a result, the individual will “tend to leave utterances unsaid.” Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 76 (1960).


68. See Scales v. United States, 367 U.S. 203 (1961). The Scales defendants were convicted under the membership clause of the Smith Act, 18 U.S.C. § 2385. The Court held that the clause—and the Constitution—permits the punishment of “active members” of the Communist Party. Active membership, however, can only be proved by showing that a defendant had both knowledge of the illegal goals of the organization as well as “specific intent” to advance the illegal goals of the organization. As such, the majority admitted “there is 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.” 367 U.S. at 226.

69. See Wechsler, Jones & Korn, supra note 22, at 968.

In his dissent Judge Coffin was particularly troubled by the majority's specific intent test:

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 the First Amendment rights is protected, two are not . . . . To say "subsequent legal acts clearly undertaken for rendering effective the advocated illegal action" . . . renders retrospectively conspiratorial the earlier protected ambiguous advocacy is to say that two rights make a wrong. 71

Judge Coffin apparently regarded the words of the agreement, standing alone, as protected expression which became unprotected only upon a showing that a defendant's lawful statements or acts, subsequent to the agreement, established unambiguous support for the agreement's objectives. Thus two acts of protected expression combined to entwine an individual, through a "delayed fuse approach," 72 in criminal conduct.

But Judge Coffin's analysis is plainly contrary to traditional conspiracy doctrine under which the agreement itself is not protected expression, but the basis of the crime. The requirement of specific intent is imposed merely to ensure that "passive" members of the group will not be convicted. Nevertheless, when the conspiratorial objective is unlawful expression, a delayed fuse effect is created by the specific intent test. If, as argued above, 73 the legality of an agreement to engage in expression cannot be determined until the expression actually occurs, a defendant cannot know at the time of the agreement whether the association is an unlawful conspiracy. 74 Neither his unambiguous statements nor his lawful acts subsequent to the agreement will render the association unlawful. Thus, his participation becomes discernibly unlawful only upon the subsequent expression of another person, and this "delayed fuse" phenomenon may have a pronounced chilling effect upon those who might seek to associate with persons whose political views are controversial and provocative.

Where a statute which impinges upon first amendment freedoms serves an admittedly legitimate state purpose, the Court has frequently

71. 416 F.2d at 187 (dissent).
72. Id. at 18.
73. See pp. 880-84 supra.
74. See note 14 supra. The First Amendment clearly forbids the legislature from making it an offense to agree to engage in lawful expression.
inquired whether a "less drastic means" of regulation might fully achieve the stated purpose. If the purpose can be achieved without abridging protected activity, the state interests in any broader means of regulation carries very slight weight in the constitutional balance. The legitimate state interest in a statute which punishes conspiracies to engage in unlawful expression is the prevention of whatever consequences are believed to flow from the proscribed expression. If it be conceded that conspiracy law cannot reach an agreement to advocate prior to the actual advocacy, this legitimate state interest can be achieved simply by prosecuting for the advocacy without the use of the overbroad conspiracy weapon.

Punishing the expression rather than the agreement would, of course, preclude criminal liability for those who had participated in the agreement but not the advocacy and those who had urged others to speak but had not done so themselves. But it is precisely these people against whom the use of the conspiracy weapon is illegitimate, for those who contemplate future expression or who urge others to engage in future expression cannot know—given the vagueness of the substantive law of conspiracy and the ad hoc nature of the Court's tests in the first amendment area—whether their conduct will form the basis of a conspiracy conviction under current doctrine.

Another possible state interest in the conspiracy device might be found in the general danger rationale. Under the common law general danger notion, it will be recalled, the conspiratorial agreement was said to be punishable because the combination spawned an extensive anxiety in society. Putting aside the question whether there be any empirical basis for this assumption, it might be remarked that an apprehension as to the content and effect of future expression is an essential feature of a society which endorses freedom of speech. Because unlawful expression is itself an inchoate crime, an agreement to engage in expression is, by definition, twice removed from any harm government can constitutionally seek to prevent. At this level of multiple

75. See, e.g., Shelton v. Tucker, 364 U.S. 479, 488 (1960): [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose. See also N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963); Note, Legislative Inquiry into Political Activity: First Amendment Immunity from Committee Investigation, 65 YALE L.J. 1159, 1174-75 (1956). But see Note, Less Drastic Means and the First Amendment, 78 YALE L.J. 464 (1969), for a critique of the Court's formulation of the "less drastic means" doctrine.
76. See pp. 883-84 supra.
77. See p. 876 supra.
inchoacy, society has no cognizable reason for anxiety; in fact, if the values underlying the first amendment are to be served, a democratic society should encourage the controversial political associations that might be "chilled" if conspiracy law is applied in this area.

The Model Penal Code version of the general danger rationale is equally unjustified in this class of cases. Punishing a defendant for both the agreement and the completed crime if the conspiracy has criminal purposes beyond the crimes already accomplished is impermissible for the same reasons that a conspiracy indictment cannot be brought prior to the occurrence of the expression which is the purpose of the conspiracy. A rationale adopted to provide a weapon against organized crime should have no place in "combating" free expression and association.

The general danger rationale asserts a state interest in the use of conspiracy law against defendants who have not themselves engaged in unlawful expression and who therefore could not be prosecuted for the completed offense. Prosecuting only for unlawful expression rather than for conspiracy, however, is also a less drastic means for regulating those who, under the "specific object" rationale alone, could be punished either for conspiracy or for the completed offense. First amendment principles thus suggest that the conspiracy should be "merged" into the substantive offense in this class of cases.

78. See p. 877 supra.
79. The Model Penal Code version of the general danger rationale for conspiracy in this class of cases suffers from the same problems inherent in any prior restraint of expression. Just as it is improper to regulate an individual's future expression based on evidence of his past unlawful expression, see notes 54-56 supra, it is also improper to metamorphize an agreement to engage in expression into a "general danger" because past speeches were unlawful.
80. The general danger rationale is also the justification for punishing those who have participated in the substantive offense for both the conspiracy and the completed crime. See note 25 supra.
81. The general danger rationale being outweighed by first amendment considerations, this leaves the specific object rationale as the remaining justification for conspiracy law in this class of cases. Under that rationale, the government may prosecute those who have engaged in the unlawful speech either for conspiracy or for the completed crime, but not for both. See note 25 supra. This is because under the specific object rationale alone, the conspiracy should be treated like an attempt. However, reference to the law of attempts provides no principled guidance to the proper theoretical resolution of the question of which offense to prosecute. Some authorities allow punishment for either the attempt or the completed crime while others permit prosecution only for the substantive offense. (This latter phenomenon is often called "merger"; the inchoate stage is "merged" into the completed offense.) See People v. Wasserbach, 51 N.Y.S.2d 502, 510 (Kings County Ct. 1945), rev'd on other grounds, 271 App. Div. 756, 64 N.Y.S.2d 703 (1946). See also Remington & Joseph, Charging, Convicting and Sentencing the Multiple Criminal Offender, 1961 Wis. L. Rev. 528 (1961); Sobel, The Anticipatory Offenses in the New Penal Law: Solicitation, Conspiracy, Attempt and Facilitation, 32 Brooklyn L. Rev. 527 (1966).
82. It is, of course, far more logical to prosecute those who have engaged in the unlawful expression for that expression and not for the agreement simply because the focus of the trial will be on the expression and the response of the audience.
A conspiracy trial burdens the defendants with serious procedural disadvantages theoretically warranted because it is normally difficult to prove the existence of an agreement.\textsuperscript{83} When the conspiratorial objective is unlawful expression which has been accomplished, the justification for utilizing the complex procedures inherent in a conspiracy trial disappears.\textsuperscript{84} The government may not claim that conviction for conspiracy will permit greater punishment than conviction for the substantive offense because, under the specific object rationale alone, the inchoate stage of criminal conduct cannot logically be graded higher than the completed crime.\textsuperscript{85}

In the absence of any legitimate justifications for employing the sweeping procedures of a conspiracy trial, the first amendment requires that the government pursue the equally effective, but less drastic means of punishing those who engage in unlawful expression for the expression itself and not for the prior agreement.\textsuperscript{86}

IV.

The optimal, and perhaps the only effective, method of judicial surveillance of the use of conspiracy law to police unlawful expression is to articulate principled \textit{per se} rules. It may be that the formulation

\textsuperscript{83} See p. 877 supra.
\textsuperscript{84} The complex procedures of a conspiracy trial make it more difficult for an individual defendant to establish his innocence. See pp. 877-78 supra. The Supreme Court's concern for procedural protections in first amendment cases in Speiser is particularly relevant on this score:

[S]ince the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances, the procedures by which the facts of the case are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford.


\textsuperscript{85} See Wechsler, Jones & Korn, supra note 22, at 1022-23, 1026-28. Under the specific object rationale alone, the inchoate offense is treated as an attempt.

\textsuperscript{86} See Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464, 469 (1969): Any sensible construction of the first amendment would forbid a legislature [and hence a prosecutor] to go out of its way to inhibit expression either by design or accident, and the choice of the harsher or equally effective means suggests that suppression of speech was the legislature's (or prosecutor's) real purpose from the start.

In effect, then, the first amendment requires that the inchoate aspects of the offense merge into the completed unlawful expression. The doctrine of merger in conspiracy cases existed at common law—merger was required if the substantive offense was a felony and the conspiracy a misdemeanor. In such cases, the prosecutor could charge the defendant only for the completed crime. However, when the conspiracy was a felony, merger was prohibited. The significant procedural differences between trials for misdemeanor and for felony gave sustenance to this rule. Since these differences no longer exist, the common law doctrine of merger has generally been abandoned, See Developments, supra note 19, at 968-69. See also Note, Merger of Misdemeanor into Executed Felony, 31 Colur. L. Rev. 708 (1931). While trial procedures no longer compel merger, it is suggested here that first amendment principles do.
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of rules does enhance the "legal mystique" of the Constitution and courts, thus insulating the judiciary somewhat from the high political passions particularly characteristic in this area and from the devastating impact of such passions on first amendment freedoms. But the far more compelling reasons for the application of \textit{per se} rules here are to reduce the uncertainty of scope—and, thus, the dissent-deterring potential—now endemic to conspiracy law, and to discourage the legislature and executive from repeated and novel attempts to suppress expressive and associational group conduct.\footnote{"The one clear virtue of \textit{per se} rules is certainty." Note, \textit{Civil Disabilities and the First Amendment}, 78 \textit{Yale L.J.} 842, 851 n.39 (1969). In the first amendment area especially, the certainty inherent in \textit{per se} rules is essential if individuals are to enjoy the rights of free speech and association. For a well researched discussion of the Supreme Court's gradual movement away from interest balancing toward \textit{per se} rules where civil disabilities threatened to encroach upon first amendment freedoms, see \textit{id}.}

Based on the analysis in the preceding sections of this Note, three rules may be articulated to conform the use of conspiracy law to the principles of the First Amendment.

The first rule is merely a summary of the conclusions from the previous analysis: The first amendment prohibits conspiracy indictments alleging agreements to engage in any form of expression.

The sole inquiry a court need make under this rule is whether the alleged conspiratorial objective is expression.\footnote{When the government charges a group with conspiring to advocate government overthrow or conspiring to incite riot, it is indicting these persons for their agreement to engage in what the government believes to be unlawful expression. The trial judge, however, need make no determination as to whether the expression is indeed unlawful when measured against one of the First Amendment tests. Instead, the mere fact that the conspiratorial objective is expression is determinative for the purpose of dismissing the indictment.} The fact that a trial judge can enforce the rules simply by analyzing the government's complaint means that the inestimable damage to a political group which may result from a time-consuming conspiracy trial will be prevented where the government does not have a constitutionally valid conspiracy case. As the Court said in \textit{Dombrowski v. Pfister}:

\begin{quote}[T]he chilling effect upon the exercise of First Amendment rights may derive from the fact of prosecution unaffected by the prospects of its success or failure.\footnote{580 U.S. 479, 487 (1965). Judge Coffin's five-part "outer limits" are too vague to provide this type of insulation from the burdens of litigation. Individuals desirous of expressing themselves could not know with any certainty whether their conduct could be labeled "conspiratorial." No trial court could determine from an indictment alone whether the facts of a particular case warranted protection from a conspiracy trial, and the very fact of such a trial may do excessive damage to first amendment freedoms. See note 6 supra.} \end{quote}

In effect, what is suggested here is a pleading rule which precludes the government from indicting individuals for conspiracy to engage
in unlawful expression. At the same time, however, the pleading rule embodies a proscription that should influence the prosecutorial decision to seek indictments as well as the grand jury's willingness to indict. The government is left to prosecute each individual for the separate offense of illegal expression.90

While the first rule would render invalid a great many of the indictments under which associational expression has been punished in the past, its defect is that it may easily be avoided by bringing indictments which charge action as the purpose of the conspiracy and use expression to prove the overt acts and specific intent of each defendant.91

To prevent such circumvention, courts should analyze the overt acts alleged in the conspiracy indictment to determine whether the non-expressive objective was achieved, or was to be achieved, by means of expression. This task would not be difficult where the objective has already taken place. For example, in People v. Epton92 the defendant was charged with, *inter alia*, conspiracy to riot. Not only had the riot already taken place, but there was no evidence that the defendant had himself participated in violent conduct. The overt acts indicated only that the defendant had engaged in what the court found to be unlawful

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90. In theory, this rule would also require the dismissal of a conspiracy indictment if the conspiratorial objective were the kind of action which the Court has treated as symbolic speech. Though the Court has never set forth a standard for defining symbolic speech, it has frequently held that action is so interrelated with expression as to merit first amendment protection. For example, in Stromberg v. California, 283 U.S. 283 (1931), the Court held that the first amendment protected waving a red flag. In State Board of Education v. Barnette, 319 U.S. 624, 632 (1943), the Court held the flag salute to be a "form of utterance." In Brown v. Louisiana, 383 U.S. 131 (1966), sit-ins were held to be protected expression, and in Tinker v. Des Moines Independent Com. Sch. Dist., 393 U.S. 503 (1969), the Court treated wearing a black armband as akin to "pure speech." Presumably, once the Court finds that action is symbolic speech, that action should warrant first amendment protection from direct regulation unless it creates a clear and present danger or incites others to violence. However, the Court has not followed this approach but has instead applied a balancing test in this area even where the symbolic speech comes under direct governmental regulation. See, e.g., United States v. O'Brien, 391 U.S. 367 (1968), where the Court, assuming *arguendo* that draft card burning was a form of symbolic speech, went on to uphold a criminal regulation of such conduct because it claimed that the regulation impinged on the first amendment only indirectly. Until the Court enunciates a means of defining symbolic speech, it will be difficult to insulate such conduct from conspiracy indictments. However, it is clear that if the objective of a conspiracy amounts to action which the Court has *already* labeled "symbolic speech," then the conspiracy charge should be dismissed. For suggested principles by which the Court might classify action as speech and non-speech, see *Note, Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968).

91. For example, rather than charge a conspiracy to advocate government overthrow, the prosecution might allege a conspiracy to overthrow the government; the prosecution would then use expression as evidence of the overt acts and as evidence of each defendant's specific intent. This was Justice Jackson's view of the *Dennis* prosecution, though this is not what the government had charged. See *Dennis v. United States*, 341 U.S. 491, 561-79 (concurring opinion).

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forms of expression, as well as action incidental to that expression, as a means of inciting the riot.

When the non-expressive objective of an alleged conspiracy has not yet been accomplished, the court's approach should be similar. The overt acts may illustrate that, until the time of the indictment, the defendants had only engaged in expression as a means of furthering the as yet unaccomplished conspiratorial objective. For example, in Schenck v. United States the indictment charged the defendants with, inter alia, conspiring to cause insubordination in the armed forces. The overt acts indicated that the defendants had attempted to achieve their objective by publishing and distributing literature which the Court found to be unlawful.

This second rule may be stated thus: if the overt acts indicate that a non-expressive conspiratorial objective was achieved, or was to be achieved, solely by means of expression and action incidental to that expression, the court should pierce the form of the indictment, interpret the conspiratorial objective as unlawful expression, and dismiss the conspiracy charge. The government is then left to prosecute each defendant for the separate offense of illegal expression. The purpose

of the second rule, then, is to ensure the operation of the first: conspiracy.

93. Since the overt act requirement is purely a formality, see note 41 supra, the prosecution might allege some non-expressive overt acts along with the expressive overt acts. In such a case, the court should consider whether the non-expressive overt acts are merely incidental or subordinate to the expressive overt acts. For example, the construction of a platform for public speakers is incidental to the later public speeches, the printing of leaflets is incidental to the resulting literature, and the organizing of a meeting is incidental to the speeches later delivered at that meeting. In such cases, the overt acts, when considered together would indicate that the defendants intended to achieve their objective by means of expression and nothing more.

94. 249 U.S. 47 (1919).

95. At the time of the indictment, the government might attempt to establish that the unachieved objective had been attempted by means of expression but would, in the future, be attempted by means of action as well. If the defendants have not indicated such future conduct except by means of expression (presumably reflective of their intent), the rule suggested here precludes the government from prosecuting for conspiracy. Instead, the government must wait until the group conduct moves out of the realm of expression and into action. See T. Emerson, The System of Freedom of Expression 409-11 (1970). Such a rule is the product of a balance between the government's loss in such a case and the greater loss to freedom of expression which results when conspiracy law is used against persons who have only engaged in expression. Once the conspiracy moves out of pure expression, however, the third rule comes into play. See TAN 97-105 infra.

96. The first and second rules would require the dismissal of the entire indictment in the Spock case. That indictment charged the five defendants with conspiring to "counsel, aid and abet" draft resistance. Thus, the expressive objective and the action objectives were lumped together in one count. Compare People v. Epton, 19 N.Y.2d 499, 281 N.Y.S.2d 9 (1967), cert. denied, 390 U.S. 29 (1968), where the defendant was charged
When the non-expressive objective of a group has been accomplished or attempted by means of both expression and action not incidental to that expression, neither the first rule nor the second rule require dismissal of the indictment. Unless restrictions are placed on the use of conspiracy law in such cases, however, an individual might still find himself involved in a conspiracy trial merely because of his ideas. Since the agreement is rarely susceptible to direct proof, the fact of an individual’s association with a group engaged in unlawful action may be sufficient to establish his agreement. Furthermore, his specific intent could be established merely by “unambiguous statements” in support of this unlawful action even if such expression, standing alone, would merit constitutional protection. Even where a defendant has engaged in unlawful action as well as speech, the use of constitutionally protected public expression may be so prejudicial in the minds of the jury that the defendant could be convicted for his ideas rather than for his acts.

To prevent the use of conspiracy law to convict individuals on the basis of their ideas, courts should bar the use of constitutionally protected public expression as evidence either of an overt act or of an individual’s specific intent. The chilling effect caused by the use of protected expression as evidence in a conspiracy trial is the same as that which flows from prosecuting an individual for the speech itself. Justice Douglas recognized this fact in his dissent in *Epton v. New York*: in three separate counts: conspiracy to advocate riot, conspiracy to riot, and unlawful advocacy. In *Spock*, the first rule would require the immediate dismissal of the conspiracy “to counsel” part of the indictment. Under the second rule, the rest of the indictment would be dismissed because the overt acts all illustrated that the defendants were aiding and abetting draft resistance through means of expression and action incidental to that expression. Under the first and second rule the conspiracy indictment in the *Epton* case would also be dismissed.

97. See p. 877 supra.
98. See notes 36, 63 supra; see also United States v. Spock, 416 F.2d 165, 187 (1st Cir. 1969) (Coffin, J., dissenting); Esco Corporation v. United States, 340 F.2d 1000 (1965), and United States v. Masonite Corp., 316 U.S. 255, 275 (1942).
100. Professor Emerson has written:
Only a rule that a member cannot be punished for the illegal activities of his organization unless he himself participates in them can be reconciled with the demands of the First Amendment.
T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 129 (1970). The third rule to be suggested here, however, would not go so far; a member of a group engaged in unlawful action would be protected to the extent that his constitutionally protected expression could not, at a later time, be used against him.
101. To determine whether the public expression sought to be introduced as evidence is constitutionally protected, the court should apply the current incitement test employed by the Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). See note 43 supra. If the expression is found likely to have incited lawless action, then under this third rule it would be admissible. In all other cases it would be excluded.
The use of constitutionally protected activities to provide the overt acts for conspiracy convictions might well stifle dissent and cool the fervor of those with whom society does not agree at the moment.\textsuperscript{103}

While the other members of the Court have not responded to this view, in \textit{United States v. Johnson}\textsuperscript{104} the Court held that the overt acts in a conspiracy cannot include speech protected by the speech and debate clause. The Court reasoned that the use of constitutionally protected speech would tend to deter Congressmen from unfettered expression on the floor of their respective houses. The use of expression protected by the first amendment would have the same chilling effect on individual citizens.

If the first amendment bars the use of protected public expression as overt acts in a conspiracy, then such expression should also be barred as evidence of a defendant's specific intent. Since the requirement of an overt act may be met by the slightest proof, the government could delete the expressive overt acts from the indictment and nevertheless use that evidence during the trial. If the only evidence of a defendant's specific intent is constitutionally protected speech, the danger is too great that an individual will be punished merely for his ideas and his association with a controversial group. And, if the government has other evidence to establish a defendant's specific intent, the use of constitutionally protected expression would normally be both surplusage and prejudicial.\textsuperscript{103}

\textsuperscript{103} \textit{Id.} at 32 (dissent).
\textsuperscript{104} 383 U.S. 169 (1966). The government prosecuted and convicted a United States Congressman with others for conspiracy to defraud the United States. One of the overt acts consisted of a speech the Congressman had delivered on the floor of the House of Representatives.

There may be cases where a defendant's protected expression is critical to establishing his specific intent because the other evidence of his actions, standing alone, is not convincing. But if this other evidence is so inconclusive, the defendant's conviction could rest primarily on what he once correctly perceived as protected speech. In \textit{Street v. New York}, 394 U.S. 576 (1969), the Supreme Court rather obliquely implied that such a conviction would be improper. There the defendant had made a brief speech against racism while burning an American flag. He was indicted under a state law making it a crime to hold in contempt, by word or deed, the flag of the United States. Finding the speech protected because it had not threatened to incite violence, the Court reversed. The conviction on the grounds that the defendant could have been convicted for his ideas alone. Though the Court went on to explain that its decision did not prohibit the government from using protected expression to establish the elements of an action offense, Justice White, in dissent, carefully pointed out that the Court's reasoning contradicted its subsequent disclaimer. \textit{See Street v. New York}, 394 U.S. 576, 619 n.3 (1969) (White, J., dissenting).

Under the third rule suggested in this Note the prosecution is required to investigate further in order to produce reasonably convincing evidence of specific intent other than the defendant's protected public expression.