

and common-law invasions are pleaded in alternative causes of action as in the *Sidis*<sup>82</sup> case, the same statutory policy seems to determine the result.

It seems inescapable that the New York statute and decisions do not offer a clear-cut rationale for protection of privacy. Comprehensive protection against commercial use of some aspect of the personality has not been afforded. Relief is given for the use of a famous name in an unauthorized endorsement but the same name may be used with impunity in a biography, though not in a comic book. The difficulties of interpretation and the limits of protection suggest that common-law flexibility is better suited for the necessarily widely varied fact situations found in privacy actions.

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### COMMON-LAW CRIMINAL CONSPIRACY AS A WEAPON AGAINST CORRUPT POLITICAL ORGANIZATIONS

Machine control over patronage has been the greatest barrier to the unseating of the self-perpetuating big-city political machine by the conventional election process. As a result, various oblique methods have been used in order to restore popular, democratic control. An example of one such method was the indictment for criminal conspiracy of Mayor McFeely of Hoboken, New Jersey.<sup>1</sup> It is proposed first to examine in what ways the members of this political machine overreached themselves and how this was turned into a weapon which helped drive the machine from power, and then to consider the desirability of using this weapon against other entrenched political machines.

Mayor McFeely was an extreme example of the political boss. Although he never received a salary of over \$5,000 a year as Mayor, he amassed a fortune estimated at \$3,000,000.<sup>2</sup> "Tall, bald, and sour-faced, he did not even afford his subjects the dubious pleasure of watching him make public appearances. He made almost no speeches (his grammar was too bad), took no interest in parades, and rode around in a bullet-proof Cadillac. . . . Under his rule Hoboken taxes went sky-high, building almost ceased."<sup>3</sup> The McFeely family had been in power so long that "the roster of the police department read like the fly-leaf of the family Bible."<sup>4</sup>

After twenty-two years of McFeely's rule, public frustration finally found expression in an indictment for common-law criminal conspiracy.<sup>5</sup> This indictment named the Mayor, the Director and Deputy Director of Public Safety, the Chief and Deputy Chief of Police, and other superior officers of the De-

<sup>82</sup> See text following note 29 supra; see also note 35 supra.

<sup>1</sup> *State v. McFeely*, 52 A. 2d 823 (Ct. Quart. Sess. N.J., 1947).

<sup>2</sup> 22 *Life*, No. 21, at 41 (May 26, 1947).

<sup>3</sup> 49 *Time*, No. 21, at 28 (May 26, 1947).

<sup>4</sup> 29 *Newsweek*, No. 21, at 23 (May 26, 1947).

<sup>5</sup> *State v. McFeely*, 52 A. 2d 823 (Ct. Quart. Sess. N.J., 1947)

partment of Police. The purpose of the conspiracy, it was alleged, was to coerce dismissal or resignation of seventeen "rebel" policemen who had affronted the machine by seeking back pay for seven-day work-weeks during the war. The means used to accomplish the purpose of the conspiracy were alleged to be "unwarranted harassment, the making of false and groundless departmental charges, and various unjustified intimidations having reference to impoverishment, injury and other evil prospects."<sup>6</sup>

It was alleged, for example, that certain named patrolmen while on duty were ordered to "ring the signal boxes on their posts once every half hour, although other patrolmen . . . were only required to ring . . . once every hour." It was also alleged that one Gehm, a patrolman, was commanded not to "perform any carpentry work at his home at any time" under threat of suspension and that Gehm's woodworking machine had been caused to be removed from his cellar. Four hours' extra duty were allegedly ordered for one Carmody after a full eight-hour shift, and when he was unable to perform this duty because of a recent operation, Carmody was suspended for disobedience. A police post was allegedly established within the cell-block of the jail at police headquarters and certain patrolmen assigned to duty therein. And it was alleged that one Walker was required to stand in the street on a platform two feet square, and that when Walker sought to use the toilet facilities at police headquarters he was told that he would be required to furnish a physician's certificate in the event he again desired to use those facilities.<sup>7</sup> Decision on the motion to quash was postponed until six days after election, at which time the motion was dismissed.<sup>8</sup>

The framers of this indictment for criminal conspiracy perhaps proceeded upon the theory that these acts were unlawful in the sense that they gave rise to causes of action for civil damages. It is also possible that such "harassments" as forcing an officer to stand in one spot for long periods might be classed as "cruel and unusual punishments" and be unlawful as violations of the Eighth Amendment. But whatever the justification, the advantages of securing a criminal indictment against members of entrenched political machines for acts which are not crimes are apparent. Its use against the McFeely machine was a major factor in the defeat of this political organization at the polls.<sup>9</sup> As former Governor Charles Edison said, "All citizens who believe in decency in government are happy to learn that the McFeely machine has been defeated. In these trying times American democracy in action has once again proved its ability to clean its own house."<sup>10</sup> Thus in this instance the unique use of criminal conspiracy in framing an indictment for acts not in themselves criminal, but giving rise to

<sup>6</sup> *Ibid.*, at 824.

<sup>7</sup> Indictment No. 112, Sept. Term, Hudson County Ct. of Quarter Sessions (N.J., 1946).

<sup>8</sup> N.Y. Times, p. 16, col. 3 (Feb. 4, 1947).

<sup>9</sup> N.Y. Times, p. 20, col. 3 (May 15, 1947). The other major factor was use for the first time of newly installed voting machines.

<sup>10</sup> N.Y. Times, p. 1, col. 5 (May 14, 1947).

possible civil remedies, did help to remove the tentacles of a parasitic political machine. How would it work elsewhere?

Since this indictment was for common-law criminal conspiracy, it could be argued that in the large number of states which have abolished common-law crimes<sup>11</sup> an indictment of this nature would not be allowed. The distinction between common-law and statutory criminal conspiracy may, however, be of little overt importance.<sup>12</sup> Some statutory definitions of criminal conspiracy require commission of an overt act, which, generally speaking, was not a necessary element of the common-law crime.<sup>13</sup> But this difference may not be significant if the interpretation of what constitutes an overt act is a liberal one.<sup>14</sup> Further, statutes presumably define the crime of conspiracy with more certainty and particularity. But the statutes have been worded in such a vague manner<sup>15</sup> that they can hardly be said to be any stricter or more precise than the common law. Consequently, since the alleged contrast does not seem to be justified, criminal conspiracy is potentially as strong a weapon against corrupt political officials in states that have abolished common-law criminal conspiracy as in states that have not.

Secondly, the extension of criminal conspiracy to acts which are not criminal if committed by individuals is not accepted everywhere as it has been in New Jersey.<sup>16</sup> In the majority of cases the courts have defined conspiracy as any com-

<sup>11</sup> *Wilson v. United States*, 77 F. 2d 236 (C.C.A. 8th, 1935); *Ex parte Harder*, 9 Cal. App. 2d 153, 49 P. 2d 304 (1935); *People v. Legeri*, 239 App. Div. 47, 266 N.Y. Supp. 86 (1933); *Cox v. State*, 203 Ind. 544, 177 N.E. 898 (1931).

<sup>12</sup> "The phraseology of an indictment . . . at common-law and one drawn under § 1827 of the statute charging conspiracy . . . would be drawn in almost identically the same language except the concluding paragraph, which would refer to the statute." *Commonwealth v. Weiner*, 51 Dauph. 229 (12th Jud. Dist. Pa., 1941). Statutes seem to furnish only a skeleton outline, so that the procedural and evidentiary problems of common-law conspiracy remain. *Ritchie*, *The Crime of Conspiracy*, 16 *Can. Bar Rev.* 202, 205 (1938).

<sup>13</sup> *People v. Mather*, 4 *Wend. (N.Y.)* 229 (1830). An overt act is considered as evidence of the common-law crime, whereas the act is a necessary part of the crime of statutory criminal conspiracy. *Collier*, *Criminal Conspiracy Needing Overt Act To Make It Indictable*, 71 *Cent. L. J.* 387 (1910).

<sup>14</sup> In *State v. Erwin*, 120 P. 2d 285, 295 (Utah, 1941), it was said that the statute merely "says that some act besides the agreement must be done to effect the object thereof."

<sup>15</sup> "To commit any act for the perversion or obstruction of justice or the due administration of the laws," N.J. *Rev. Stat.* (1937) tit. 2, c. 119, § 1(h). Examples from other states are similar: "To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws." N.Y. *Penal Law (McKinney, 1944)* Art. 54, § 580(6). "Or to do any act injurious to the public trade, health, morals, police, or administration of public justice." It was also thought necessary to include a section describing combinations which are not criminal. Ill. *Rev. Stat.* (1947) c. 38, § 139. "To commit any act injurious to the public health, public morals, trade or commerce, or for the perversion or corruption of public justice or the due administration of the law." Ala. *Code* (1940) tit. 14, § 103. "To injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." 35 *Stat.* 1092 (1909), 18 *U.S.C.A.* § 51 (1940).

<sup>16</sup> "There can be found running through our legal literature many remarkable statements that an act perfectly lawful when done by one person becomes by some sort of legerdemain

bination of two or more persons to do an unlawful act or a lawful act by unlawful means.<sup>17</sup> "Unlawful" has usually meant "criminal," but apparently through an historical mistake<sup>18</sup> criminal conspiracy has not everywhere been so confined.

Even where criminal conspiracy is confined to its historical limits, its use is advantageous because the actual acts committed need not be alleged with the same particularity as in an indictment for the crime itself.<sup>19</sup> As so confined criminal conspiracy has been used against corrupt public officials in two ways. It has been used to indict public officials who combined in agreements not to enforce existing laws and ordinances, typically anti-vice regulations.<sup>20</sup> The use of an indictment for criminal conspiracy against such officials seems more desirable than more indirect methods, such as disenrollment proceedings.<sup>21</sup> Conspiracy has also been used to curb election frauds.<sup>22</sup>

In those jurisdictions where conspiracy has not been so confined some element other than combination alone has been considered essential. That element may be an act giving rise to a cause of action for civil damages, as in the McFeely indictment. In the Alabama case of *Mitchell v. State*<sup>23</sup> transfer of the names of registered voters from one precinct to another without their knowledge was held indictable as a conspiracy, although it would not have been considered criminal if done individually. Similarly in the Kentucky case of *Commonwealth*

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criminal when done by two or more persons acting in concert, and this upon the theory that the concerted action amounts to a conspiracy. . . . If an individual is clothed with a right when acting alone, he does not lose such right merely by acting with others, each of whom is clothed with the same right. If the act done is lawful, the combination of several persons to commit it does not render it unlawful." *Lindsay & Co., Ltd. v. Montana Federation of Labor*, 37 Mont. 264, 273, 96 Pac. 127, 130 (1908). Contra: *State v. Bienstock*, 78 N.J. L. 256, 73 Atl. 530 (1909).

<sup>17</sup> *Alexander v. United States*, 95 F. 2d 873 (C.C.A. 8th, 1938); *People v. Link*, 365 Ill. 266, 6 N.E. 2d 201 (1937); *People v. Tenerowicz*, 266 Mich. 276, 253 N.W. 296 (1934).

<sup>18</sup> Hawkins' statement in *Pleas of the Crown* that "there can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal, at common-law" is unsupported by cases, unless by wrongful he meant criminal. Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393, 402 (1922). This unsupported statement, however, has been cited as authority frequently enough so that in fact there is now support for the viewpoint. See *State v. Murphy*, 6 Ala. 765 (1844).

<sup>19</sup> *Mercer v. United States*, 61 F. 2d 97 (C.C.A. 3d, 1937); *Williamson v. United States*, 207 U.S. 425, 447 (1907). This is apparently true of both common-law and statutory conspiracy. *Commonwealth v. Donoghue*, 250 Ky. 343, 63 S.W. 2d 3 (1933). A Canadian writer kindly points out the applicability of criminal conspiracy against American "racketeers," so that both master and catspaw may be caught and indicted. *Ritchie, The Crime of Conspiracy*, 16 Can. Bar Rev. 202 (1938).

<sup>20</sup> *People v. Kanar*, 314 Mich. 242, 22 N.W. 2d 359 (1946); *State v. Erwin*, 120 P. 2d 285 (Utah, 1941); *People v. Tenerowicz*, 266 Mich. 276, 253 N.W. 296 (1934).

<sup>21</sup> *Wilbur v. Howard*, 70 F. Supp. 930 (Ky., 1947); *Disenrollment of State's Attorney by Federal Court for Failure To Perform Official Duties*, 15 Univ. Chi. L. Rev. 217 (1947).

<sup>22</sup> *United States v. Classic*, 313 U.S. 299 (1941); *Walker v. United States*, 93 F. 2d 383 (C.C.A. 8th, 1937); *State v. Bienstock*, 78 N.J. L. 256, 73 Atl. 530 (1909).

<sup>23</sup> 27 So. 2d 30 (Ala., 1945).

*v. Donoghue*,<sup>24</sup> an indictment for common-law criminal conspiracy to charge usurious interest was upheld on appeal despite the fact that the usury statute declared no crime but merely rendered contracts for all interest over 6 per cent void. A more extreme position was taken by the New York Appellate Division in *People v. Harris*.<sup>25</sup> A statute provided that the holder of a public office who refused to sign a waiver of immunity when testifying before a grand jury should be subject to an action brought by the Attorney General for removal from office. When the Commissioner of Water Supply refused to sign such a waiver, action was begun by the Attorney General for forfeiture of the Commissioner's office. The action of the city board in creating a new office for the Commissioner and "removing" him from his old one, in order to avoid the effect of forfeiture, was held to be a criminal conspiracy. By analogy, a criminal conspiracy might have been found if the Commissioner had followed the board's advice and resigned.<sup>26</sup> The final result was quashing of the indictment on the ground that criminal means or ends were lacking.<sup>27</sup>

It is difficult in the light of such cases as the foregoing to pin down the element necessary in addition to combination. The word "unlawful" may be extended to include mere tortious acts. This would include the acts of "harassment" in the *McFeely* case<sup>28</sup> and the injury done to the individual voter by a transfer of his registration. It would be harder to classify the act of usury in this category, and the New York case would not fit at all. Moreover, the doctrine of the latter case was that use of a charge of conspiracy against the city board which had appointed the Commissioner to a new office was unwarranted. Thus, where the indictment is an extension of the historical confines of criminal conspiracy the cases indicate that the act must still be unlawful in the sense that it gives rise to a cause of action. Even this extension, however, will not be sanctioned in all jurisdictions, and the degree to which it is accepted will determine the effectiveness of criminal conspiracy indictments against public officials based on the broadened meaning of "unlawful."

Even if the jurisdiction adopts such a broadened meaning, there are other factors to be considered before criminal conspiracy is employed against an entrenched political machine. Once the doctrine that either criminal means or a criminal end must be proved to constitute a conspiracy is departed from, wide

<sup>24</sup> 250 Ky. 343, 63 S.W. 2d 3 (1933).

<sup>25</sup> 268 App. Div. 731, 54 N.Y.S. 2d 161 (1945). It should be noted that New York has expressly abolished common-law crimes, N.Y. Penal Law (McKinney, 1944) Art. 2, § 22.

<sup>26</sup> 268 App. Div. 731, 738, 54 N.Y.S. 2d 161, 167 (1945).

<sup>27</sup> *People v. Harris*, 294 N.Y. 424, 63 N.E. 2d 17 (1945).

<sup>28</sup> In New Jersey combination plus attempted or actual commission of acts which are an oppression to others has also been held to constitute criminal conspiracy. *State v. Bienstock*, 78 N.J. L. 256, 73 Atl. 530 (1909). The foundation for this viewpoint is a frequently cited dictum, based more or less on Hawkins' famous statement (note 18 supra) "that a combination will be an indictable conspiracy . . . where the confederacy having no lawful aim, tends simply to the oppression of individuals." *State v. Donaldson*, 32 N.J. L. 151, 154 (1867).

disagreement and consequent unpredictability result.<sup>29</sup> Since certainty is one of the leading objectives of the criminal law, this consideration would tend to inhibit use of the device. Moreover, since the fundamental right of an accused to know the crime with which he is charged may be endangered by this uncertainty, defendants might conceivably be deprived of due process of law.<sup>30</sup> Another danger in the use of the broadened crime of conspiracy is the possibility of abuse through the procurement of indictments alone as an oppressive measure. Malicious use of the device might hamper the activities of honest public officials, subjecting them to loss of prestige, quite apart from any conviction. Furthermore, widespread use of the extension might perhaps bring the pressure of corruption on the courts instead of restricting its operation to the machine.

Other factors, however, may operate to prevent abuse when the broadened crime of conspiracy is used against entrenched political machines. Some of the reluctance to employ criminal conspiracy, stemming from its anti-labor origins,<sup>31</sup> might carry over to operate as a bar against its unwarranted extensions in other fields, such as against public officials. Furthermore, use of conspiracy against public officials may be limited in the same way as are other forms of prosecution; the prosecuting attorney, who is the initiator of most indictments, is very often an important cog in the political machine which is the object of the indictment. Consequently, it is unlikely that public officials will be indicted for criminal conspiracy unless public opinion has been aroused against a long history of corruption. In the *McFeely* case, in fact, public indignation found its expression by bill of presentment—the grand jury proceeded upon its own initiative. Moreover, as a practical matter, the danger of extending the scope of criminal conspiracy is not very great, since the most common of these cases—election fraud conspiracies and conspiracies not to enforce vice laws—may be prosecuted without extending the meaning of the word “unlawful.”

The *McFeely* case, therefore, suggests attractive possibilities in the use of criminal conspiracy against public officials, although there should be a careful balancing of its disadvantages with its advantages and the restrictions operating to check its abuse. Certainly the courts should take notice that the problem of democratic control where a political machine has become securely entrenched is a difficult one. Criminal conspiracy deserves careful consideration in light of the fact that it may sometimes be the only means available for loosening the grip of an established machine.

<sup>29</sup> 11 N.Y.U.L.Q. Rev. 469 (1934), noting *Commonwealth v. Donoghue*, 250 Ky. 343, 63 S.W. 2d 161 (1945); Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393 (1922); Holdsworth, *Review of Winfield, Conspiracy and Abuse of Legal Process*, 37 L.Q. Rev. 462 (1921); Digby, *The Law of Criminal Conspiracy in England and Ireland*, 6 L.Q. Rev. 129 (1890).

<sup>30</sup> *Holden v. Hardy*, 169 U.S. 366 (1898).

<sup>31</sup> “Like most legal principles this doctrine was an arbitrary statement of a result, and depended for its existence on the economic views of the judges using it. Indeed, it is clear in retrospect that these economic views were really the law, while the doctrine of criminal conspiracy was merely the form in which it was presented for public consumption.” Gregory, *Labor and the Law* 30 (1946).