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sion's recommendations. Their dismissal of Government Code sections 50140-45 as "an anachronism in modern law" thus appears to have been premature and ill-considered. A re-establishment of these provisions seems called for. They would provide a source of relief particularly well fitted to the needs of a state faced with the prospect of continued agitation over civil rights. The New York experience with the Harlem riots may never be duplicated in California. But a national effort as volatile as the civil rights movement always raises a great threat of sudden misdirection and destructive consequences. Legislation designed to ease the burden of such disturbances should not be dismissed lightly.

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## MASS DEMONSTRATIONS AND CRIMINAL CONSPIRACIES

Mass demonstrations have become a frequently used method of gaining the public's attention and coercing redress for social inequities. Some groups using this method have gone beyond lawful demonstrations and centered their demonstrations instead around an intentional mass violation of a law. These violations disrupt the peace of the community and place an increased burden on law enforcement agencies and the courts.<sup>1</sup> The crime intentionally committed is usually a misdemeanor. Recent demonstrators in California, for example, have been charged with unlawful assembly, failure to disperse, trespass, and disturbing the peace<sup>2</sup>—all misdemeanor offenses punishable by a relatively minor penalty.<sup>3</sup> The penalty apparently does not deter repeated violations; there seem to be many repeat violations.<sup>4</sup>

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<sup>1</sup> Specific instances of such illegal activities were seen in California in the San Francisco demonstrations in April 1964 and the demonstrations at the University of California at Berkeley in December 1964.

<sup>2</sup> CAL. PEN. CODE §§ 407, 409, 602(j), 415 respectively. Amended complaint filed in Municipal Court of City and County of San Francisco, April 1964, against persons involved in demonstrations at the Cadillac Agency in San Francisco.

<sup>3</sup> CAL. PEN. CODE § 17 provides that a misdemeanor is any crime not punishable with death or by imprisonment in the state prison. CAL. PEN. CODE §§ 408 (unlawful assembly is a misdemeanor); 409 (failure to disperse is a misdemeanor); 602 (trespass is a misdemeanor); 415 (disturbing the peace is a misdemeanor and punishable "by fine not exceeding two hundred dollars, or by imprisonment in the county jail for not more than 90 days, or by both fine and imprisonment, or either, at the discretion of the court").

<sup>4</sup> Complaints were dismissed against 28 of the 91 demonstrators still awaiting trial on the San Francisco demonstrations as these 28 were awaiting sentencing on their convictions for participation in other demonstrations. Oakland Tribune, Feb. 18, 1965, p. 2, col. 2.

The purpose of this note is to explore the possibility of convicting unlawful demonstrators of criminal conspiracy and the possible effect of such a conviction as a law enforcement tool. The discussion will be confined to situations where the violation is of a constitutionally valid law and will not attempt to include those cases where the law violated is constitutionally defective.<sup>5</sup> Demonstrations which violate no criminal law, *e.g.* orderly picketing, will not be discussed.

A criminal conspiracy has been defined as an agreement between two or more persons to achieve an unlawful object, or to achieve a lawful object by unlawful means.<sup>6</sup> This common-law definition explicitly requires an agreement, two or more parties, and a specific intent both to commit an unlawful act and to combine with another for that purpose.<sup>7</sup> Furthermore, the California statutes governing conspiracies enumerate the illegal objectives which provide a basis for the conspiracy charge,<sup>8</sup> and require proof of an overt act in furtherance of the conspiracy.<sup>9</sup> It is submitted that mass demonstrations conducted with the intent to breach a law in aid of the purpose of the demonstration are within both the reason<sup>10</sup> and the letter of the law proscribing criminal conspiracies. In some of the mass demonstrations, the agreement to violate the law is express, there is well over the minimum requisite of two persons, and the specific intent requirement is fulfilled—often proof of intent is aided by express, pre-announced statements by the participants. The overt acts necessary as proof of the conspiracy in California are generally not concealed, since these acts help attain the publicity sought by the demonstrators for their cause.

Under the express provisions of the California statute governing conspiracies, the unlawful demonstrations seem to fall within the purview of two subdivisions of section 182. Subdivision one makes an agreement to commit a crime a conspiracy.<sup>11</sup> Demonstrators gathering to commit a misdemeanor would clearly fall within this category.<sup>12</sup> In addition, subdivision five of section 182 makes an agreement "to commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws" a

<sup>5</sup> For cases involving void statutes see *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Turner v. City of Memphis*, 369 U.S. 350 (1962).

<sup>6</sup> *Pettibone v. United States*, 148 U.S. 197, 203 (1893); *Marino v. United States*, 91 F.2d 691, 693 (9th Cir. 1937), *cert. denied*, 302 U.S. 764 (1938).

<sup>7</sup> See generally PERKINS, *CRIMINAL LAW* 527-49 (1957).

<sup>8</sup> CAL. PEN. CODE § 182 lists the illegal objectives.

<sup>9</sup> "No agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this State to effect the object thereof, by one or more of the parties to such agreement and the trial of cases of conspiracy may be had in any county in which any such act be done." CAL. PEN. CODE § 184.

<sup>10</sup> The rationale for the criminal conspiracy charge is that "the social menace of numerous individuals combined to breach the laws is qualitatively greater than the undeveloped intent of any one alone." King, *The Control of Organized Crime in America*, 4 STAN. L. REV. 52, 60 (1951).

<sup>11</sup> "If two or more persons conspire: 1. To commit any crime. . . ." CAL. PEN. CODE § 182.

<sup>12</sup> *E.g.*, *Globe Dairy Lunch v. Joint Culinary Workers*, 117 Cal. App. 2d 190, 255 P.2d 94 (1953) (civil conspiracy); *People v. Anderson*, 117 Cal. App. Supp. 763, 1 P.2d 64 (1931) (dictum) (although defendants cannot be convicted of conspiracy unless charged with the same, proof of such conspiracy is admissible on the trial of a conspirator charged with a crime committed in furtherance of that conspiracy).

criminal conspiracy. It is possible that demonstrators whose concerted actions lead to mass arrests, followed by large numbers of trials, involving great cost and delay in the judicial system, are also guilty of violations of this provision. When the avowed purpose is to obtain publicity by clogging the courts, the participants are clearly guilty of a conspiracy to do an act injurious to the administration of justice. Thus, the demonstrators would seem to fall within the California law of conspiracy, and there is some case authority which would indicate such a holding.<sup>13</sup>

While the illegal demonstrators in California have not been tried for criminal conspiracies, it would seem clear that they could be. By use of the conspiracy charge, law and order within the community could be better maintained.

Initially, arrest on charges of criminal conspiracy would allow the enforcement agency to prevent disorder and damage to property before they occur. Under the present use of trespass and disturbing the peace charges, each and every person involved in the demonstration must commit an overt criminal act. Allowing this increases the length of the demonstration and thus increases the danger to both life and property. A conspiracy at common law occurred as soon as the agreement was made.<sup>14</sup> In California, as mentioned above, there is a statutory provision<sup>15</sup> requiring an overt act in pursuance of the purpose of the conspiracy, but this is only to insure the conspiracy was committed; and circumstantial evidence is sufficient.<sup>16</sup> This overt act need not be committed by each member, and the act of one may be attributed to all the other participants.<sup>17</sup> Thus, if a conspiracy is charged there is no need to wait for all the participants to commit the planned acts before arrests are made. Earlier intervention would prevent the additional disturbances and dangers that always accompany mass demonstrations, and would allow more effective law enforcement. Greater protection could be afforded those directly or indirectly affected by the demonstrations.

The early intervention of effective law enforcement would be particularly useful where demonstration leaders advocating violent action are involved. Because conspiracy is an offense separate and distinct from the criminal object of the agreement,<sup>18</sup> attendance at a preparatory group meeting to plan an unlawful demonstration would satisfy the requirements of conspiracy. Depending on the gravity of the planned action, law enforcement agencies could take effective action at any time from the first preparatory meeting to the actual demonstration itself. In the past, the demonstrations in California have been of a non-violent nature. Where objectives are non-violent crimes, early intervention at the planning stage is not such a necessity as in situations where violence is the objective. But if arrests were made at the preparatory stage

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<sup>13</sup> *Ibid.*

<sup>14</sup> PERKINS, CRIMINAL LAW 531 (1957).

<sup>15</sup> CAL. PEN. CODE § 184.

<sup>16</sup> *Cf.* People v. McKinney, 218 Cal. App. 2d 174, 32 Cal. Rptr. 175 (1963); People v. Cummings, 173 Cal. App. 2d 721, 343 P.2d 944 (1959).

<sup>17</sup> People v. Garcia, 187 Cal. App. 2d 93, 9 Cal. Rptr. 493 (1960); People v. Kefry, 166 Cal. App. 2d 179, 332 P.2d 848 (1958).

<sup>18</sup> People v. Augusto, 193 Cal. App. 2d 253, 14 Cal. Rptr. 284 (1961); People v. Campbell, 132 Cal. App. 2d 262, 281 P.2d 912 (1955).

rather than at the time of the planned unlawful disturbance itself, the group's objectives of illegal intimidation and coercion would not be accomplished.

Another beneficial effect of applying the law of conspiracy to unlawful demonstrations lies in the deterrent effect of more severe penalties. According to the California statute, a conspiracy is punishable by a variety of penalties, depending on the type of conspiracy involved.<sup>19</sup> Since the penalty for some of the violations herein considered can be a State prison sentence, a conspiracy conviction could be a felony conviction.<sup>20</sup> This seems to be within the discretion of the sentencing judge, and provision is made for county jail sentences, which would be misdemeanor convictions.<sup>21</sup> Thus, instead of punishing the demonstrators for committing misdemeanors, the courts could convict them of felonies on a conspiracy charge, with the attendant higher penalties. Illegal mass demonstrations are composed of those who are leaders, planning and organizing activities, and those who, because they believe in the cause, follow even to the point of risking misdemeanor convictions. The effect of possible felony convictions as a deterrent is yet to be determined, but simple logic would seem to indicate that, at least in regard to the latter group, the risk of a felony conviction will give rise to a moment of contemplation that is perhaps now lacking.<sup>22</sup> The seriousness of possible felony convictions would forcefully remind the potential unlawful demonstrators of the quality and nature of the act they are about to commit. The sanctions of law applied to a convicted felon are many and harsh. In addition to the initial confinement in the State prison, the felon may be disqualified as a juror,<sup>23</sup> give his spouse grounds for divorce,<sup>24</sup> and may have severe restrictions placed on his liberty even after he is paroled.<sup>25</sup> The informal penalties, such as loss of job, education, and respect would also be compelling reasons for second thought on the part of the potential unlawful demonstrators. Consideration of these possible consequences could restrain the demonstrators from violation of constitutionally valid laws as a method of obtaining redress for the social injustices of which they complain.

The fact that criminal conspiracy has not yet been used in California demonstrations is due, at least in part, to the awareness of prosecutors of the harsh consequences described above. In every unlawful mass demonstration there are many participants who do not deserve the stigma of a felony conviction. But where

<sup>19</sup> CAL. PEN. CODE § 182.

<sup>20</sup> "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison. . . ." CAL. PEN. CODE § 17.

<sup>21</sup> "When they conspire to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than three years, or by a fine not exceeding five thousand dollars (\$5,000) or both." CAL. PEN. CODE § 182.

<sup>22</sup> It is not within the scope of this paper to determine the deterrent effect of felony convictions upon habitual criminal offenders.

<sup>23</sup> CAL. CONST. art. 20, § 11; CAL. PEN. CODE § 1072.

<sup>24</sup> CAL. CIV. CODE § 92(6).

<sup>25</sup> CAL. PEN. CODE §§ 3052-53, 3056, 3059.

there is continued use of unlawful demonstrations and where the same individuals continue to initiate and incite unlawful action, there must be more adequate and effective methods of legal control. Use of the criminal conspiracy charge allows the prosecutor to intervene at an earlier stage and affords a stronger weapon against repeated violations and violators. As the statute allows penalties to range from imprisonment in the county jail to incarceration in the State prison,<sup>26</sup> the stigma of a felony conviction need not fall indiscriminately upon all participants.

Another reason the criminal conspiracy charge has not been used in mass demonstrations is the alertness of the prosecutor to the centuries-long criticism of the crime.<sup>27</sup> The criticism, which appears at first to be purely academic,<sup>28</sup> is seen on further observation to have had a genuine effect on the practical application of the law of criminal conspiracy.<sup>29</sup> Reversals of convictions for conspiracy have been accompanied by opinions denouncing the sprawling and dragnet effect of the conspiracy charge.<sup>30</sup> It must be noted, however, that most of this criticism arose during a period in our history when both the state and federal governments were making extensive use of criminal conspiracy to cover illegal activities inadequately covered by other statutes.<sup>31</sup> It should also be noted that the criticism is primarily aimed at common-law conspiracy.<sup>32</sup>

Criminal conspiracy in California appears to have escaped such criticism. Penal Code provisions furnish the limitations missing at common law.<sup>33</sup> As the statutory definition of the offense has undergone only minor changes since its introduction into California law, it would seem that the statute has had satisfactory application.<sup>34</sup> The California criminal conspiracy statute provides a most effective tool for law enforcement where masses of demonstrators violate valid laws.

While the ends the demonstrators are seeking may be just and lawful, their means in these instances are not. The law should be enforced in such a manner as to prevent injury to the rights of the majority by groups attempting to obtain

<sup>26</sup> Note 21 *supra*.

<sup>27</sup> See Harno, *Some Significant Developments in Criminal Law and Procedure in the Last Century*, 42 J. CRIM. L., C. & P.S. 427, 437 (1951); Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922); Comment, *Developments in the Law of Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959); Note, *The Objects of Criminal Conspiracy—Inadequacies of State Law*, 68 HARV. L. REV. 1056 (1955).

<sup>28</sup> *Ibid*.

<sup>29</sup> See, e.g., *Recommendation of Senior Circuit Judges*, 1925 ATT'Y GEN. ANN. REP. 5-6.

<sup>30</sup> E.g., *Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (concurring opinion); *United States v. Falcone*, 109 F.2d 581 (2d Cir.), *rev'd*, 311 U.S. 205 (1940).

<sup>31</sup> Harno, *Some Significant Developments in Criminal Law and Procedure in the Last Century*, 42 J. CRIM. L., C. & P.S. 427, 438 (1951). For cases illustrating the use of the conspiracy charge by the federal government see King, *The Control of Organized Crime in America*, 4 STAN. L. REV. 52, 64-65 n.77, 66 n.86 (1951).

<sup>32</sup> E.g., Note, *The Objects of Criminal Conspiracy—Inadequacies of State Law*, 68 HARV. L. REV. 1056 (1955).

<sup>33</sup> *Id.* at 1068 n.113 (distinguishing conspiracy in California).

<sup>34</sup> For history of amendments see WEST'S ANN. CAL. PEN. CODE § 182. The constitutionality of the law is well settled, *People v. Henderson*, 120 Cal. App. 2d 50, 53, 260 P.2d 639, 640 (1953).