

The Opacity of Real Conspiracies

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The Opacity of Real Conspiracies  
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The conspiracies referred to in the title are criminal, not linguistic. The statute and case law governing criminal conspiracy is of perhaps unexpected interest to linguists as linguists, because it regularly poses to attorneys and judges the question of how to treat opaque contexts. The record of their responses provides suggestive material on natural-language reasoning. In turn, the study of these responses as responses to the opacity problem, rather than from some other perspective, gives to conspiracy law a degree of conceptual unity it now lacks.

In the common law; conspiracy is typically defined as a "combination between two or more persons formed for the purpose of doing either an unlawful act or a lawful act by unlawful means" (LaFave and Scott, 1972: 454). Some jurisdictions, such as New York State, have by statute added an additional element to this definition. Thus Section 105.20 of the New York Penal Law requires that "a person shall not be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators in furtherance of the conspiracy." The overt act need not, in itself, be criminal. If two conspirators have agreed to rob a bank and one of them photographs the bank's rear entrance, his act counts, even though a famous mural in imminent danger of demolition might fill a significant portion of the picture he took.

Conspiracy is familiar to nearly everyone today as an area of the law which is extremely susceptible to abuse, but my concern is not with the linguistics of paranoia and vagueness. For my purposes, the most legitimate and honest prosecution with no Bill of Rights overtones would suffice, because the fundamental issue would remain the same. Western jurisprudence tends to demand more than an evil thought before punishment may be inflicted. A conspiracy conviction comes closer than most to punishing mere thought. For this reason, the common law requires an act as well as the requisite mental state, although common law jurisdictions treat the conspiratorial agreement itself as such an act. As noted, some jurisdictions require more. The requisite mental state consists in the intention to carry out the acts supposedly agreed upon. In some cases the evidence of at least verbal agreement may be clear; in others it may not. If no direct proof of agreement is available, the agreement may be inferred circumstantially. But whatever the status of the agreement, a link must be established between it and the intention. Even in a common-law jurisdiction the jury may be hesitant to convict for the mere utterance of words, and the accused will surely try to argue that he was just joking or was misunderstood. For example, in *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), "Geaney claimed that while he had been associating with Lynch, Donnellan and McKeever, he had no knowledge that they planned a robbery and had ridden on the motor boat solely for recreation. He also denied that the photograph of himself drinking beer with Lynch and

Donnellan had been taken at the same time as the photographs with the shotgun, despite the identity of Lynch's and Donnellan's costumes." In a jurisdiction like New York a jury might be unwilling to find that an apparently innocent deed was "an overt act... committed...in furtherance of the conspiracy."

At this point in the argument, a legal text or judicial opinion will typically pose itself the question: What was the intention of the accused? Using a common-sense understanding of what "intention" means, the text or opinion will try to determine the content of the object clause underneath the verb "conspire" (or "intend"). Naturally, the question is not posed in these words, but all consideration of whether the evidence of conspiracy is sufficient either to go to the jury or to convict appears to involve exactly this. X conspired to do A. How do we know? By considering what it means to do A and what kind of evidence exists for describing the object of conspiracy as A in the first place. A particularly clear example of the kind of reasoning involved can be found in *United States v. Alsondo*, 486 F.2d 1339 (2d Cir. 1973), about which more later.

It is precisely here that the texts and the courts err. By treating their task as identifying the content of the object clause - and considering any problems as aberrations, they (through no fault of their own) overlook the fact that the verbs and their complements are only parts of a larger, implicit logical expression or underlying semantic representation. Crucial to this larger representation is the placement of any existential quantifier or quantifiers. Roughly speaking, the court or jury must decide which of the following ways of characterizing a conspiracy to assault a federal officer is the correct one.

1. Bob exists and is a federal officer; Bill and Sam conspired (intended) to assault him.
2. Bill and Sam intended that the object of their conspiracy be a certain existing federal officer named Bob.

That is, in (1) the existential quantifier is outside an opaque context; in (2), it is inside one. The two characterizations are not equivalent, nor is there any known way of deriving the one from the other. If Bill and Sam believe Bob to be a federal agent, it does not follow that he is one; and if he is one, it does not necessarily follow that they believe he is. The courts intuitively know this, but they cannot seem to escape their narrow verbal concentration on object clauses. Their intuitions, however, slip into the foreground when they try to resolve the problems created by this limited approach. When that happens, the courts slide back and forth between characterizations (1) and (2).

Characterizations like (1) are of advantage to a court in finding guilt because important elements of the intended criminal act are taken as given, or at least as relatively unproblematical; being unproblematical, they are removed from the realm of mere thought, for which one is not to be punished. See, for example,

the reasoning of the district judge in *United States v. Alsondo*: "It is not necessary for the government to prove that the defendants... knew that the persons they were going to assault or impede or resist were federal agents. It's enough, as far as this particular element of the case is concerned, for the government to prove that the defendants agreed and conspired to commit an assault" (Trial Transcript, cited 95 S.Ct. 1255, at 1259).

Characterizations like (2) become important when the defense claims the defendant had no such thing in mind. He may have done something wrong, but he did not conspire to do it - it just happened. Since consecutive sentences can be handed down for the substantive crime and the conspiracy to commit it, such verbal maneuvering is not necessarily idle play. Judge Learned Hand provides a relevant and often-cited passage: "While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past" (*United States v. Crimmins*, 123 F.2d 271 (2d Cir. 1941)). In addition, a characterization like (2) would represent the only possibility available to the prosecution if the putative object of the conspiracy was in the given case impossible to attain. LaFare and Scott provide a convenient summary: "It has been held, for example: that there may be a conspiracy to commit abortion even when, unknown to the conspirators, the woman was not pregnant; that there may be a conspiracy to commit rape on a woman believed to be unconscious although she was in fact dead;...that there may be a conspiracy to smuggle liquor in violation of the customs law even though, unknown to the conspirators, the liquor was of domestic origin" (1972: 475-76).

From these last remarks it might appear that the courts will "opportunistically" seize whichever characterization best suits their purposes. That "opportunism" is not quite so rampant, however, may be seen in the earnestness with which the courts attack essentially the same problems when they are presented without their traditional labels. Such situations arise when there is no direct evidence of an actual agreement between supposed conspirators. It becomes necessary to infer one. How can this be done? In *People v. Luria*, 251 Cal. App. 2d 471, 59 Cal. Rptr. 628 (1967), the Court had to decide whether the owner of a telephone answering service was guilty of conspiracy to commit prostitution. The prosecution attempted to show that Luria must have conspired, because, although he had knowledge of the criminal activity, he still allowed his answering service to be used. In other words, certain criminal activities existed (existential quantifier outside the opaque context); from the existence of these activities the prosecution wants to conclude that Luria intended them to exist or conspired to bring about their existence (existential quantifier inside the opaque context). Since there is no logical derivation leading from the one to the other, various other more or less plausible methods must be tried in order to obtain the desired result. In its opinion the Court analyzes a number of methods available to it in the form of

precedent. It apparently concludes that in some circumstances intent can be inferred from the defendant's knowledge and that knowledge of the illegal use of goods or services can itself be inferred from certain facts. I say apparently, because the Court fails to separate clearly the proof of knowledge from the inference of intent. A clear progression is visible here: The Court slips from facts known to the state, to knowledge possessed by the defendant, to the defendant's intent.

The specific situations which, according to the Court, permit the inference of constructive (i.e., hypothetical) intent are: (1) "when the purveyor of legal goods for illegal use has acquired a stake in the venture" - as when grossly inflated rates are charged for the ultra-short-term use of rooms; (2) "when no legitimate use for the goods or services exists" - as when a girl is apprenticed to a "music teacher" who has no means of teaching music; (3) "when the volume of business with the buyer is grossly disproportionate to any legitimate demand" - as when 300 times the normal supply of narcotics is sold to a country doctor; (4) when a "supplier... furnishes equipment which he knows will be used to commit a serious crime" - as when a service-station attendant knows that the gasoline he is selling will be used to make Molotov cocktails. For all four classifications the Court adds the proviso that it will draw the desired inference only if the use in question constitutes a felony, not a misdemeanor.

For situations (1) through (4) above the Court feels reasonably sure that anyone thus occupied must be aware of the normal concomitants to his acts. In fact, it might conclude that someone was mentally defective who lacked such awareness, as writers often do when dealing with related issues in the law of attempt. If the Court treats situations in the manner just sketched, it must supplement its reasoning with additional criteria to fill in the gap between plausibility and deduction. One such gap-filling criterion is the requirement that the substantive crime be a felony. This requirement of feloniousness serves two related purposes: (1) It accords with a common modern rationale for conspiracy law; (2) it suggests a fairly stringent evidentiary standard.

Conspiracy law is supposed to provide society with the means of interrupting criminal activity before it causes irreparable harm. The need for interruption is thought to be especially great when a group forms for criminal ends, since even in crime the division of labor brings rewards. If the aim of the conspiracy is the commission of a felony, the degree of danger involved putatively justifies faith in less conclusive forms of reasoning. On the other hand, distinguishing felonies from misdemeanors indirectly increases the amount of proof required, since a judge or jury will, at least ideally, demand clearer indications of intent before subjecting an individual to the more severe penalties felonious intent may involve.

Note that none of the criteria discussed above is equivalent to the one most commonly mentioned in linguistics: synonymy of expressions, based on the ideal speaker-hearer's knowledge of the language. Nor is any exactly of the Morning Star/Evening Star

variety, which is used to show that referentially identical expressions can behave differently in opaque contexts. Instead, these legal examples occupy a middle ground. They neither require ideal speakers nor do they presuppose the discovery of non-obvious empirical relations.

One additional, and opposite, technique of judicial reasoning may be added. In *United States v. Feola*, 95 S.Ct. 1255 (1975), the Supreme Court reversed the Court of Appeals decision in Alsondo (see above), on the grounds that Feola need not have known that a federal agent was to be the victim of his assault in order to be convicted of conspiring to assault a federal agent. It reached this result by holding that the "federalness" of the agent simply established federal, rather than state, jurisdiction. Such a maneuver is equivalent to lifting part of the characterization of the crime out of the opaque context, thereby eliminating a difficult question of proof, since all were agreed that the victim really was an agent. The Court felt justified in removing an element of Feola's intent because the dangerousness of his criminal purpose had already been made evident by the completion of the assault. It therefore saw no need to employ the means discussed above for shifting material into the opaque context. Rather, it had to articulate reasons for its definitive rejection of Learned Hand's line of argument in Crimmins, and it found some in the intent of Congress to protect federal officers and federal functions against criminal interference and state neglect. After arguing that congressional purpose allows it to read the federal assault statute (18 U.S.C.A. §111) as not requiring the assailant to know that his victim is a federal officer, the Court proceeds to claim that for the same reason knowledge is also not requisite for conspiracy to assault. In supporting this additional proposition the Court relies on a careless reading of the general federal conspiracy statute and a misrepresentation of the Crimmins rationale. Both these weaknesses are revealing when considered with regard to this paper's reformulation of conspiracy characterizations.

"The general conspiracy statute, 18 U.S.C. §371, offers no textual support for the proposition that to be guilty of conspiracy a defendant in effect must have known that his conduct violated federal law. The statute makes it unlawful simply to 'conspire... to commit any offense against the United States.' A natural reading of these words would be that since one can violate a criminal statute simply by engaging in forbidden conduct, a conspiracy to commit that offense is nothing more than an agreement to engage in the prohibited conduct" (95 S.Ct. 1255 (1975), at 1265). Not only is knowledge that someone is a federal officer not equivalent to knowledge that one is breaking a federal law, but the Court's reasoning is lacking in other ways as well. If knowledge is not essential to the prohibited substantive crime, so argues the Court, then it follows that it is not essential to the conspiracy. But here the Court merely assumes what it wants to prove. In fact, the most "natural" reading seems to involve placing the words "any offense against the United States" within the object complement of "conspire," that is, within the opaque context.

To conspire to commit an offense against the United States is not quite the same thing as to conspire to commit an offense and to find out later that it was one against the national government.

The Court's interpretation of Crimmins is no more convincing: "One may run a traffic light 'of whose existence one is ignorant,' but assaulting another 'of whose existence one is ignorant,' probably would require unearthly intervention" (Id., at 1267). True enough, but here the Court is parodying the characterization which Crimmins would suggest in this case, namely something like characterization (2) above. Physical existence is not at issue here. What matters is knowledge of the existence of the victim under a description as a federal agent. Because the Court fails to see this, its opinion remains weak. Interestingly, however, it retains the normal style of argumentation when discussing conspiracies which have not succeeded. "Where...there is an unfulfilled agreement to assault, it must be established whether the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction" (Id., at 1269). Making such a determination involves shifting quantifiers into opaque contexts, which in turn requires the kind of careful distinctions the Court seems unwilling to make.

Because the federal jurisdiction rationale is defended so poorly in Feola, its value might be questioned, but it is nevertheless obvious that the rationale appeals or appears persuasive to a fair number of judges. For this reason I prefer to leave it in the list of devices which the law uses to motivate the placement of existential quantifiers. To this list could be added a number of techniques employed in the law of attempt; I reserve that task, however, for an expanded version of this article. What is important now is to stop looting cases in search of linguistic examples and to point out the value of this exercise for conspiracy law.

The conceptual unity of conspiracy law arises at present out of its orientation toward the aims of preventing the fruition of inchoate crimes and breaking up coordinated criminal activity. As has been seen, these aims inform some of the devices for placing existential quantifiers. Perhaps such aims are even an essential part of any system of criminal justice. By themselves, however, they provide little help in arguing particular cases; they help shift the balance in favor of one quantifier placement or another, and logically they seem to remain subordinate to this task of placement. In fact, I believe that without the tacit importation of ideas concerning quantifier placement they would even lose much of their force as policy. The very notion of closeness to fruition depends on the relation between characterizations like (1) and (2), on the kinds of plausible connections that can be created between existential quantifiers under intent verbs and those above them. Since it is fairly difficult to see this relation while considering solely the content of the object clauses themselves, the slight shift of attention which linguistics suggests and this article advocates leads to a concentration on the central issues, thereby providing greater conceptual unity to conspiracy law and permitting

a more coherent analysis of apparently random variations in the decided cases.

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