hold formal hearings. Simply the knowledge that their activities are under investigation would tend to deter the bulk of unwitting offenders from further violations. The fear of formal administrative proceedings, with their attendant publicity, and the possibility of eventual loss of mail privileges should be sufficient to discourage the respectable businessman from persisting in borderline activities. Should the individual decide to risk an unfavorable outcome of the administrative hearing, he would do so with the confidence that his rights are protected by the provisions of the Administrative Procedure Act.[62] Whereas the hardened offenders and fly-by-night operators are not likely to be impressed by the threat of administrative action, the imminence of, and subjection to, criminal prosecution may alarm this breed of offender into terminating activities.[63] It would seem, therefore, that there is little to lose by denying the power of the Postmaster General to summarily withhold the privilege of access to the mails. The bulk of cases can be dealt with by pressures implicit in formal hearing procedures. Close liaison between postal inspectors and government prosecutors should lead to effective control of the criminal residue.

Conclusion

Grave threats to personal rights are implicit in the power of an administrative agency to apply summary sanctions. For this reason, they should be employed reluctantly, and only in those situations where extreme danger to the public urgently demands swift action. Whether the activities against which postal sanctions have been summarily applied are of this nature is a question for legislative or judicial decision. The present use of these powers by the Post Office Department is without judicial precedent or legislative authority. Clearly it is the duty of the courts to declare such usurpation of authority illegal.

STATE SEDITION LAWS: THEIR SCOPE AND MISAPPLICATION

The criminal codes of thirty-one states, Hawaii, and Alaska[1] pro-

62. See note 16 *supra.*

63. See note 57 *supra.*

1. ALA. CODE tit. 14, §§ 19-20 (1953); ALASKA COMP. LAWS ANN. §§ 65-11-1-65-11-2 (1949); ARK. STAT. § 41-4107 (1947); COLO. STAT. ANN. c. 40 Art. 23 § 7 (1935); CONN. GEN. STAT. §§ 8346-47 (1949); DEL. CODE ANN. tit. 11, § 862 (1953); FLA. STAT. §§ 779.05, 876.22-.31 (1953); GA. CODE § 26-901a (1953); HAWAII REV. LAWS § 11001 (1945); ILL. REV. STAT. c. 37, §§ 527-29 (1951); IND. ANN. STAT. § 10-1302 (Burns 1933); IOWA CODE ANN. §§ 689.4-.9 (1949); KAN. GEN. STAT. § 21.306 (1949); KY. REV. STAT. § 432.030 (1953); LA. REV. STAT. § 53:207 (1950); MD. ANN. CODE GEN.

scribe sedition[2] regardless of the defendant's conviction or potential indictment under a similar federal statute.[3] An examination of the application of state sedition acts[4] raises grave doubts as to whether the legislation has been employed to punish conduct constituting something other than sedition and whether the states are substantively, procedurally, and administratively equipped to prosecute the crime.

Elastic and difficult to define,[5] common law sedition evolved from

---

LAWS art. 85A, §§ 1-9 (1951); MICH. COMP. LAWS §§ 750.545a-d, 752.311-13 (Supp. 1952); MINN. STAT. ANN. §§ 612.07-.09 (West 1947); MISS. CODE ANN. § 2402 (1942), §§ 4064-01-13 (Supp. 1954); MONT. REV. CODES ANN. § 94-4401 (1947); NEV. COMP. LAWS §§ 10300-01 (1929); N. H. REV. STAT. ANN. LAWS c. 588 §§ 2-8 (1955); N.J. STAT. ANN. § 2A:148-3 (1951); N.C. GEN. STAT. §§ 14-11-12 (1953); OHIO REV. CODE §§ 2921.21-2921.27 (1954); PA. STAT. ANN. tit. 18, § 4207 (1945); R. I. GEN. LAWS c. 604, §§ 1-4 (1938); TENN. CODE ANN. § 39-4405 (1955); TEX. PEN. CODE ANN. art. 153 (1948); VA. CODE § 18-352.1 (1950); WASH. REV. CODE § 9.05.150 (1951); W. VA. CODE ANN. §§ 5912-14 (1955).

2. Sedition, by its very nature, is unique among the crimes included in the general area of subversion. The distinctive characteristic of the laws under discussion is that they reach beyond acts and make criminal the utterance of words. It has long been advocated that punishment for language which affronts existing standards be left to more subtle sanctions than prosecution and imprisonment. See CHAFEE, FREE SPEECH IN THE UNITED STATES (1946); Mann, *Security and the Constitution,* Current History, October, 1955, 236; Prendergast, *State Legislatures and Communism: The Current Scene,* 44 AM. POL. SCI. REV. 556 (1950).

3. 54 STAT. 670 (1940), later amended by 62 STAT. 808 (1948); 18 U.S.C. § 2385 (1952). The validity of the act on its face was upheld in Dennis v. United States, 341 U.S. 494 (1951). The constitutionality of the entire act is once again before the Court in Schneiderman v. United States, 106 F.Supp. 906 (S.D.Cal. 1952), *aff'd sub nom.* Yates v. United States, 225 F.2d 146 (9th Cir. 1955), *cert. granted* 24 U.S.L. WEEK 3101 (Oct. 18, 1955). The constitutionality of that portion of the act making it criminal to knowingly join or be a member of an organization which teaches and advocates the overthrow of the government is in issue in United States v. Lightfoot, (N.D. Ill. 1955), *appeal docketed,* No. 11470, 7th Cir., Sept. 19, 1955.

4. See GELLHORN, THE STATES AND SUBVERSION 394 (1952). Seventeen types of state statutes are indexed: treason, rebellion and insurrection, sedition, criminal syndicalism, criminal anarchism, red flag laws, sabotage, masks and disguises, exclusion from elective office, exclusion from public office, exclusion from state employment, registration statutes, teacher oaths, teacher loyalty other than oaths, miscellaneous school statutes, exclusion from welfare benefits. See also FUND FOR THE REPUBLIC, DIGEST OF PUBLIC RECORD OF COMMUNISM IN THE UNITED STATES 241 (1955).

In addition the state sedition legislation has been discussed in CHAFEE, FREE SPEECH IN THE UNITED STATES (1946) and EMERSON AND HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (1952). See also Million, *Political Crimes,* 5 Mo. L. REV. 164, 293 (1940); Prendergast, *State Legislatures and Communism: The Current Scene,* 44 AM. POL. SCI. REV. 556 (1950); Groner, *State Control of Subversive Activities in the United States,* 9 FED. B.A.J. 61 (1947); Hunt, *Federal Supremacy and State Anti-Subversion Legislation,* 53 MICH. L. REV. 407 (1955); Notes, 28 IND. L.J. 492 (1953); 61 HARV. L. REV. 1215 (1948).

5. Although sedition as a crime was unknown to Rome, acts which later came to be recognized as the offense were punished as treason by death. Rex v. Stroud, 3 St. Tr. 235, 270 (K.B. 1629).

"In the lay press we read that the learned judge had not adequately charged the jury on the meaning or legal definition of the word 'sedition.' We can well understand his difficulty. Even if he had had his law library with him, he would have found it difficult to construct a definition which would have been consistent with all the charges and judgments—and they are many—on the true significance of this debatable term." 191

treason and criminal libel.[6] It was a misdemeanor,[7] appearing more in its adjective form than substantive,[8] that is, seditious libel,[9] seditious words and rumors,[10] and seditious conspiracies.[11] Contrary to the precise constitutional straightjacketing of treason in the United States,[12]

LAW TIMES 31 (1941).

"Sedition consists in acts, words, or writings intended or calculated, in the circumstances of the time, to disturb the tranquility of the state, by creating ill-will, discontent, disaffection, hatred, or contempt towards the person of the King, or towards the Constitution or Parliament, or the Government, or the established institutions of the country, or by exciting ill-will between different classes of the King's subjects, or encouraging any class of them to endeavour to disobey, defy or subvert the laws or resist their execution, or to create tumults or riots, or to do any act of violence or outrage or endangering the public peace." RUSSELL, ON CRIME 139 (10th ed. 1950). "Sedition . . . embraces everything, which by word, deed, or writing, is calculated to disturb the tranquility of the state, and lead ignorant persons to endeavour to subvert the government and laws of the empire." Regina v. Burns, 16 Cox. C.C. 355, 360 (K.B. 1886). See also CHAFEE, *op. cit. supra* note 4, at 497; Rex v. Stroud, *supra*.

6. Truth of the statements made, at common law, was not a defense. Rex v. Burdett, 1 St. Tr. (n.s.) 1, 153-54 (K.B. 1820); Regina v. Duffy, 2 Cox C.C. 45, 49 (Q.B. 1846). This seems to be a facet inherited from criminal libel. Bona-fide belief in the truth of the matter stated, however, might be used in mitigation. Rex v. Burdett, *supra* at 159. Prior to Fox's Libel Act, 1792, 32 GEO. 3, c. 60, the court decided the all-important question of whether the material in question was "seditious" while the jury was relegated to the role of determining whether the defendant had actually written, printed, or published the material. After 1792, the jury was permitted to return a general verdict on the defendant's guilt or innocence.

7. Rex v. Stroud, 3 St. Tr. 235 (1629).

8. Sir James Stephen doubted whether there was such a crime as sedition except as used in its adjective form. STEPHEN'S DIGEST OF CRIMINAL LAW 92 (7th ed. 1926). Rex v. Stroud, 3 St. Tr. 235, 267 (K.B. 1629).

9. 32 GEO. 3, c. 60 (1792). Rex. v. McHugh, 2 Ir. R. 587 (1901); Regina v. Sullivan, 11 Cox C.C. 44 (1868); Rex v. Harvey, 2 B. & C. 257, 107 E.R. 379 (K.B. 1823); Rex v. Lambert, 2 Camp. 398, 170 E.R. 1196 (1810); Rex v. Cobbett, 29 St. Tr. 1 (K.B. 1804); Rex v. Frost, 22 St. Tr. 471 (1793); Rex v. Horne, 20 St. Tr. 651 (K.B. 1778); Rex v. Wilkes, 4 Burr. 2527, 98 E.R. 327 (1769); Rex v. Matthews, 15 St. Tr. 1323 (1719); Regina v. Tuchin, 14 St. Tr. 1095 (1704).

10. 23 ELIZ., c. 2 (1581).

11. 3 & 4 EDW. 6, c. 5 (1549). O'onnell v. Regina, 11 Cl. & Fin. 155, 8 E.R. 1061 (1844); Regina v. Cooper, 4 St. Tr. (n.s.) 1249 (Q.B. 1843); Regina v. O'Conuer, 4 St. Tr. (n.s.) 935 (Q.B. 1843); Regina v. Holberry, 4 St. Tr. (n.s.) 1347 (1840); Rex v. Hunt, 1 St. Tr. (n.s.) 171 (K.B. 1820).

12. U.S. CONST. art. III, § 3. "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid or comfort. No person shall be convicted of treason unless on testimony of two witnesses to the same overt act, or on confession in open court."

"However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason." Marshall, C. J., in *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 126 (1807). Marshall further recalled the fear of the common law doctrine of constructive treason. "[T]he framers of our constitution . . . must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation." *Id.* at 127.

conduct constituting advocacy of overthrow of the Crown[13] or encompassing the death of the King[14] was considered treason.[15]

Similarity between English and American sedition is found only in instigation of contempt and disaffection. Sedition in America[16] generally consists of advocacy by word, publication, or otherwise of the overthrow of the existing government by force and violence or inciting discontent and contempt for that government. As proof of advocacy is sufficient to satisfy the conduct element of sedition, it may be distinguished from treason, insurrection, rebellion, and sabotage which require overt acts aimed at the accomplishment of the prohibited ends. Sedition is also distinguishable from criminal syndicalism,[17] which is advocacy of destruction and overthrow of industrial ownership, and criminal anarchism,[18] which decries government as a political theory rather than a particular sovereign. These differences have been overlooked, however, by state legislatures[19] and courts, and sedition seems to have become merged with

13. Rex v. Horne Tooke, 25 St. Tr. 1 (1794) (conspiracy to depose King); Rex v. Darrell, 10 Mod. 321, 88 Eng. Rep. 747 (K.B. 1715) (intent to depose King); Rex v. Cook, 13 St. Tr. 311 (1696) (inviting invasion from France); Regina v. Blunt, 1 St. Tr. 1409 (1600) (design to deprive Queen of her crown). For a discussion as to whether speaking of words advocating such acts was treason, see Rex v. Despard, 28 St. Tr. 346, 347 (1803).

14. Regina v. Francis, 4 St. Tr. (n.s.) 1376 (1842); Rex v. Hardy, 1 East P.C. 60 (K.B. 1794); Rex v. Vane, 84 Eng. Rep. 1060 (K.B. 1662); Rex v. McGuire, 4 St. Tr. 653 (1645). See Black, *Imagining the King's Death*, 30 LAW NOTES (N.Y.) 148 (1926).

15. As to the distinction between high treason and sedition, see 1 East P.C. 48, 22 St. Tr. 477 (1793).

16. GELLHORN, *op. cit. supra* note 4, at 397. Advocacy of overthrow has been added. See note 5 *supra*. For sedition's general American history see authorities cited in note 4 *supra*.

17. See, *e.g.*, IOWA CODE ANN. § 689.10-13 (1951). See Burns v. United States, 274 U.S. 328 (1927) (upholding constitutionality of California statute); Fiske v. Kansas, 274 U.S. 380 (1927) (invalidating application of Kansas statute as violative of fourteenth amendment); State v. Lowery, 104 Wash. 520, 177 Pac. 355 (1918); State v. Tonn, 195 Iowa 94, 191 N.W. 530 (1923); case collections in 21 A.L.R. 1543 (1922), 73 A.L.R. 1498 (1930); Note, 36 ILL. L. REV. 357 (1941). Eighteen states, Alaska, and Hawaii proscribe the crime by statute. FUND FOR THE REPUBLIC, *op. cit. supra* note 4, at 296.

18. See, *e.g.*, N.Y. PEN. LAW, § 160 (1902). This is the act under which Gitlow v. New York, 268 U.S. 652 (1925) was originally prosecuted. See State v. Scott, 86 N.J.L. 133, 90 Atl. 235 (1914); People v. Larkin, 234 N.Y. 530, 138 N.E. 434 (1922). Nineteen states and Alaska proscribe the crime by statute. FUND FOR THE REPUBLIC, *op. cit. supra* note 4, at 289.

Note that Gitlow, a Communist, was convicted for anarchism, an ideology completely incompatible with Communism. See Pound, joined by Cardozo, dissenting, 234 N.Y. 132, 154, 136 N.E. 317, 326 (1922).

19. COLO. STAT. ANN. c. 48, § 48 (1935) (combines anarchy and sedition); CONN. GEN. STAT. § 8346 (1949) (combines anarchy and sedition); HAWAII REV. LAWS, c. 236, §11001 (1945) (makes unlawful publication of material advocating ". . . sabotage, incendiarism, sedition, anarchy. . . ."); R.I. GEN. LAWS, c. 604, §§ 1-4 (1938) (combine sedition, criminal syndicalism, and criminal anarchism).

syndicalism and anarchism. Prosecutions of anarchists, Socialists, I.W.W. members, Communists, and other non-conformists have been maintained indiscriminately under statutes proscribing one or any combination of these crimes.

At common law, the paramount element has long been a specific intent[20] to bring about contempt and disaffection for the government rather than mere publication of inflammatory material which might amount to a breach of the peace. This element has been generally absent in state prosecutions;[21] only nine of the thirty-one sedition statutes contain any reference to the defendant's state of mind.[22] Although a specific intent has been recognized in recent federal prosecutions,[23] the require-

20. As outlined by Stephen: ". . . a seditious intention is an intention to bring into hatred or contempt, or to incite disaffection against the person of Her Majesty, her heirs or successors, or the government or constitution of the United Kingdom, as by law established or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of Church or State by law established, or to raise discontent or dissaffection among Her Majesty's subjects, or to promote feelings of ill will and hostility between different classes of such subjects." STEPHEN, *op. cit. supra* note 8, at § 114. Regina v. Burns, 16 Cox C.C. 355 (1886) is generally considered the outstanding recitation of the 19th and 20th century English law of sedition. RUSSELL, ON CRIME 140 (10th ed. 1950); CHAFEE, *op. cit. supra* note 4, at 505.

Justice Cave, in the Burns case, after proclaiming what constituted a seditious intention, added this important qualification: "An intention to show that Her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or constitution, as by law established, with a view to their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in church or State by laws established, or to point out, in order to their removal, matters which are producing or have a tendency to produce, feelings of hatred and ill will between classes of Her Majesty's subjects, is not a seditious intention." Regina v. Burns, *supra* at 360.

21. Several state courts have rejected defendant's contentions that intent was an essential element of the crime. "The legislature may, as a general rule, penalize the doing of an act without regard to the intent or knowledge of the doer. . . ." State v. Loundy, 103 Or. 443, 499, 204 Pac. 958, 976 (1922). "[T]he legislature had the power to provide that any person who joins an organization organized for unlawful purposes, whether such person is or is not aware of the unlawful purpose, is guilty of an offense." People v. McClennegan, 195 Cal. 445, 468, 234 Pac. 91, 100 (1925).

22. Maryland's Ober Law and statutes patterned after it in Florida, Georgia, Michigan, New Hampshire, Ohio, and Washington require the defendant to act "knowingly and wilfully." Indiana's act states: "It shall be unlawful to advocate . . . or with intent to forward such purpose, to print . . . any document . . . by which there is advocated . . . the overthrow, by force and violence, of the government of the United States. . . ." Pennsylvania's statute proscribes conduct ". . . the intent of which is . . . to encourage any person to engage in any conduct with a view of overthrowing . . . the government." See statutes cited note 1 *supra*.

23. "The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. . . . [A]n intent to overthrow the Govrenment of the United States by advocacy thereof is . . . susceptible of proof." Vinson, C. J., in Dennis v. United States 341 U.S. 494, 500 (1951). Judge Medina, in instructing the jury in the Dennis case, stated: "*[I]t is not the abstract doctrine of overthrowing and destroying organized government by unlawful means which is denounced by this law.* . . . You cannot find the defendants or any of them guilty of the crime charged unless you are satisfied beyond a reasonable doubt that they conspired to

ment in cases brought under the state laws, with few exceptions,[24] seems to be only the intent to publish the material held as seditious or to bring the government into hatred or contempt without proof of an intent to commit the far more substantial crime of advocating the overthrow of the United States government by force and violence. In light of the severe sentences meted out under the statutes, the states appear to be punishing what at common law was treason while requiring proof of a far less serious crime.[25]

Historically, sedition has been invoked to stifle political opposition. In 1798,[26] the Federalist-controlled Congress enacted the first Alien and Sedition Act plainly aimed at growing Jeffersonian power. The defendants, generally influential Republican editors and politicians, were imprisoned for words considered mild-to-average in modern-day political attacks.[27] Under the misnamed Espionage Acts of 1917[28] and 1918[29] and

---

organize a society, group and assembly of persons who teach and advocate the overthrow of the Government of the United States by force and violence and to advocate and teach the dnty and necessity of overthrowing or destroying the Government of the United States by force and violence, with the intent that such teaching and advocacy be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, *all with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit.*" United States v. Foster, 9 F.R.D. 367, 391 (S.D.N.Y. 1951), *aff'd sub nom.* Dennis v. United States, 341 U.S. 494 (1951). (Emphasis added.)

24. Gerdes v. State, 104 Neb. 35, 175 N.W. 606 (1919). Defendant refused to buy Liberty Bonds and cursed local subscription committee. Conviction for sedition reversed because of no proof of intent.

25. State v. Boloff, 138 Ore. 568, 4 P.2d 326 (1931). Defendant was an unemployed sewer digger arrested for vagrancy. Police found a Communist Party membership card in his possession. He was convicted and sentenced to 10 years in prison. See Belt, J., dissenting. *Id.* at 653, 4 P.2d at 340. See note 78 *infra.*

26. 1 STAT. 596 (1798). The act made it a federal offense to make false, scandalous, and malicious criticism of the President, Congress, of the government of the United States with intent to defame the government or to bring the officials into disrepute or to incite against them the hatred of the people or to encourage resistance to the law.

27. The act came close to precipitating civil war. Secession was threatened by Jefferson in the Virginia-Kentucky Resolutions. See COMMAGER, DOCUMENTS OF AMERICAN HISTORY 178-183 (1948). The four trials fully reported are United States v. Lyon, Wharton's St. Tr. 333 (1798); United States v. Haswell, Wharton's St. Tr. 684 (1800); United States v. Cooper, Wharton's St. Tr. 659 (1800); United States v. Callender, Wharton's St. Tr. 688 (1800). The act is generally considered a major factor in the Federalist defeat of 1800. It expired in 1801 and Jefferson pardoned all those convicted thereunder. Congress eventually repaid most of the fines. EMERSON AND HABER, *op. cit. supra* note 4, at 367; CHAFEE, *op. cit. supra* note 4, at 507.

28. 40 STAT. 217 (1917), repealed by 62 STAT. 862 (1948). The act had little to do with espionage. It made criminal obstruction of enlistment or causing insubordination, disloyalty, or mutiny in the armed forces.

29. 40 STAT. 533 (1918), repealed by 41 STAT. 1359-60 (1921). See 60 CONG. REC. 293-94, 4207-08 (1921). This amendment to the previous year's act was actually a legislative snowball. Asked by Attorney General Gregory for a brief amendment to stop attempts to obstruct recruiting and war loan drives, the Senate Judiciary Committee inserted, almost in its entirety, a sweeping Montana sedition act (Mont. Laws, 1918, Ex.

the 2,000 prosecutions brought under them,[30] it became criminal to advocate higher taxes instead of bond issues, to state that the draft was unconstitutional though the Supreme Court had not yet held it valid, to say the sinking of merchant vessels was legal, to urge that a referendum should have preceded declaration of war, or to urge that the war was contrary to the teachings of Christ.[31]

Responding to world tension and real dangers of foreign-dominated subversive organizations, the federal government re-entered the field in 1940 with the Smith Act,[32] an almost word-for-word reprint of the 1902 New York anarchy statute,[33] which punishes the teaching or advocacy of violent overthrow of the United States government or of any state or local government.[34] Invoked but once in its first eight years,[35] the act was later employed in prosecutions of top level communist leaders[36] and now is supplemented by other federal anti-subversion statutes including the Internal Security Act of 1950[37] and the Communist Control Act of 1954.[38]

Ses., c. 11, p. 28). See note 46 *infra*. The statute's successor is MONT. REV. CODE ANN. § 94-4401 (1947).

30. The six most important cases which reached the Supreme Court include Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919); Schaefer v. United States, 251 U.S. 466 (1920); Pierce v. United States, 252 U.S. 239 (1920). The Abrams case marked the beginning of the long line of first and fourteenth amendment dissents of Justices Brandeis and Holmes. For discussions of the acts and prosecutions, see CHAFEE, *op. cit. supra* note 4, 36-140; EMERSON AND HABER, *op. cit. supra* note 4, 347-383. For a less impassioned and, perhaps, more objective approach to the period, see Hall, *Free Speech in Wartime*, 21 COLUMB. L. REV. 526 (1921). As to the corresponding period in England, see Note, 31 HARV. L. REV. 296 (1917).

31. See generally, United States v. Krafft, 249 Fed. 919 (3d Cir. 1918); United States v. Kirchner, 255 Fed. 301 (4th Cir. 1918); Granzow v. United States, 261 Fed. 172 (8th Cir. 1919); Shaffer v. United States, 255 Fed. 886 (9th Cir. 1919); Sandberg v. United States, 257 Fed. 643 (9th Cir. 1919); Albers v. United States, 263 Fed. 27 (9th Cir. 1920); White v. United States, 263 Fed. 17 (6th Cir. 1920); United States v. Boutin, 251 Fed. 313 (N.D.N.Y. 1918); United States v. Nagler, 252 Fed. 217 (W.D. Wis. 1918).

32. 54 STAT. 670 (1940), later amended by 62 STAT. 808 (1948), 18 U.S.C. § 2385 (1952). See *Hearings Before the Senate Judiciary Committee on H.R. 5138*, 76th Cong., 3d Sess., 5-12 (1940); 86 CONG. REC. 9031-32 (1940); 84 CONG. REC. 10452 (1939).

33. See note 42 *infra*.

34. The 1948 revision outlawed the attempted overthrow of "the government of the United States, or the government of any State, Territory, District, or Possession thereof. . . ." 18 U.S.C. § 2385 (1952). The wording had been ". . . any government in the United States." 54 STAT. 670 (1940). The change does not appear to be one of substance.

35. Dunne v. United States, 138 F.2d 137 (8th Cir. 1943), *cert. denied*, 320 U. S. 790 (1943).

36. Dennis v. United States, 341 U.S. 494 (1951). Of the 105 Communists indicted under provisions of the act to March 23, 1954, 67 had been convicted. FUND FOR THE REPUBLIC, *op. cit. supra* note 4, at 202.

37. 64 STAT. 987 (1950), 50 U.S.C. §§ 781-98 (Supp. 1952).

38. 68 STAT. 775 (1954), Pub. L. No. 337, 83d Cong., 2d Sess. (Aug. 24, 1954).

With the exception of pre-Civil War statutes passed by the southern states in a frantic effort to halt the spreading abolitionist movement,[39] sedition on a state level was virtually unmentioned in the nineteenth century.[40] It remained for the growing struggle between industrial expansion and the rising force of labor to set the stage for the crime's modern period. The Haymarket bombing in 1887[41] and the assassination of President McKinley in 1901 prompted a movement against adverse political thought which has not yet ended. Shortly after the latter event, New York passed its Criminal Anarchy Act,[42] generally considered the forerunner of most anti-subversion legislation.[43] Legislatures during and after World War I enacted statutes condemning sedition, anarchy, and syndicalism,[44] and several states, particularly Minnesota,[45] Montana,[46] and

---

39. Georgia proscribed, subject to the death penalty, "aiding or assisting in the circulation or bringing into this state . . . any . . . pamphlet, paper or circular, for the purposes of exciting to insurrection, conspiracy or resistance among the slaves, negroes, or free persons of colour. . . ." Ga. L. 1829, p. 170, sec. 10.

40. Excepting the civil war period, the only reported case is Respublica v. Dennie, 4 Pa. 266 (1805). Defendant was found not guilty of sedition for writing, "A democracy is scarcely tolerable at any period of national history. . . . No wise man but discerns its imperfections, no good man but shudders at its miseries, no honest man but proclaims its fraud, no brave man but draws his sword against its force." *Id.* at 268. The jury was instructed that ". . . if the publication was seditiously, maliciously, and wilfully aimed at the independence of the United States, or the constitution thereof or of this state . . ." they should convict, but if it ". . . was honestly meant to inform the public mind, and warn them against supposed dangers in society . . ." they should acquit. *Id.* at 270.

41. Eight anarchists were convicted of murder for the deaths of eight policemen killed when a bomb was thrown during a meeting of labor sympathizers. One of the convicted men committed suicide and three were hanged. Those remaining were pardoned three years later. Spies v. People, 122 Ill. 1, 12 N.W. 865, *aff'd*, 123 U.S. 131 (1887). See Zeisler, *Reminiscences of the Anarchist Case*, 21 ILL. L. REV. 224 (1926).

42. Laws of 1902, c. 371; N.Y. PEN. LAW, §§ 160-161. See note 33 *supra*.

43. See, *e.g.*, WIS. STAT. § 347.14 (1953), passed in 1903 and patterned on the New York act.

44. Anti-subversion legislation has been passed by the states in four different periods. The first came after the events discussed in the text above; the second immediately after World War I; a third during the Depression; and a fourth after World War II.

45. State v. Holm, 139 Minn. 267, 166 N.W. 181 (1918); State v. Moilen, 140 Minn. 112, 167 N.W. 345 (1918); State v. Spartz, 140 Minn. 203, 167 N.W. 547 (1918); State v. Freerks, 140 Minn. 349, 168 N.W. 23 (1918); State v. Townley, 140 Minn. 413, 168 N.W. 591 (1918); State v. Kaercher, 141 Minn. 186, 169 N.W. 699 (1918); State v. Hartung, 147 Minn. 128, 179 N.W. 646 (1920).

The target of these prosecutions was the radical Non-Partisan League. The actions were typical of the hysterical prosecution of a minority group which had, even if the intention could be shown, not the slightest chance of effecting the overthrow of any government. Not only did the prosecutions further unfair and harsh treatment of German-American farmers, most of whom were guilty only of being of German ancestry, but they seriously impaired the war effort. See O'Brian, *Civil Liberty in War Time*, 42 PROC. N.Y. STATE BAR ASS'N 275 (1919).

The statute under which these cases were brought (Minn. Laws 1917, c. 463) was upheld in Gilbert v. Minnesota, 254 U.S. 325 (1920). Mr. Justice Brandeis' dissent on first and fourteenth amendment grounds is the first square argument by a mem-

California,[47] instituted stringent enforcement.

Prosecutions subsided during the prosperity years of the late 1920's[48] but were renewed with vigor, during the depression and strike-infested years which followed, to combat labor's growing pains rather than any imminent or remote threat of the overthrow of any government.[49]

The states base their jurisdiction over the crime of sedition on the theory that any attempt to destroy the United States also imperils the states' sovereignty.[50] They will so argue, joined by the United States Solicitor General,[51] in *Commonwealth v. Nelson*,[52] presently before the

---

ber of the Court that freedom of speech is protected from state infringement. *Id.* at 334. For the speech which resulted in Gilbert's indictment and conviction, see CHAFEE, *op. cit. supra* note 4, at 289. For a unanimous reversal of conviction for comparable language as violative of due process, see Fiske v. Kansas, 274 U.S. 380 (1927). See also Warren, *The New Liberty Under the 14th Amendment*, 39 HARV. L. REV. 431 (1926); Green, *Liberty Under the Fourteenth Amendment*, 27 WASH. U. L. Q. 497 (1942); Note, 14 VA. L. REV. 49 (1927).

46. State v. Kahn, 56 Mont. 108, 182 Pac. 107 (1919); State v. Griffith, 56 Mont. 241, 184 Pac. 219 (1919); State v. Wyman, 56 Mont. 600, 186 Pac. 1 (1919); State v. Smith, 57 Mont. 563, 190 Pac. 107 (1920); State v. Diedtman, 58 Mont. 13, 190 Pac. 117 (1920); State v. Fowler, 59 Mont. 346, 196 Pac. 992 (1921). Convictions were generally of I.W.W. members under Mont. Laws 1918, Ex. Sess., c. 11, p. 28.

47. California prosecuted radicals of all types for the crime of criminal syndicalism (CAL. PEN. CODE §§ 11400-02 (1949), having no sedition or anarchy statutes. People v. Welton, 190 Cal. 236, 211 Pac. 802 (1922); People v. McClennegen, 195 Cal. 445, 234 Pac. 91 (1925); People v. Malley, 49 Cal. App. 597, 194 Pac. 48 (1920); People v. Lesse, 52 Cal. App. 280, 199 Pac. 46 (1921); People v. Eaton, 60 Cal. App. 612, 213 Pac. 275 (1923); People v. Thurman, 62 Cal. App. 147, 216 Pac. 394 (1923).

The statute was upheld in Whitney v. California, 274 U.S. 357 (1927). Justice Brandeis, however, concurred specially, joined by Justice Holmes, saying constitutional issues had not been sufficiently raised at the trial to bring them before the Supreme Court's limited jurisdiction to review state convictions. *Id.* at 372. See Burns v. United States, 274 U.S. 328 (1927).

Between 1919 and 1924, 511 persons were indicted. Of these, 264 were tried. One hundred were freed, 31 by acquital, 69 by hung juries. Of 164 convicted, 23 received suspended sentences and 128 received prison sentences ranging from one to fourteen years. One hundred fourteen appealed and 55 convictions were reversed. Note, 19 CAL. L. REV. 64, 65-66 (1930).

48. Only three reported cases may be found between 1925 and 1930. Stromberg v. California, 283 U.S. 359 (1931) (conviction reversed); Gregory v. Commonwealth, 226 Ky. 617, 11 S.W.2d 432 (1928) (conviction reversed); Commonwealth v. Widovich, 295 Pa. 311, 145 Atl. 295 (1929).

49. See, *e.g.*, State v. Boloff, 138 Ore. 568, 4 P.2d 326 (1931). Defendant received a 10-year sentence. At the rehearing, the court stated: "The party [Communist] program, more than the defendant, is on trial." 138 Ore. 610, 632, 7 P.2d 775, 783 (1931).

50. Brief of the State of New Hampshire as Amicus Curiae, p. 4, Commonwealth v. Nelson, 377 Pa. 58, 104 A.2d 133 (1954), *cert. granted*, 348 U.S. 814 (1955). New Hampshire was joined in the brief by 24 states: Arizona, Connecticut, Florida, Georgia, Indiana, Kansas, Louisiana, Maine, Maryland Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, South Carolina, Tennessee, Virginia, Washington, Wisconsin.

51. Brief for the United States as Amicus Curiae, Commonwealth v. Nelson, *supra* note 50.

52. 377 Pa. 58, 104 A.2d 133 (1954), *cert. granted*, 348 U.S. 814 (1955). For case comment see 18 U. OF DETROIT L. REV. 231 (1955); 39 MINN. L. REV. 211 (1955); 40

United States Supreme Court. Pennsylvania's highest court invalidated the application of that state's sedition act[53] by reversing the conviction of Steve Nelson,[54] long-time communist leader, also convicted of conspiring to violate the Smith Act.[55] Arguing that federal statutes had superseded and suspended the state law,[56] the court relied heavily on *Hines v. Davidowitz,*[57] in which it was ruled that the Federal Alien Registration Act[58] superseded similar state statutes.[59] The state court rejected *Gilbert v.*

CORNELL L. Q. 130 (1954); 29 N.Y.U.L.Q. REV. 1293 (1954); 34 B.U.L. REV. 514 (1955); 102 U. OF PA. L. REV. 1089 (1954).

53. PA. STAT. ANN. tit. 18, § 4207 (1945).

54. Nelson is one of the few ranking Communists ever tried by a state. An admitted member of the party's National Committee, Nelson was also mentioned in connection with the theft of atomic secrets from the University of California. House Committee on Un-American Activities, *Report on Soviet Espionage in Connection with the Atom Bomb,* 81st Cong., 2d Sess. (1948). When asked by a Congressional investigator to which side he would owe his allegiance in the event of war between the United States and Russia, Nelson pleaded the fifth amendment. House Committee on Un-American Activities, *Hearings Regarding Steve Nelson,* 81st Cong., 1st Sess. (1949). He was described as "atom bomb spy" by Justice Musmanno in Clarke v. Meade, 377 Pa. 150, 204, 104 A.2d 465, 476 (1954).

55. United States v. Mesarosh, 116 F.Supp. 345 (W.D. Pa. 1953), *cert. granted,* 24 U.S.L. WEEK 3164 (Dec. 13, 1955). Nelson, alias Steve Mesarosh, received a 5-year sentence here as opposed to 20 years, $10,000 fine, and payment of $13,000 costs in the state action. By the Supreme Court's grant of certiorari in this case, Nelson assumes the unusual position of having both state and federal convictions before the Court simultaneously.

56. State courts have in the past universally rejected the same argument. State v. McKee, 73 Conn. 18, 46 Atl. 409 (1900); People v. Most, 171 N.Y. 423, 64 N.E. 175 (1902); State v. Holm, 139 Minn. 267, 166 N.W. 181 (1918); State v. Kahn, 56 Mont. 108, 182 Pac. 107 (1919); State v. Tachin, 92 N.J.L. 269, 106 Atl. 145 (1919); People v. Steelik, 187 Cal. 361, 203 Pac. 78 (1921); State v. Hennessy, 114 Wash. 351, 195 Pac. 211 (1921); People v. Lloyd, 304 Ill. 23, 136 N.E. 505 (1922); Commonwealth v. Lazar, 103 Pa. Super. 417, 157 Atl. 701 (1931); Barton v. City of Bessemer, 234 Ala. 20, 173 So. 626 (1937). The Nelson case was expressly challenged in Nelson v. Wyman, —— N.H. ——, 105 A.2d 756 (1955). See Albertson v. Millard, 106 F.Supp. 635, 641 (E.D. Mich. 1952), *rev'd on other grounds,* 345 U.S. 242 (1953). For the Supreme Court's relative tolerance in regard to other types of anti-subversion statutes, see Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951) (affirmed discharge of municipal employees for failure to take loyalty oath); Gerende v. Board of Supervisors, 341 U.S. 56 (1951) (approved constitutionality of Maryland statute requiring candidate for public office to execute non-subversion affidavit); Adler v. Board of Education, 342 U.S. 485 (1952) (upheld New York statute disqualifying subversives from teaching in schools).

57. 312 U.S. 52 (1941).

58. 54 STAT. 673 (1940), as amended 66 STAT. 223 (1952), 8 U.S.C. §§ 1301-06 (Supp. 1952).

59. Instances of implied supersession may be separated into four classifications:

a) Cases in which the scheme of federal legislation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. Pennsylvania R.R. v. P.S.C., 250 U.S. 566 (1919).

b) The act of Congress may touch a field in which the federal interest is so dominant that the federal system may be assumed to preclude enforcement of state laws on the same subject. Hines v. Davidowitz, 312 U.S. 52 (1941).

c) The object sought to be obtained by the federal law and the character of the obligation imposed by it reveal the same purpose as the state law. Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926); New York Central R.R. v. Winfield, 244 U.S.

Minnesota,[60] the leading case of state-prosecution advocates, distinguishing the Minnesota statute in question as a local police measure.[61] Thus the fate of state sedition laws, and by implication the future of more than 300 other state laws concerning subversion,[62] would seem to turn on the issue of supersession rather than the considerations raised heretofore in this discussion.

Since English history affords no parallel to the federal system, a decision on whether the states should have a voice in punishing sedition will necessarily come solely from American experience. Sedition, however, has long been considered a crime against the sovereign, which in the case of the United States is the national government. Although the states generally proscribe sedition against "this state or the United States,"[63] nowhere on record can be found a conviction for advocacy of the overthrow of an individual state. Federal prosecution advocates also contend that the "world movement"[64] form of the communist conspiracy takes it outside the scope of state power[65] since the Federal Constitution charges the national government with the duty of guaranteeing "to every state in this union a Republican form of government."[66]

No state can successfully argue that it is a completely independent sovereign or that its safety, or very being, does not depend on the security of the national government. Certainly the communist conspiracy is not aimed at any individual state; it is difficult to imagine an internal as-

---

147 (1917).

d) The state policy may produce a result inconsistent with the object of the federal statute. Hill v. Florida, 325 U.S. 538 (1945).

It is submitted, however, that the supersession holding of the Pennsylvania court is inconsistent with Allen-Bradley Local No. 1111 v. Wisconsin E. Rel. Bd., 315 U.S. 740, 749. "[T]his Court has long insisted that an intention of Congress to exclude states from exerting their police power must be clearly manifested." No such clear manifestation may be found, especially in light of a letter from Congressman Smith, the bill's sponsor, reprinted in Commonwealth v. Nelson, 277 Pa. 58, 90, 104 A.2d 133, 142 (1954) (dissenting opinion). See also H.R. Rep. No. 2980, 81st Cong., 2d Sess., 25-46 (1950). As to supersession generally, see Hunt, *Federal Supremacy and State Anti-Subversion Legislation,* 53 MICH. L. REV. 407 (1955); Notes, 60 HARV. L. REV. 262 (1946); 66 HARV. L. REV. 327 (1952); 55 COLUM. L. REV. 83 (1955).

60. 252 U.S. 325 (1920).

61. Commonwealth v. Nelson, 277 Pa. 58, 72, 104 A.2d 133, 140 (1954).

62. See note 4 *supra.*

63. See, *e.g.,* PA. STAT. ANN. tit. 18, § 4207 (1945).

64. See CONGRESSIONAL FINDING OF NECESSITY, 64 STAT. 987 (1950), 50 U.S.C. § 781 (Supp. 1952).

65. At least 22 municipalities have also entered the subversion field. Atlanta, Ga., Terre Haute, Ind., and Bessemer, Ala., have ordinances proscribing sedition similar to those discussed herein, save for less stringent sanctions. The latter law's constitutionality was upheld in Barton v. City of Bessemer, 234 Ala. 20, 173 So. 626 (1936). See Sutherland, *Freedom and Internal Security,* 64 HARV. L. REV. 383, 388 (1951); FUND FOR THE REPUBLIC, *op. cit. supra* note 4, at 455.

66. U.S. CONST. art. IV, § 4.

sumption of power by a group emanating from a single state.[67]

The states contend that invalidating the application of their sedition laws would deprive them of power to quell uprisings before they begin,[68] despite the fact that each has a complete set of statutes covering public disorders and riots.[69] It is submitted that if the conduct which the states have previously punished as sedition amounts to no more than a criminal breach of the peace, such conduct should be left to statutes proscribing it. If, on the other hand, the states have punished real sedition, it seems they have intruded in a federal matter and should limit their control of subversion to statutes covering state issues such as education[70] and welfare.[71]

In addition to the pre-emption issue raised by the *Nelson* case,[72] several other arguments against state sedition prosecutions may be presented. Coupled with the lack of any statutory intent requirement is an almost uniform absence of any consideration as to the amount of danger created by the defendant's conduct.[73] Such a consideration was originally presented by Mr. Justice Holmes' "clear and present danger" test in

67. The states have long been barred from punishing treason against the United States. *Ex parte* Quarrier, 2 W. Va. 569 (1866). If the most generally quoted definition of sedition, advocacy of overthrow, is to be accepted, it would seem that sedition and treason may be distinguished only in that one requires an overt act while the other does not and that, if states are barred from prosecuting treason against the United States, they should be similarly precluded from punishing sedition aganist that government.

68. See note 50 *supra* at 21.

69. See, *e.g.*, PA. STAT. ANN. tit. 18 § 4401 (riots, routs, assemblies, affrays); § 4406 (disorderly conduct); § 4416 (carrying deadly weapons); § 4417 (carrying bombs and explosives). See Commonwealth v. Nelson, 277 Pa. 58, 70, 104 A.2d 133, 139 (1954).

70. A state-by-state listing of laws concerning subversion as related to education may be found in FUND FOR THE REPUBLIC, *op. cit. supra* note 4, at 427. N.Y. EDUCATION LAW § 3204 and W. VA. CODE c. 18, § 1734 (1955) provide for courses in every school in citizenship, civics, and American history. Positive legislation of this type concerned with educating the youthful liberal rather than punishing the adult Communist seems to be better means of avoiding subversion.

71. *Id.* at 410.

72. 277 Pa. 58, 104 A.2d 133 (1954), *cert. granted* 348 U.S. 814 (1955).

73. The early decisions under the syndicalism and sedition statutes, based on the premise that government could properly regulate attempts at its forceful overthrow, held that the conduct might be proscribed if it had a "reasonable tendency" to promote violence. See, *e.g.*, People v. Lloyd, 304 Ill. 23, 136 N.E. 505 (1922); Commonwealth v. Lazar, 103 Pa. Super. 417, 157 Atl. 701 (1931). For cases showing reversal for failure to instruct jury on clear and present danger, see Shaw v. State, 76 Okla. Crim. 271, 134 P.2d 999 (1943); Wood v. State, 77 Okla. Crim. 305, 141 P.2d 309 (1943). "However reprehensible a Legislature may regard certain convictions or affiliations, it cannot forbid them if they present no 'clear and present danger that they will bring about the substantive evils' that the Legislature has a right to prevent." Danskin v. San Diego Unified School District, 28 Cal.2d 536, 542, 171 P.2d 885, 889 (1946). *Contra*, State v. Kassay, 126 Ohio St. 177, 184 N.E. 521 (1932); People v. Ruthenberg, 229 Mich. 315, 201 N.W. 358 (1924); People v. Steelik, 187 Cal. 361, 203 Pac. 78 (1921); State v. Laundy, 103 Ore. 443, 204 Pac. 958 (1922).

Schenck v. United States.[74] Although the continued application and utility of the test is uncertain as a result of *United States v. Dennis,*[75] it seems that there should be some appreciable amount of inherent danger upon which to base a criminal conviction for mere speech. If the states are truly concerned for their existence and seek to prevent their overthrow, some possibility of that end resulting from the defendant's conduct should be present.

Although the theory of dual prosecution by state and federal governments for the same conduct has long been settled,[76] it has continually met with strong opposition founded upon the aversion of Americans toward any circumvention of the constitutional guarantee against double jeopardy.[77] Moreover, there is the basic unfairness of the disparity of sen-

74. 249 U.S. 47, 52 (1919). The rule is, as defined by Justice Holmes: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." For later application, see Herdon v. Lowry, 301 U.S. 242 (1937); Thornhill v. Alabama, 310 U.S. 88 (1940); Taylor v. Mississippi, 319 U.S. 583 (1943). See generally, Antieau, *The Rule of Clear and Present Danger: Scope of Its Applicability,* 48 MICH. L. REV. 811 (1950).

75. 341 U.S. 494 (1951). The weight of the test was greatly diminished by the Supreme Court's adoption of Judge Hand's interpretation which emphasized the gravity of the evil rather than its imminence or the accused's ability to bring it about. United States v. Dennis, 183 F.2d 201, 211 (2d Cir. 1950). This case has prompted a series of articles, most of which maintain that it sounded the rule's death knell. Nathanson, *The Communist Trial and the Clear and Present Danger Test,* 63 HARV. L. REV. 1167 (1950); Boudin, *Seditious Doctrines and the Clear and Present Danger Rule,* 38 VA. L. REV. 143, 315 (1952); Gorfinkel and Mack, *Dennis v. United States and the Clear and Present Danger Rule,* 39 CALIF. L. REV. 475 (1951); Mendelson, *Clear and Present Danger—From Schenck to Dennis,* 52 COLUM. L. REV. 313 (1952); Corwin, *Bowing Out Clear and Present Danger Rule,* 27 NOTRE DAME LAW. 325 (1952).

76. United States v. Lanza, 260 U.S. 377 (1922); Sexton v. California, 189 U.S. 319 (1903); California v. Zook, 336 U.S. 725 (1949).

77. "As a matter of legal analysis there can be no doubt of the soundness of the doctrine which allows concurrent or successive federal and state prosecutions for the same act. But one cannot read the history of these concurrent prosecutions without becoming conscious that such two or even three-fold prosecutions (since in some cases municipalities may prosecute also for the same act) have produced irritation and feelings of injustice beyond any good they have accomplished. It is never wise to foster a public feeling that law is something arbitrary and out of touch with justice." Address by Roscoe Pound, delivered before California Bar Ass'n at Pasadena, Sept. 18, 1930. See 17 A.B.A.J. 9, 14 (1931). See dissent of Justices Frankfurter and Burton in California v. Zook, 336 U.S. 725, 738, 741 (1949); Grant, *The Lanza Rule of Successive Prosecutions,* 32 COLUM. L. REV. 1309 (1932); Note, 55 COLUM. L. REV. 83, 96 (1955). *But cf.* State v. Kelly, —— Fla. ——, 76 S.2d 798 (1954); Nelson v. Wyman, —— N.H. ——, 102 A.2d 756 (1954); Gilbert v. Minnesota, 254 U.S. 325 (1920); Halter v. Nebraska, 205 U.S. 34 (1907).

Double jeopardy is not violated in the strict sense since it arises only when a person is tried two times for the same crime by the same sovereign. If both the state and federal governments have jurisdiction to act against the defendant, it follows that he is not held in double jeopardy when each of the two sovereigns tries him once for the same crime.

tences between federal and states statutes.[78] Harsh punishments meted out by state-court juries may reflect the prejudicial tenor[79] of the prosecutions and point to "scare" legislation and a lack of judicial objectivity.

Since much of the state legislation in question was enacted at the instigation of investigating bodies such as the Tenney Committee of California,[80] jurists argue that constitutional and procedural guarantees were scrapped in a sacrificial offering to swift and stringent prosecution. One reason for invalidation of the sedition act involved in *Commonwealth v. Nelson*[81] was that Pennsylvania procedure permits indictment on the information of a private individual. Hired-witness charges were often heard during I.W.W. prosecutions in California during the early 1920's[82] and defendants under Minnesota's wartime sedition act could be arrested without a warrant.[83]

Admitting the difficulty of drafting a statute in precise language to deal with the type of conduct sedition typifies, some courts have, nevertheless, been too quick to reject appeals as to vagueness and indefiniteness with bland assertions that the words of the statute are sufficiently explicit and have such commonly understood significance that the defendant

78. The average maximum punishment under the statutes cited in note 1 *supra* is 11.8 years. Nine states, Delaware, Georgia, Iowa, Kentucky, Michigan, Minnesota, Montana, Pennsylvania, and Texas, provide maximums of 20 years or more. Maximum under the substantive section of the Smith Act (18 U.S.C. § 2385 (Supp. 1952) is 10 years, while the general conspiracy law (18 U.S.C. § 371 (Supp. 1952) carries a maximum of five years. An example may be seen by comparing the fate of the Dennis defendants, all top-level communist leaders most of whom received five-year terms, with that of Braden, *infra* note 91, alleged member of a five-man communist cell, who was given a 15-year sentence.

79. For an argument that such harsh punishments may be cruel and unusual and violative of the eighth amendment, see Belt, J., dissenting in State v. Boloff, 138 Ore. 568, 653, 4 P.2d 326 (1931).

In AM. CIV. LIB. UNION, A STRIKE IS CRIMINAL SYNDICALISM IN CALIFORNIA (1931), the commander of the El Centro (Calif.) American Legion is quoted as saying: "The way to kill the red plague is to dynamite it out. That's what we did in Imperial County. The judge who tried the Communists was a Legionnaire; 50 per cent of the jurors were war veterans. What chance did the Communists have?" He was allegedly speaking of convictions carrying sentences ranging up to 42 years affirmed in People v. Horiuchi, 114 Cal. App. 415, 300 Pac. 457 (1931).

80. BARRETT, THE TENNY COMMITTEE (1951). Discussions of the Lusk Committee in New York, Washington's Canwell Committee, and the Broyles Commission of Illinois are found in GELLHORN, *op. cit. supra* note 4.

81. 277 Pa. 58, 74, 104 A.2d 133, 141 (1954).

82. Professional witnesses, themselves former I.W.W. members, seem to have testified in case after case to the same set of facts and confessions. People v. Powell, 71 Cal. App. 500, 236 Pac. 311 (1925); People v. Wright, 68 Cal. App. 621, 230 Pac. 221 (1924); People v. Cox, 66 Cal. App. 287, 226 Pac. 14 (1924); People v. Roe, 58 Cal. App. 690, 209 Pac. 381 (1922).

83. Minn. Laws, 1917, c. 463. See CHAFEE, *op. cit. supra* note 4, at 287.

has been adequately warned of what is criminal.[84] Such assertions pale before statutory language making it unlawful to excite *"ill feeling* against the United States,"[85] to use *"contemptuous language"* against the United States,[86] "speech . . . which would incite any *racial distrust,"*[87] "teachings *in sympathy* with . . . institutions or forms of government hostile, inimical, or *antagonistic* to those . . . of this state or the United States,"[88] or to *"suggest"* overthrow by force and violence.[89]

It is also questionable whether states are administratively equipped to try sedition cases. Recent prosecutions of alleged seditionists have been based primarily on the subversive nature of the communist movement. Few states staff any organization comparable to the F.B.I. The testimony of that organization's operatives is normally needed to prove the defendant a subversive.[90] An average county prosecutor, aided by one or two deputies, is hardly capable of preparing and presenting a case of this magnitude without great assistance from federal agencies. While cooperation between state and federal police forces is to be encouraged, a prosecution which is entirely dependent upon federal assistance should not be brought in a state court.[91]

---

84. State v. Boyd, 86 N.J.L. 75, 78, 91 Atl. 586, 587 (1914); State v. Sinchuck, 96 Conn. 605, 607, 115 Atl. 33, 34 (1921); State v. Workers' Socialist Publishing Co., 150 Minn. 406, 407, 185 N.W. 931, 932 (1921); People v. Lloyd, 304 Ill. 23, 33, 136 N.E. 505, 511 (1922); People v. Ruthenberg, 229 Mich. 315, 324, 201 N.W. 358, 361 (1925); Berg v. State, 29 Okla. Crim. 112, 117, 233 Pac. 497, 500 (1925). *Contra,* State v. Klapprott, 127 N.J.L. 395, 22 A.2d 877 (1941) (reversed conviction because words "hatred," "abuse," and "hostility" were abstract, indefinite, and unconstitutional as to the spoken word. *Id.* at 402, 22 A.2d at 882.) State v. Diamond, 27 N.M. 477, 202 Pac. 988 (1921) (held sedition statute unconstitutional because it failed to proscribe how government was to be overthrown.) The New Jersey Supreme Court, however, in State v. Tachin, 92 N.J.L. 270, 106 Atl. 145 (1909) affirmed a statute similar to that in State v. Diamond, *supra,* by reading into the act that the proscribed opposition or hostility would include "subversion or destruction by force."

The United States Supreme Court, in Fox v. Washington, 236 U.S. 273 (1915), upheld the constitutionality of a statute punishing persons who publish matter "which shall tend to encourage disrespect for law."

85. ALASKA COMP. LAWS ANN. § 65-11-1 (1949).

86. HAWAII REV. LAWS c. 236, § 11190 (1945).

87. MISS. CODE ANN. § 2402 (1942).

88. W. VA. CODE ANN. § 5912 (1955).

89. KY. REV. STAT. § 432.030 (1953).

90. *E.g.,* possible intereference with the F.B.I.'s program could have been caused had Herbert A. Philbrick, whose undercover work was largely instrumental in convicting the Dennis defendants, been forced two years earlier to testify in a state prosecution of a communist underling.

91. Each of the foregoing objections to state prosecutions was clearly manifested in the recent case of Commonwealth v. Braden, No. 101692, Jefferson Circuit Court (Ky. 1954). Defendant sold a home in a White residential area in Louisville to a Negro family. The house was later bombed and from a grand jury investigation of the blast came the sedition indictment under which Braden was convicted, sentenced to 15 years in prison, and fined $5,000. No proof was required of either any "clear and present danger" or advocacy of the overthrow of the United States government or that of Ken-

A withdrawal by the states from prosecution of sedition, whether it be by Supreme Court mandate or by a realization of issues here raised, is needed.[92] Passed in haste and with little legislative planning[93] and enforced indiscriminately and arbitrarily in periods of war, hysteria, and social unrest, state sedition statutes generally constitute a hindrance rather than an aid in the search for compatibility between internal security, personal liberty, and judicial integrity.

---

tucky. If guilty of sedition, the defendant is liable to indictment under the Smith Act. It is noteworthy that the United States Attorney General, possessing knowledge of Braden's alleged Communist party membership, has instituted no proceeding under the Smith Act. The reason might be that there is insufficient evidence upon which to base a federal prosecution or that such action might interfere with nation-wide Communist surveilance. The Commonwealth's evidence was almost entirely supplied by federal sources. It consisted of general testimony on Communism by Velde Committee witnesses, introduction of books and pamphlets from Braden's library, and the testimony of an F.B.I. undercover witness that Braden was a Communist. In view of the circumstances, the possibility cannot be iguored that Braden was not tried because he had committed sedition against the United States or Kentucky, but because he had flaunted the South's racial code.

Another state sedition case of note still pending is that of Prof. Dirk Jan Struik of Massachusetts Institute of Technology, Commonwealth v. Gilbert, No. 40734, Middlesex Superior Court (Mass. 1954), under MASS. ANN. LAWS c. 264, § 11 (Supp. 1954), unused since passage in 1919. Indictment was returned in 1951, N.Y. Times, Sept. 13, 1951, p. 23, col. 3. After a hearing on motion to quash (March 24, 1954), the trial court reported the case to the Supreme Judicial Court, presenting questions of law including whether the act and/or the indictment are violative of the first and fourteenth amendments and whether the Smith Act has suspended application of the Massachusetts act. See Report, Commonwealth v. Gilbert, *supra*, p. 4. The Supreme Judicial Court has made no decision, obviously awaiting a Supreme Court decision in Commonwealth v. Nelson.

92. An investigation of the desirability of a uniform subversive activities act was discussed in 1952 at a conference of Eastern Attorneys General. Neither the Council of State Governments nor its Drafting Committee has ever been formally approached with respect to the proposal. No record of any further work could be obtained. Letter from Herbert L. Wiltsee, Southern Representative, Council of State Governments, to Indiana Law Journal, Nov. 28, 1955.

93. The regrettable situation was best illustrated by Sen. John H. Dent, then minority leader in Pennsylvania's Senate, during debate on that state's Loyalty Act (PA. STAT. ANN. tit. 65, §§ 212-225 (Supp. 1954). Recalling that when he had voted against a 1945 measure taking Communists off the ballot, he ". . . was vindicated, because it was declared unconstitutional, but all the newspapers and the people in my community, who felt that they were doing what they thought was right, burned me in effigy upon my front lawn and, although I was characterized as a Red and a near Red or 'pink' or whatever you want to call it, there was never an apology made to my family, there was never a word of retraction made after the bill was declared unconstitutional. So . . . in the face of that injustice, in fairness to my family, I will vote for this legislation. . . . We are living in a day when men will hide behind the decent emblem of patriotism to do things that they would not do openly, but as a leader of my party, I must subscribe to the days that we live in. . . . I will vote for this measure because the injustices of the day demand me to vote for it." See Byse, *A Report on the Pennsylvania Loyalty Act*, 101 U. OF PA. L. REV. 480, 507 (1953).