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A public defender system or a plan for court-appointed, state-paid counsel for indigents would be expensive. But the law has long acknowledged society's interest in protecting the innocent. Can an impartial judge adequately protect the rights of an indigent appearing without counsel? Mr. Justice Sutherland, quoted above, thought not, and a number of Florida circuit judges agree. Remedial legislation seems long overdue.[25]

If the Florida Legislature does act to make counsel appointment mandatory in noncapital cases, consideration should be given to the question of whether the defendant need volunteer a request to have counsel appointed. It is conceivable that, even though a defendant be given the right to counsel, he may, through ignorance of this right, fail to make a request. In this respect, a statute similar to Federal Rule 44, which requires appointment of counsel unless defendant objects, seems desirable.

After reading some of the cases in which right to counsel has been denied, one can not help but feel that the present state of the law in Florida is uncomfortably reminiscent of the single commandment ultimately imposed by communal leaders in George Orwell's *Animal Farm*: "All animals are equal but some animals are more equal than others."[26]

TIMOTHY P. POULTON

SUPERSESSION OF STATE SEDITION LAWS BY FEDERAL LEGISLATION

"[O]n the part of the [President]," asserted Congressman Matthew Lyon in 1798, "every consideration of the public welfare [is] swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adultation, and selfish avarice."[1] For

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[25]The Florida Legislature passed a population act in 1955 that permits counties with populations exceeding 480,000 (Dade County) to have a public defender. FLA. GEN. LAWS c. 30143. This is a step in the right direction, but even a statewide law of local option nature is not a satisfactory substitute for a general law with mandatory provisions.

[26]At 122 (1946).

[1]Lyon's Case, 15 Fed. Cas. No. 8646, at 1183 (C.C.D. Vt. 1798).

this statement Congressman Lyon was indicted, convicted, and sent to prison under America's first sedition act.[2] Since then much water has gone under the bridge; men have been tried and imprisoned for public utterances under laws propounding a farrago of definitions for that elusive word *sedition.* An attempt to find a suitable meaning for this term, however, is not within the scope of this note. Indeed, such an ambitious undertaking would uncover, from the more than forty state sedition laws, an almost equal number of definitions for this type of conduct.[3] The concern here is with the legality of *any* state efforts in this field, with emphasis on Florida, in view of the United States Supreme Court's holding in the much publicized case of *Pennsylvania v. Nelson.*[4] A long, if sporadic, association of the federal and state governments in the prosecution of this crime appears to be coming to an end.

Action by the states to punish sedition was almost unknown before the conflicts of industrialization brought forth a rash of statutes in the earlier part of this century.[5] Historically, spates of sedition laws have appeared in times of domestic unrest and contention or external military threat. The Haymarket bombing in 1886 and the assassination of President McKinley in 1902 led to the first state sedition law, the New York Criminal Anarchy Act. This effort inspired similar action by a small number of states circa 1900[6] and a subsequent re-entrance into the field by the federal government.[7] Later sedition acts bloomed during the tumult of World War I,[8] at which time advocating heavier taxation instead of bond issues became a

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[2]Alien and Sedition Act, 1 STAT. 570 (1798).

[3]In some jurisdictions sedition consists of intentional advocacy of violent overthrow of democratic government, while in others "suggesting" disaffection toward the government or mere unknowing membership in a "subversive" organization is a crime.

[4]350 U.S. 497 (1956).

[5]Exceptions are Southern statutes passed in the pre-Civil War period to curb inflammatory speech designed to incite resistance among the slaves. For discussion see EMERSON and HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 371-75 (1952).

[6]WASH. REV. CODE §9.81.020 (1951) (passed in 1909); WIS. STAT. §347.14 (1955) (passed in 1903).

[7]The Smith Act, 18 U.S.C. §2385 (1952), was patterned after the earlier New York law.

[8]Some of the more stringent acts were Mont. Laws 1918, c. 11, and Minn. Laws 1917, c. 463. For a detailed discussion of the subject see CHAFEE, FREE SPEECH IN THE UNITED STATES 36-107 (1954).

criminal act,[9] as well as criticizing the YMCA,[10] or stating that war was contrary to the teaching of Christ.[11] Action by the states supplemented the already existing Federal Espionage Act.[12] In most cases the state laws outdid their federal counterparts, which were apparently deemed inadequate. In 1918, for example, the Minnesota court held that it was a crime, under that state's espionage act, to attempt to thwart the efforts of women knitting clothes for the war by the comment, "No soldier ever sees these socks."[13]

By 1921 two thirds of the states had enacted sedition legislation.[14] During the prosperous 'twenties prosecutions dropped sharply, but with the onslaught of the depression the rules as to what could safely be advocated again bore watching. The United States Supreme Court, however, beginning in 1931,[15] evolved a body of precedent, under the constitutional guaranty of freedom of speech and press, that was to sharply curtail unbridled government power in this field, whether under state or federal law.[16] Concurrent prosecution of sedition by the two levels of government continued within these bounds down to the cataclysmic pronouncement of the *Nelson* decision.

PENNSYLVANIA V. NELSON

Reverberations were felt in nearly every attorney general's office in the country when the Pennsylvania Supreme Court in January 1954 held that federal legislation had superseded the state's sedition act.[17] The lower court's conviction of Steve Nelson, a high Communist Party official, for advocating violent overthrow of the federal government was reversed in an opinion construing the intent of Congress in proscribing sedition under the Smith Act.[18] Far from requiring federal legislation to expressly pre-empt the field in which it applies,

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[9]See CHAFEE, FREE SPEECH IN THE UNITED STATES 51 (1954).

[10]See United States v. Nagler, 252 Fed. 217 (W.D. Wis. 1918), *rev'd on other grounds*, 254 U.S. 661 (1920).

[11]Shaffer v. United States, 255 Fed. 886 (9th Cir. 1919).

[12]40 STAT. 217 (1917).

[13]State v. Freerks, 140 Minn. 349, 350, 168 N.W. 23, 24 (1918).

[14]*E.g.*, COLO. STAT. ANN. c. 48, §21 (1935); IND. STAT. ANN. §10-1302 (Burns 1956); N.J. STAT. ANN. §2A:148-13 (1951).

[15]Near v. Minnesota, 283 U.S. 697 (1931).

[16]See CHAFEE, *op. cit. supra* note 9, c. 11; EMERSON and HABER, *op. cit. supra* note 5, at 384-428.

[17]Commonwealth v. Nelson, 377 Pa. 58, 104 A.2d 133 (1954).

[18]18 U.S.C. §2385 (1952).

the majority justices held that such intent may be implied from the mere pervasiveness of the statute, adding further that "readily does the inference of federal pre-emption arise."[19] This inference must have been strong indeed, in view of Title 18 of the United States Code,[20] which provides: "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."[21]

There have been four criteria, the court stated, for determining the intent of Congress regarding pre-emption when it was not expressly made clear:

(1) All-inclusive nature of the federal statute law.[22]
(2) Dominance of federal interest in the particular field.[23]
(3) Object sought to be obtained and obligations imposed by the statute.[24]
(4) Conflicts between the federal statute and the state law.[25]

The Pennsylvania court concluded that sedition is a national crime the suppression of which federal law must control, and moreover control exclusively, if it is to be effective.

The United States Supreme Court granted the state's petition for certiorari.[26] At this time amici curiae briefs appeared from every corner of the country, mostly submitted by aroused state attorneys general, to urge that the state laws be left intact. In a six-to-three opinion the Court nevertheless affirmed the Pennsylvania holding.[27]

Noting that the states have power to enforce sedition laws unless the federal government has occupied the field, the majority found the area at that time exhaustively covered by federal law. On previous occasions it had ruled that such pervasiveness gave rise to a strong inference of pre-emption.[28] Here, the dominance of the federal interest

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[19]Commonwealth v. Nelson, 377 Pa. 58, 66, 104 A.2d 133 (1954).
[20]See *id.* at 519 (dissenting opinion).
[21]18 U.S.C. §3231 (1952).
[22]Pennsylvania R.R. v. Public Serv. Comm'n 250 U.S. 566 (1919).
[23]Hines v. Davidowitz, 312 U.S. 52 (1941).
[24]Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).
[25]Hill v. Florida, 325 U.S. 538 (1945).
[26]Pennsylvania v. Nelson, 348 U.S. 814 (1954).
[27]Pennsylvania v. Nelson, 350 U.S. 497 (1956).
[28]Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Pennsylvania R.R. v. Public Serv. Comm'n, 250 U.S. 566 (1919).

also was determinative: "[O]ur attention has not been called to any case where the prosecution has been successfully directed against an attempt to destroy state or local government."[29]

Further, with the states prosecuting sedition against the federal government, the danger of mutual interference presented itself. A crime of such broad scope cannot be attacked piecemeal. It has been argued that the invaluable aid of agents such as Herbert A. Philbrick in the *Dennis*[30] prosecutions could have been seriously impaired had their operations been prematurely exposed in state proceedings by testimony while under subpoena.[31] In his brief for the United States as amicus curiae, the Attorney General, although favoring continued state prosecution, conceded that full state co-operation was necessary.[32] The Court felt that the most efficient protection of the country demanded one system of investigation, detection, and prosecution.

A number of laws containing vague admonitions not to "excite ill feeling against the United States"[33] or "suggest" overthrow by violence[34] can hardly be said to comply with the requirement of statutory clarity as to what conduct constitutes a crime. Further, penalty provisions present a problem. The wide divergence of these is graphically illustrated by defendant Nelson's sentence of twenty years imprisonment by the Pennsylvania lower court, contrasted with a five-year sentence in the federal proceeding for the same crime.[35] There is also wide disagreement among the states as to what is seditious. Chief Justice Warren's comparison, in the majority opinion, of the Florida and federal code provisions as to membership in subversive organizations illustrates the varying rules as to what acts are punishable in the different jurisdictions. In Florida, for instance, a ten-year sentence may be imposed for an act that would not be considered sedition in the federal courts.[36] The question of who can

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[29]350 U.S. at 508.

[30]Dennis v. United States, 341 U.S. 494 (1951).

[31]Note, 31 IND. L.J. 270, 284 (1956).

[32]Brief for the United States as Amicus Curiae, p. 31, Pennsylvania v. Nelson, 350 U.S. 497 (1956).

[33]ALASKA COMP. LAWS ANN. §65-11-1 (1949).

[34]KY. REV. STAT. ANN. §432.030 (1955).

[35]United States v. Mesarosh, 116 F. Supp. 345 (W.D. Pa. 1953), *aff'd,* 223 F.2d 449 (3d Cir.), *rev'd,* 352 U.S. 1 (1955).

[36]FLA. STAT. §876.02 (1957) provides a maximum of ten years imprisonment for mere membership in a "communistic" organization. 50 U.S.C. §783 (f) reads: "Neither the holding of office nor membership in any Communist organization shall constitute . . . a violation . . . ."

initiate an indictment has also received different treatment in the various states. The Supreme Court regarded as potentially dangerous the Pennsylvania provision allowing an indictment for sedition founded upon an information made by a private individual: "The opportunity thus present for the indulgence of personal spite and hatred or for furthering some selfish advantage or ambition need only be mentioned to be appreciated."[37]

The opinion relied heavily on the Court's reasoning in the previous case of *Hines v. Davidowitz*,[38] in which a state alien registration statute was invalidated on the pre-emption theory. In 1940 Congress had passed the Federal Alien Registration Act; and this, together with the immigration and naturalization laws, exhaustively controlled the regulation of aliens. The dominance of the national interest in dealing with aliens and the fact that these dealings involve relations with foreign sovereignties were held to lodge exclusive responsibility in this area with the federal government. There is much to be said for the analogous argument that sedition, practically speaking, is a national crime; it is not very probable that the communist conspiracy would attempt by violence to set up a police state in Nebraska or a totalitarian regime in San Antonio. Nevertheless, the applicability of *Hines v. Davidowitz* to sedition is debatable. That case relied principally on the power of the federal government to deal exclusively with matters affecting foreign sovereignties. This problem does not present itself in a sedition context. Certainly no foreign state need be concerned with the methods this country uses in prosecuting sedition among its citizens. Further, no constitutional sanction of exclusive jurisdiction can be gleaned in this area as opposed to the field of foreign affairs. For this reason, the reliance on Mr. Justice Douglas's reasoning in *Rice v. Santa Fe Elevator Corp.*[39] is also tenuous. In that case the question of interstate commerce was involved, and again the power of Congress to regulate is expressly made clear in the Constitution.

The prior affirmance of concurrent state and federal jurisdiction over sedition in *Fox v. Ohio*[40] and *Gilbert v. Minnesota*[41] was distinguished by the limited scope of the state statutes involved. In the

[37]350 U.S. at 507, quoting Commonwealth v. Nelson, 377 Pa. 58, 74, 104 A.2d 133, 141 (1954).

[38]312 U.S. 52 (1941).

[39]331 U.S. 218 (1947).

[40]46 U.S. (5 How.) 410 (1847).

[41]254 U.S. 325 (1920).

former case the federal power to punish counterfeiting was held not impinged upon, since the state offense was based on fraud by passing spurious money. In the latter case a law proscribing any action which would hinder military or naval enlistments in the State of Minnesota was held a local police measure not encroaching upon the exclusive federal power to raise and maintain armies. The well-known sedition cases of *Gitlow v. New York*[42] and *Whitney v. California*[43] were clearly inapposite, as the pre-emption question was not raised.

Immediately following the *Nelson* decision the clamor of many state prosecutors was supplemented by several protestations from Congress. Representative Howard Smith of Virginia, sponsor of the act in question, was among the vehement critics of the holding, emphatically disclaiming any intent to supersede:[44]

> "May I say that when I read this opinion, it was the first intimation I ever had, either in preparation of the act, or in hearings before the Judiciary Committee, or debates in the House . . . that Congress ever had the faintest notion of nullifying the concurrent jurisdiction of the respective sovereign states . . . ."

The statement is clear enough. The intent of Congress, however, and not that of any lesser group or individual, was the object of the Court's search. It is perhaps significant that the dissenting congressmen have been unable, in several attempts during the three sessions of Congress since the decision was handed down, to find a majority willing to prescribe the intent as they see it. The United States Attorney General also has gone on record as opposing a change in the Court's construction.[45]

All this tends to mitigate the argument that the Court threw all caution and judicial propriety to the winds, though legislative inaction in 1958 is not necessarily indicative of legislative intent in 1940. In view of Congress's prior express intention not to "impair the jurisdiction" of the states through Title 18, the Court's holding that the sedition provision therein nullifies state authority is pre-

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[42]268 U.S. 652 (1925).

[43]274 U.S. 357 (1927).

[44]*Hearings Before the Subcommittee of the Senate to Investigate the Administration of Internal Security Laws*, 84th Cong., 2d Sess., at 11 (1956).

[45]Christian Science Monitor, April 3, 1958, p. 3, col. 5.

tentious, to say the least. Policy arguments for uniformity are very persuasive, but one cannot help thinking that these arguments apply to any situation involving concurrent criminal law enforcement and that Congress must have realized this in providing that state jurisdiction remain unimpaired.

EFFECT OF THE NELSON CASE UPON FLORIDA LEGISLATION

Along with forty-one other states, Alaska, and Hawaii, Florida has extensive legislation dealing with the general subject of sedition.[46] Inspired by the Smith Act of 1940, the legislature in 1941 made it a felony to advocate the doctrines of "criminal anarchy," "criminal communism," or "criminal naziism" and to become a member of any organization promoting such ideas.[47] The general plan is that of the Smith Act, and the Florida Supreme Court has held that interpretation of the state law should follow the federal courts' interpretation of the Smith Act.[48] One important element, however, is missing in the state statute. The federal law ends with the phrase, "becomes or is a member of . . . any such society, group or assembly of persons, *knowing the purposes thereof* . . . ."[49] Is membership without knowledge punishable under the Florida statute? Probably so, in spite of the federal courts' having construed the Smith Act otherwise[50] and the Florida Court's having held that supporting the Communist Party without knowledge does not violate the state's anti-communist loyalty oath.[51] At least Chief Justice Warren, as noted earlier, is of the opinion that membership per se is a felony under the Florida law.[52]

In 1949 a loyalty oath for all state employees and candidates for public office was added to the sedition statutes,[53] and in 1953 "subversive activities and organizations" themselves were proscribed;[54] membership in such organizations was again prohibited, but the additional requirement that one be a "knowing" member was added

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[46]FLA. STAT. §§876.01-.11, .22-.30 (1957).

[47]*Id.* §876.02 (5).

[48]State *ex rel.* Feldman v. Kelly, 76 So.2d 798 (Fla. 1954).

[49]18 U.S.C. §2385 (1952). (Emphasis added.)

[50]Scales v. United States, 227 F.2d 581 (4th Cir. 1955), *rev'd on other grounds,* 355 U.S. 1 (1957).

[51]State v. Diez, 97 So.2d 105 (Fla. 1957).

[52]350 U.S. at 508.

[53]FLA. STAT. §876.05 (1957).

[54]*Id.* §876.26.

to the newer section.[55] In all, there are now over fifteen sections in the Florida statutes dealing with different aspects of sedition. The question of course arises, since the *Nelson* decision, as to what parts of the sedition statutes, if any, continue to be enforceable.

In the latter part of 1957 the Florida Supreme Court was presented with the problem of determining the breadth of *Pennsylvania v. Nelson*. In *State v. Diez*[56] a prosecution for perjury in connection with the loyalty oath section of the Florida sedition law was defended on the ground, among others, that the whole act had been nullified by the *Nelson* case. The Florida Court refused to extend the *Nelson* reasoning that far, stating that in approving the state's loyalty oath it was "not passing upon any prosecution for sedition, or any violation that should be left to the federal government,"[57] though it conceded that disloyalty was the subject of sedition. The Court urged in support that it could be "logically argued that by keeping out of state government those persons who might prove disloyal, the federal government would be advantaged."[58] This is not too convincing in view of the statement in the *Nelson* opinion that "a state sedition statute is superseded regardless of whether it purports to supplement the federal law."[59]

The Florida Court's holding, however, that a state can determine the fitness of its own employees is backed by federal authority.[60] Further, loyalty to the state and national governments is a proper factor determinative of fitness.[61] The United States Supreme Court, in addition, has recently reiterated its stand that there is no constitutional right to government employment,[62] though a "public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory"[63] comes under the protection of the due process clause. Since no discrimination was alleged in the *Diez* case, the decision would in all probability enjoy full federal backing.

Section 876.23 of the Florida sedition statutes poses another problem. In this paragraph, overt physical acts pointing to destruction

[55] *Id.* §876.24.

[56] 97 So.2d 105 (Fla. 1957).

[57] *Id.* at 108.

[58] *Ibid.*

[59] 350 U.S. at 504.

[60] Slochower v. Board of Higher Educ., 350 U.S. 551, 555 (1956) (dictum); *accord,* Garner v. Board of Pub. Works, 341 U.S. 716 (1951).

[61] Garner v. Board of Pub. Works, 341 U.S. 716 (1951).

[62] Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

[63] *Id.* at 556, quoting Wieman v. Updegraff, 344 U.S. 183, 192 (1952).

of the state government are proscribed as felonious. Is this conduct pre-empted by a federal decision in which advocacy under the Smith Act only was the issue? The *Nelson* opinion does not say, but it has been argued that it implies such coverage.[64] Sabotage and other physical acts pointing to destruction of a government do not, strictly speaking, constitute sedition,[65] but the distinction has often been overlooked in state statutes. Similarly, the Supreme Court's decision in the *Nelson* case speaks of the Internal Security Act and the Communist Control Act, as well as the Smith Act, as aiding in pre-emption of the sedition field.[66] Inasmuch as the first two laws deal with overt conduct such as sabotage and acts of violence, the mentioning of these acts in the opinion gives credence to the theory that this type of conduct also was pre-empted. The decision would in all probability turn on the question of whether sabotage of national or state government is involved. As to the latter situation the United States Supreme Court said: "Neither does [this decision] . . . limit the right of the State to protect itself at any time against sabotage or attempted violence of all kinds."[67]

Another connected question that is made less clear by the decision is its application to a situation involving advocacy of overthrow of a state government only. The Smith Act includes advocacy relating to a state government, but the question was not at issue in the *Nelson* case. Section 876.01 of the Florida act makes seditious conduct confined exclusively to a state punishable, so construction of the decision as to this point is pertinent to the Florida situation. Other courts have reluctantly concluded that the *Nelson* decision inescapably extends to circumstances in which a state government is the sole target.[68] In *Commonwealth v. Gilbert*[69] it was reasoned that even though the crime under consideration was directed only to the Massachusetts government, it was nevertheless punishable under the Smith Act and thus came under its pre-emptive intent. Following this reasoning, however, the court put a judicial foot in the door to keep the question open:[70]

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[64]Note, 2 WAYNE L. REV. 225 (1956).
[65]See 47 AM. JUR., *Sedition* §2 (1943).
[66]350 U.S. at 503.
[67]*Id.* at 500.
[68]Braden v. Kentucky, 291 S.W.2d 843 (Ky. 1956); Commonwealth v. Gilbert, 334 Mass. 71, 134 N.E.2d 13 (1956).
[69]334 Mass. 71, 134 N.E.2d 13 (1956).
[70]*Id.* at 75, 134 N.E.2d at 16.

"We do not wish to be understood as saying that there can never be any instance of any kind of sedition directed so exclusively against the State as to fall outside the sweep of Pennsylvania v. Nelson."

Following closely on the heels of this pronouncement came a Kentucky decision involving an indictment for sedition against both the state and federal governments.[71] After citing the *Nelson* case as controlling, the court enthusiastically adopted the Massachusetts dictum, expressly referring to it. In its enthusiasm, however, the Kentucky court apparently extended the Massachusetts rule to all instances of sedition solely against the state government, thus adding to the confusion here.

Other questions left unsettled by the *Nelson* holding are avoided in this state by the nature of the Florida sedition statutes. Problems involving mere registration of individuals and groups with the state police, for instance, and state subversive-investigating commissions have arisen in other jurisdictions. In *Albertson v. Attorney General*[72] the Michigan court held that state registration of subversives was no longer permitted under the *Nelson* decision, but New Hampshire has held that the decision does not preclude legislative investigations of subversion.[73] Laws prohibiting the name of any communist nominee from appearing on a ballot have also been held invalid.[74] "Next they will be seeking to abolish the special division of subversive activities set up by the State police . . . to keep track on Communists," angrily reports the Attorney General of Massachusetts.[75] The courts, at any rate, have not been niggardly in giving full force to the letter and spirit, as they see it, of *Pennsylvania v. Nelson.*

CONCLUSION

Defense against the communist conspiracy in this country now appears to be fairly solidly in the hands of the federal government. The protests and exhortations of state prosecutors and some members of Congress have been unavailing upon either the judiciary to find concurrent jurisdiction or the legislature to rewrite congressional in-

[71]Braden v. Kentucky, 291 S.W.2d 843 (Ky. 1956).

[72]354 Mich. 519, 77 N.W.2d 104 (1956).

[73]Kahn v. Wyman, 100 N.H. 245, 123 A.2d 166 (1956).

[74]Albertson v. Attorney Gen., 345 Mich. 519, 77 N.W.2d 104 (1956).

[75]*Hearings, supra* note 44, at 31.