

States the Federal Constitution and the War Protesters

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THE STATES, THE FEDERAL CONSTITUTION,
AND THE WAR PROTESTERS

"Hell no! We won't go!" respond crowds of draft-age youths to the exhortations of a Stokley Carmichael or an H. Rap Brown.¹ Benjamin Spock, Martin Luther King, Linus Pauling, Bishops Pike and Sheen, and other religious and moral leaders raise their voices in objection to American participation in the Vietnam conflict.² Most of these leaders discourage enlisting in the armed forces while the United States is engaged in a war they regard as immoral. Many actively encourage youths to register as conscientious objectors or to take other lawful steps to avoid military service. Some advocate avoidance of service by any means, legal or illegal.

"Counseling centers" have been established to assist individual objectors in avoiding military service.³ Many counselors use "nondirective" counseling methods, pointing out the alternatives available to the objector, and leaving to him the decision of which method to choose, whereas others, more inclined toward "directive" counseling, advocate such positive action as fleeing to Canada, feigning medical defects or emotional aberrations, securing criminal convictions, or simply refusing to be inducted.⁴ The unpopularity of the Vietnam conflict has also resulted in mass demonstrations,⁵ picketing of draft boards, induction centers, and recruiting offices,⁶ and actual physical interference with the operation of these facilities.⁷

¹ N.Y. Times, May 2, 1967, at 7, col. 3; N.Y. Times, Nov. 15, 1966, at 16, col. 7; N.Y. Times, Oct. 30, 1966, § 1, at 63, col. 3; N.Y. Times, Oct. 29, 1966, at 1, col. 7.

² See, e.g., Reeves, *Peace, Man, Says Baby Doctor Spock*, N.Y. Times, July 16, 1967, § 6 (Magazine), at 8-9; *Conversion: Bishop Sheen's Call for Unilateral Withdrawal*, NEWSWEEK, Aug. 14, 1967, at 90; *Doctor King's Crusade: How He Hopes To End the War*, U.S. NEWS, May 8, 1967, at 14; N.Y. Times, Sept. 27, 1967, at 13, col. 1; N.Y. Times, July 18, 1967, at 27, col. 3; N.Y. Times, July 2, 1967, § 1, at 2, col. 5; N.Y. Times, May 6, 1967, at 1, col. 6; N.Y. Times, May 1, 1967, at 1, col. 7; N.Y. Times, April 5, 1967, at 1, col. 1; N.Y. Times, April 2, 1967, § 1, at 1, col. 3.

³ *Draft Counseling and Resistance Centers*, TIME, Sept. 8, 1967, at 15; see, e.g., N.Y. Times, July 18, 1967, at 27, col. 3; N.Y. Times, July 2, 1967, § 1, at 2, col. 5.

⁴ See, e.g., Jackson, *Evading the Draft: Who, How and Why*, LIFE, Dec. 9, 1966, at 40; *Resistance Movement*, NEW REPUBLIC, May 24, 1967, at 5; N.Y. Times, Oct. 3, 1967, at 5, col. 3; N.Y. Times, July 18, 1967, at 27, col. 3.

⁵ See, e.g., N.Y. Times, Dec. 6, 1967, at 1, col. 4; N.Y. Times, Oct. 21, 1967, at 1, col. 5; *id.* at 8, col. 1.

⁶ See, e.g., N.Y. Times, Dec. 6, 1967, at 1, col. 4; *id.* at 8, col. 4; N.Y. Times, Oct. 28, 1967, at 5, col. 6; N.Y. Times, Sept. 21, 1967, at 1, col. 3; N.Y. Times, Aug. 1, 1967, at 3, col. 7.

⁷ See, e.g., N.Y. Times, Dec. 6, 1967, at 1, col. 4 (picketing and resistance at New York City induction center); N.Y. Times, Oct. 28, 1967, at 5, col. 3 (blood poured in draft files); *id.* at 5, col. 6 (protest at Oberlin against Naval recruiters); N.Y. Times, Oct. 21, 1967, at 9,

The protestors run the risk of violating federal and state statutes prohibiting acts that interfere with drafting or recruiting members of the armed forces.⁸ Construed broadly, either the federal recruitment obstruction statute⁹ or the federal sedition statute¹⁰ could render all their activities criminal. Various state statutes also make it a crime to publicly¹¹ or privately¹² discourage enlisting in the armed forces or to use "scurrilous" or "abusive" speech regarding the government or the military.¹³

The application of both federal and state statutes raises serious constitutional issues. A broad interpretation of the federal sedition statute may clash with the first amendment protection of free speech. The validity of the state statutes, leftovers of wartime sedition acts,¹⁴ is especially questionable under free speech principles, because they lack the careful draftsmanship of the federal provisions. Unlike the federal statutes, they cannot be justified in terms of self-preservation and national interest. Furthermore, they are subject to attack on the grounds of vagueness and federal preemption.

I

FEDERAL CRIMES

A. *The Federal Sedition Statute*

Unlike its predecessor, the broad Espionage Act of 1917,¹⁵ the pres-

col. 3 (protest at Oakland induction center); N.Y. Times, Oct. 11, 1967, at 16, col. 1 (protest at Oakland induction center).

⁸ E.g., Act of June 25, 1948, 18 U.S.C. § 2388(a) (1964); Universal Military Training and Service Act § 12(a), 50 U.S.C.A. Appendix § 462(a) (Supp. 1967); CONN. GEN. STAT. ANN. § 53-5 (1958); MINN. STAT. ANN. § 609.395 (1964); MONT. REV. CODES ANN. § 94-4401 (1947); N.J. STAT. ANN. § 2A:148-22 (1953).

⁹ Universal Military Training and Service Act § 12(a), 50 U.S.C.A. Appendix § 462(a) (Supp. 1967).

¹⁰ Act of June 25, 1948, 18 U.S.C. § 2388(a) (1964).

¹¹ N.J. STAT. ANN. § 2A:148-22 (1953). Although this statute purports to apply only to public speech, it also encompasses all printed matter of similar content.

¹² MONT. REV. CODES ANN. § 94-4401 (1947).

¹³ E.g., CONN. GEN. STAT. ANN. § 53-5 (1958); MONT. REV. CODES ANN. § 94-4401 (1947).

¹⁴ E.g., Espionage Act of 1917, ch. 30, §§ 3-4, 40 Stat. 219, as amended, Act of May 16, 1918, ch. 75, §§ 3-4, 40 Stat. 553-54. (Most of these state statutes were first enacted during World War I.) See generally Hervey & Kelley, *Some Constitutional Aspects of Statutory Regulation of Libels on Government*, 15 TEMP. L.Q. 453 (1941). See also Z. CHAFFEE, *FREEDOM OF SPEECH* 44-45 (1920).

¹⁵ Ch. 30, §§ 3-4, 40 Stat. 219, as amended, Act of May 16, 1918, ch. 75, §§ 3-4, 40 Stat. 553-54. Section 3 of the 1918 amendment provided in part:

[W]hoever, when the United States is at war, shall willfully cause or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully

ent federal sedition statute¹⁶ prohibits only actual or attempted obstruction of enlistments. Although the statute purports to be operative only "when the United States is at war,"¹⁷ in 1953 Congress extended its effect until six months after the President declared an end to the "national emergency" that had been proclaimed at the beginning of the Korean conflict.¹⁸ No president has officially declared an end to that emergency, and the statute is presently in full effect.¹⁹ Under the act, any person who "willfully obstructs the recruiting or enlistment service of the United States" is guilty of a crime.²⁰

Although the statute appears unambiguous on its face, the meaning of its essential terms is uncertain. "Obstructs" may be narrowly construed to include only actual physical interference with recruitment services, or it may be read broadly to include any psychological interference, including speech that *might* discourage persons from enlisting or serving in the armed forces.²¹ The definition of "recruiting or enlistment service" is equally ambiguous. It may relate only to an actual recruiting situation, such as a recruiting campaign on a college campus, or, construed broadly, may include the government's overall recruitment program.

The construction given the statute is vitally important in determin-

obstruct or attempt to obstruct the recruiting or enlistment service of the United States, and whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, . . . or the uniform of the Army or Navy of the United States, . . . or shall willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States . . . shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.

The ridiculous extremes to which prosecutions under this statute were carried are recorded in *Z. CHAFEE*, *supra* note 14, at 40-119.

¹⁶ Act of June 25, 1948, 18 U.S.C. § 2388(a) (1964).

¹⁷ *Id.*

¹⁸ Act of June 30, 1953, 18 U.S.C. § 2391 (1964).

¹⁹ Letter from Representative Emmanuel Celler, Chairman of the House Judiciary Committee, to the *Cornell Law Review*, Oct. 24, 1967, on file in the Cornell Law Library. In this letter Chairman Celler reported that the Department of Justice confirmed that 18 U.S.C. § 2391 is operative. The operation of this statute is contingent on President Truman's proclamation at the beginning of the Korean War. Proc. No. 2914, 3 C.F.R. 1949-53 Comp. 99 (1950), 50 U.S.C. Appendix at 9497 (1964).

²⁰ Act of June 25, 1948, 18 U.S.C. § 2388(a) (1964).

²¹ Apparently the word "obstructs" has been broadly construed under similar provisions to include speech made in nonrecruitment situations. See *Debs v. United States*, 249 U.S. 211 (1919) (socialist's public speech against World War I); *Frohwerk v. United States*, 249 U.S. 204 (1919) (newspaper publisher's printed opposition to World War I); *O'Hare v. United States*, 253 F. 538 (8th Cir. 1918), *cert. denied*, 249 U.S. 598 (1919) (socialist lecturer's statements opposing World War I).

ing the constitutional validity of the prohibitions imposed.²² The further an interpretation strays from physical interference with an actual recruitment situation, the more likely the prohibitions will violate the free speech guarantee.²³

B. *Section 12(a) of the Universal Military Training and Service Act—Counseling Evasion of Service*

Section 12(a) of the Universal Military Training and Service Act²⁴ provides that a person "who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces" is guilty of a crime.²⁵ The elements of the crime include intent²⁶ to *counsel*, aid, or abet avoidance of registration or service. "Aid" and "abet" are familiar terms in criminal law and do not present unusual problems of interpretation. The definition of "counsel," however, is not so clear. It may connote either advice and instruction through the passive interchange of ideas, or advice and instruction with a deliberate intent to influence behavior.²⁷ The former suggests nondirective counseling; the latter connotes directive counseling.

Directive counseling to avoid military service by illegal means falls squarely within the statutory prohibition under any possible interpretation of the word "counsel." Nondirective counseling that results in illegal action is not so clearly prohibited, since the word "counsel" can be limited to the giving of affirmative advice. Furthermore, the illegal action resulting from nondirective counseling arguably is the sole responsibility of the advisee, since he makes his own choice between the alternative courses of action explained by the counselor. Directive counseling is analogous to criminal conspiracy: a mutually agreed upon

²² If the federal sedition statute were interpreted to prohibit only physical interference, then there would be no question of its validity in relation to constitutionally protected speech.

²³ Thus, if the statute prohibits speech that merely discourages the public in general from enlisting, even when uttered far from an actual recruiting situation, the statute probably violates the first amendment guarantee of free speech.

²⁴ 50 U.S.C.A. Appendix § 462(a) (Supp. 1967). Portions of this act (not here pertinent) were substantially amended by the Military Selective Service Act of 1967, 81 Stat. 100.

²⁵ 62 Stat. 622, 50 U.S.C.A. Appendix § 462(a) (Supp. 1967). Although this statute does not seem to have been applied in such a manner as to violate free speech, some convictions in themselves seem shocking. For example, the statute has been applied to cover advice not to register given by a college dean to one of his students, *Gara v. United States*, 178 F.2d 38 (6th Cir. 1949), *aff'd*, 340 U.S. 857 (1950); and by a physician to his stepson, *Warren v. United States*, 177 F.2d 596 (10th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950).

²⁶ The word "knowingly" implies culpable intent. *Graves v. United States*, 252 F.2d 878 (9th Cir. 1958).

²⁷ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 518 (1961).

course of illegal action is planned.²⁸ Nondirective counseling, however, does not involve a mutually agreed upon course of action. Often the counselor is not even aware of the action ultimately taken by the client. Thus, the criminal conspiracy analogy does not apply.

Just as the sedition statute is open to a variety of interpretations, section 12(a) may be construed either narrowly to prohibit only directive counseling that encourages illegal activity, or broadly to include even nondirective counseling or directive counseling that encourages only lawful means of avoiding service, such as registering as a conscientious objector.²⁹ Again, the construction will significantly affect the constitutional validity of the statute.

II

FIRST AMENDMENT DEFENSES

Both the sedition statute and the Universal Military Training and Service Act restrict a citizen's right to protest the actions of his government whenever the means of protest interferes with raising an army. All but the narrowest constructions of these statutes infringe the freedom of expression guaranteed by the first amendment. The forerunner of the statutes, the Espionage Act of 1917,³⁰ was upheld against a first amendment attack in *Schenck v. United States*.³¹ Justice Holmes there formulated the "clear and present danger" test which has become the touchstone of modern free speech principles. During the five years following *Schenck*, Justices Holmes and Brandeis refined this test to protect speech that did not produce a danger of *immediate* action.³²

²⁸ The essence of conspiracy at common law is two or more persons combining with the intent and purpose of committing a public offense by doing an unlawful act. The actual occurrence of an act is required under the federal view. See *Scales v. United States*, 367 U.S. 203 (1961); *Harney v. United States*, 306 F.2d 523 (1st Cir.), cert. denied, 371 U.S. 911 (1962); *Ventimiglia v. United States*, 242 F.2d 620 (4th Cir. 1957).

²⁹ It seems fairly certain that the section prohibits only the counseling of illegal means to avoid service. Cf. *Weaver v. Pool*, 249 Ala. 644, 647-48, 32 So. 2d 765, 767-68 (1947) (dictum). See also *Bond v. Floyd*, 385 U.S. 116, 134, 136 (1966).

³⁰ Ch. 30, §§ 3-4, 40 Stat. 219, as amended, Act of May 16, 1918, ch. 75, §§ 3-4, 40 Stat. 553-54.

³¹ 249 U.S. 47 (1919). In *Dennis v. United States*, 341 U.S. 494, 503 (1951), Justice Vinson refers to *Schenck* as the first important case to deal with free speech.

³² See the minority opinions of Justices Brandeis and Holmes in *Abrams v. United States*, 250 U.S. 616, 624 (1919), *Schaefer v. United States*, 251 U.S. 466, 482 (1920), *Pierce v. United States*, 252 U.S. 239, 253 (1920), *Gitlow v. New York*, 268 U.S. 652, 672 (1925), and *Whitney v. California*, 274 U.S. 357, 372 (1927). In *Gitlow v. New York*, *supra* at 673, Justices Holmes and Brandeis indicated that only speech which "attempt[s] to induce an uprising against government at once and not at some indefinite time in the future" can legitimately be punished within the confines of the first and fourteenth amendments.

The extent to which the right to protest is protected today is illustrated by the statement of the Supreme Court, in *New York Times v. Sullivan*,³³ that speech dealing with public issues "should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."³⁴ The Court concluded, therefore, that the Sedition Act of 1798,³⁵ which prohibited vocalized opposition to government policies, has been declared unconstitutional in the court of history.³⁶ In *Bond v. Floyd*,³⁷ the Court announced that "the First Amendment protects expressions in opposition to national foreign policy in Vietnam and to the Selective Service system."³⁸

It is clear, therefore, that not all speech that may interfere with recruiting or the draft can be prohibited. It is equally clear, however, that not all such speech is protected. In *Bond*, the Court suggested a distinction of prime importance in defining the permissible scope of dissent—the distinction between speech urging lawful activity and speech urging unlawful activity.³⁹ Thus, public or private speech urging lawful dissent or avoidance of service through legal means should be privileged regardless of its popularity or success,⁴⁰ since there is no legitimate gov-

³³ 376 U.S. 254 (1964). The right of free speech today has probably advanced beyond the views of Justices Holmes and Brandeis. In *Dennis v. United States*, 341 U.S. 494 (1951), the Court upheld the conviction of Communist Party members under the Smith Act, 18 U.S.C. § 2385 (1964), which dealt with teaching or advocating the overthrow of the government. This view was subsequently rejected. The majority in *Dennis* expanded the concept of imminent action to encompass events distant in time and remote in danger. The dissenters contended that the majority misapplied Holmes's test. 341 U.S. at 581-90. Recently, Justices Clark and Harlan, dissenting in two separate cases, protested that *Dennis* was ignored and that the area of free speech was becoming overly broad. *Keyishian v. Board of Regents*, 385 U.S. 589, 623 (1967); *Dombrowski v. Pfister*, 380 U.S. 479, 500 (1965).

³⁴ 376 U.S. at 270. *New York Times* is generally regarded as broadening protection under the first amendment. See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CR. REV. 191.

³⁵ Ch. 74, 1 Stat. 596.

³⁶ 376 U.S. at 276 (dictum). This reasoning may have some bearing on the constitutionality of the federal sedition statute and the Smith Act. The Smith Act has been referred to as the first peacetime sedition act since 1798. Ballard, *Freedom of Speech Today*, 48 A.B.A.J. 521, 522 (1962).

³⁷ 385 U.S. 116 (1966). In this case the Court ruled unconstitutional the exclusion of Julian Bond from the Georgia House of Representatives for expressing opposition to the war in Vietnam.

³⁸ *Id.* at 132.

³⁹ *Id.* at 134, 136. It is interesting to note that the Court in *Bond* cited *New York Times* as the sole free speech authority.

⁴⁰ Cf. *Cox v. Louisiana*, 379 U.S. 536 (1965) (arrest not justified by mere peaceful expression of unpopular opinion); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (peaceful expression of minority views may call for police protection, rather than arrest).

ernmental interest in preventing a person from exercising his legal rights. Speech urging illegal action, however, cannot always be protected. Here a distinction must be drawn between public speech and private counseling.

Whether public speech urging illegal action can be prohibited depends on a balancing of the rights of the individual against the interests of the government.⁴¹ The federal government undoubtedly has a right of self-preservation,⁴² and Congress has the right to "raise and support Armies,"⁴³ but the exercise of these rights may not unnecessarily infringe the rights of the individual. Since the government has an interest in its own orderly functioning, it may, in some circumstances, prohibit public speech that is likely to cause direct and immediate disobedience of its laws.⁴⁴ A speech made to an angry crowd of youths in front of a local draft board office urging them to loot and burn the office, or to a similar crowd before a recruiting office urging them to physically attack the recruiters, threatens interests that the government has a right to protect and creates the possibility of direct and immediate action. Thus, it is outside the area of constitutionally protected speech. In the relatively sedate atmosphere of a church or college auditorium, on the other hand, public speech criticizing American participation in the Vietnam conflict as morally wrong and stating that no one should be willing to serve in such a war does not usually create the possibility of direct and immediate dangerous action, even though it may result in some youths ultimately resorting to illegal means of avoiding service.

The Court has always been more concerned with protecting public, as opposed to private, speech, since public speech tends to preserve freedom, inform the public, and encourage legitimate change.⁴⁵ Thus, whereas the Constitution may protect a public speaker urging all youths to flee to Canada, it may not protect a private counselor who urges an individual to flee to Canada. Indeed, privately advocating illegal action

⁴¹ Such a test has always been used whether it has been called a "clear and present danger" test or a "balancing" test. Compare Alfange, *The Balancing of Interests Test in Free Speech Cases: In Defense of an Abused Doctrine*, 2 L. IN TRANS. Q. 35 (1965), with Z. CHAFEE, *supra* note 14, at 38. Alfange suggests that the decision in *Dennis* was a disaster "not because the Court balanced interests, but because it did not." Alfange, *supra* at 48.

⁴² See generally *Dennis v. United States*, 341 U.S. 494, 501 (1951); *Hartzel v. United States*, 322 U.S. 680, 689 (1944); *Schenck v. United States*, 249 U.S. 47, 52 (1919). But cf. Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CALIF. L. REV. 4 (1961).

⁴³ U.S. CONST. art. I, § 8; see *Gilbert v. Minnesota*, 254 U.S. 325, 330-31 (1920).

⁴⁴ See *Bond v. Floyd*, 385 U.S. 116, 134 (1966) (dictum).

⁴⁵ See *id.* at 136; *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

such as refusal of induction may constitute criminal conspiracy,⁴⁶ and can be prohibited.

Since the federal sedition statute can be construed broadly to include acts that are clearly protected by the first amendment, it is subject to attack as unconstitutional on its face. But the Supreme Court probably will never take this route. As ultimate arbiter of federal statutes, it can construe the statutes narrowly, including within the prohibition only those acts that Congress has the power to prohibit. Thus, free speech can be protected without sacrificing the ability to punish truly unlawful acts.⁴⁷

III

STATE CRIMES

Although state statutes vary widely, for purposes of analysis two general categories are discernible: "scurrilous speech" statutes,⁴⁸ and "enlistment obstruction" statutes.⁴⁹ The elements of the crime under each are significantly different.

A. "Scurrilous Speech" Statutes

The "scurrilous speech" statutes are exemplified by the Connecticut statute, which provides:

Any person who speaks, or writes, prints and publicly exhibits or distributes, or who publicly exhibits, posts or advertises any disloyal, scurrilous or abusive matter concerning the form of government of the United States, its military forces, flag or uniforms, or any matter which is intended to bring them into contempt or which creates or fosters opposition to organized government, shall be fined not more than five hundred dollars or imprisoned not more than five years or both.⁵⁰

These statutes are similar to the Espionage Act of 1917,⁵¹ which was severely criticized as too broad.⁵² A broad construction of the Connecti-

⁴⁶ See pp. 531-32 & note 28 *supra*.

⁴⁷ The Supreme Court construes statutes in such a way as to find, if at all possible, that they prohibit conduct only in constitutionally permissible areas. See, e.g., *Screws v. United States*, 325 U.S. 91 (1945).

⁴⁸ E.g., CONN. GEN. STAT. ANN. § 53-5 (1958); MONT. REV. CODES ANN. § 94-4401 (1947).

⁴⁹ E.g., MINN. STAT. ANN. § 609.395 (1964); MONT. REV. CODES ANN. § 94-4401 (1947); N.J. STAT. ANN. § 2A:148-22 (1953).

⁵⁰ CONN. GEN. STAT. ANN. § 53-5 (1958).

⁵¹ Ch. 30, §§ 3-4, 40 Stat. 219, as amended, Act of May 16, 1918, ch. 75, §§ 3-4, 40 Stat. 553-54. See Z. CHAFEE, *supra* note 14, at 40-119.

⁵² For a discussion of broad federal statutes applied during times of war or national emergency, see Boudin, "Seditious Doctrines" and the "Clear and Present Danger Rule," 38 VA. L. REV. 143 (1952); Hervey & Kelley, *supra* note 14, at 470-92; O'Brian, *Restraints upon Individual Freedom in Times of Emergency*, 26 CORNELL L.Q. 523, 526 (1941).

cut statute might subject to criminal prosecution a person who advocates a constitutional amendment or criticizes a military uniform for aesthetic reasons. It could be applied to a public speaker who criticizes American foreign policy or the Selective Service system. Indeed, the statutes are commonly so vague that they could be used to prohibit any speech that in any way criticizes the government, its agencies, or its symbols. Nor do they seem limited to public speech, but rather appear applicable to the private words of a draft counselor who condemns the military forces by stating, for example, that he believes the American participation in Vietnam is illegal and the soldiers fighting there are guilty of war crimes.

B. *Enlistment Obstruction Statutes*

The New Jersey sedition statute⁵³ is typical of "enlistment obstruction" statutes. It provides that any person who advocates, prints, or publishes, "in any public place or at any meeting where more than 5 persons are assembled, that any person should not enlist in any of the armed forces of the United States or of this state . . . is guilty of a high misdemeanor."⁵⁴ Some statutes deal only with public speech,⁵⁵ but others apparently cover both public and private speech⁵⁶ and thus reach both public advocacy and private counseling. Although not all of these statutes expressly require intent, the courts have inferred an intent requirement.⁵⁷

The statutes pose an important problem of construction concerning the content and surrounding circumstances that might bring speech within the prohibition. Read narrowly, the prohibition includes only speech that specifically urges others not to enlist. Read broadly, the prohibition might include any dissenting opinion concerning military or foreign policy, since such statements might be intended to discourage others from enlisting.⁵⁸ Either reading raises a number of vital constitutional issues.

⁵³ N.J. STAT. ANN. § 2A:148-22 (1953).

⁵⁴ *Id.* A high misdemeanor is punishable by a maximum imprisonment of seven years. *Id.* § 2A:85-6.

⁵⁵ *E.g., id.* § 2A:148-22.

⁵⁶ *E.g.,* MONT. REV. CODES ANN. § 94-4401 (1947); see MINN. STAT. ANN. § 609.395 (1964) (the comments give the former sections and indicate the scope of the present law).

⁵⁷ See *State v. Smith*, 57 Mont. 349, 188 P. 644 (1920); *State v. Wyman*, 56 Mont. 600, 186 P. 1 (1919); *State v. DeFillipis*, 15 N.J. Super. 7, 83 A.2d 16 (1951). But see *State v. Gilbert*, 141 Minn. 263, 169 N.W. 790 (1918), *aff'd*, 254 U.S. 325 (1920).

⁵⁸ The words spoken in *Gilbert v. Minnesota*, 254 U.S. 325 (1920), were little more than criticism of the government. In *Gilbert* the Supreme Court upheld the defendant's conviction under a broad state provision making it a crime to discourage enlistments. For

IV

CONSTITUTIONAL DEFENSES TO STATE PROSECUTION

A. *First Amendment*

Since the state laws are directed at the same activity as are the federal laws, the arguments concerning restraints on freedom of expression apply to both.⁵⁹ In the absence of a clear and present danger of immediate action resulting from speech, no restraint should stand.⁶⁰ The breadth of the state laws makes them appear unconstitutional on their face. Unlike federal statutes, the Supreme Court is not able to "save" these laws through interpretation, since statutory construction is the final responsibility of the state's highest tribunal.⁶¹ Furthermore, as is apparent from even a cursory comparative reading, the state statutes lack the careful draftsmanship of the federal laws. Finally, the arguments of self-preservation and national defense that may be made in justification of the federal statutes are inapplicable to the state statutes.

In *Gilbert v. Minnesota*,⁶² a state statute⁶³ similar to the New Jersey law⁶⁴ was upheld, over constitutional objections based on the first and fourteenth amendments, as an appropriate exercise of the state police power. The dissenting opinion of Justice Brandeis, which is more in accord with modern constitutional law than is the majority opinion, noted that the statute could be applied where there was no imminent danger and that it therefore threatened constitutionally protected speech.⁶⁵ In order legitimately to restrain speech today a statute must be drafted to apply only to the narrow area of speech that the state may prohibit.⁶⁶ The majority opinion in *Gilbert*, therefore, is no longer an acceptable view.

examples of the punishment of mere criticism under similar statutes, see Z. CHAFEE, *supra* note 14, at 40-119.

⁵⁹ See pp. 532-34 & notes 30-45 *supra*.

⁶⁰ See cases cited note 32 *supra*.

⁶¹ The highest state tribunal gives a state statute its final interpretation and the United States Supreme Court makes its decision in light of this interpretation. At times, a state statute will be so vague or so clearly in conflict with constitutional rights that the Supreme Court may find it unconstitutional lacking final state court construction. See, e.g., *Baggett v. Bullitt*, 377 U.S. 360 (1964).

⁶² 254 U.S. 325 (1920).

⁶³ Law of April 20, 1917, ch. 463, [1917] Minn. Laws (repealed 1963); see MINN. STAT. ANN. § 609.395 (1964).

⁶⁴ N.J. STAT. ANN. § 2A:148-22 (1953).

⁶⁵ 254 U.S. at 334-35.

⁶⁶ See *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Stromberg v. California*, 283 U.S. 359

B. *Vagueness and Due Process*

Penal statutes lacking clear definitions of the prohibited activity are subject to attack as void for vagueness.⁶⁷ One is not constitutionally "required at peril of life, liberty or property to speculate as to the meaning of penal statutes."⁶⁸ What is scurrilous or abusive speech? What words tend to bring the government or its symbols into contempt? What speech discourages persons from enlisting? Opponents of the Vietnam conflict must engage in a guessing game in order to decide what protests might make them subject to criminal sanction. Such a guessing game is questionable in any case; when the prohibited activity is ordinarily protected by the first amendment, the game cannot be tolerated.⁶⁹

C. *Preemption*

The Constitution allocates legislative authority between the state and federal governments in four ways: (1) areas of exclusive state or federal concern where only one sovereign is permitted to legislate;⁷⁰ (2) areas of federal concern where the states are permitted to apply their own legislation until Congress occupies the field;⁷¹ (3) areas of combined federal and state interest where federal and state legislation are permitted to coexist;⁷² and (4) areas of combined federal and state interest where the federal interests outweigh any state interests.⁷³

(1931). Statutes proscribing illegal speech cannot constitutionally encompass "other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." *Thornhill v. Alabama*, *supra* at 97. In *Stromberg v. California* the Court struck down a "seditious flag" statute because it could "be construed to include peaceful and orderly opposition to government by legal means and within constitutional limits." 283 U.S. at 366, *quoting* *People v. Mintz*, 106 Cal. App. 725, 734, 290 P. 93, 97 (1930) (dissenting opinion).

⁶⁷ See *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *DeGregory v. Attorney General*, 383 U.S. 825 (1966); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Stromberg v. California*, 283 U.S. 359 (1931).

⁶⁸ *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

⁶⁹ See cases cited note 67 *supra*.

⁷⁰ See *United States v. Pink*, 315 U.S. 203 (1942) (exclusive federal power over foreign relations); *Strand v. Schmittroth*, 251 F.2d 590 (9th Cir.), *cert. dismissed*, 355 U.S. 886 (1957) (limitation on power of federal courts).

⁷¹ See *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (sedition); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (interstate rate regulation).

⁷² See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, *rehearing denied*, 374 U.S. 858 (1963) (retail marketing laws); *California v. Zook*, 336 U.S. 725 (1949) (regulation of transportation).

⁷³ See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, *rehearing denied*, 376 U.S. 973

Both dissenting opinions in *Gilbert v. Minnesota*⁷⁴ contended that the Federal Espionage Act of 1917⁷⁵ had preempted the field, leaving no room for the individual states to enact similar legislation. Justice Brandeis felt that the regulation of speech and conduct that interfered with federal recruitment services and the federal war effort was an area of solely federal concern and that state legislation in the area was not permissible. He stated that "Congress has the exclusive power to legislate concerning the Army and the Navy of the United States, and to determine, among other things, the conditions of enlistment."⁷⁶ Justice Brandeis argued further that even if this were not an area of solely federal concern, the Espionage Act of 1917, providing a complete plan of federal legislation in the area, would have preempted the field.⁷⁷

The trend of federal constitutional law has supported the preemption views of Justice Brandeis.⁷⁸ In modern times the Court held, in *Pennsylvania v. Nelson*,⁷⁹ that the Pennsylvania Sedition Act, dealing with subversive activities controls, was preempted by the Smith Act.⁸⁰ In *Nelson* the Court formulated a three-fold test for determining whether an area has been preempted by Congress. First, is "the scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"⁸¹? Second, is the "federal interest . . . so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject"⁸²? And third, does the "enforcement of state . . . acts [present] . . . a serious danger of conflict with the administration of the federal program"⁸³?

On the basis of this test, it appears that state sedition laws dealing with enlistments fall directly within a preempted area. Inter-

(1964) (federal patent law over any state law); *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84 (1963) (federal pipeline regulation over state laws).

⁷⁴ 254 U.S. 325, 334 (1920).

⁷⁵ Ch. 30, §§ 3-4, 40 Stat. 219, *as amended*, Act of May 16, 1918, ch. 75, §§ 3-4, 40 Stat. 553-54.

⁷⁶ 254 U.S. at 336.

⁷⁷ *Id.* at 334-36.

⁷⁸ See *Hines v. Davidowitz*, 312 U.S. 52 (1941).

⁷⁹ 350 U.S. 497 (1956).

⁸⁰ Compare 18 U.S.C. § 2385 (1964) with PA. STAT. ANN. tit. 18, § 4207 (1963). This decision stirred Congressional concern over the Court's views of preemption. See *Hearings on H.R. 3 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 84th Cong., 1st Sess., ser. 9 (1955); Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

⁸¹ 350 U.S. at 502, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947).

⁸² *Id.* at 504, quoting 331 U.S. at 230.

⁸³ *Id.* at 505.

fering with recruitments is a crime against the *federal* government, and the federal scheme, limited to times of imminent danger and more carefully drawn to protect personal liberties,⁸⁴ leaves no room for an inference that Congress intended the states to supplement it. Furthermore, the Constitution does not provide for concurrent state power to prevent the obstruction of federal armed forces, but rather makes this a solely federal concern.⁸⁵ National security and preservation of the armed forces have been treated as matters of vital national interest.⁸⁶ The only possible state interest in the matter must relate to the state police power.⁸⁷ Finally, state enforcement of such statutes results in sporadic local prosecutions and a multiplicity of tribunals producing incompatible standards.

Since state laws prohibiting seditious words invade an area already covered by federal provisions,⁸⁸ and since such statutes overlap the federal sedition statute, they also seem to be preempted. State power to punish such overlapping offenses as impersonation of federal officers, desecration of the flag, and the like, probably is also preempted, except where there is a local breach of the peace.⁸⁹ As pointed out by the majority in *Gilbert*, the real purpose of such state legislation is to aid the federal government in maintaining respect for federal institutions.⁹⁰ Once the federal government has acted in these areas, however, any state legislation not directly related to state police power is probably impermissible.

D. Police Power

Because of the presence of federal legislation, the only remaining matter of legitimate state concern is public safety at the local level. The decision in *Gilbert*, upholding a state sedition law, was later limited in this fashion by the *Nelson* Court.⁹¹

The danger of a breach of peace is obvious when one yells profanities as the American flag passes in a parade or uses abusive language in reference to the Marine uniform in a bar full of Marines. Application of the state laws under such circumstances might be justified in terms of

⁸⁴ See *id.* at 507-09.

⁸⁵ See *id.* at 501; U.S. CONST. art. I, § 8.

⁸⁶ See *Pennsylvania v. Nelson*, 350 U.S. 497, 505 (1956).

⁸⁷ See *id.* at 505-09.

⁸⁸ Act of June 25, 1948, 18 U.S.C. § 2388(a) (1964).

⁸⁹ Cramton, *The Supreme Court and State Power To Deal with Subversion and Loyalty*, 43 MINN. L. REV. 1025, 1033 (1959). *But cf.* *Uphaus v. Wyman*, 360 U.S. 72 (1959).

⁹⁰ *Gilbert v. Minnesota*, 254 U.S. 325, 328-31 (1920).

⁹¹ *Pennsylvania v. Nelson*, 350 U.S. 497, 501 (1956).

the Court's "fighting words" doctrine.⁹² These cases, however, are better resolved under breach of the peace statutes, which do not prohibit constitutionally protected speech encouraging persons not to enlist.⁹³ Referring to the argument that words may produce a breach of the peace, the Court has differentiated between incitement and reaction.⁹⁴ Speech that urges persons to illegal action may be punishable under the state's police power to prevent disorderly conduct and destruction of life and property, if the possibility of such immediate substantive evils exists. But unpopular speech that produces hostile reaction among the listeners must be given protection as long as the speech itself is not intentionally used to produce hostilities and is given at some proper forum. In response to the contention that unpopular public expressions tend to produce a disturbance of the peace, the Court has stated that "constitutional rights may not be denied simply because of hostility to their assertion or exercise."⁹⁵ Of course, there are limits to what one can say in producing hostilities, as illustrated by the "fighting words" doctrine. For example, personally abusive remarks to a soldier concerning his uniform may be outside first amendment protection. Similarly, one who harasses a zealous enlistee concerning the morality of his enlistment may overstep the bounds of free speech. But public speech in a proper forum, concerning all military uniforms or encouraging the public in general not to enlist should be protected by the first amendment.

CONCLUSION

The constitutionality of state and federal statutes dealing with obstructing federal recruitment, counseling the evasion of service, discouraging persons from enlisting in the armed forces, and speaking scurrilously against the government or its symbols depends, at least to some degree, on the construction given them by the courts. The federal sedition statute, if interpreted narrowly to encompass only physical interference with an actual recruitment situation, presents no serious

⁹² *Beauharnais v. Illinois*, 343 U.S. 250 (1952). *Contra*, *Cox v. Louisiana*, 379 U.S. 536 (1965); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Terminiello v. Chicago*, 337 U.S. 1 (1949). Apparently this doctrine, that words which produce hostility may be punished, could have been limited to the area of direct personal insult before *Beauharnais*. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

⁹³ Most states have breach of the peace statutes, statutes enabling municipalities to pass breach of the peace ordinances, or more specific statutes dealing with inciting riots, trespasses on public property, and similar breaches of the peace.

⁹⁴ *Cox v. Louisiana*, 379 U.S. 536 (1965); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *DeJonge v. Oregon*, 299 U.S. 353 (1937).

⁹⁵ *Cox v. Louisiana*, 379 U.S. 536, 551 (1965), quoting *Watson v. Memphis*, 373 U.S. 526, 535 (1962).

question of constitutionality. If interpreted to encompass speech aimed at preventing enlistments in an actual recruitment situation, the statute might be upheld as a legitimate attempt to prevent disturbances on federal premises. Any broader application of the statute would be an unconstitutional invasion of free speech.

Section 12(a) of the Universal Military Training and Service Act, which deals with counseling, aiding, or abetting persons in the evasion of registration or service, is probably constitutional as presently construed, since it apparently punishes only the counseling of *illegal* action.

The present state sedition and scurrilous speech statutes appear unconstitutional on first amendment, vagueness, and preemption grounds. They do not lend themselves readily to any constitutional construction. Conceivably, an extremely narrow state statute dealing with discouraging enlistments could be drafted to avoid constitutional attack. Even the present Minnesota statute, which avoids the preemption question and limits its application to a war situation, may be questioned on first amendment grounds. A state statute, to be clearly constitutional, must be limited to situations in which the police power of the state is applicable. Since such a statute would necessarily be confined to narrow areas already covered by breach of the peace statutes, it would be redundant and unnecessary.

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