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Constitutional Law - 1968 *Anti-Riot* Statute Up-held in *United States v. Dellinger*

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CONSTITUTIONAL LAW—1968 ANTI-RIOT Statute Upheld in *United States v. Dellinger*.

Prior to and during the time of the 1968 Democratic Convention David Dellinger, Rennie Davis, Tom Hayden, Abbie Hoffman and Jerry Rubin made various speeches in Chicago, Illinois, the site of the convention.¹ Dellinger, Davis and Hayden were associated with an organization called the National Mobilization Committee to End the War in Vietnam (better known as "MOBE"). Hoffman and Rubin were organizers of the Youth International Party (better known as the "Yippies"). As a result of their speeches all five were prosecuted for traveling in interstate commerce, from outside of Illinois to the City of Chicago, with intent to incite, organize, promote and encourage a riot.²

The five were convicted in the United States District Court for the Northern District of Illinois³ for violating the 1968 Anti-Riot Act.⁴ The

1. *United States v. Dellinger*, 472 F.2d 340, 349-50 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973). The speech or speeches which were used in evidence to prove the charges against the defendants are as follows: against Dellinger, August 28, 1968, at Grant Park; against Davis, August 1, 1968, at 30 West Chicago Ave., August 9, 1968, at the "MOBE" office (407 S. Dearborn Street), August 18, 1968, at 1012 North Noble Street and August 26, 1968, at Grant Park; against Hayden, August 26, 1968, at Lincoln Park and August 28, 1968, at Grant Park; against Hoffman, August 26, 1968, at Lincoln Park, August 27, 1968, at Lincoln Park and August 29, 1968 at Grant Park; and against Rubin, August 25, 1968, at Lincoln Park, August 26, 1968, at Lincoln Park and August 27, 1968, at Lincoln Park.

2. *Id.*

3. *United States v. Dellinger*, 69 CR 180 (N.D. Ill. Feb. 18, 1970).

4. 18 U.S.C. §§ 2101, 2102 (1968). 18 U.S.C. § 2101 provides:

(a)(1) Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent—

(A) to incite a riot; or

(B) to organize, promote, encourage, participate in, or carry on a riot;

or

(C) to commit any act of violence in furtherance of a riot; or

(D) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot;

and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraph (A), (B), (C), or (D) of this paragraph—

Shall be fined not more than \$10,000, or imprisoned not more than five years, or both.

(b) In any prosecution under this section, proof that a defendant engaged or attempted to engage in one or more of the overt acts described in subparagraph (A), (B), (C), or (D) of paragraph (1) of subsection (a) and (1) has traveled in interstate or foreign commerce, or (2) has use of or used any facility of interstate or foreign commerce, including but not limited to, mail, telegraph, telephone, radio, or television, to communicate with or broadcast to any person or group of persons prior to such overt acts, such travel or use shall be admissible proof to establish that such defendant traveled in or used such facility of interstate for foreign commerce.

defendants appealed their conviction and the United States Court of Appeals for the Seventh Circuit reversed and remanded the case. Various errors committed at trial warranted reversal. First, there was a unanimous finding by the court that the demeanor of the trial judge and prosecutors was improper. Secondly, the court held that it was error not to allow voir dire questions on the attitude of the prospective jurors upon such topics as the Vietnam War, counter-cultural life and police misconduct. Finally, the court concluded that it was reversible error for the trial judge and marshal to communicate with the deliberating jury.⁵ However, these grounds for reversal will not be examined in the course of this comment. Rather, the scope of the comment will be confined to a discussion of the constitutionality of the Anti-Riot Act.

(c) A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts.

(d) Whenever, in the opinion of the Attorney General or of the appropriate officer of the Department of Justice charged by law or under the instructions of the Attorney General with authority to act, any person shall have violated this chapter, the Department shall proceed as speedily as possible with a prosecution of such person hereunder and with any appeal which may lie from any decision adverse to the Government resulting from such prosecution; or in the alternative shall report in writing, to the respective Houses of the Congress, the Department's reason for not so proceeding.

(e) Nothing contained in this section shall be construed to make it unlawful for any person to travel in, or use any facility of, interstate or foreign commerce for the purpose of pursuing the legitimate objectives of organized labor, through orderly and lawful means.

(f) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section; nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law.

18 U.S.C. § 2102 provides:

(a) As used in this chapter, the term "riot" means a public disturbance involving (1) an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual or (2) a threat or threats of the commission of an act or acts of violence by one or more persons part of an assemblage of three or more persons having, individually or collectively, the ability of immediate execution of such threat or threats, where the performance of the threatened act or acts of violence would constitute a clear and present danger of, or would result in, damage or injury to the property of any other person or to the person of any other individual.

(b) As used in this chapter, the term "to incite a riot", or "to organize, promote, encourage, participate in, or carry on a riot," includes, but is not limited to, urging or instigating other persons to riot, but shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts.

5. *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), cert. denied, 93 S. Ct. 1443 (1973).

I. DOCTRINES OF OVERBREADTH, VAGUENESS AND CHILLING EFFECT

A legislative act may suggest two possible constructions—one construction constitutionally valid, the other constitutionally invalid. In cases where the constitutionality of a particular statute is at issue, the courts have relied upon the “well established rule of strict construction.”⁶ The rule enables the interpreting court to choose the construction that will uphold the constitutionality of the statute.⁷ The rule of strict construction, however, does not apply to statutes which involve first amendment issues. The reason is that since first amendment rights have a preferred position over other constitutional rights, statutes which involve first amendment issues must be examined extra carefully.⁸ The extra careful examination does not imply that statutes which concern the first amendment have a presumption of unconstitutionality. It is only a warning to the legislatures that first amendment statutes will be scrutinized for overbreadth and vagueness.⁹

The concept of overbreadth is used to describe a statute which is so broadly drafted that it “may describe and give warning regarding conduct which cannot constitutionally be penalized.”¹⁰ The traditional approach used by the courts in determining the constitutionality of an allegedly overbroad statute is the application of the statute to the facts of the instant case.¹¹ The Supreme Court, in *United States v. Raines*,¹² expressed this approach by saying that federal courts should never “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”¹³

Because the first amendment rights have a preferred position, the normal doctrine of overbreadth is not followed when the courts interpret statutes affecting first amendment rights. While the *Raines*¹⁴ rule

6. McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182, 1214 (1959).

7. *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 390 (1924); *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

8. *United States v. Rumely*, 345 U.S. 41, 56-57 (1953) (Douglas, J., concurring); *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-33 (1963). See also McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182, 1213 (1959); Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464 (1956).

9. McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182, 1213 (1959).

10. *United States v. Dellinger*, 472 F.2d 340, 355 (7th Cir. 1972), cert. denied, 93 S. Ct. 1443 (1973).

11. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

12. 362 U.S. 17 (1960).

13. *Id.* at 21.

14. *Id.* The Court in *Raines* states, “. . . that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.”

is that the constitutionality of a statute is determined only by its effect on the person challenging the statute, the first amendment overbreadth doctrine mandates application of the challenged statute to all "hypothetical persons whose privileged activities come within the sweep of an overbroad law."¹⁵ Therefore, when first amendment rights conflict with an existing statute, the judiciary will declare the statute void on its face. As stated in *Thornhill v. Alabama*:

Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.¹⁶

The doctrine of chilling effect is related to the concept of first amendment overbreadth. There are two major reasons for courts to apply the chilling effect doctrine, the first of which is to prevent deterrence on first amendment rights.¹⁷ Since the first amendment freedoms are favored, the theory is that no statute should be allowed to exist which has the slightest possibility of transgressing upon those freedoms. As the Court in *N.A.A.C.P. v. Button* said:

These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual applications of sanctions. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.¹⁸

Secondly, the chilling effect doctrine is applied by courts so that no one is forced to test his first amendment rights on a case by case basis. Rather than having each person vindicate his own case, "the whole statute must be declared a violation of the first amendment and void for all applications."¹⁹ In the landmark decision of *Dombrowski v. Pfister*, the United States Supreme Court concluded that:

If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested by only those hardy enough to risk criminal prosecution to determine the proper scope of regulation.²⁰

15. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 847 (1970).

16. 310 U.S. 88, 98 (1940).

17. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 853 (1970); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

18. 371 U.S. 415, 433 (1963) (citations omitted).

19. *United States v. Dellinger*, 472 F.2d 340, 356 (7th Cir. 1972), cert. denied, 93 S. Ct. 1443 (1973).

20. 380 U.S. 479, 487 (1965).

Therefore, not only does the first amendment warn legislators that proposed legislation may have the effect of deterring protected activity, but also that legislation which concerns the first amendment may be declared unconstitutional on its face. The first amendment was designed to protect and to encourage its favored rights.²¹

The concept of overbreadth is based upon principles of substantive due process and the main issue is whether the language of the statute given its normal meaning is so broad that its sanctions may apply to constitutionally protected conduct.²² On the other hand, the concept of vagueness is based upon the principle of procedural due process which requires proper judicial standards and fair notice.²³ To determine whether a statute is vague, courts will examine its provisions to see if they give citizens reasonable notice of prohibited conduct. Furthermore, a statute must set forth adequate standards to guide the judge or jury in its determination of guilt. The thrust of the vagueness doctrine is to prevent men of common intelligence from being required to guess at the meaning of a statute.²⁴

In statutes affecting first amendment rights there is almost total merger between the doctrines of overbreadth and vagueness. The reason may be that with statutes affecting first amendment freedoms, men of common intelligence are often equally confused as to the permissible scope of the statute and to its literal meaning.²⁵ In fact, the Supreme Court has often used the idioms of first amendment overbreadth and vagueness interchangeably.²⁶ In any event, when a statute concerns itself with first amendment rights, the courts will carefully examine the statute to see that it has not violated the concepts of overbreadth and vagueness and to determine that a chilling effect will not result from its application. The constitutional requirement is that first amendment statutes be drawn sufficiently narrow in scope.²⁷

21. *Landry v. Daley*, 280 F. Supp. 938, 952 (N.D. Ill. 1968), *rev'd sub nom. Boyle v. Landry*, 401 U.S. 77 (1971). Though *Landry* was reversed, the case provided an excellent discussion of the concepts of vagueness and overbreadth.

22. *Id.* at 951; see Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 197 (1955).

23. *Landry v. Daley*, 280 F. Supp. 938, 951 (N.D. Ill. 1968), *rev'd sub nom. Boyle v. Landry*, 401 U.S. 77 (1971).

24. *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); See also Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. OF PA. L. REV. 67 (1960).

25. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 874 (1970).

26. *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965); *Herndon v. Lowry*, 301 U.S. 242, 259 (1937); *Stromberg v. California*, 283 U.S. 359, 369 (1931). However a case that drew a distinction was *Zwickler v. Koota*, 389 U.S. 241, 249-50 (1967).

27. *United States v. Robel*, 389 U.S. 258 (1967).

II. REGULATION OF THE FIRST AMENDMENT RIGHT TO FREE SPEECH

The United States Constitution says, "Congress shall make no law . . . abridging the freedom of speech" ²⁸ Though this negative restriction on Congressional power is constructed in the absolute, the Supreme Court has not interpreted the right to speech as an absolute freedom. ²⁹ In the famous words of Mr. Justice Holmes speaking for the majority in *Schenck v. United States*: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." ³⁰

As a result, the Supreme Court has evolved a standard which balances rational government interests against the individual's right to freedom of speech, thereby restraining certain speech. ³¹ Libel ³² and obscenity, ³³ for instance, are the two most common forms of speech which have been prohibited by the government. The justifications for proscribing these actions are generally apolitical. However, legislative regulation of speech may not be apolitical in those areas which pose a threat to the established system. In determining whether there is cause for regulation of speech, the government will first determine the substance of the threat. For example, advocating the Communist ideology has been viewed as a threat to American democracy. In the case of *Yates v. United States*, ³⁴ wherein fourteen people were convicted of advocating Communism in violation of the Smith Act, ³⁵ the Court differentiated between urging someone to do something and urging someone to believe in something. The Court drew a distinction between the "advocacy of abstract doctrine from the advocacy of action." ³⁶ While advocacy of beliefs or ideas may not be infringed upon by legislation, advocacy that inspires destructive action may be infringed upon. Although advocacy of action may be regulated, the regulation will further depend on the immediacy of the action. ³⁷ In the decision

28. U.S. CONST. amend. I.

29. *Dennis v. United States*, 341 U.S. 494, 508 (1951); *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 573 (1942); For a contrary view see *Konigsberg v. State Bar*, 366 U.S. 36, 56-71 (1961) (Black, J., dissenting).

30. 249 U.S. 47, 52 (1919).

31. *Dennis v. United States*, 341 U.S. 494, 510 (1951); *Yates v. United States*, 354 U.S. 298, 318-27 (1957).

32. *See, e.g., Beauharnais v. Illinois*, 343 U.S. 250 (1952).

33. *See, e.g., Roth v. United States*, 354 U.S. 476 (1957).

34. 354 U.S. 298 (1957).

35. 18 U.S.C. § 2385 (1940).

36. 354 U.S. 298, 325 (1957).

37. The earliest test was pronounced by Mr. Justice Holmes in *Schenck v. United States*, 249 U.S. 47, 52 (1919). Mr. Justice Holmes, speaking for the majority, wrote, "The question in every case is whether the words used are used in such circumstances

of *Brandenburg v. Ohio*³⁸ the Court enunciated the requirements that would enable a court to strike down a statute which on its face denied the first amendment right to free speech.³⁹ Expanding on the *Yates*⁴⁰ distinction between advocacy of belief and advocacy of action, the Court said that before advocacy of action may be regulated or punished it must be shown that: “. . . such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action.”⁴¹ Therefore, the only speech that may be regulated by legislation is speech that is *intended to* and *has capacity to* cause imminent lawless action.

A pertinent example of speech likely to produce imminent lawless action is that which is directed towards inciting a riot. When speech becomes so provocative that it actually proximates action, the constitutional protection is abandoned.

When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious.⁴²

III. THE MAJORITY DECISION

Prior to *United States v. Dellinger*,⁴³ the Anti-Riot Act was challenged in the case of *National Mobilization Committee to End the War in Vietnam v. Foran*.⁴⁴ The plaintiffs in *Foran*, who included three of the defendants in *Dellinger*, tried to enjoin the United States Attorney from presenting evidence to a grand jury. The plaintiffs contended that the Anti-Riot Act was both unconstitutional on its face and as ap-

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. It is a question of proximity and degree.” See also Strong, *Fifty Years of “Clear and Present Danger”: From Schenck to Brandenburg—And Beyond*, 1969 S. CT. REV. 41.

38. 395 U.S. 444 (1969).

39. Defendants on page 21 of their brief argued that prior to *Brandenburg*, the case of *Whitney v. California*, 274 U.S. 357 (1927), retained sufficient potency to enable an advocacy statute to survive an attack on its face and be constitutionally tested by subsequent standards of construction and application. Brief for defendants at 21, *U.S. v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973). However, since *Brandenburg*, it is clear that the first amendment statutes must be tested on their face. See *Dennis v. United States*, 341 U.S. 494 (1951); *Yates v. United States*, 354 U.S. 298 (1957); *Noto v. United States*, 367 U.S. 290 (1961).

40. 354 U.S. 298 (1957).

41. 395 U.S. 444, 447 (1969).

42. *Feiner v. New York*, 340 U.S. 315, 320 (1951), quoting *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940).

43. 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973).

44. 411 F.2d 934 (7th Cir. 1969). It must be noted that *Foran* was decided after *Brandenburg*.

plied.⁴⁵ In a brief opinion, the Seventh Circuit affirmed the district court's⁴⁶ ruling which denied plaintiffs' relief. The Seventh Circuit said that the Act was not void on its face, and ". . . that the Riot provisions are not such an encroachment on free speech nor so vague and indefinite as to present a substantial constitutional question."⁴⁷

In *Dellinger*, the Seventh Circuit decided to re-examine the constitutionality of the Anti-Riot Act because that case presented issues that were not brought to its attention in *Foran*.⁴⁸ The *Dellinger* court said the question of the validity of the Anti-Riot Act on its face is whether: ". . . it punishes speech only when a sufficiently close relationship between such speech and violent action is found to exist."⁴⁹

A United States citizen has a right to freely travel throughout the country without undue restriction.⁵⁰ Since the Anti-Riot Act denies interstate travel or facilities to those who have the specific intent to commit one of the prohibited acts, the defendants challenged the Act as being an unconstitutional burden on the right to travel.⁵¹ The majority refused the defendants' argument, stating that the element of interstate

45. In *National Mobilization Committee to End the War in Viet Nam v. Foran*, 297 F. Supp. 1 (N.D. Ill. 1968), the plaintiffs wanted to convene a three-judge federal court under 28 U.S.C. §§ 2282, 2284 (1964) for the purpose of passing on the constitutionality of an act of Congress.

46. 297 F. Supp. 1 (N.D. Ill. 1968).

47. 411 F.2d 934, 938 (7th Cir. 1969). The Seventh Circuit further stated, "That is all we are to determine under Section 2182 of the Judicial Code [28 U.S.C.] and therefore we need not and do not consider whether the Riot statute might possibly be misapplied." The Seventh Circuit, although recognizing a remnant of *Whitney*, did not rely on any remnant of *Whitney*. See note 39 *supra*.

48. Two other courts have agreed with the conclusions of *Foran*: *Livingston v. Garmire*, 437 F.2d 1050 (5th Cir.), *opinion withdrawn on rehearing*, 442 F.2d 1322 (5th Cir. 1971); and *Douglas v. Pitcher*, 319 F. Supp. 706 (E.D. La. 1970). It must be noted that in *Livingston* and *Douglas* the issue was not the constitutionality of the Anti-Riot Act. See, however, *In re Shead*, 302 F. Supp. 560, 567 (N.D. Cal. 1969) *aff'd on other grounds* in *Carter v. United States*, 417 F.2d 384 (9th Cir. 1969). In *In re Shead*, the district court did pass on the Anti-Riot Act by stating:

This Court only holds that the Congressional Act effectively avoids the infirmities of overbreadth and vagueness. Adequate guidance delineating between lawful and unlawful conduct is given to the public in compliance with the standards of due process of law.

49. *United States v. Dellinger*, 472 F.2d 340, 360 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973). For an analysis of Congressional power, based on the commerce clause, to create the Anti-Riot Act see Note, *The Riot Act of 1968: Congress Rides a Trojan Horse*, 4 GA. L. REV. 359, 361-72 (1970).

50. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Guest*, 383 U.S. 745 (1966).

51. P. 107 of defendants' brief states:

The burden that such a statute places on 'freedom of movement' for the purpose of exercising First Amendment rights is staggering. Any 'outside agitator' (who by virtue of being such will have crossed state lines and have committed a wholly lawful 'overt act') runs the risk that he will be accused of having done so with 'evil intent.' The college student who helps black sharecroppers in Mississippi to organize may be found to have the 'intent' to 'aid and abet one of them in carrying on a riot'.

travel mentioned in §2101(a)(1) was merely the federal jurisdictional factor. As the Seventh Circuit said:

We view the statutory element of interstate travel (or use of facilities), accompanied by the specified intent, as an element which Congress required as the foundation for its power to punish the conduct of inciting or participating in a riot.⁵²

As a result, the major problem confronting the court was the impact of the Anti-Riot Act on free speech.⁵³ The central prohibition of the Anti-Riot Act is, of course, "riot". There is, however, no requirement in the Anti-Riot Act that the "riot" actually occur and the Seventh Circuit faced the assertion that failure to provide that a riot occur makes the statute unconstitutional. The defendants argued that frustrated attempts to cause riots have an insufficient nexus with action which may constitutionally be regulated.⁵⁴ The Seventh Circuit did not accept the argument because *Brandenburg* prohibited advocacy that was "likely to produce or incite imminent lawless action."⁵⁵ The Seventh Circuit held that the Act was consistent with *Brandenburg* in that the statute simply punished lawless action that was likely to be accomplished. Thus, if a person traveled interstate with the intent to incite or carry on a riot⁵⁶ and that activity was interrupted by an intervening force, such as police action, that person could still be prosecuted for violating the Anti-Riot Act. The consummated riot need not occur for a person to be prosecuted for violating the inchoate parts of the Anti-Riot Act.⁵⁷

Defendants had argued that since the enumerated acts of §2101(a)(1)(A)-(D) were merely steps toward a goal to riot and not steps in the fulfillment of riot, the Anti-Riot Act was unconstitutional. If the enumerated acts listed in §2101(a)(1)(A)-(D) were to be construed as steps taken to perfect the goal to riot, there would be an inadequate relationship between those enumerated acts and constitutionally pro-

52. *United States v. Dellinger*, 472 F.2d 340, 359 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973). At times the government argued that the "gravamen of the offense" was really travel with intent. The Seventh Circuit was unwilling to accept this argument on the grounds that the government's proposed construction of the statute would clearly be a violation of the right to travel.

53. Though the Seventh Circuit recognized the constitutional protection of freedom of assembly, the court felt that there appeared to be "no question of validity with respect to freedom of assembly which requires distinct consideration." 472 F.2d 340, 358 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973). *See note 17 supra*.

54. 472 F.2d 340, 362 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973).

55. 395 U.S. 444, 447 (1969).

56. *See note 4 supra* for full text of the statute.

57. 472 F.2d 340, 362 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973). However, for one to be prosecuted under § 2101(a)(1)(C) the riot must be in progress; "(C) to commit any act of violence in furtherance of a riot;"

hibited action.⁵⁸ The defendants' interpretation of the acts prohibited by §2101(a)(1) (A)-(D) as merely steps toward a goal to riot is derived from the following language of §2101(a)(1):

. . . who either during the course of any such travel or use or thereafter performs or attempts to perform *any other overt act* for any purpose specified in subparagraph (A), (B), (C), or (D) . . .⁵⁹ (emphasis added)

The Seventh Circuit rejected the defendants' interpretation. The court relied upon §2101(b) to substantiate its position that the prohibited acts of §2101(a)(1) (A)-(D) were steps in the fulfillment of a riot. The following wording was germane:

In any prosecution under this section, proof that a defendant engaged or attempted to engage in one or more of *the overt acts* described in subparagraph (A), (B), (C), or (D). . .⁶⁰ (emphasis added)

The majority believed that in using the term *overt acts*, Congress clearly mandated that §2101(a)(1) (A)-(D) set forth steps in the fulfillment of a riot.

Therefore, the Seventh Circuit upheld the Anti-Riot Act in accordance with the requirements of *Brandenburg*.⁶¹ The constitutionally prohibited action is the actual occurrence or likelihood of a riot. The overt acts which will either produce or have the possibility of producing a riot are enumerated in §2101(a)(1) (A)-(D). If a person travels interstate or uses interstate facilities with the intent to make a speech that would incite, organize, promote or encourage a riot, that person may be prosecuted under the Anti-Riot Act. These acts, however, "must be specifically intended at the time of travel, and one of them must be the purpose for which the required overt act is done or attempted."⁶²

Although the Anti-Riot Act met the *Brandenburg* requirement that the prohibited action occur or have a likelihood of occurrence, a further requirement had to be met. The *Yates*⁶³ decision held that advocacy of action could be prohibited but advocacy of expression could not be prohibited. The defendants in *Dellinger* argued that §2102 (b)⁶⁴ punished advocacy of expression; that the use of the word

58. 472 F.2d 340, 361-62 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973).

59. See note 4 *supra* (emphasis added) for full text of the statute.

60. *Id.* (emphasis added).

61. 395 U.S. 444, 447 (1969).

62. 472 F.2d 340, 361 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973).

63. 354 U.S. 298 (1957).

64. See note 4 *supra* for full text of the statute.

“urging” in §2102(b) meant “little more than an effort at persuasion.”⁶⁵ Since persuasion to riot would not be a forceful threat of action but rather harmless coaxing, the use of the word “urging” was fatal to the constitutionality of the statute.

The Seventh Circuit rejected the defendants’ interpretation of the meaning of “urging.” The word “urge” indicates a pressing manner of overcoming a drawback to a certain course;⁶⁶ therefore, “urging” was not merely harmless persuasion but a pressing for action which could be constitutionally prohibited. The court pointed out that in *Street v. New York*,⁶⁷ the Supreme Court had interchangeably used the words “urge” and “incite.”⁶⁸

The defendants’ strongest argument that §2102(b) prevented constitutionally protected expression was the highly technical problem of the “double negative”:

(b) As used in this chapter, the term “to incite a riot” or to organize, promote, encourage, participate in, or carry on a “riot”, includes, but is not limited to, urging or instigating other persons to riot, but shall *not* be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief, *not* involving advocacy of any act or acts of violence or assertion of the rightness of or the right to commit, any such act or acts.⁶⁹ (emphasis added)

Since a negation of a negation results in an affirmation and an exclusion from an exclusion results in an inclusion, defendants argued that the Anti-Riot Act prevented and punished oral or written advocacy which merely asserted a belief in the rightness of violent acts.⁷⁰ Beliefs and ideas are expressions that are constitutionally protected by the first amendment. Because the language of §2101(b) was overly broad and therefore could produce a chilling effect on one’s first amendment right of free expression, the defendants argued that the Anti-Riot Act was unconstitutionally void on its face.⁷¹

The Seventh Circuit concluded that the Anti-Riot Act was not unconstitutional.⁷² The court first reasoned that the “double negative” in §2101(b) was the result of an abundance of caution by the drafters to insure that mere expressions of beliefs and ideas would be protected.

65. 472 F.2d 340, 361 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973).

66. *Id.* at 362.

67. 394 U.S. 576 (1969).

68. *Id.* at 591. “We begin with the interest in preventing incitement. Appellant’s words, taken alone, did not urge anyone to do anything unlawful.”

69. See note 4 *supra* (emphasis added) for full text of the statute.

70. § 2102(b) was not presented to or considered by the court in *Foran*.

71. Defendants’ brief at 20-26.

72. 472 F.2d 340, 355 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973).

While admitting the awkward phraseology of the "double negative", the court explained that the purpose of the "double negative" was to exclude the "described advocacy not from the preceding exclusion but from the terms being defined."⁷³ Therefore, the exclusionary phrase of §2102(b)(2) was an added protection by the drafters that expressions of belief would not be prevented or punished.⁷⁴

The Seventh Circuit ruled that the added exclusion of §2102(b)(2) reflected the drafters' realization that a highly inciting speech to cause a riot will often contain an assertion by the speaker on the rightness of such rioting. Hence, the added exclusion of §2102(b)(2) was meant to deter the inciting speaker from defending his speech on the theory that he was only expressing a mere belief.⁷⁵

Finally, the Seventh Circuit rejected the defendants' argument that §2102(b) placed a chilling effect on the first amendment right to free speech. In support of their position, the defendants relied upon the rule of *Dombrowski v. Pfister*:⁷⁶

So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression.⁷⁷

Because the issue of the "double negative" had eluded everybody in *Foran*, the Seventh Circuit surmised that there was only a minimal possibility of prosecutions being based on the defendants' construction of §2102(b).⁷⁸ Therefore, the Seventh Circuit concluded that because the Anti-Riot Act did not suffer from overbreadth or vagueness the Anti-Riot Act was constitutional.

IV. THE DISSENT

Judge Pell, in his dissent, alleged that the Anti-Riot Act was clearly a violation of the first amendment right of free speech.⁷⁹ He acknowledged that a sufficiently narrow statute could have been drawn, but felt that the Anti-Riot Act was facially unconstitutional.⁸⁰ However, the dissent thought that the issue of whether the statute was unconstitutional on its face did not require the Seventh Circuit to "propose con-

73. *Id.* at 363.

74. *See* note 4 *supra* for full text of the statute.

75. 472 F.2d 340, 363 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973).

76. 380 U.S. 479 (1965).

77. *Id.* at 494 (citations omitted). 472 F.2d 340, 364 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973).

78. 472 F.2d 340, 364 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973).

79. *Id.* at 409.

80. *Id.* at 410.

stitutionally acceptable guidelines for a national anti-riot statute.”⁸¹ The exclusive duty of the Seventh Circuit in *Dellinger* was to determine the constitutionality of the statute as it was written.

The dissent was concerned about the lack of a relationship between the time that one traveled interstate and the time that one committed any of the prohibited acts of §2101(a)(1) (A)-(D). Particularly disturbing to the dissent was the phrase of §2101(a)(1) which states:

. . . and who either during the course of any such travel or use *thereafter* performs or attempts to perform any other overt act. . .⁸²
(emphasis added)

A basic principle of criminal common law is that the mental element of intent occur simultaneously with the criminal act.⁸³ The dissent felt that the mental element of intent should not have been so loosely connected to the jurisdictional factor of interstate travel. Under the Anti-Riot Act, someone could have crossed the state line with the past intent of inciting a riot and could still be subject to federal prosecution for what is in essence a local crime.⁸⁴ To Judge Pell, this effect of the Anti-Riot Act worked a “discouraging impact on the freedom to travel.”⁸⁵

More importantly, the dissent thought that the Anti-Riot Act is unconstitutionally overbroad. Besides having a strong distaste for the generally awkward draftsmanship of the statute,⁸⁶ the dissent was particularly critical of two areas. The first area was the use of the word “urging” in §2102(b). Since the word urge is so ambiguous, the dissent felt that the drafters should provide a precise meaning of “urging” as used in §2102(b). Under the existing Anti-Riot Act, adverse parties can demonstrate acceptable, but contrary, definitions of “urging.” In a statute involving first amendment rights, a multiple definition of a crucial word is fatal to that statute’s constitutionality. Where the determination of constitutionality is decided upon whether a word defines action or expression, that word itself must have a specific definition. In doubtful cases, the dissent would deem the word a term of expression and not action. Otherwise, the courts would be guilty of judicially rewriting legislation in the area of first amendment

81. *Id.* at 415.

82. See note 4 *supra* (emphasis added) for full text of the statute.

83. Note, *The Riot Act of 1968: Congress Rides a Trojan Horse*, 4 GA. L. REV. 359, 381 (1970). See also *United States v. Fox*, 95 U.S. 670, 671 (1878): “The Criminal intent essential to the commission of an offense must exist when the act complained of is done. . . .”

84. 472 F.2d 340, 414 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973).

85. *Id.* at 415.

86. 472 F.2d 340, 411-12 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973).

rights.⁸⁷ Judge Pell would interpret "urging" as a word of expression, thereby striking down the Anti-Riot Act as overly broad.

The dissent also said that the statute was vague. If a person expressed a sincere belief in the rightness of violence to achieve social goals and also exclaimed that such violence was necessary to achieve those goals, he could be prosecuted under the existing Anti-Riot Act. The dissent believed that the definition of "urging" in §2102(b) places an awful burden on an individual's decision to express sincere beliefs. The citizen has no guide in determining how sincere he can be in the expression of his personal beliefs.

The matter of the "double negative" in §2102(b) was the second critical question concerning unconstitutional overbreadth. The dissent conceded that the matter would be different if §2102(b)(2) stopped after the phrase "expression of belief."⁸⁸ Similarly, there would have been no problem had §2102(b) been worded:

but shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expressions of belief, *even though* involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit any such act or acts.⁸⁹

Since those constructions were not used, the dissent felt that the Anti-Riot Act is void on its face, the invalidity being that the statute prohibits free expression. As stated by the Supreme Court in *Noto v. United States*:

We held in *Yates* and we reiterate now, that the mere abstract teaching of . . . theory, including the teaching of the moral propriety or even the moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.⁹⁰

The Anti-Riot Act gives no protection to the interstate traveler who expresses a belief in the right of violence as a means of relieving social ills. Under the statute, the one who merely expresses an opinion on the propriety of violence is just as apt to be prosecuted as the one who truly incites lawless action. Under the controlling weight of *Brandenburg*, the dissent stated that the Anti-Riot Act failed to draw the line between protected and unprotected speech. Therefore, the dissent would hold the Anti-Riot Act unconstitutionally void on its face.

87. *Id.* at 414.

88. See note 4 *supra* for full text of the statute.

89. 472 F.2d 340, 412 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973).

90. 367 U.S. 290, 297-98 (1961).

V. CONCLUSION

The most dangerous aspect of the Anti-Riot Act is its overbreadth. The Anti-Riot Act fails to spell out the appropriate guidelines of constitutionally protected conduct. Constitutionally protected conduct depends on the subjective views of the federal officials who enforce the statute. An overly broad statute cannot exist on the assumption that federal prosecutors will only prosecute the extreme violations of that statute. In the precious area of first amendment rights, the legislatures must articulate specific guidelines to prevent arbitrary decision making. The Anti-Riot Act does not preclude the possibility that its provisions will be enforced in an arbitrary manner. The chilling effect of the Anti-Riot Act should not remain unnoticed by the judiciary.

Furthermore, the Anti-Riot Act is unconstitutionally vague and *Dellinger* exemplifies this conclusion. In *Dellinger* judges of the Seventh Circuit offered divergent meanings of the word "urging" as used in §2102(b). If judges of the Seventh Circuit had different opinions in interpreting the meaning of "urging", surely the common man will be confused. Therefore, the Anti-Riot Act has not told the American citizen how sincere and how aggressive he can be in expressing his beliefs.

Because the first amendment right of free speech is so essential, it should not remain stifled by the Anti-Riot Act. As Judge Pell said in his dissent:

. . . [T]hough we or at least the substantial majority of us, may find it abhorrent to think that the rightness of violence should ever be advocated, even though expressed as an idea or belief, nevertheless, the distaste must be overridden in preservation of the essential freedom here at stake.⁹¹

The Anti-Riot Act, being both overly broad and vague, results in a chilling effect that cannot be described as minimal.⁹² Prosecution for protected free expression is a real threat under the controversial provisions of the Anti-Riot Act.

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91. 472 F.2d 340, 413 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 1443 (1973).

92. *Id.* at 364.