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"Congress Shall Make No Law...":II

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"CONGRESS SHALL MAKE NO LAW . . .":II*

O. John Rogge†

Federal Police Power

THE framers of the federal bill of rights by the First and Tenth Amendments sought to deny Congress power over utterances unless they were connected with criminal conduct other than advocacy. Any power over such utterances was to reside in the states. However, the Supreme Court departed from the framers' intent.

One of the factors in this development was the emergence of an undefined federal police power. This occurred largely under the commerce and postal clauses.¹⁵¹ It began over a century ago. As early as 1838 Congress passed a law requiring the installation of safety devices upon steam vessels.¹⁵² Beginning in 1842 Congress enacted a long series of statutes proscribing obscene material.¹⁵³ The first such act prohibited the importation of "indecent and obscene prints, paintings, lithographs, engravings, and transparencies."¹⁵⁴ In 1848 Congress prohibited the importation of spurious and adulterated drugs and provided a system of inspection to make the prohibition effective.¹⁵⁵ In 1865 Congress made it a misdemeanor to mail an "obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character."¹⁵⁶ The next year Congress controlled the transportation on land and water of explosives.¹⁵⁷ In 1868 Congress made it unlawful to use the mails for lottery literature and paraphernalia.¹⁵⁸

*The first instalment of this article was published in the January issue, 56 MICH. L. REV. 331 (1958).—Ed.

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¹⁵¹ Art. I, §8, cls. 3 and 7. On the point generally, see ROGERS, *THE POSTAL POWER OF CONGRESS* (1916); Cushman, "National Police Power Under the Postal Clause of the Constitution," 4 MINN. L. REV. 402 (1920); Cushman, "The National Police Power Under the Commerce Clause of the Constitution," 3 MINN. L. REV. 289, 381, 452 (1919); Rogers, "The Extension of Federal Control Through the Regulation of the Mails," 27 HARV. L. REV. 27 (1913).

¹⁵² Act of July 7, 1838, c. 191, 5 Stat. 304.

¹⁵³ The Court in its opinion in *Roth v. United States*, 354 U.S. 476 at 485 (1957), listed 20 such acts.

¹⁵⁴ Act of Aug. 30, 1842, c. 270, §28, 5 Stat. 566.

¹⁵⁵ Act of June 26, 1848, c. 70, 9 Stat. 237.

¹⁵⁶ Act of March 3, 1865, c. 89, §16, 13 Stat. 507.

¹⁵⁷ Act of July 3, 1866, c. 162, 14 Stat. 81.

¹⁵⁸ Act of July 27, 1868, c. 246, §13, 15 Stat. 196.

In 1872 Congress codified the various postal laws, and added to its proscription of obscene material "disloyal devices printed or engraved."¹⁵⁹ In the succeeding section it forbade "letters or circulars concerning illegal lotteries" and prohibited in addition those "concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretences."¹⁶⁰ The next year material relating to contraception was added to the proscribed list.¹⁶¹ However, this same act eliminated the phrase about disloyal devices.¹⁶² In 1876 the provisions against lottery literature were broadened by eliminating the word "illegal."¹⁶³ In 1895 Congress prohibited the introduction or carriage of lottery tickets in the mails or in interstate commerce.¹⁶⁴ This act was held constitutional in the *Lottery Case, Champion v. Ames*.¹⁶⁵ Earlier measures against lotteries were sustained in *Ex parte Jackson*¹⁶⁶ and *In re Rapier*.¹⁶⁷ In the *Jackson* case the Court announced that under the postal clause Congress could refuse the facilities of the mails "for the distribution of matter deemed injurious to the public morals."¹⁶⁸ In *Public Clearing House v. Coyne*¹⁶⁹ the Court upheld the postmaster general in the issuance of a fraud order authorizing the interception and return to the sender of all mail addressed to a company engaged in operating an endless chain scheme. The Court stated that Congress could "forbid the delivery of letters to such persons or corporations as in its judgment are making use of the mails for the purpose of fraud or deception or the dissemination among its citizens of information of a character calculated to debauch the public morality."¹⁷⁰

In 1893 Congress began to enact the safety appliance acts now applicable to interstate railroads. The first of these was the Automatic Coupler Act.¹⁷¹ In 1906 Congress forbade the distribution or sale of impure foods and drugs by means of interstate

¹⁵⁹ Act of June 8, 1872, c. 335, §148, 17 Stat. 302.

¹⁶⁰ *Id.*, §149.

¹⁶¹ Act of March 3, 1873, c. 258, §1, 17 Stat. 598.

¹⁶² *Id.*, §2, 17 Stat. 599.

¹⁶³ Act of July 12, 1876, c. 186, §2, 19 Stat. 90.

¹⁶⁴ Act of March 2, 1895, c. 191, 28 Stat. 963.

¹⁶⁵ 188 U.S. 321 (1903).

¹⁶⁶ 96 U.S. 727 (1878).

¹⁶⁷ 143 U.S. 110 (1892).

¹⁶⁸ 96 U.S. 727 at 736 (1878).

¹⁶⁹ 194 U.S. 497 (1904).

¹⁷⁰ *Id.* at 507-508.

¹⁷¹ 27 Stat. 531 (1893), 45 U.S.C. (1952) §§1 to 8.

commerce: it passed two comprehensive statutes known as the Meat Inspection Act¹⁷² and the Pure Food Act.¹⁷³ Two years later Congress passed legislation regulating the employment of children in the District of Columbia,¹⁷⁴ and in 1916 prohibited the movement in interstate commerce of the products of child labor.¹⁷⁵ In 1918 Congress enacted minimum wage legislation for women and children in the District of Columbia.¹⁷⁶ This act was held unconstitutional in *Adkins v. Children's Hospital*,¹⁷⁷ but the *Adkins* case was subsequently overruled in *West Coast Hotel Co. v. Parrish*,¹⁷⁸ involving a minimum wage statute of the state of Washington.

In 1910 Congress enacted the Mann Act,¹⁷⁹ which bore the title "An Act To further regulate interstate and foreign commerce by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes." This act was sustained in *Hoke v. United States*,¹⁸⁰ and pushed to disturbing lengths in *Caminetti v. United States*.¹⁸¹

By an act of 1912 Congress made it an offense to import from abroad or transport in interstate commerce or send through the mails, for exhibition purposes, prize fight films.¹⁸² In the same year Congress provided that advertisements in second class mail had to be labelled as such.¹⁸³ In 1919 Congress passed the National Motor Vehicle Theft Act.¹⁸⁴ In the last year of the Hoover administration it legislated against labor injunctions and "yellow dog" contracts,¹⁸⁵ as well as against kidnapping.¹⁸⁶ The former

¹⁷² Act of June 30, 1906, c. 3913, 34 Stat. 669, 674.

¹⁷³ Act of June 30, 1906, c. 3915, 34 Stat. 768.

¹⁷⁴ Act of May 28, 1908, c. 209, 35 Stat. 420.

¹⁷⁵ Act of Sept. 1, 1916, c. 432, 39 Stat. 675.

¹⁷⁶ Act of Sept. 19, 1918, c. 174, 40 Stat. 960.

¹⁷⁷ 261 U.S. 525 (1923).

¹⁷⁸ 300 U.S. 379 (1937).

¹⁷⁹ 36 Stat. 825 (1910), as amended, 18 U.S.C. (1952) §§2421 to 2424.

¹⁸⁰ 227 U.S. 308 (1913).

¹⁸¹ 242 U.S. 470 (1917).

¹⁸² Act of July 31, 1912, c. 263, 37 Stat. 240.

¹⁸³ 37 Stat. 554 (1912), as amended, 39 U.S.C. (1952) §234. This provision was sustained in *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913).

¹⁸⁴ 41 Stat. 324 (1919), as amended, 18 U.S.C. (1952) §§2311 to 2314. For a case at the 1956 term of the Court under this act, see *United States v. Turley*, 352 U.S. 407 (1957). The Court (at 417) gave the word "stolen" in this act a uniform meaning, and held that it "includes all felonious takings of motor vehicles with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny."

¹⁸⁵ 47 Stat. 70 (1932), 29 U.S.C. (1952) §§101 to 107.

¹⁸⁶ 47 Stat. 326 (1932), as amended, 18 U.S.C. (1952) §1201.

is popularly known as the Norris-LaGuardia Act, and the latter as the Lindbergh Act.

Then came the New Deal, and with it many new statutes which greatly expanded the exercise of federal power. These included the Securities Act of 1933,¹⁸⁷ the Securities Exchange Act of 1934,¹⁸⁸ the Public Utility Holding Company Act of 1935,¹⁸⁹ and the National Labor Relations Act,¹⁹⁰ enacted in the same year. There was federal legislation on such diverse subjects as cosmetics¹⁹¹ and racketeering.¹⁹² One act made it an offense to transport dentures if the impression for them was taken by one who was not licensed to practice dentistry.¹⁹³ The constitutionality of most of the securities legislation was settled in *Electric Bond & Share Co. v. SEC*,¹⁹⁴ and *North American Co. v. SEC*,¹⁹⁵ and that of the main provisions of the National Labor Relations Act in *NLRB v. Jones & Laughlin Steel Corp.*¹⁹⁶

More recently the Congress sought to restrain gambling by placing an occupational tax on gamblers.¹⁹⁷ This tax was sustained in two Supreme Court decisions.¹⁹⁸

Thus the federal government has expanded into a little bit of almost everything, from obscenity to prostitution, from cosmetics to contraception, from labor relations to securities, from theft and fraud to food and drugs, from safety appliances to lotteries, racketeering and gambling.

By way of contrast federal legislation when our Constitution was new placed much greater reliance on state governments. An act of 1799 directed federal coastal officials duly to observe "the quarantines and other restraints, which shall be required and established by the health laws of any state" with respect to any incoming vessels and "faithfully to aid in the execution of such quarantines and health laws."¹⁹⁹ An act of 1803 told cus-

¹⁸⁷ 48 Stat. 74 (1933), as amended, 15 U.S.C. (1952) §§77a to 77aa.

¹⁸⁸ 48 Stat. 881 (1934), as amended, 15 U.S.C. (1952) §§78a to 78o, 78o-3, 78p to 78hh.

¹⁸⁹ 49 Stat. 803, 838 (1935), 15 U.S.C. (1952) §§79 to 79z-6.

¹⁹⁰ 49 Stat. 449 (1935), 29 U.S.C. (1952) §§151 to 166.

¹⁹¹ 52 Stat. 1054 (1938), 21 U.S.C. (1952) §§361 to 364 (part of the Federal Food, Drug, and Cosmetic Act).

¹⁹² 48 Stat. 979 (1934), as amended, 18 U.S.C. (1952) §1951.

¹⁹³ 56 Stat. 1087 (1942), as amended, 18 U.S.C. (1952) §1821.

¹⁹⁴ 303 U.S. 419 (1938).

¹⁹⁵ 327 U.S. 686 (1946).

¹⁹⁶ 301 U.S. 1 (1937).

¹⁹⁷ 65 Stat. 529 (1951), as amended, 26 U.S.C. (Supp. IV, 1957) §§4411 to 4413.

¹⁹⁸ *United States v. Kahriger*, 345 U.S. 22 (1953) (as to persons in the states); *Lewis v. United States*, 348 U.S. 419 (1955) (as to persons in the District of Columbia).

¹⁹⁹ Act of Feb. 25, 1799, c. 12, §1, 1 Stat. 619.

toms officers "to notice and be governed by the provisions of the laws now existing of the several states prohibiting the admission or importation of any negro, mulatto, or other person of colour."²⁰⁰ The Special Committee which reported adversely on President Jackson's proposal for barring the use of the mails to "incendiary publications" cited these acts to show the respect which Congress had been wont to give to state laws.²⁰¹

The federal government also branched out into sedition again, as well as into subversion generally. During World War I Congress enacted the country's second major sedition act; and with the struggle against international communism and Russian nationalism, a third, the Smith Act, as well as a volume of legislation against subversion. The second sedition act was passed in 1918 as an amendment of the Espionage Act of 1917; and the latter act in turn added new offenses to those established during the Civil War.

During the Civil War Congress passed an act making it a crime for two or more persons in any state or territory to "conspire together to overthrow, or to put down, or to destroy by force, the Government of the United States."²⁰² A derivative of this act is still on the statute books.²⁰³ There was also a general federal conspiracy statute, which became section 37 of the Criminal Code of 1909.²⁰⁴ In addition, section 332 of this code included in its definition of a principal anyone who counselled or induced another to commit an offense against the United States.²⁰⁵ It was under a combination of the latter two provisions that Emma Goldman and Alexander Berkman were convicted during World War I for conspiring by means of speeches and publications to induce men to evade the draft.²⁰⁶

It was not an offense, however, to persuade a man not to enlist voluntarily. Nor was it a crime if a lone individual made a deliberate but unsuccessful attempt to obstruct the draft, unless there were additional facts which made his conduct amount to treason. In the Espionage Act of 1917 Congress accordingly made it a crime willfully to "cause or attempt to cause insub-

²⁰⁰ Act of Feb. 28, 1803, c. 10, §3, 2 Stat. 206.

²⁰¹ S. Rep. 118, 24th Cong., 1st sess., 6 (1836); 49 NILE'S WEEKLY REGISTER 408 at 410 (1836).

²⁰² Act of July 31, 1861, c. 33, 12 Stat. 284.

²⁰³ 62 Stat. 808 (1948), as amended, 18 U.S.C. (Supp. IV, 1957) §2384.

²⁰⁴ 35 Stat. 1088, 1096 (1909). It is now 62 Stat. 701 (1948), 18 U.S.C. (1952) §371.

²⁰⁵ 35 Stat. 1088, 1152 (1909).

²⁰⁶ *Goldman v. United States*, 245 U.S. 474 (1918).

ordination" among members of our armed forces or willfully to "obstruct the recruiting or enlistment service of the United States."²⁰⁷ These provisions were involved in the *Schenck*,²⁰⁸ *Frohwerk*²⁰⁹ and *Debs*²¹⁰ cases.

The 1918 amendment inserted "attempt to obstruct" in the clause just quoted, and further proscribed various kinds of utterances. For instance, it was an offense, when the United States was at war, willfully to "utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States into contempt, scorn, contumely, or disrepute."²¹¹ The *Abrams*²¹² case arose under the provisions of this act. It was repealed on March 3, 1921.²¹³

The Espionage Act of 1917 also declared publications and other matter in violation of its provisions to be non-mailable.²¹⁴ The 1918 amendment added a section which empowered the postmaster general "upon evidence satisfactory to him that any person or concern" was using the mails in violation of the act to cause mail addressed to any such person or concern to be returned to the senders.²¹⁵

In 1940 came the Smith Act. Then under the impact of the cold war, which followed close on the heels of World War II, Congress passed numerous measures against subversion. These included the Labor-Management Relations Act, 1947,²¹⁶ commonly known as the Taft-Hartley Act after Senator Robert A.

²⁰⁷ Act of June 15, 1917, c. 30, tit. I, §3, 40 Stat. 219.

²⁰⁸ *Schenck v. United States*, 249 U.S. 47 (1919).

²⁰⁹ *Frohwerk v. United States*, 249 U.S. 204 (1919).

²¹⁰ *Debs v. United States*, 249 U.S. 211 (1919).

²¹¹ Act of May 16, 1918, c. 75, §3, 40 Stat. 553.

²¹² *Abrams v. United States*, 250 U.S. 616 (1919).

²¹³ C. 136, 41 Stat. 1359.

²¹⁴ Act of June 15, 1917, c. 30, tit. XII, §§1, 2, 40 Stat. 230. These provisions were involved in *Milwaukee Pub. Co. v. Burleson*, 255 U.S. 407 (1921), and *Masses Pub. Co. v. Patten*, (2d Cir. 1917) 246 F. 24, reversing (S.D.N.Y. 1917) 244 F. 535.

²¹⁵ Act of May 16, 1918, c. 75, §4, 40 Stat. 554.

²¹⁶ Act of June 23, 1947, c. 120, 61 Stat. 136 (codified in scattered sections of 2, 29, 50 App., U.S.C.).

Taft of Ohio and Representative Fred A. Hartley, Jr., of New Jersey, the Internal Security Act of 1950,²¹⁷ known as well as the McCarran Act, after Senator Pat McCarran of Nevada, and the Communist Control Act of 1954.²¹⁸ The Taft-Hartley Act in section 9(h) requires the officers of any labor union wishing to use the machinery of the National Labor Relations Board to file with the Board non-communist affidavits.²¹⁹ Title I of the Internal Security Act of 1950 is officially designated as the Subversive Activities Control Act of 1950. This title requires "Communist-action" and "Communist-front" organizations to register with the attorney general. The Communist Control Act of 1954 provides that membership in the Communist Party, with knowledge of the party's purpose, subjects one "to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a 'Communist-action' organization."^{219a} Just what this means is a matter of doubt. As a result of this measure there is now legislation aimed at three types of communist organizations: communist action, communist front, and communist infiltrated. A labor union which is determined to be any of these three types is ineligible to act as an employees' bargaining representative under the National Labor Relations Act. When President Eisenhower signed this measure he issued a statement in which he said: ". . . I am proud that in this battle against the subversive elements in this country we have been able to preserve the rights of the accused in accordance with our traditions and the Bill of Rights."²²⁰

The Supreme Court sustained the validity of section 9(h) of the Taft-Hartley Act in *American Communications Assn. v. Douds*,²²¹ and of the advocacy provisions of the Smith Act in *Dennis v. United States*.²²² The constitutionality of the Sub-

²¹⁷ Act of Sept. 23, 1950, c. 1024, 64 Stat. 987 (codified in scattered sections of 8, 18, 22, 50 U.S.C.).

²¹⁸ 68 Stat. 775, 50 U.S.C. (Supp. IV, 1957) §§841 to 844, 782, 784(a)(1)(E), 789, 790, 791(e)(3), 792a, 793(a)(b).

²¹⁹ 61 Stat. 143, 146 (1947), 29 U.S.C. (1952) §159(h).

^{219a} Act of Aug. 24, 1954, c. 886, 68 Stat. 775 at 776.

²²⁰ N.Y. TIMES, Aug. 25, 1954, p. 1:4. In 1956 Congress passed yet more legislation against subversion. 70 Stat. 899, 50 U.S.C. (Supp. IV, 1957) §§851 to 857 (requiring registration of persons trained in espionage activities by any foreign government or political party); 70 Stat. 623, 18 U.S.C. (Supp. IV, 1957) §§2384, 2385 (increasing penalties for seditious conspiracy from \$5000 and six years to \$20,000 and twenty years; and for advocating violent overthrow of the government from \$10,000 and ten years to \$20,000 and twenty years).

²²¹ 339 U.S. 382 (1950).

²²² 341 U.S. 494 (1951), affirming (2d Cir. 1950) 183 F. (2d) 201.

versive Activities Control Act of 1950 was argued before it in *Communist Party v. Subversive Activities Control Board*,²²³ but the Court did not reach the issue. Instead it sent the case back to the Subversive Activities Control Board for reconsideration because of the alleged false testimony of three government witnesses: Harvey Matusow, Paul Crouch, and Manning Johnson.

Intent, Attempt, Solicitation and Conspiracy

Another factor which helped to prepare the way for the Supreme Court's affirmation of the constitutionality of the advocacy provisions of the Smith Act in the *Dennis* case was Justice Holmes' extension in his "clear and present danger" test of the approach in the law of attempts and of conspiracy to the field of speech.²²⁴ This was what Chief Justice Vinson in the *Dennis* case described as Justice Holmes' "classic dictum"²²⁵ in the *Schenck*²²⁶ case. By his test Justice Holmes made an exception to the First Amendment for words which "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress had the right to prevent."²²⁷ This test has been commended, as one "of great value,"²²⁸ by Professor Chafee, and condemned as "both unintelligible in practice and baseless in theory,"²²⁹ by Alexander Meiklejohn. A little earlier Meiklejohn described it "as a peculiarly inept and unsuccessful attempt to formulate an exception to the principle of freedom of speech."²³⁰ Recently Judge Learned Hand, who in the *Dennis* case turned Justice Holmes' test into its converse,^{230a} questioned its survival.

²²³ 351 U.S. 115 (1956), reversing (D.C. Cir. 1954) 223 F. (2d) 531.

²²⁴ Judge Herbert F. Goodrich of the United States Court of Appeals for the Third Circuit, while he was a law teacher, wrote that Justice Holmes' "test is similar to the common law liability for attempt to commit a crime—the act done by the wrongdoer must have come dangerously near to success." "Does the Constitution Protect Free Speech?" 19 MICH. L. REV. 487 at 492 (1921), and 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1068, 1072 (1938). Judge Hastie in his dissenting opinion, in which Judge Maris joined, in *United States v. Mesarosh*, (3d Cir. 1955) 223 F. (2d) 449, reversed 352 U.S. 1 (1956), quoted this statement (at 461) with approval. Judge Goodrich in that case voted with the majority.

²²⁵ 341 U.S. 494 at 503 (1951).

²²⁶ 249 U.S. 47 (1919).

²²⁷ Id. at 52.

²²⁸ FREE SPEECH IN THE UNITED STATES 81 (1948).

²²⁹ "The First Amendment and Evils That Congress Has a Right To Prevent," 26 IND. L.J. 477 (1951).

²³⁰ FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 50 (1948).

^{230a} (2d Cir. 1950) 183 F. (2d) 201 at 212.

In the last of his three Holmes Lectures at the Harvard Law School he is reported to have said: "I doubt that the doctrine will persist, and I cannot help thinking that for once Homer nodded."^{230b}

The law of attempts, although now largely governed by statute, began as an exercise by courts of a common law power to punish dangerous conduct not proscribed by statute.²³¹ One can find early instances of the exercise of this power,²³² but the law of attempts received its formulation and development under the guiding hand of Lord Mansfield. A leading case is *Rex v. Scofield*.²³³ There the defendant was charged with having put a lighted candle among matches and small pieces of wood under the stairway of a house with the intent to burn the house. But there was neither allegation nor proof that the house was burned. The defendant's counsel argued that an attempt to commit a misdemeanor²³⁴ was not an indictable offense. Lord Mansfield and Justice Bullard answered: "It makes a great difference, whether an act was done; as in this case putting fire to a candle in the midst of combustible matter, (which was the only act necessary to commit a mesdemeanor) and where no act at all is done. The *intent* may make an act, innocent in itself, criminal; nor is the *completion* of an act, criminal in itself, necessary to constitute criminality. Is it no offence to set fire to a train of gunpowder with intent to burn a house, because by accident, or the interposition of another the mischief is prevented?"²³⁵

It was the law of attempts which Justice Holmes discussed as a judge of the Supreme Judicial Court of Massachusetts in

^{230b} N.Y. TIMES, Feb. 7, 1958, p. 12:1.

²³¹ See Arnold, "Criminal Attempts—The Rise and Fall of an Abstraction," 40 YALE L. J. 53 (1930).

Of course, as Justice Douglas put it for the Court in *Jerome v. United States*, 318 U.S. 101 at 104 (1943), ". . . there is no common law offense against the United States. . . ." See also *United States v. Gradwell*, 243 U.S. 476 (1917); *United States v. Hudson*, 7 Cranch (11 U.S.) 31 (1812). Cf. *Rochin v. California*, 342 U.S. 165 at 168 (1952); *Malinski v. New York*, 324 U.S. 401 at 412-413 (1945) (concurring opinion of Justice Frankfurter); *Marcello v. United States*, (5th Cir. 1952) 196 F. (2d) 437 at 443. Hence an attempt to commit a federal crime would not itself be criminal federally unless a federal statute made it so. In *re Guayde*, (C.C.N.Y. 1901) 112 F. 415 (attempt to import women into the United States for the purposes of prostitution). But see *United States v. Galleanni*, (D.C. Mass. 1917) 245 F. 977 at 978-979.

²³² See Sayre, "Criminal Attempts," 41 HARV. L. REV. 821 at 826-834 (1928).

²³³ Cald. Magis. Cases 397 (1784).

²³⁴ Id. at 399. The defendant was in possession of the house, and thus it was not a felony at common law for him to burn it.

²³⁵ Id. at 400.

Commonwealth v. Kennedy,²³⁶ and as chief justice of that court in *Commonwealth v. Peaslee*,²³⁷ before going to the federal Supreme Court. The *Kennedy* case involved an attempt to kill by placing poison in the victim's cup. In sustaining a conviction Justice Holmes writing for the court said:

"... As the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it. . . . Every question of proximity must be determined by its own circumstances, and analogy is too imperfect to give much help. Any unlawful application of poison is an evil which threatens death, according to common apprehension, and the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension, coupled with the great harm likely to result from poison even if not enough to kill, would warrant holding the liability for an attempt to begin at a point more remote from the possibility of accomplishing what is expected and might be the case with lighter crimes. . . ."238

In the *Peaslee* case the indictment charged simply that the defendant had put combustible material in a building with intent to burn it. The court held the indictment insufficient. In the course of the court's opinion Chief Justice Holmes pointed out that in order to constitute an indictable attempt, more than preparation was necessary. The difference between them, however, was only one of degree. He said:

"... [P]reparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor although there is still a *locus penitentiae* in the need of a further execution of the will to complete the crime. As was observed in a recent case, the degree of proximity held sufficient may vary with circumstances, including among other things the apprehension which the particular crime is calculated to excite. . . ."239

A recent illustrative federal case is *United States v. Coplon*.²⁴⁰

²³⁶ 170 Mass. 18, 48 N.E. 770 (1897).

²³⁷ 177 Mass. 267, 59 N.E. 55 (1901).

²³⁸ 170 Mass. 18 at 20, 22, 48 N.E. at 770 (1897).

²³⁹ 177 Mass. 267 at 272, 59 N.E. 55 (1901).

²⁴⁰ (2d Cir. 1950) 185 F. (2d) 629, cert. den. 342 U.S. 920 (1952).

Judith Coplon was convicted of an attempt to deliver defense information to a Russian confederate, Gubitchev. She had the material in her purse but before she could hand it over to him they were arrested. The Court of Appeals for the Second Circuit, although reversing the conviction, nevertheless held that the facts were sufficient to constitute an attempt. Chief Judge Learned Hand wrote for the court: "There can be no doubt in the case at bar that 'preparation' had become 'attempt.'"²⁴¹

Justice Holmes also dealt with the law of attempts in his *The Common Law*:

"Some acts may be attempts or misdemeanors which could not have effected the crime unless followed by other acts on the part of the wrong-doer. For instance, lighting a match with intent to set fire to a haystack has been held to amount to a criminal attempt to burn it, although the defendant blew out the match on seeing that he was watched. So the purchase of dies for making counterfeit coin is a misdemeanor, although of course the coin would not be counterfeited unless the dies were used. . . .

"It will be readily seen that there are limits to this kind of liability. The law does not punish every act which is done with the intent to bring about a crime. If a man starts from Boston to Cambridge for the purpose of committing a murder when he gets there, but is stopped by the draw and goes home, he is no more punishable than if he had sat in his chair and resolved to shoot somebody, but on second thoughts had given up the notion. . . . We have seen what amounts to an attempt to burn a haystack; but it was said in the same case, that, if the defendant had gone no further

²⁴¹ Id. at 633. For other federal cases holding that the conduct in question amounted to a criminal attempt, see *Lemke v. United States*, (9th Cir. 1954) 211 F. (2d) 73, cert. den. 347 U.S. 1013 (1954) (attempt to obtain money under false pretenses); *Daniel v. United States*, (8th Cir. 1942) 127 F. (2d) 1 (attempt to transport liquor into Kansas, a dry state); *Gregg v. United States*, (8th Cir. 1940) 113 F. (2d) 687, reversed on other grounds on rehearing, (8th Cir. 1940) 116 F. (2d) 609 (same); *United States v. Baker*, (S.D. Cal. 1955) 129 F. Supp. 684 (attempt to rob a bank); *United States v. Duane*, (D.C. Neb. 1946) 66 F. Supp. 459 (attempt to transport liquor into Kansas).

For federal cases holding conduct to amount to preparation falling short of an attempt, see *Seiden v. United States*, (2d Cir. 1926) 16 F. (2d) 197 (manufacture of spirits did not constitute attempt to defraud United States of taxes on liquor while engaged as a distiller); *Wooldridge v. United States*, (9th Cir. 1916) 237 F. 775 (arranging with a girl under 16 years of age to meet her at a particular place and meeting her at the appointed place held not to be an attempt to commit rape); *United States v. Stephens*, (C.C. Ore. 1882) 12 F. 52 (transmitting from Alaska to a firm in San Francisco a letter ordering whiskey to be sent to Alaska held not to amount to an attempt to introduce spirituous liquors into Alaska).

than to buy a box of matches for the purpose, he would not have been liable.

"Eminent judges have been puzzled where to draw the line, or even to state the principle on which it should be drawn, between the two sets of cases. But the principle is believed to be similar to that on which all other lines are drawn by the law. Public policy, that is to say, legislative considerations, are at the bottom of the matter; the considerations being, in this case, the nearness of the danger, the greatness of the harm, and the degree of apprehension felt. When a man buys matches to fire a haystack, or starts on a journey meaning to murder at the end of it, there is still a considerable chance that he will change his mind before he comes to the point. But when he has struck the match, or cocked and aimed the pistol, there is very little chance that he will not persist to the end, and the danger becomes so great that the law steps in. With an object which could not be used innocently, the point of intervention might be put further back, as in the case of the purchase of a die for coining.

"The degree of apprehension may affect the decision, as well as the degree of probability that the crime will be accomplished. . . ." ²⁴²

In judging whether conduct is sufficiently dangerous to constitute a criminal attempt, intent, as Lord Mansfield and Justice Holmes made plain, is a relevant factor. In *Swift & Co. v. United States*,²⁴³ a Sherman Anti-Trust Act case, Justice Holmes as a member of the United States Supreme Court in writing the Court's opinion further explained:

" . . . The statute gives this proceeding against combinations in restraint of commerce among the States and against attempts to monopolize the same. Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth v. Peaslee*. . . . But when that intent and the consequent dangerous prob-

²⁴² HOLMES, *THE COMMON LAW* 66-69 (1881).

²⁴³ 196 U.S. 375 (1905).

ability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result. . . ."²⁴⁴

Years earlier in *The Common Law* he wrote:

"There is another class of cases in which intent plays an important part, for quite different reasons from those which have been offered to account for the laws of malicious mischief. The most obvious example of this class are criminal attempts. Attempt and intent, of course, are two distinct things. Intent to commit a crime is not itself criminal. There is no law against a man's intending to commit a murder the day after tomorrow. The law only deals with conduct. An attempt is an overt act. . . .

". . . The importance of the intent is not to show that the act was wicked, but to show that it was likely to be followed by hurtful consequence."²⁴⁵

For example, the conduct of one who on a hunting trip shoots at a bear and accidentally hits a companion is less dangerous than that of one who with intent to kill shoots at a person and misses; for on an overall basis the conduct of those who act with an intent to kill another will result in many more homicides than the conduct of those who have no such intent.

The crime of solicitation rests on the same basis and began in the same way as that of attempt. A little over a decade and a half after the *Scofield* case came *Rex v. Higgins*.²⁴⁶ There the defendant was indicted for soliciting the servant of another to steal his master's goods but the indictment contained no charge that the servant either agreed to, or did, steal the goods. The Court of King's Bench, relying heavily upon the *Scofield* case, affirmed a judgment of conviction. Justice Lawrence in the course of his opinion said:

". . . [A]ll offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable. Then the question is, whether an attempt to get another to steal is not prejudicial to the community? of which there can be no doubt. The whole argument for the defendant turns upon a fallacy in assuming that no act is charged to have been done by him; for a solicitation is an act. . . ."²⁴⁷

²⁴⁴ *Id.* at 396.

²⁴⁵ HOLMES, *THE COMMON LAW* 65, 68 (1881).

²⁴⁶ 2 East 5, 102 Eng. Rep. 269 (1801).

²⁴⁷ *Id.* at 21, 102 Eng. Rep. 269 at 275 (1801).

As in the law of attempts, again there was a case before the Supreme Judicial Court of Massachusetts while Justice Holmes was a member of that court, *Commonwealth v. Flagg*.²⁴⁸ The indictment charged that the defendant offered ten dollars to another to burn a certain barn. This was held sufficient. Chief Justice Morton wrote for the court: "It is an indictable offence at common law for one to counsel and solicit another to commit a felony or other aggravated offence, although the solicitation is of no effect, and the crime counselled is not in fact committed. . . ." ²⁴⁹

Legal writers and courts have differed as to whether a solicitation should be treated as a distinct crime from an attempt. Professor Francis B. Sayre wrote:

" . . . Although in some jurisdictions solicitations are treated as indictable attempts, either by virtue of judicial decisions failing to distinguish them, or by statutory provisions, the great weight of authority is otherwise. Analytically the two crimes are distinct. Each has its own peculiar features; clearly not every indictable solicitation can be considered as an indictable attempt. The one who attempts to commit a felony becomes a principal if the attempt succeeds, and he who solicits becomes an accessory before the fact. An indictable solicitation may not come close enough to the crime to constitute an indictable attempt. For instance, where A urges B to murder C in another town, and B is persuaded to do so but, because of A's conversation having been overheard, is arrested when entering a store to purchase a revolver, B's acts have not gone beyond the stage of mere preparation, and neither A nor B should be convicted for an attempt. A should, nevertheless, be liable for the crime of solicitation, and both A and B for the crime of conspiracy. In spite of their many similarities, therefore, these two crimes should not be confused." ²⁵⁰

On the other hand Thurman W. Arnold argued:

"Solicitation involves the same considerations as attempts. The conduct simply consists of hiring or inducing someone to act instead of acting oneself. Courts should assume the same kind of power to extend the limits of a given rule to cover persuasion and inducements, as well as conduct, where the policy of the particular rule seems to require it. There

²⁴⁸ 135 Mass. 545 (1883).

²⁴⁹ Id. at 549.

²⁵⁰ Sayre, "Criminal Attempts," 41 HARV. L. REV. 821 at 857-858 (1928).

is no object in treating it differently from attempt. The distinction between solicitation and attempt leads to an occasional absurd result, but usually it is a harmless device for relieving a defendant of liability under an attempt indictment when his conduct seems not sufficiently serious to merit court action."²⁵¹

So far as treating a solicitation as an attempt is concerned, it would seem that Arnold has the better of the argument. In the suppositious case which Professor Sayre puts there is no reason why *A*, if deemed to be guilty of an offense in addition to that of conspiracy, should not be held liable for the crime of attempt.

However, if *A* solicits *B* to commit an offense and *B* refuses, *A* should no more be held guilty of an attempt than if he had gone to a store to buy a revolver in order to murder somebody or a box of matches in order to burn a building and the storekeeper refused to sell to him.²⁵² A fortiori should this result apply to the general advocacy of illegal action. Francis Wharton wisely reasoned in his *Criminal Law*:

"For we would be forced to admit, if we hold that solicitations to criminality are generally indictable, that the propagandists, even in conversation, of agrarian or communistic theories are liable to criminal prosecutions; and hence the necessary freedom of speech and of the press would be greatly infringed. It would be hard, also, we must agree, if we maintain such general responsibility, to defend, in prosecutions for soliciting crime, the publishers of Byron's "Don Juan," of Rousseau's "Emile," or of Goethe's "Elective Affinities." Lord Chesterfield in his letters to his son, directly advises the latter to form illicit connections with married women; Lord Chesterfield, on the reasoning here contested, would be indictable for solicitation to adultery. Undoubtedly, when such solicitations are so publicly and indecently made as to produce public scandal, they are indictable as nuisances or as libels. But to make bare solicitations or allurements indictable as attempts, not only unduly and perilously extends the scope of penal adjudication, but forces on the courts psychological questions which they are incompetent to decide, and a branch of business which would make them despots of every intellect in the land."²⁵³

²⁵¹ Arnold, "Criminal Attempts—The Rise and Fall of an Abstraction," 40 YALE L. J. 53 at 76-77 (1930).

²⁵² See *United States v. Stephens*, (C.C. Ore. 1882) 12 F. 52.

²⁵³ Vol. 1, §218 (12th ed. Ruppenthal 1932).

From the standpoint of arresting probably dangerous conduct the crime of conspiracy involves the same considerations as that of attempt, but, unlike that of attempt, it did not begin as a general offense at common law. Rather it originated in a series of statutes dating from the time of Edward I enacted to remedy specific abuses: at first only combinations to procure false indictments, bring false appeals, or maintain vexatious suits constituted criminal conspiracies.²⁵⁴

Whereas the crime of solicitation should be treated as part of that of attempt the crime of conspiracy should not be so treated; for the very fact that persons have entered into a conspiracy to do a certain act increases the chances that the act will be done. As Chief Justice Vinson wrote in the *Dennis* case, "It is the existence of the conspiracy which creates the danger."²⁵⁵ Thus the crime consists in the conspiracy. As Judge Justin Miller stated in his *Handbook of Criminal Law*, "The reason for finding criminal liability in case of a combination to effect an unlawful end or to use unlawful means, where none would exist, even though the act contemplated were actually committed by an individual, is that a combination of persons to commit a wrong, either as an end or as a means to an end, is so much more dangerous, because of its increased power to do wrong, because it is more difficult to guard against and prevent the evil designs of a group of persons than of a single person, and because of the terror which fear of such a combination tends to create in the minds of people."²⁵⁶

An overt act might or might not be required. It was not at common law.²⁵⁷ The general federal conspiracy statute,²⁵⁸ first enacted in 1867,²⁵⁹ calls for an overt act; but the act making it a crime to conspire to overthrow the government of the United States by force,²⁶⁰ first enacted during the Civil War,²⁶¹ and the

²⁵⁴ See Sayre, "Criminal Conspiracy," 35 HARV. L. REV. 393 at 396 (1922).

²⁵⁵ *Dennis v. United States*, 341 U.S. 494 at 511 (1951), quoted with approval at the 1956 term in the Court's opinion in *Yates v. United States*, 354 U.S. 298 at 317 (1957).

²⁵⁶ MILLER, HANDBOOK OF CRIMINAL LAW 110 (1934). Justice Jackson set forth this comment in his concurring opinion in *Dennis v. United States*, 341 U.S. 494 at 573-574 (1951). See also *Pinkerton v. United States*, 328 U.S. 640 at 643-644 (1946); *Frohwerk v. United States*, 249 U.S. 204 at 210 (1919); *Goldman v. United States*, 245 U.S. 474 at 477 (1918); *United States v. Rabinowich*, 238 U.S. 78 at 88 (1915).

²⁵⁷ See *Hogan v. O'Neill*, 255 U.S. 52 at 55 (1921); *Nash v. United States*, 229 U.S. 373 at 378 (1913).

²⁵⁸ 62 Stat. 701 (1948), 18 U.S.C. (1952) §371.

²⁵⁹ Act of March 2, 1867, c. 169, §30, 14 Stat. 484.

²⁶⁰ 62 Stat. 808 (1948), as amended, 18 U.S.C. (Supp. IV, 1957) §2384.

²⁶¹ Act of July 31, 1861, c. 33, 12 Stat. 284.

Sherman Anti-Trust Act²⁶² do not. Neither did the Smith Act.²⁶³ Even if an overt act is necessary, it need not be dangerous enough to constitute an attempt; indeed, in and of itself it need not be dangerous at all, for the danger lies in the act of conspiring. Justice Holmes pointed out in his dissenting opinion in *Hyde v. United States*:²⁶⁴

" . . . [A] conspiracy is not an attempt. . . . An attempt, in the strictest sense, is an act expected to bring about a substantive wrong by the forces of nature. With it is classed the kindred offence where the act and the natural conditions present or supposed to be present are not enough to do the harm without a further act, but where it is so near to the result that if coupled with an intent to produce that result, the danger is very great. *Swift & Co. v. United States*. . . . But combination, intention, and overt act may all be present without amounting to a criminal attempt—as if all that were done should be an agreement to murder a man fifty miles away and the purchase of a pistol for the purpose. There must be dangerous proximity to success. But when that exists the overt act is the essence of the offence [of attempt]. On the other hand, the essence of the conspiracy is being combined for an unlawful purpose; and if an overt act is required, it does not matter how remote the act may be from accomplishing the purpose, if done to effect it; that is, I suppose, in furtherance of it in any degree. . . . ”²⁶⁵

Or as Justice Harlan wrote at the last term in the Court's opinion in the *Yates*, *Schneiderman* and *Richmond* cases concerning the overt act, "Nor, indeed, need such an act, taken by itself, even be criminal in character. *Braverman v. United States*, 317 U.S. 49. The function of the overt act in a conspiracy prosecution is simply to manifest 'that the conspiracy is at work,' *Carlson v. United States*, 187 F. 2d 366, 370. . . . ”²⁶⁶

²⁶² 26 Stat. 209 (1890), 15 U.S.C. (1952) §§1 to 7. In sustaining this provision in *Nash v. United States*, 229 U.S. 373 (1913), Justice Holmes (at 378) wrote for the Court: "Coming next to the objection that no overt act is laid, the answer is that the Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability."

²⁶³ Act of June 28, 1940, c. 439, §3, 54 Stat. 671. With the revision of the criminal code in 1948 Smith Act conspiracy cases were brought under the general federal conspiracy statute, 62 Stat. 701, 18 U.S.C. (1952) §371, and an overt act is now necessary. See *Yates v. United States*, 354 U.S. 298 (1957).

²⁶⁴ 225 U.S. 347 (1912).

²⁶⁵ *Id.* at 387-388.

²⁶⁶ 354 U.S. 298 at 334.

If one applies the law of attempt and conspiracy, with the suggested approach of treating solicitation as an attempt, to the field of speech and of the press one should arrive at the conclusion that the exhortation or incitement of another to do an illegal act should not, without more, amount to a crime. The same result should follow if there is no more than the advocacy by an individual of the overthrow of the government by force and violence. The question becomes more difficult of resolution if there is a conspiracy to advocate such overthrow, for such conduct is more dangerous than the advocacy of violence by a lone individual. Thus Justice Jackson in his concurring opinion in the *Dennis*²⁶⁷ case placed his approval of the constitutionality of the advocacy provisions of the Smith Act on the strongest possible ground, that of conspiracy.²⁶⁸ Nevertheless, even a conspiracy to advocate the violent overthrow of the government should not be regarded as sufficiently dangerous to suffer proscription. Moreover to treat such conduct as criminal is not an effective remedy for it. To this point, too, Justice Jackson addressed himself in his concurring opinion in the *Dennis* case. In his concluding paragraph he wrote: "While I think there was power in Congress to enact this statute and that, as applied in this case, it cannot be held unconstitutional, I add that I have little faith in the long-range effectiveness of this conviction to stop the rise of the Communist movement. Communism will not go to jail with these Communists. No decision by this Court can forestall revolution whenever the existing government fails to command the respect and loyalty of the people and sufficient distress and discontent is allowed to grow up among the masses. Many failures by fallen governments attest that no government can long prevent revolution by outlawry. . . ." ²⁶⁹

In any event a conspiracy to advocate violence as well as the individual advocacy of violence, without more, should be held to be within the protection of the First Amendment. However, the law started on another course.

²⁶⁷ *Dennis v. United States*, 341 U.S. 494 (1951).

²⁶⁸ *Id.* at 572-577.

²⁶⁹ *Id.* at 577-578. Charles Holt, one of those imprisoned under the Sedition Act of 1798, after he got out of prison, continued writing, but under the pseudonym, Nathan Sleek. This was one of the things he wrote: "Punishment only hardens printers. . . . [T]hey come out of jail holding their heads higher than if they had never been persecuted. Finally they assume the appearance of innocent men who have suffered wrongfully." Quoted in SMITH, *FREEDOM'S FETTERS* 384 (1956).

"A Clear and Present Danger"

The points of departure for that other course were *Fox v. Washington*²⁷⁰ and *Goldman v. United States*.²⁷¹ The *Fox* case involved a statute of the state of Washington which made the advocacy of the commission of any crime an offense. The printed matter in question was an article entitled "The Nude and the Prudes." Apparently some nudists had been arrested and convicted for indecent exposure. The article predicted and encouraged the boycott of those who had been responsible for this, and concluded: "The boycott will be pushed until these invaders will come to see the brutal mistake of their action and so inform the people." The Supreme Court sustained a conviction under the state statute for these utterances. Justice Holmes delivered the Court's opinion. He took the article in question to advocate a breach of the state laws against indecent exposure. Without referring to *Commonwealth v. Flagg*²⁷² he wrote concerning the Washington statute: ". . . It lays hold of encouragements that, apart from statute, if directed to a particular person's conduct, generally would make him who uttered them guilty of a misdemeanor if not an accomplice or a principal in the crime encouraged, and deals with the publication of them to a wider and less selected audience. Laws of this description are not unfamiliar. . . ." ²⁷³

However, apart from the constitutional question whether the states under the Fourteenth Amendment's requirement that no state shall "deprive any person of life, liberty, or property, without due process of law" have a greater power over utterances than the federal government under the First Amendment's injunction that "Congress shall make no law,"²⁷⁴ it would seem clear that as a matter of good government the utterances in question should not have been punished.

In the *Goldman* case Emma Goldman and Alexander Berkman for their utterances were convicted of a conspiracy to in-

²⁷⁰ 236 U.S. 273 (1915).

²⁷¹ 245 U.S. 474 (1918).

²⁷² 135 Mass. 545 (1883).

²⁷³ 236 U.S. 273 at 277-278.

²⁷⁴ See *Roth v. United States*, 354 U.S. 476 at 498, 501, 503, 505-507 (1957) (concurring and dissenting opinion of Justice Harlan); *Beauharnais v. Illinois*, 343 U.S. 250 at 288, 294-295 (1952) (dissenting opinion of Justice Jackson); *Gitlow v. New York*, 268 U.S. 652 at 672 (1925) (dissenting opinion of Justice Holmes in which Justice Brandeis joined). Cf. *Palko v. Connecticut*, 302 U.S. 319 (1937).

duce resistance to the Selective Draft Law of 1917. The Supreme Court sustained their conviction. Chief Justice White wrote for the Court: ". . . an unlawful conspiracy under §37 of the Criminal Code to bring about an illegal act and the doing of overt acts in furtherance of such conspiracy is in and of itself inherently and substantially a crime punishable as such irrespective of whether the result of the conspiracy has been to accomplish its illegal end. *United States v. Rabinowich* . . . and the authorities there cited."^{274a}

The stage was now set for the *Schenck*,²⁷⁵ *Frohwerk*²⁷⁶ and *Debs*²⁷⁷ cases, the first cases which the Court decided under the Espionage Act of 1917. Eugene V. Debs and the defendants in the *Schenck* case were socialists. The defendants in the *Frohwerk* case were German sympathizers who put out a German language newspaper, the *Missouri Staats Zeitung*. Debs was indicted under the 1917 act, as amended in 1918, for obstructing and attempting to obstruct the draft by making a speech in which he advocated socialism and advanced the Marxist thesis that capitalism caused wars. The defendants in the other two cases were indicted, among other things, for conspiring to obstruct the draft; in the *Schenck* case by circulating a socialist leaflet, and in the *Frohwerk* case by distributing a newspaper. In the *Schenck* case there was also evidence that the defendants mailed their leaflet to draftees. The Court unanimously affirmed judgments of conviction in all three cases. In each instance Justice Holmes delivered the Court's opinion.

It was in the *Schenck* case that he laid down his clear and present danger test:

" . . . The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. . . . The Statute of 1917, in §4 punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone

^{274a} 245 U.S. 474 at 477 (1918).

²⁷⁵ 249 U.S. 47 (1919).

²⁷⁶ 249 U.S. 204 (1919).

²⁷⁷ 249 U.S. 211 (1919).

warrants making the act a crime. *Goldman v. United States*. . . .²⁷⁸

In the *Frohwerk* case he added:

" . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech. . . .

"It is said that the first count is bad because it does not allege the means by which the conspiracy was to be carried out. But a conspiracy to obstruct recruiting would be criminal even if no means were agreed upon specifically by which to accomplish the intent. It is enough if the parties agreed to set to work for that common purpose. That purpose could be accomplished or aided by persuasion as well as by false statements. . . . The conspiracy is the crime, and that is one, however diverse its objects. . . ."²⁷⁹

However, it is submitted that in none of these cases, nor in the *Fox* and *Goldman* cases, was sufficient consideration given, from a legislative standpoint, to the lack of danger in the proscribed conduct, and, from a judicial standpoint, in view of the First Amendment, to the lack, apart from speech, of criminal conduct. Neither legislatively nor judicially was there an adequate distinction between the word and the criminal deed. In the *Fox* and *Goldman* cases the First Amendment was not dis-

²⁷⁸ 249 U.S. 47 at 52 (1919).

²⁷⁹ 249 U.S. 204 at 206, 209-210 (1919). In *Schaefer v. United States*, 251 U.S. 466 (1920), Justice Brandeis, in a dissenting opinion in which Justice Holmes joined, quoted Justice Holmes' clear and present danger test in the *Schenck* case and explained (at 482-483): "This is a rule of reason. . . . The question whether in a particular instance the words spoken or written fall within the permissible curtailment of free speech is, under the rule enunciated by this court, one of degree. . . . If the words were of such a nature and were used under such circumstances that men, judging in calmness, could not reasonably say that they created a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent, then it is the duty of the trial judge to withdraw the case from the consideration of the jury; and if he fails to do so, it is the duty of the appellate court to correct the error. . . ." In a concurring opinion for himself and Justice Holmes in *Whitney v. California*, 274 U.S. 357 (1927), he stated (at 376-377): ". . . The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. . . . [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. . . ."

cussed at all.²⁸⁰ In the other three cases it was considered in too cursory a fashion. Justice Holmes bears out this observation in a comment he made about the *Debs* case in a letter to Sir Frederick Pollock: ". . . There was a lot of jaw about free speech, which I dealt with somewhat summarily in an earlier case—*Schenck v. U.S.* . . . also *Frohwerk v. U.S.* . . . As it happens I should go farther probably than the majority in favor of it, and I daresay it was partly on that account that the C.J. assigned the case to me."²⁸¹

Chief Justice Vinson was thus correct when in his opinion in the *Dennis* case he referred, in connection with the *Schenck* case, to "the summary treatment accorded an argument based upon an individual's claim that the First Amendment protected certain utterances."²⁸² He was also right in his appraisal of what he called "the Holmes-Brandeis rationale," which became the Court's approach. After discussing *Gitlow v. New York*,²⁸³ he stated: "Justices Holmes and Brandeis, then, made no distinction between a federal statute which made certain acts unlawful, the evidence to support the conviction being speech, and a statute which made speech itself the crime. This approach was emphasized in *Whitney v. People of State of California*. . . ."²⁸⁴

But *Debs* should not have gone to prison for making what Chief Justice Vinson described in the *Dennis* case as "one speech attacking United States' participation in the war";²⁸⁵ nor the defendants in the *Frohwerk* case for what Chief Justice Vinson in the same case called the "publication of twelve newspaper articles attacking the war."²⁸⁶ The *Schenck* case is somewhat more difficult of resolution, for the defendants mailed their leaflets to draftees; but they, too, should have been permitted to go their way unmolested.

A lone individual should be free to advocate anything, even a violation of the law. It is too difficult to draw a distinction be-

²⁸⁰ In the *Schenck* case Justice Holmes said with reference to the *Goldman* case: "Indeed that case might be said to dispose of the present contention if the precedent covers all *media concludendi*. But as the right to free speech was not referred to specially, we have thought fit to add a few words." 249 U.S. 47 at 52. The *Fox* case, since it arose before *Gitlow v. New York*, 268 U.S. 652 (1925), confined its discussion to the Fourteenth Amendment.

²⁸¹ 2 HOLMES-POLLOCK LETTERS, Howe ed., 7 (1941).

²⁸² *Dennis v. United States*, 341 U.S. 494 at 503 (1951).

²⁸³ 268 U.S. 652 (1925).

²⁸⁴ 341 U.S. 357 at 506 (1927).

²⁸⁵ *Id.* at 504.

²⁸⁶ *Ibid.*

tween advocacy of a change in the law and incitement to a violation of it. Besides, such advocacy is of little consequence in a sound society; its proscription, at least by Congress, violates the First Amendment; and its suppression is not an effective countermeasure. A conspiracy to advocate a violation of the law may involve more danger than such advocacy by an unattached individual, but the same considerations apply and the same result should follow.

One closer case remains, a conspiracy to cause a violation of the law, to be carried out by advocacy: this was the *Schenck* case. As Justice Holmes pointed out in the *Frohwerk*²⁸⁷ case, the conspiracy was the crime. However, again and especially at this juncture, a distinction should have been drawn between speech and other conduct. It should have made a determining difference in the *Schenck* case whether the conspiracy to obstruct the draft was to be carried out by advocacy, or by some physical means, such as, let us say, the abduction of a draftee. It is only in the latter instance that the conspiracy should have been punishable.

It was in the *Schenck* case that Justice Holmes made his famous statement about shouting fire in a crowded theatre. What he actually said was: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."²⁸⁸ But this is not advocacy. Shouting fire under such circumstances is as much an act as firing a gun or lighting a fire. It is the same as if by a shout one intentionally detonated an infernal machine. This is criminal conduct; not speech.

A conspiracy to cause a violation of the law by means of advocacy was the problem which concerned the writer the most when he took charge of the so-called sedition case of World War II, known on the third indictment as *United States v. McWilliams*.²⁸⁹ At the outset the writer read Chafee's *Free Speech in the United States*,²⁹⁰ just as he had read Chafee's *Freedom of Speech*²⁹¹ in his law school days; this was probably the book which stimulated him the most during his entire academic period.

²⁸⁷ *Frohwerk v. United States*, 249 U.S. 204 at 209-210 (1919).

²⁸⁸ *Schenck v. United States*, 249 U.S. 47 at 52 (1919).

²⁸⁹ Crim. No. 73,086, D.D.C., Jan. 4, 1944. When the writer took over this prosecution in February 1943 there had already been two indictments. *United States v. Winrod*, Crim. Nos. 70,153 and 71,203, D.D.C., July 21, 1942 and Jan. 4, 1943.

²⁹⁰ Published in 1941.

²⁹¹ Published in 1920.

In order to make sure that Americans had their full measure of freedom of speech, the writer passed by the advocacy provisions of the Smith Act—he had criticized them at a meeting of the states' attorneys general at the Department of Justice in 1940, the year the Smith Act was adopted, as appearing to him to be in violation of the First Amendment.²⁹² Instead he selected those provisions which made it a crime to conspire to cause insubordination among members of our armed forces and to distribute written or printed matter counseling such insubordination—some of the literature of the defendants had turned up at army posts. But he still had his misgivings, and accordingly narrowed the application of even those provisions by seeking an indictment only against those individuals who additionally had some form of Nazi connections such as the Nazi party, the Nazi propaganda ministry, the Nazi foreign office, various Nazi organizations in touch with deviant groups in other countries, the German Library of Information, the German embassy in Washington, D.C., various German consulates in this country, the German-American Bund, and yet others. The third indictment thus alleged that the defendants conspired “with each other and with officials of the Government of the German Reich and leaders and members of the said Nazi Party.”

During the midst of the trial the Supreme Court decided *Hartzel v. United States*,²⁹³ reversing a conviction against an individual whose literature was similar to that of the defendants in the sedition case. The ground of the decision was the insufficiency of the evidence to show intent. The defendants in the sedition case promptly made the decision the basis of a new motion to dismiss. But Justice Murphy in the Court's opinion in the *Hartzel* case had this sentence, referring to the defendant: “There was no evidence of his having been associated in any way with any foreign or subversive organization.”²⁹⁴ The writer used it as the basis for an argument that he had anticipated the Court's decision, and that the *Hartzel* case was accordingly distinguishable. The trial judge, Edward C. Eicher, agreed.

However, several months later Judge Eicher died, and the sedition case ended in a mistrial. The following year the Supreme

²⁹² For this, one of the attorneys general suggested that the writer must be a communist or its equivalent.

²⁹³ 322 U.S. 680 (1944).

²⁹⁴ *Id.* at 683.

Court in *Keegan v. United States*²⁹⁵ reversed the conviction of members of the German-American Bund on a charge of conspiracy to counsel evasion of military service. At the end of February 1946 the writer made use of both the *Hartzel* and *Keegan* cases to recommend that the Department of Justice should nol-pros all three sedition indictments. The department did not accept his recommendation. A few weeks later the writer went to Germany at the request of Attorney General, now Justice, Tom C. Clark, to look for additional evidence. He found some, but in September 1946 he nevertheless repeated his recommendation that the three sedition prosecutions be nol-prossed. Again the department failed to follow his recommendation. However, various of the defendants made motions to dismiss and these were granted.²⁹⁶ As a result of his experiences in the sedition case and his reflections on the First Amendment since then, the writer tends to the conclusion that even a conspiracy to cause a violation of the law, if the means to be employed consist of advocacy, should go unpunished. Legislatively the proscription of such a conspiracy is both unwise and ineffective; and constitutionally, at least so far as the Congress is concerned, it violates the First Amendment. From a federal standpoint, only those conspiracies should be punished where the defendants intend to effectuate them either with acts or with acts as well as advocacy.

As this analysis premonishes on hindsight, Justice Holmes' clear and present danger test was to bring unwelcome results to him and Justice Brandeis. It soon did. Before the year in which it was enunciated was out, came *Abrams v. United States*,²⁹⁷ where Justice Holmes in the course of his eloquent dissenting opinion, in which Justice Brandeis concurred, stated: "In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the government has to publish the Constitution of the United States now vainly invoked by them."²⁹⁸ The two leaflets opposed sending American troops to Vladivostok and Murmansk in the summer of 1918.

In the same opinion, however, Justice Holmes also wrote:

"I never have seen any reason to doubt that the questions of

²⁹⁵ 325 U.S. 478 (1945).

²⁹⁶ (D.C. Cir. 1947) 163 F. (2d) 695, affirming (D.C. D.C. 1946) 69 F. Supp. 812.

²⁹⁷ 250 U.S. 616 (1919).

²⁹⁸ Id. at 629.

law that alone were before this court in the cases of *Schenck*, *Frohwerk* and *Debs* . . . , were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times."²⁹⁹

He further made plain that what he had done in his clear and present danger test had been to apply to the field of advocacy the approach of the law of attempts. He additionally said in the *Abrams* case: ". . . Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing however, might indicate a greater danger and at any rate would have the quality of an attempt. . . ."³⁰⁰

But the results in the *Abrams* and other advocacy cases in which he and Justice Brandeis dissented³⁰¹ stemmed from the application of the approach in the law of attempt and of conspiracy to the field of speech. Once it is conceded that advocacy, without more, is not always protected by the First Amendment, then in times of stress neither the restrictive scope of a statute nor the clear and present danger test will be of great value in limiting suppression of speech. Concerning the prosecutions arising during World War I Professor Chafee in discussing *Masses Publishing Co. v. Patten*³⁰² had to conclude:

"As a result of this and similar decisions, the district judges ignored entirely the first element of criminal attempt and solicitation, that the effort, though unsuccessful, must approach dangerously near success. . . . A few judges, notably Amidon of North Dakota, swam against the tide, but of most Espionage Act decisions what Jefferson and Stephen and Schofield said about the prosecutions under George III and

²⁹⁹ *Id.* at 627-628.

³⁰⁰ *Id.* at 628.

³⁰¹ At the same term as the *Abrams* case they dissented in two cases in which the Court sustained convictions under the Espionage Act of 1917. *Schaefer v. United States*, 251 U.S. 468 (1920); *Pierce v. United States*, 252 U.S. 239 (1920).

³⁰² (2d Cir. 1917) 246 F. 24, reversing (S.D. N.Y. 1917) 244 F. 535.

the Sedition Act of 1798 can be said once more, that men were punished without overt acts, with only a presumed intention to cause overt acts, merely for the utterance of words which judge and jury thought to have a tendency to injure the state. Judge Rogers was right in saying that the words of the Espionage Act of 1917 bear slight resemblance to the Sedition Law of 1798, but the judicial construction is much the same, except that under the Sedition Law truth was a defense."³⁰³

On truth as a defense in the prosecutions under this country's first sedition act James M. Smith, in *Freedom's Fetters*, wrote:

"The interpretation which the courts put on the truth provision made it worse than useless as an aid to the defendant. Under the rulings handed down by the judges of the Supreme Court on circuit, this supposed safeguard actually reversed the normal criminal law presumption of innocence. Instead of the government's having to prove that the words of the accused were false, scandalous, and malicious, the defendant had to prove that they were true. As Judge Samuel Chase put it, the accused had to prove all of his statements 'to the marrow. If he asserts three things and proves but two,' the jurist said, 'he fails in his defense, for he must prove the whole of his assertions to be true.' This is a clear illustration of the doctrine of presumptive guilt; in practice, the courts presumed the defendant guilty until he proved himself innocent.

"Moreover, the accused was required not only to prove the truth of every word in every statement but, in one instance, to prove an entire count in an indictment by the same witness. Even though the statement contained more than one point, the defendant could not introduce different witnesses to prove different points. According to Judge Chase, this practice would have been 'irregular and subversive of every principle of law.'

"The court also refused to distinguish between a false statement of facts and erroneous opinions. Indeed, the expression of any opinion on future events could be condemned as false under the interpretation given section three of the law. Although the prosecutor could no more prove the falsity of a prediction than the defendant could prove its truth,

the statement was considered false because the defendant had failed to carry the burden of proof."³⁰⁴

The exception to the First Amendment which Justice Holmes sanctioned in his clear and present danger test was to help produce still other unwanted results to him and especially to Justice Brandeis. At the term following the one at which the opinion in the *Abrams* case came down, the Court ruled in *Milwaukee Pub. Co. v. Burleson*³⁰⁵ not only that the provisions of the Espionage Act of 1917 declaring certain matter to be nonmailable were constitutional but also that the postmaster general had the power to deny the use of second class mail to a newspaper publisher who in the opinion of the postmaster general had violated the act's provisions. Both justices dissented.

In addition, the Court sustained convictions under state statutes restricting utterances: under a Minnesota sedition act in *Gilbert v. Minnesota*,³⁰⁶ New York's criminal anarchy act in *Gitlow v. New York*,³⁰⁷ and California's criminal syndicalism act in *Whitney v. California*.³⁰⁸ Justice Brandeis dissented in the *Gilbert* case and both he and Justice Holmes in the *Gitlow* case. However, in the latter case Justice Holmes concluded his dissenting opinion, in which Justice Brandeis joined, with this paragraph:

"If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more."³⁰⁹

Concerning this dissent Justice Holmes wrote Pollock: "My last performance during the term, on the last day, was a dissent

³⁰⁴ SMITH, FREEDOM'S FETTERS 421-422 (1956).

³⁰⁵ 255 U.S. 407 (1921). In *Masses Pub. Co. v. Patten*, (2d Cir. 1917) 246 F. 24, reversing (S.D.N.Y. 1917) 244 F. 535, the court sustained the postmaster of the city of New York in seeking to bar from the mails a particular issue of a monthly magazine called *The Masses*.

³⁰⁶ 254 U.S. 325 (1920).

³⁰⁷ 268 U.S. 652 (1925).

³⁰⁸ 274 U.S. 357 (1927). See also *Burns v. United States*, 274 U.S. 328 (1927).

³⁰⁹ 268 U.S. 652 at 673 (1925).

(in which Brandeis joined) in favor of the rights of an anarchist (so-called) to talk drool in favor of the proletarian dictatorship."⁸¹⁰

The approach in these various cases provided the basis for the Court's decision in *Dennis v. United States*,⁸¹¹ in which it sustained the validity of the advocacy provisions of this country's third sedition law, the Smith Act. In the course of his opinion Chief Justice Vinson, relying on the phrasing of Chief Judge Learned Hand in the court's opinion below,⁸¹² modified the clear and present danger test into its converse: "Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' . . . We adopt this statement of the rule."⁸¹³

Dennis Case Dilemma

Besides resulting in a certain measure of suppression of speech which it is submitted the First Amendment protects, the clear and present danger test as applied in the *Dennis* case involves the Court in this dilemma: either the Court has increased its legislative functions; or it has transferred to the courts the determination of a question of fact which should have been left with the jury. It was the first horn of this dilemma which led Justice Jackson in his concurring opinion in the *Dennis* case to refuse to apply the clear and present danger test in reaching his conclusion as to the validity of the advocacy provisions of the Smith Act.

Let us take these provisions. The Court sustained them because of the threats with which international communism confronts us. As Chief Justice Vinson explained in his opinion in the *Dennis* case, "The situation with which Justices Holmes and Brandeis were concerned in *Gitlow* was a comparatively isolated event, bearing little relation in their minds to any substantial threat to the safety of the community. . . . They were not con-

⁸¹⁰ 2 HOLMES-POLLOCK LETTERS, Howe ed., 163 (1941). Actually *Gitlow* was a communist.

⁸¹¹ 341 U.S. 494 (1951).

⁸¹² *United States v. Dennis*, (2d Cir. 1950) 183 F. (2d) 201 at 212.

⁸¹³ 341 U.S. 494 at 510 (1951). In the *Roth* case Circuit Judge Frank in his concurring opinion suggested that in the light "of the Supreme Court's opinion in the *Dennis* case" he "would stress the element of probability in speaking of a 'clear danger.'" 237 F. (2d) 796 at 826.

fronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis.”³¹⁴ But suppose the communist danger lessens. Suppose communism changes industrially into various separate and fairly autonomous corporate entities and agriculturally into a substantial number of mechanized as well as privately held farms. What happens if the government now obtains a conviction on a conspiracy indictment under the advocacy provisions of the Smith Act against the leaders of American communism? What happens to such a conviction once international communism no longer exists as a threatening force in the world?

After the *Dennis* decision the courts in Smith Act prosecutions fell into the practice of examining the international situation. They concluded that bad as it was when the prosecution began in the *Dennis* case, it had not lessened: if anything, it had become worse. The Court of Appeals for the Second Circuit in *United States v. Flynn*,³¹⁵ the second Foley Square Smith Act conspiracy prosecution, stated: “. . . if the danger was clear and present in 1948, it can hardly be thought to have been less in 1951, when the Korean conflict was raging and our relations with the communist world had moved from cold to hot war.”³¹⁶ The Court of Appeals for the Third Circuit in *United States v. Mesarosh*³¹⁷ and for the Sixth Circuit in *Wellman v. United States*³¹⁸ quoted this language with approval.³¹⁹ The Court of Appeals for the Seventh Circuit in *United States v. Lightfoot*³²⁰ cited it similarly.³²¹ In the *Lightfoot* case the defendant pointed to the end of the Korean war. Also, in the words of the court, “defendant’s counsel seemed to be deeply impressed by the Spirit of Geneva, and he professed to believe that the Geneva Conference had resulted in a complete relaxation of International tensions.” The court responded: “The period covered by the indictment is, of course, the critical period for us to consider. However, in any case, whether a clear and present danger existed cannot depend on whether

³¹⁴ 341 U.S. 494 at 510 (1951).

³¹⁵ (2d Cir. 1954) 216 F. (2d) 354, cert. den. 348 U.S. 909 (1955).

³¹⁶ Id. at 367.

³¹⁷ (3d Cir. 1955) 223 F. (2d) 449, revd. on other grounds 352 U.S. 1 (1956).

³¹⁸ (6th Cir. 1955) 227 F. (2d) 757, judgment vacated and case remanded 354 U.S. 931 (1957).

³¹⁹ 223 F. (2d) 449 at 456; 227 F. (2d) 757 at 764.

³²⁰ (7th Cir. 1956) 228 F. (2d) 861, revd. 355 U.S. 2 (1957).

³²¹ 228 F. (2d) 861 at 870 (1956).

the faces of the Communist Leaders in Russia are suffused with smiles. We need only make passing mention of the fact that at the time of the writing of this opinion, the smiles have been replaced with scowls, and the sugary words of such leaders have been supplanted by words of vituperative condemnation."³²²

Suppose, however, that international communism loses its momentum and power, and the Court so finds. Will the Court then hold that the advocacy provisions of the Smith Act cannot constitutionally be applied on the ground that there is no longer a clear and present danger that advocacy of the overthrow of the government by force and violence will bring about this result? But surely that will be legislating just as much as if Congress were to pass an act repealing the advocacy provisions of the Smith Act. It was this difficulty which Justice Jackson had in mind when he wrote in his concurring opinion:

"If we must decide that this Act and its application are constitutional only if we are convinced that petitioner's conduct creates a 'clear and present danger' of violent overthrow, we must appraise imponderables, including international and national phenomena which baffle the best informed foreign offices and our most experienced politicians. We would have to foresee and predict the effectiveness of Communist propaganda, opportunities for infiltration, whether, and when, a time will come that they consider propitious for action, and whether and how fast our existing government will deteriorate. And we would have to speculate as to whether an approaching Communist *coup* would not be anticipated by a nationalistic fascist movement. No doctrine can be sound whose application requires us to make a prophecy of that sort in the guise of a legal decision. The judicial process simply is not adequate to a trial of such far-flung issues. The answers given would reflect our own political predilections and nothing more.

"The authors of the clear and present danger test never applied it to a case like this, nor would I. . . ."³²³

The other horn of the dilemma in the clear and present danger test as applied in the *Dennis* case is the removal from the jury of the determination of an issue of fact which that body properly should decide. In the ordinary case the jury determines whether there has been a criminal attempt or conspiracy. At first

³²² Ibid.

³²³ 341 U.S. 494 at 570 (1951).

when the approach of the law of attempt and conspiracy was applied to the field of speech, this seemed to be the law there too. Justice Brandeis in his concurring and dissenting opinion in *Schaefer v. United States*,³²⁴ in which Justice Holmes joined, after explaining that the newly announced clear and present danger test was a rule of reason which involved a question of degree, continued: ". . . And because it is a question of degree the field in which the jury may exercise its judgment is, necessarily, a wide one. But its field is not unlimited. The trial provided for is one by judge *and* jury; and the judge may not abdicate his function. If the words were of such a nature and were used under such circumstances that men, judging in calmness, could not reasonably say that they created a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent, then it is the duty of the trial judge to withdraw the case from the consideration of the jury; and if he fails to do so, it is the duty of the appellate court to correct the error. . . ." ³²⁵

And such seemed to be the ruling of the Court in *Pierce v. United States*.³²⁶ In sustaining the overruling of a demurrer to the indictment Justice Pitney in the Court's opinion said: ". . . Whether the statements contained in the pamphlet had a natural tendency to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer but by the jury at the trial. There was no error in overruling the demurrer." ³²⁷

The defendants took the stand and testified that their sole purpose in distributing the pamphlet in question was to gain converts for socialism. Justice Pitney for the Court responded: "What interpretation ought to be placed upon the pamphlet, what would be the probable effect of distributing it in the mode adopted, and what were defendants' motives in doing this, were questions for the jury, not the court, to decide." ³²⁸

But District Judge Medina in the *Dennis* case instructed the

³²⁴ 251 U.S. 466 (1920).

³²⁵ *Id.* at 483.

³²⁶ 252 U.S. 239 (1920).

³²⁷ *Id.* at 244.

³²⁸ *Id.* at 250. Justice Brandeis in his concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927), in which Justice Holmes joined, wrote (at 379): "Whether, in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury.

jury that the application of the clear and present danger test presented a question of law for the determination of the court: "This is a matter of law about which you have no concern. It is a finding on a matter of law which I deem essential to support my ruling that the case should be submitted to you to pass upon the guilt or innocence of the defendants. . . ." ³²⁹ And the Supreme Court affirmed a judgment of conviction under this instruction. Chief Justice Vinson wrote:

"The question in this case is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. We hold that the statute may be applied where there is a 'clear and present danger' of the substantive evil which the legislature had the right to prevent. Bearing, as it does, the marks of a 'question of law,' the issue is properly one for the judge to decide." ³³⁰

Justice Douglas in his dissent observed: "I had assumed that the question of the clear and present danger, being so critical an issue in the case, would be a matter for submission to the jury. It was squarely held in *Pierce v. United States* . . . to be a jury question. . . ." ³³¹ But the Court in the *Dennis* case ruled otherwise.

Pre-emption

Once it has been determined that federal power exists in a certain area another question arises, and that is whether the exercise of federal power supersedes the exercise of state power in that area. A half decade after the decision in the *Dennis* case the Court held in *Pennsylvania v. Nelson* ³³² that the federal Smith Act pre-empted the field, and that for this reason a Pennsylvania

She claimed below that the statute as applied to her violated the Federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did the request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury. . . ."

³²⁹ *Dennis v. United States*, 341 U.S. 494 at 512 (1951).

³³⁰ *Id.* at 514-515.

³³¹ *Id.* at 587.

³³² 350 U.S. 497 (1956), affirming 377 Pa. 58, 104 A. (2d) 133 (1954), reversing 172 Pa. Super. 125, 92 A. (2d) 431 (1952).

sedition law was invalid. This decision also cast doubt on such laws of other states—thirty-three jurisdictions, including Alaska and Hawaii, have sedition statutes.³³³ Indeed, after the *Nelson* holding the highest courts of two states, Kentucky and Massachusetts, invalidated state sedition indictments,³³⁴ and the Supreme Court of Michigan held unconstitutional various provisions of the Michigan Communist Control Law, commonly referred to as the Trucks Act.³³⁵

At the same term as the *Nelson* decision the Court ruled in *Railway Employees' Dept. v. Hanson*³³⁶ that the union shop provision of the Railway Labor Act, which was written into the law in 1951,³³⁷ superseded the right to work provision of the Nebraska constitution. This ruling affected the laws in seventeen states.³³⁸ In earlier cases in the labor field the Court determined that under the provisions of the National Labor Relations Act, enacted in 1935, and as amended by the Labor-Management Relations Act, 1947, Wisconsin's Public Utility Anti-Strike Act,³³⁹ the strike vote provision of a Michigan labor mediation law,³⁴⁰ an order of the Wisconsin Employment Relations Board for the reinstatement of an employee discharged because of his failure to join a union even though his employment was not covered by a union shop or similar contract,³⁴¹ a certification by the same board of a union as the collective bargaining representative,³⁴² the provisions of a New York statute under which the New York Labor Relations Board permitted the unionization of foremen,³⁴³ and a Florida statute requiring a license for business agents of labor

³³³ See Rogge, "Compelling the Testimony of Political Deviants," 55 MICH. L. REV. 163 at 181 (1956).

³³⁴ *Braden v. Commonwealth*, (Ky. 1956) 291 S.W. (2d) 843; *Commonwealth v. Gilbert*, (Mass. 1956) 134 N.E. (2d) 13. Cf. *Commonwealth v. Hood*, (Mass. 1956) 134 N.E. (2d) 12. State courts in Massachusetts quashed state sedition indictments against a total of eight persons, including Prof. Dirk Struik, Massachusetts Institute of Technology mathematician. N.Y. TIMES, May 26, 1956, p. 6:1.

³³⁵ *Albertson v. Millard*, 345 Mich. 519, 77 N.W. (2d) 104 (1956).

³³⁶ 351 U.S. 225 (1956). For two cases on pre-emption at the 1957 term, see *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957) (peaceful picketing); *Benanti v. United States*, 355 U.S. 96 (1957) (wiretapping by state officers).

³³⁷ 64 Stat. 1238, 45 U.S.C. (1952) §152, Eleventh.

³³⁸ See 351 U.S. 225 at 231-232 (1956).

³³⁹ *Amalgamated Assn. v. Wisconsin Employment Relations Bd.*, 340 U.S. 383 (1951).

³⁴⁰ *United Automobile Workers v. O'Brien*, 339 U.S. 454 (1950).

³⁴¹ *Plankington Packing Co. v. Wisconsin Employment Relations Bd.*, 338 U.S. 953 (1950).

³⁴² *LaCrosse Telephone Corp. v. Wisconsin Employment Relations Bd.*, 336 U.S. 18 (1949).

³⁴³ *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767 (1947).

unions,³⁴⁴ were all invalid because of pre-emption. In the case involving the Michigan act the Court, after a review of the provisions of the federal acts, ruled: "None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation."³⁴⁵

In *Alberts v. California*,³⁴⁶ the California obscenity case at the 1956 term, counsel for petitioner, relying on federal obscenity legislation,³⁴⁷ argued: "The scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."³⁴⁸ The Court rejected the argument in that case,³⁴⁹ but federal power is now established. If Congress wishes to pre-empt the obscenity field it can do so. Will Congress then add to the recently established Department of Health, Education, and Welfare³⁵⁰ yet another, a Department of Culture?

*"A General Consolidated Government"*³⁵¹

With the *Dennis*, *Nelson* and *Roth* decisions we are indeed in danger of becoming the "general and consolidated government"³⁵² of which Jefferson in the Kentucky Resolutions of 1798, and the "general consolidated government" of which the draftsman of the Kentucky Resolutions of 1799, expressed their fears. It was this problem which Justice Harlan had in mind when he wrote in his dissent in the *Roth* case:

"Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do. It has often been said that one of the great strengths of our federal system is that we have, in the forty-

³⁴⁴ *Hill v. Florida*, 325 U.S. 538 (1945).

³⁴⁵ *United Auto Workers v. O'Brien*, 339 U.S. 454 at 457 (1950). This language was quoted with approval in *Amalgamated Assn. v. Wisconsin Employment Relations Bd.*, 340 U.S. 383 at 390 (1951).

³⁴⁶ 354 U.S. 476 (1957).

³⁴⁷ 62 Stat. 768 (1948), as amended, 18 U.S.C. (1952) §1461; 69 Stat. 183 (1955), 18 U.S.C. (Supp. IV, 1957) §§1461, 1465; 64 Stat. 451 (1950), 39 U.S.C. (1952) §259a; 70 Stat. 699 (1956), 39 U.S.C. (Supp. IV, 1957) §259b. See Brief for Appellant, pp. 109, 115.

³⁴⁸ Brief for Appellant, p. 115 (subheading).

³⁴⁹ 354 U.S. 476 at 493-494 (1957).

³⁵⁰ 67 Stat. 18 (1953), 5 U.S.C. (Supp. IV, 1957) §623.

³⁵¹ 4 ELLIOT, DEBATES, 2d ed., 545 (1881).

³⁵² *Id.* at 542.

eight States, forty-eight experimental social laboratories. 'State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation.' Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State might be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.

"Quite a different situation is presented, however, where the Federal Government imposes the ban. The danger is perhaps not great if the people of one State, through their legislature, decide that 'Lady Chatterley's Lover' goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard. But the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book. The prerogative of the States to differ on their ideas of morality will be destroyed, the ability of States to experiment will be stunted. The fact that the people of one State cannot read some of the works of D. H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me to be intolerable, and violative of both of the letter and spirit of the First Amendment.

"I judge this case, then, in view of what I think is the attenuated federal interest in this field, in view of the very real danger of a deadening uniformity which can result from nation-wide federal censorship, and in view of the fact that the constitutionality of this conviction must be weighed against the First and not the Fourteenth Amendment. . . ." ³⁵³

It has been to this problem that President Eisenhower has repeatedly given his attention during his two terms as our chief executive. In a message to Congress in March 1953 he recommended "the creation of a commission to study the means of

achieving a sounder relationship between Federal, State and local governments."³⁵⁴ Congress accordingly established a Commission on Intergovernmental Relations³⁵⁵ "to study the proper role of the Federal Government in relation to the States and their political subdivisions . . . to the end that these relations may be clearly defined and the functions concerned may be allocated to their proper jurisdiction."³⁵⁶ The next month he told the 45th annual Conference of Governors, meeting in Seattle, that he had "asked for a commission that would study this proper division between state responsibility and Federal responsibility."³⁵⁷

The Commission on Intergovernmental Relations, with Meyer Kestnbaum as its chairman, submitted reports totalling over 2000 pages. The index alone ran to almost 150 pages. In *A Report to the President for Transmittal to the Congress* it mustered the admonition:

" . . . Assuming efficient and responsible government at all levels—National, State, and local—we should seek to divide our civic responsibilities so that we:

*"Leave to private initiative all the functions that citizens can perform privately; use the level of government closest to the community for all public functions it can handle; utilize cooperative intergovernmental arrangements where appropriate to attain economical performance and popular approval; reserve National action for residual participation where State and local governments are not fully adequate, and for the continuing responsibilities that only the National Government can undertake."*³⁵⁸

President Eisenhower made the problem the subject of his address at Williamsburg, Virginia at a state dinner of the 49th annual Conference of State Governors. He cautioned that those who "would stay free must stand eternal watch against excessive concentration of power in government."³⁵⁹ He pointed to the concentration of power in the hands of the communists in Russia, and observed, with reference to recent efforts there at decentralization, that even "Soviet rulers have felt compelled to allow

³⁵⁴ 99 CONG. REC. 2459 (1953).

³⁵⁵ Act of July 10, 1953, c. 185, 67 Stat. 145.

³⁵⁶ *Id.*, §1.

³⁵⁷ For the text of his address see N.Y. TIMES, Aug. 5, 1953, p. 10:3-8.

³⁵⁸ At p. 6 (1955).

³⁵⁹ For the text of his address see N.Y. TIMES, June 25, 1957, p. 16:2-8.

some small part of the Government to gravitate closer to the people." He referred by way of contrast to our governmental system of checks and balances, but continued: "Yet a distinguished American scholar has only recently counseled us that in the measurable future, if present trends continue, the states are sure to degenerate into powerless satellites of the National Government in Washington."

He stated the substance of the Tenth Amendment. With reference to a governor who wired Washington for help instead of asking the state legislature to act, he commented: "But does it not tend to encourage the still greater growth of the distant and impersonal centralized bureaucracy that Jefferson held in such dread and warned us about in such great and intense detail?"

He proposed the formation of a joint federal-state committee charged with these duties:

"One—To designate functions which the states are ready and willing to assume and finance that are now performed or financed wholly or in part by the Federal Government;

"Two—To recommend the Federal and State revenue adjustments required to enable the states to assume such functions, and

"Three—To identify functions and responsibilities likely to require state or Federal attention in the future and to recommend the level of state effort, or Federal effort, or both, that will be needed to assure effective action."

Such a study group has since been created. It is known as the Joint Federal-State Action Committee, and consists of seven federal officials, including three Cabinet officers, and ten state governors.³⁶⁰

The concentration of power in the hands of the federal government was also a topic for discussion at the 1956 and 1957 annual meetings of the American Bar Association and of the Conference of Chief Justices. In August 1956 at the 79th annual meeting of the American Bar Association the dominant note in the welcoming speech of Governor Allan Shivers of Texas and in the address of the association's then president, E. Smythe Gambrell, was that federal concentration of power threatened to destroy states' rights. Governor Shivers welcomed the members

³⁶⁰ N.Y. TIMES, July 21, 1957, p. 1:2, p. 40:3-5.

of the association "to a state whose people believe in the Tenth Amendment." Mr. Gambrell declared that in the "clamor of controversy" over the first eight amendments to the Constitution "our people seem to have overlooked the Ninth and Tenth Amendments."³⁶¹ In the same month the speakers at the Conference of Chief Justices, composed of the highest judicial officers of the forty-eight states, took up the same theme.³⁶² The latter body at its 1957 meeting authorized a special committee to study the role of the judiciary as it affected the distribution of power between the federal and state governments.³⁶³

In addition to the President, the Conference of State Governors, the Conference of Chief Justices, and the American Bar Association, a Government Operations subcommittee of the House of Representatives in July 1957 gave attention to the continuing growth of federal power. It held a hearing. One of its witnesses was Meyer Kestnbaum. He said that the study to be conducted by the Joint Federal-State Action Committee as well as a series of regional meetings which the subcommittee planned to hold after Congress adjourned could do a great deal to focus attention on the problem.³⁶⁴

In September 1957 the National Conference of Chief Justices set up two special committees to study means of slowing the "constant expansion" of federal governmental power. One of these was to study the judiciary's role in the growth of federal power at the expense of the states.³⁶⁵

So far little has been accomplished. Nevertheless, on one issue the states prevailed: the ownership of tidelands oil. However, they did not win their victory before the Supreme Court,³⁶⁶ but in Congress.³⁶⁷ This but bears out the observation of the Commission on Intergovernmental Relations in its *Report to the President* that the Court, although the guardian of civil liberties,³⁶⁸ in comparison with, and contrast to, the other two branches of government, over the past century and a half "except when dealing with

³⁶¹ N.Y. TIMES, Aug. 28, 1956, p. 1:4.

³⁶² N.Y. TIMES, Aug. 25, 1956, p. 13:1.

³⁶³ N.Y. TIMES, July 14, 1957, p. 48:4-5.

³⁶⁴ N.Y. TIMES, July 30, 1957, p. 16:6.

³⁶⁵ N.Y. TIMES, Sept. 24, 1957, p. 24:3-4.

³⁶⁶ See *United States v. Texas*, 339 U.S. 707 (1950); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. California*, 332 U.S. 19 (1947).

³⁶⁷ Submerged Lands Act, 67 Stat. 29 (1953); 43 U.S.C. (Supp. IV, 1957) §§1301 to 1315; *Alabama v. Texas*, 347 U.S. 272 (1954).

³⁶⁸ At pp. 29-30.

slavery, has probably taken the most consistently Nationalist position."³⁶⁹

State power can prevail in two other areas if the Court will but apply the First Amendment in the manner in which it is submitted its framers intended: obscenity and sedition. Obscenity is such a purely local matter that only local communities should decide what to do about it. As for sedition the only restrictions upon it should be those placed on state power by the "concept of ordered liberty"³⁷⁰ embodied in the due process clause of the Fourteenth Amendment.

³⁶⁹ Id. at 23.

³⁷⁰ See *Palko v. Connecticut*, 302 U.S. 319 at 325 (1937).