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CONSTITUTIONAL LAW - CIVIL RIGHTS - FIRST AMENDMENT FREEDOMS-REFORMULATION OF THE CLEAR AND PRESENT DANGER DOCTRINE

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CONSTITUTIONAL LAW — CIVIL RIGHTS — FIRST AMENDMENT FREEDOMS—REFORMULATION OF THE CLEAR AND PRESENT DANGER DOCTRINE—In July 1948 the apostles¹ of Communism in America were indicted under the conspiracy provisions of the Smith Act of 1940. The tension marking both the trial and the present era has obscured the constitutional problems and policy considerations involved. It is the purpose of this comment to trace the history of this cause celebre, *Dennis et al. v. United States*,² and to examine its effect upon our constitutional notions of the permissible bounds of utterance, primarily by an analysis of the appellate opinions.

I. *The Nature of the Indictment and the Trial*

The Smith Act of 1940 contained "the most drastic restriction on freedom of speech ever enacted in the United States during peace,"³ but the far-reaching sections had been little used.⁴ The defendants were

¹ Originally defendants were twelve leaders of the Communist Party of the United States. Eugene Dennis, general secretary, headed the list after the case of William Foster, chairman, was severed because of his illness. See *NEW YORK TIMES*, Jan. 19, 1949, p. 1:1.

² 341 U.S. 494, 71 S.Ct. 857 (1951), Petition for rehearing denied, 72 S.Ct. 20 (1951).

³ CHAFEE, *FREE SPEECH IN THE UNITED STATES* 441 (1941). Chafee indicates that the formal title, the Alien Registration Act of 1940, 54 Stat. L. 670 (1940), was misleading.

⁴ Title 1 of the original act. The solitary use of the prohibition against conspiracy to advocate overthrow, section 3, was in *Dunne et al. v. United States*, (8th Cir. 1943) 138 F. (2d) 137, cert. den. 320 U.S. 790, 64 S.Ct. 205 (1943), where leaders of the Socialist

charged with a conspiracy to advocate revolution and to organize for the advocacy thereof.⁵ It is to be noted that the defendants were not charged with seditious conspiracy for actual overthrow of government,⁶ or even with actual advocacy of the pernicious doctrine.⁷ Preliminary motions to dismiss the indictments were denied.⁸ A challenge to the array was exhaustive. After probably the longest criminal trial in the country's history,⁹ each of the eleven defendants was convicted and sentenced.¹⁰ Trial Judge Medina then sentenced the defense counsel, including Mr. Dennis, who acted as his own counsel, for contempt because of their conduct during the trial.¹¹

II. *Historical Perspective—Freedom of Utterance*

After feudal days in England, the first significant triumph for freedom of utterance was the overthrow of the Censor.¹² Indeed Blackstone equated freedom of the press with an absence of previous restraint.¹³

Workers Party, a Trotskyite faction, were convicted for conspiracy to advocate overthrow of government and insubordination in the armed forces. Affirmed on authority of *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625 (1925). See note 22 *infra*.

⁵ 18 U.S.C. (1940) §11, consolidated in 18 U.S.C. (1948) §371. The alleged object of the conspiracy was violation of 18 U.S.C. (1940) §10, present 18 U.S.C. (1948) §2385. Indictment charged defendants with willfully and knowingly conspiring between April 1, 1945 and July 20, 1948: (1) to organize, as the Communist Party of the United States, a group to advocate the overthrow and destruction of the government by force and violence and (2) knowingly and willfully to advocate and teach the duty and necessity of overthrowing and destroying the government by force and violence. See (D.C.N.Y. 1949) 9 F.R.D. 367 at 374-375. The trial judge charged that the government was trying to establish one conspiracy, not two, with organization a means to the end of advocacy. *Id.* at 376.

⁶ Overt act not required. See 18 U.S.C.A. (1948) §2384.

⁷ 18 U.S.C. (1940) §10. Present 18 U.S.C. (1948) §2385.

⁸ (D.C.N.Y. 1948) 80 F. Supp. 479. Defendants were permitted to travel outside the jurisdiction, (D.C.N.Y. 1948) 79 F. Supp. 422.

⁹ Review of proceedings and testimony is outside the scope of this comment. For a condensed account, see 37 INDEX, *NEW YORK TIMES* 1060-1065 (1949). Also charge to jury, (D.C. N.Y. 1949) 9 F.R.D. 367 at 381-386. Basically the government contended that the defendants were the leaders of a highly organized movement devoted to the revolutionary principles of Leninism-Marxism, while the defendants insisted that they were "legal" Marxists educating the people for peaceful progress to the Socialist state with resort to force only for protection of political power once lawfully obtained.

¹⁰ See *NEW YORK TIMES*, Oct. 15, 1949, p. 1:8 for verdict and *id.*, p. 2:1 for biographies of defendants. All defendants except Thompson were sentenced to 5 years imprisonment and fined \$10,000. See *NEW YORK TIMES*, Oct. 22, 1949, p. 1:8.

¹¹ For catalogue of contemptuous conduct see *United States v. Sacher et al.*, (D.C. N.Y. 1949) 9 F.R.D. 394. The Supreme Court has agreed to review the case, 72 S.Ct. 84 (1951).

¹² Milton's *AREOPAGITICA* (1644) was the classic utterance for the liberty of unlicensed printing, but censorship was not abolished until a half century later. See CHAFFEE, *FREE SPEECH IN THE UNITED STATES* 498 (1941).

¹³ 4 BLACKST. COMM. 154 (Wendell 1854). For indication of modern distaste for the prior restraint, see *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625 (1931). For the too

With the exit of the Censor the parliament passed seditious libel laws.¹⁴ The practices of the judges of the Crown in seditious libel cases prompted liberal elements to advocate an increased jury participation in such cases.¹⁵ Their struggles were successful, resulting in Fox's Libel Act of 1792,¹⁶ which provided that the jury render a general verdict in seditious libel cases and pass on the seditious character of the utterance as well as the mere fact of its publication.

The First Amendment to the Constitution¹⁷ limited the power of Congress within boundaries narrower than the outlines of common law seditious libel.¹⁸ The Sedition Act of 1798¹⁹ made blame of government punishable, but its constitutionality was never tested and it expired in 1800. In the nineteenth century the doctrine of laissez faire pervaded the field of speech. Therefore there was little conceptual development of the limits of the First Amendment. The Espionage Act of 1917, in operation,²⁰ restricted utterance again. There then began the modern delimitation of the permissible bounds of seditious utterance. Justice Holmes, by analogy to the field of criminal attempt and solicitation, formulated the test of "clear and present danger."²¹ The preliminary restriction²² of this doctrine and the later practical acceptance²³

broad penal statute held void on its face by analogy to the censor, see *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736 (1940).

¹⁴ Both seditious libel and oral sedition were misdemeanors. High treason was the serious offense. The first type was compassing or imagining the king's death. An overt act was generally required; but cf. *Burdett's case*, cited in 1 *HALK P.C.* 115 (1847), and discussion in 4 *BLACKST. COMM.* 70-74 (Wendell 1854).

¹⁵ See 1 *VEEDER, LEGAL MASTERPIECES* 83-140 (1903), for Erskine's argument before Lord Mansfield in the case of the Dean of St. Asaph. Cf. *Zenger case*, 17 *How. St. Tr.* 675 (1735).

¹⁶ 32 *Geo.* 3, c. 60 (1792).

¹⁷ Protection of freedom of utterance was not incorporated into the original Constitution because of the general view, before the doctrine of implied powers, that the people had not delegated control over utterance. See *THE FEDERALIST*, No. 84.

¹⁸ *CHAFEE, FREE SPEECH IN THE UNITED STATES* 19-21 (1941). See also Holmes, J., dissenting in *Abrams v. United States*, 250 U.S. 616 at 630, 40 S.Ct. 17 (1919).

¹⁹ 1 *Stat. L.* 596 (1798).

²⁰ 40 *Stat. L.* 217 (1917).

²¹ "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck v. United States*, 249 U.S. 47 at 52, 39 S.Ct. 247 (1919). For application, see *Abrams v. United States*, 250 U.S. 616, 40 S.Ct. 17 (1919), particularly the great dissenting opinion of Justice Holmes. *Hartzel v. United States*, 322 U.S. 680, 64 S.Ct. 1233 (1944), was the only Espionage Act case decided by the court during the last war.

²² *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625 (1925), was a conviction under a criminal anarchy statute prohibiting advocacy of overthrow in terms quite similar to the Smith Act. There was no evidence of effect resulting from the publication. The majority affirmed, holding that where the legislature had prohibited advocacy of doctrine itself, as distinguished from conduct in the *Schenck* case, the usual test of the reasonableness of the legislative judgment applied. Justices Holmes and Brandeis dissented, wanting to apply the

of the Holmes-Brandeis interpretation has been elsewhere reviewed.²⁴ Under this test constitutional protection was afforded not only to criticism of government but even to incitement to unlawful action up to a certain point. The rationale was an abiding faith that the best hope for truth lies in the free combat of ideas. Persons who urge unlawful action generally also voice criticism of the laws. The principle of self-government demands that they be heard until the danger becomes too great. *Dennis v. United States* offers a re-definition of the danger zone.

III. *Clear and Probable Danger*

Judge Learned Hand wrote the affirming opinion²⁵ in the Second Circuit. Two issues, the challenge to the array and the conduct of the trial, not renewed²⁶ before the Supreme Court deserve mention. The claim of systematic exclusion and of a predilection for the wealthier juror in composing the jury list was rejected.²⁷ Judge Hand, for the court, likewise disappointed those of defendants' counsel who had attempted to provoke misconduct during the trial.²⁸ Other issues considered were reviewed in the Supreme Court. To the contention that the language of the act was too broad, Judge Hand thought the separability clause²⁹ a sufficient answer for the court's power to limit application within the

clear and present danger test. *Gitlow* and cases following established that the First Amendment was incorporated into the Fourteenth as a limitation upon the states. See also *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641 (1927), conviction for organization of a group to teach criminal syndicalism, especially Brandeis, J., concurring. This case may be of significance in determining the constitutionality of 18 U.S.C. (1948) §2385 to the extent that it prohibits membership in a society advocating overthrow.

²³ E.g., *Thomas v. Collins*, 323 U.S. 516 at 529-530, 65 S.Ct. 315 (1945); for vigorous application even in contempt of court case, see *Bridges v. California*, 314 U.S. 252 at 263, 62 S.Ct. 190 (1941).

²⁴ E.g., *Antieau*, "The Rule of Clear and Present Danger: Scope of Its Applicability," 48 *MICH. L. REV.* 811 (1950); also the appellate opinions in the *Dennis* case itself.

²⁵ (2d Cir. 1950) 183 F. (2d) 201.

²⁶ *Certiorari* [340 U.S. 863, 71 S.Ct. 91 (1950)], was limited to (1) whether sections in question inherently or as applied violated the First Amendment and (2) whether the sections violated the First and Fifth Amendments because of indefiniteness.

²⁷ Principal case, (2d Cir. 1950) 183 F. (2d) 201 at 216 et seq.; cf. attack on "blue ribbon" jury, *Fay v. New York*, 332 U.S. 261, 67 S.Ct. 1613 (1947).

²⁸ Principal case, (2d Cir. 1950) 183 F. (2d) 201 at 224 et seq. Questions included bias of judge; use of informers' testimony; denial of an impartial jury [cf. *Dennis v. United States*, 339 U.S. 162, 70 S.Ct. 519 (1950), government employees on jury]; admission and exclusion of evidence; and refusal to allow defendant Davis to sum up on his own behalf. On the last point it was held that a defendant does not have an absolute right to discharge counsel without substantial reason at the very conclusion of a case.

²⁹ See note 13 *supra*; that *Thornhill v. Alabama* suggests a rule of inseparability for statutes impinging on First Amendment freedoms, see 61 *HARV. L. REV.* 1208 (1948); generally see Stern, "Separability and Separability Clauses in the Supreme Court," 51 *HARV. L. REV.* 76 (1937).

dictates of the First Amendment. To the contention that the act so limited was vague, the usual answer was made that it was difficult to reach the conduct otherwise and that the unlawful intent required compensated for the ambiguity.³⁰

The two questions of most significance remained: what is the proper delimitation of freedom of utterance? Who is to delimit, judge or jury? With the exception of Judge Chase, concurring in the Second Circuit, none of the affirming opinions were content to rest on *Gitlow v. New York*.³¹ (*Gitlow* was the 1925 free speech case involving a state statute quite similar to the Smith Act. A majority there held that the words prohibited need only have an evil tendency toward an end that the legislature could forbid.) Judge Medina was influenced by *Gitlow*, but in his charge he tried to come as near as possible to the philosophy of its dissenting opinion. He charged the jury that it must find an intent "to achieve this goal of the overthrow . . . as speedily as circumstances would permit it to be achieved."³² Further he instructed that the statute prohibited not academic discussion of Communist philosophy, but rather the teaching of such a doctrine as a rule of action and by "language reasonably and ordinarily calculated to incite persons to such action."³³ It is to be noted that the trial judge reserved the question analogous to that of clear and present danger. He held, as a matter of law, that if the jury found a violation of the statute as interpreted, then there "is sufficient danger of a substantive evil . . . to justify the application of the statute under the First Amendment."³⁴ Whether the evil was overthrow or attempted overthrow, as to neither was there proof of an immediate danger to bring the situation within the orthodox clear and present danger doctrine. Certainly the intent to cause overthrow as speedily as possible does not satisfy the alternative suggested by Justice Holmes: "the United States constitutionally may punish speech that produces *or is intended* to produce a clear and imminent danger."³⁵

³⁰ Cf. *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031 (1945).

³¹ 268 U.S. 652, 45 S.Ct. 625 (1925). See note 22 *supra*.

³² *United States v. Foster*, (D.C.N.Y. 1949) 9 F.R.D. 367 at 391.

³³ *Ibid.*

³⁴ *Id.* at 392. This language is similar to that used in the *Gitlow* case.

³⁵ *Abrams v. United States*, 250 U.S. 616 at 627, 40 S.Ct. 17 (1919) (italics added); cf. Brandeis, J., concurring in *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641 (1927), ". . . no 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." *Id.* at 377. "I am unable to assent to the suggestion in the opinion of the court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment." *Id.* at 379.

Judge Hand, faced with a grave evil, not shown to be present, reformulated "clear and present danger." The new test is "clear and probable danger," though not so termed by Judge Hand:

"In each case they [the 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."³⁶

The once independent factor of imminency is explained only as it bears on probability.³⁷ The quality of the evil receives new emphasis. Judge Hand's opinion pointed out that Justices Holmes and Brandeis never faced evils comparable to this communist menace in 1948, and further suggested that the original test, based upon faith in a free interchange of ideas, might not apply to the subterfuges of the defendants.³⁸ Judge Hand seems less tolerant of language of incitement than were Justices Holmes and Brandeis when he indicates that it might have been held as an original question that the First Amendment did not protect persuasion when it was inseparably confused with instigation.³⁹ Jettisoning of the imminency factor is held further justified to reach the Communist movement in its incubation period. Judge Hand also approves the procedural variant,⁴⁰ in the application of the test, by holding it properly within the function of the trial judge to balance the repression with the evil when discounted. Thus the judge in a given case now defines the permissible bounds of freedom of utterance.

IV. *The Supreme Court*

The United States Supreme Court upheld, 6-2,⁴¹ the constitutionality of the questioned sections, inherently and as applied. Two concurring opinions expressed doubt as to the wisdom of the law.

³⁶ Principal case, (2d Cir. 1950) 183 F. (2d) 201 at 212.

³⁷ *Ibid.*: "Given the same probability, it would be wholly irrational to condone future evils which we should prevent if they were immediate; that could be reconciled only by an indifference to those who come after us."

³⁸ That freedom of utterance should be protected in the parlor as well as the marketplace see 63 HARV. L. REV. 1167 (1950). Comments on Judge Hand's approach included: 51 COL. L. REV. 98 (1951); 11 LAWYER'S GUILD REV. 1 (1951); 5 RUTGERS L. REV. 413 (1951); 99 UNIV. PA. L. REV. 407 (1950); 36 VA. L. REV. 1090 (1950).

³⁹ Principal case, (2d Cir. 1950) 183 F. (2d) 201 at 207. For Hand's early view, see *Masses Publishing Co. v. Patten*, (D.C.N.Y. 1917) 244 F. 535 at 540: "Words are not only the keys of persuasion, but the triggers of action." But cf. "Every idea is an incitement," Holmes, J., dissenting in *Gitlow v. New York*, 268 U.S. 652 at 673, 45 S.Ct. 625 (1925).

⁴⁰ For view of original espousers that clear and present danger question was one for jury and that control by judiciary should be through technique of holding that no reasonable jury could convict, see *Schaefer v. United States*, 251 U.S. 466 at 482, 40 S.Ct. 259 (1920).

⁴¹ Principal case, 341 U.S. 494, 71 S.Ct. 857 (1951), Justice Clark not participating.

Chief Justice Vinson adopted, for the majority, Chief Judge Hand's reformulation. The clear and present danger test, devised in less serious circumstances, was not to encase the government in a "semantic straitjacket":

"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 confronted 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."⁴²

An attempt at overthrow was held the "evil" and its probability of success immaterial. The conspiracy to advocate could be constitutionally restrained because its existence was the danger. The Chief Justice thought that the division of function between judge and jury had not yet been authoritatively determined. The choice below was approved. The attack on the statute on its face because its language was too broad was rejected. *Thornhill v. Alabama*,⁴³ which suggested that a statute infringing First Amendment freedoms (as mirrored in the Fourteenth) was to be judged on its face to avoid the pervasive restraint of its language, was distinguished as involving a state statute.

Justice Frankfurter concurred. First he criticized any absolutist interpretation of the First Amendment,⁴⁴ the antecedents of which in the state constitutions indicated that freedom of utterance was relative:

"The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved."⁴⁵

For Justice Frankfurter, the primary responsibility for weighing the competing interests, in the free speech area as elsewhere, must belong to the legislature.⁴⁶ While respect for the legislative judgment is no

⁴² *Id.* at 510. Cf. "But in suggesting that the substantive evil must be serious and substantial, it was never the intention of this Court to lay down an absolutist test measured in terms of danger to the Nation." *American Communications Association v. Douds*, 339 U.S. 382 at 397, 70 S.Ct. 674 (1950).

⁴³ See note 13 *supra*. That distinction between discussion and advocacy in administering the act is unworkable, see Statement of Action and Policy of the American Civil Liberties Union, June 27, 1951.

⁴⁴ See discussion of Justice Black's views *infra*.

⁴⁵ Principal case, 341 U.S. 494 at 524, 71 S.Ct. 857 (1951).

⁴⁶ Cf. Frankfurter, J., concurring in *Kovacs v. Cooper*, 336 U.S. 77 at 89 *et seq.*, 69 S.Ct. 448 (1949), and tracing the evolution of the "preferred position of freedom of speech."

longer to be put in the terms of *Gitlow v. New York*,⁴⁷ such determination is to be respected "unless outside the pale of fair judgment."⁴⁸ The clear and present danger test is to be read in the context in which it developed and is not to be made a substitute for the weighing of qualitative values. Justice Frankfurter holds that the social value of the speech ought to affect the balance and that advocacy of overthrow ranks low.⁴⁹ The Court, noting the danger, ought not to presume that the people's elected representatives unconstitutionally restricted speech. The opinion was a study in constitutional technique. "To make validity of legislation depend on judicial reading of events still in the womb of time . . . is to charge the judiciary with duties beyond its equipment."⁵⁰ Justice Frankfurter emphasized that constitutionality is not synonymous with wisdom and that the statute was unwise.⁵¹ This was respect for the legislative judgment and "education in the abandonment of foolish legislation."⁵²

Justice Jackson also concurred, though expressing doubt as to the efficacy of the statute. "Many failures by fallen governments attest that no government can long prevent revolution by outlawry."⁵³ Essentially his position was that the clear and present danger test, developed as a rule of reason to limit prosecutions for trivialities under a statute aiming at anarchists, ought not to be applied to the Communist strategem of revolutionary techniques by a totalitarian party.⁵⁴ The test should be restricted to "hot-headed speech on a street corner, or circulation of a few incendiary pamphlets, or parading by some zealots behind a red flag, or refusal of a handful of school children to salute our flag,"⁵⁵ where the effects of the utterance could be better measured. Concluding that the Communist type of advocacy is punishable, Justice Jackson, erroneously it is submitted, thought his position

⁴⁷ See note 22 supra.

⁴⁸ Principal case, 341 U.S. 494 at 540, 71 S.Ct. 857 (1951).

⁴⁹ Cf. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766 (1942). It is submitted that classification of advocacy of overthrow in a category with obscene, profane, libelous, and "fighting" words is erroneous. See note 69 infra.

⁵⁰ Principal case, 341 U.S. 494 at 551, 71 S.Ct. 857 (1951).

⁵¹ Quoting the Director-General of the British Broadcasting System: "The debate must be won. . . . Erroneous doctrines thrive on being expunged. They die if exposed." Principal case, 341 U.S. 494 at 553, 554, 71 S.Ct. 857 (1951).

⁵² Frankfurter, J., in *Minersville School District v. Gobitis*, 310 U.S. 586 at 600, 60 S.Ct. 1010 (1940). For English view on our abdication of responsibility to the Supreme Court, see BROGAN, *POLITICS AND LAW IN THE UNITED STATES*, c. 4 (1941).

⁵³ Principal case, 341 U.S. 494 at 578, 71 S.Ct. 857 (1951).

⁵⁴ Cf. his ". . . the Communist Party is a conspiratorial and revolutionary junta," *American Communications Association v. Douds*, 339 U.S. 382 at 424, 70 S.Ct. 674 (1950).

⁵⁵ Principal case, 341 U.S. 494 at 568, 71 S.Ct. 857 (1951). For Justice Jackson's application of the clear and present danger test in a flag salute case see *Board of Education v. Barnette*, 319 U.S. 624 at 639-642, 63 S.Ct. 1178 (1943).

materially aided by the fact that the conviction here was for conspiracy to advocate.⁵⁶ This view is to be compared with the dissents following.

Justices Black and Douglas dissented. Justice Black emphasized that the indictment was for an agreement to publish ideas in the future. For him conviction for conspiracy to advocate was, no matter how worded, a virulent form of prior censorship of speech and press. Therefore section three of the Smith Act was thought unconstitutional on its face⁵⁷ and as applied. Even assuming that petitioners, though not indicted for actual advocacy, could be convicted for it, Justice Black reiterated⁵⁸ his near absolutist position⁵⁹ on the dictates of the First Amendment, at least as applied to discussion in the realm of public affairs. The clear and present danger test remained a minimum guarantee. The reasonableness test was scoffed at as little more than an admonition to Congress.

Justice Douglas first objected to outlawing speech on the basis, not of what was said, but on the intent with which it was said. He pointed out that Marxist-Leninist doctrine in academic context was permissible.⁶⁰ Further he saw a danger in elevating mere speech into seditious conduct by invoking conspiracy laws and would require peril from speech itself before permitting abridgement. Justice Douglas would retain the clear and present danger test intact even for a great evil, the determination of which should continue to be the task of the jury. He thought that there was no proof or judicial notice from which he could conclude that the Communist Party was a clear and present danger. Politically the Communists "are miserable merchants of unwanted ideas."⁶¹ As infiltrators, "the invisible army of petitioners is the best known, the most beset, and the least thriving of any fifth column in history. Only those held by fear and panic could think otherwise."⁶²

⁵⁶ For Justice Jackson's views against the extension of the conspiracy laws in another context see his concurrence, based upon opinions of administrators and observers of such laws in *Krulewitch v. United States*, 336 U.S. 440 at 445 et seq., 69 S.Ct. 716 (1949).

⁵⁷ See note 13 *infra*.

⁵⁸ Cf. *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190 (1941), and his dissent in *American Communications Association v. Douds*, 339 U.S. 382 at 445, 70 S.Ct. 674 (1950).

⁵⁹ See MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948), for the outstanding exposition of the absolutist interpretation of freedom of utterance as directed to public affairs. Criticized by Professor Chafee in 62 *HARV. L. REV.* 891 (1949).

⁶⁰ Cf. the American Civil Liberties Union position in note 43 *supra*. See, also, its *amicus curiae* brief for the Second Circuit, note 6.

⁶¹ Principal case, 341 U.S. 494 at 589, 71 S.Ct. 857 (1951).

⁶² *Ibid.*

V. *Order and Liberty*

A national statute prohibiting advocacy of overthrow of government accents the dilemma of self-government: the proper balance between the social interest in order and in liberty.⁶³ In the quarter century between the *Gitlow* and *Dennis* cases there has been an apparent adoption of the Holmes-Brandeis test, with its original elements, as the judicial formula for achieving the constitutional balance. However, the few state cases⁶⁴ involving sedition statutes did not again clearly confront the Court with the issues that had divided it in *Gitlow v. New York*. Moreover, in *Dennis v. United States*, congressional legislation in the name of national security was in issue. Application of the clear and present danger test would have resulted in a denial of power in the people's representatives to reach Communist leadership through prosecution for conspiracy to advocate forcible overthrow of government. Reformulation of the orthodox test was dictated by separation of powers thinking, where momentous national issues were involved. While the judiciary remained independent weighers of the conflicting interests,⁶⁵ Justice Frankfurter's opinion was an illustration of the higher deference paid to federal legislative judgment. The *Dennis* decision is not necessarily a harbinger of a less zealous championship of freedom of utterance than we have seen in the last decade. The affirming justices felt it necessary to comfort themselves with the speculation that Justices Holmes and Brandeis would not have held their test to be a constitutional *sine qua non*, if faced with danger of such magnitude. Therefore it is to be expected that repression of utterance will be scrutinized with a vigor at least approximating that of recent years. It is doubtful if state prosecutions under advocacy of overthrow statutes would receive the same degree of judicial tolerance, though doubtless the decision will encourage the operation of such state prosecution machinery. Indeed, a regrettable feature of the new formula is that its limits are subject to

⁶³ Cf. Beasley, "Australia's Communist Party Dissolution Act," 29 CAN. B. REV. 490 (1951), for report on decision that the act was ultra vires, hence unconstitutional. As an aftermath the electorate rejected an enabling amendment to furnish the necessary power. See also 1 STAN. L. REV. 85 (1948).

⁶⁴ *Fiske v. Kansas*, 274 U.S. 380, 47 S.Ct. 655 (1927); *De Jonge v. Oregon*, 299 U.S. 353, 57 S.Ct. 255 (1937); *Herndon v. Lowry*, 301 U.S. 242, 57 S.Ct. 732 (1937); *Taylor v. Mississippi*, 319 U.S. 583, 63 S.Ct. 1200 (1943).

⁶⁵ See note 23 supra. See also *Schneider v. State*, 308 U.S. 147 at 161, 60 S.Ct. 146 (1939). It has even been suggested that the judiciary make an independent examination of the facts in speech cases, *Craig v. Harney*, 331 U.S. 367 at 373, 67 S.Ct. 1249 (1947).

speculation. In the field of utterance this is particularly objectionable because it tends to effect a restriction on the interchange of ideas.

Dennis v. United States serves uniquely as a precedent. Conspiracy to advocate, one step removed from incitement, is punishable.⁶⁶ This seems far from the danger of overt action with which a self-reliant democracy should be primarily concerned. If justified in this case to reach an unknowable danger, still the principle demands strict limitation. The imminency factor in the clear and present danger test required that speech border on action before it could be suppressed. The jettisoning of the imminency factor achieves a perhaps desirable flexibility.⁶⁷ But this necessitates a judicial protection of civil rights commensurate with its increased discretion in effecting the qualitative balance. Respect for federal legislative judgment based presumably on detailed investigation is understandable. However, the broad sweep of the Smith Act says in fact that the Congress wants to reach all the advocacy cases that it constitutionally can.⁶⁸ This makes it incumbent upon the judiciary to constitute itself an effective constitutional ballast. It is not likely that the populace will protest repression of doctrine that is anathema to it. Further there is the unfortunate tendency to substitute repression by law for the effective answer that must be given to the obnoxious Communist creed on principle. The judiciary can best perceive the value in continual and vigorous re-establishment of fundamental tenets in the face of extremist attack.⁶⁹ Therefore it has the real responsibility to scrutinize the price tag attached to each repression of utterance and to inquire as to the worth of the bargain.

“The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and

⁶⁶ Also the re-allocation of the function of judge and jury made the jury a less effective safety valve on repression of utterance. See CHAFEE, *FREE SPEECH IN THE UNITED STATES* 504 (1941). *Wood v. State*, 77 Okla. Cr. 305, 141 P. (2d) 309 (1943), was a state case reversing a conviction, inter alia, on the ground that the question of clear and present danger had not been submitted to the jury.

⁶⁷ That the clear and present danger test is not a panacea see 9 *AM. LAW SCHOOL REV.* 881 (1941); 55 *HARV. L. REV.* 695 (1942); 1 CHAFEE, *GOVERNMENT AND MASS COMMUNICATIONS* 51 (1947); FREUND, *ON UNDERSTANDING THE SUPREME COURT* 24-28 (1949).

⁶⁸ There are further cases crystallizing. Several additional groups of Communist leaders have been indicted. E.g. *NEW YORK TIMES*, Aug. 1, 1949, p. 7:1; Aug. 8, 1949, p. 1:7; Aug. 9, 1949, p. 1:2; Aug. 29, 1949, p. 1:6; Sept. 1, 1949, p. 5:1,2.

⁶⁹ For the outstanding exposition of such value see JOHN STUART MILL, *ON LIBERTY*, c. 2 (1859).

violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."⁷⁰

Bernard A. Petrie

⁷⁰ Hughes, C.J., in *De Jonge v. Oregon*, 299 U.S. 353 at 365, 57 S.Ct. 255 (1937).