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CLANDESTINE SPEECH AND THE FIRST AMENDMENT

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COMMENTS

CLANDESTINE SPEECH AND THE FIRST AMENDMENT — A REAPPRAISAL OF THE DENNIS CASE—In a comment[1] written at the conclu-

[1] Comment, The Communist Trial and the Clear-and-Present Danger Test, 63 HARV. L. REV. 1167 (1950).

sion of the Communist leaders' trial[2] Professor Nathanson noted that Judge Medina's instructions required for a verdict of guilty that the jury "find only that the defendants intended to accomplish the overthrow of government 'as speedily as circumstances would permit it to be achieved.' "[3] This, wrote Professor Nathanson, was "inconsistent with the clear-and-present-danger test as formulated by Holmes and Brandeis, unless there were other circumstances in the facts actually presented which made that test inapplicable."[4] A major part of the balance of the comment is an attempt to refute a suggestion[5] that clandestine, underground utterance (unlike that which is openly directed to the public) is not entitled to the protection of the Holmesean clear and present danger test.

It is the purpose of what follows to suggest that under the principles espoused by Justices Holmes and Brandeis there is a constitutionally significant difference between clandestine and other utterance and that this difference was a crucial factor in the *Dennis* decision.[6] If this position is valid, *Dennis* is restricted to narrow quarters and is not, as it otherwise must be, a precedent for virtual abandonment of the clear and present danger test.

Examination of all of their opinions in which danger language is used leads inevitably to Professor Nathanson's own conclusion that Justices Holmes and Brandeis "were trying to suggest basic lines of distinction between an appeal to reason and an incitement to action, recognizing that the two might overlap, but also taking the position

[2] United States v. Foster, 9 F.R.D. 367 (1949).

[3] 63 HARV. L. REV. 1167 at 1170 (1950). The indictment charged a violation of the "Smith Act" [18 U.S.C. (1946) §11, now §§2385, 2387], that is, for "knowingly and willfully" conspiring to organize the Communist Party of the United States as a group to "teach, advocate, or encourage the overthrow or destruction" of the government "by force or violence," and "knowingly and willfully . . . to advocate . . . or teach the duty, necessity, [or] desirability . . . of overthrowing or destroying" the government "by force or violence."

[4] 63 HARV. L. REV. 1167 at 1170 (1950).

[5] One theme in the government's brief response to the defendants' motion for a directed verdict on the grounds that there had been no showing of a clear and present danger was expressed in the following terms:

> "When Holmes talked about freedom of speech, he said he meant the right of men to get their ideas accepted in the market place of thought. Holmes was talking from the background of a life and an experience where there was the freest possible discussion, in the town meetings of New England, in the public taverns, in the public squares, in the public halls, where men frankly and fearlessly stated their ideas. He was not talking about the kind of propaganda speakeasy that we heard about in this case, where persons went to school under assumed names or using only their first names, coming through a doctor's or a dentist's office into rooms some place else. This is not the kind of freedom of speech Holmes said could be protected." NEW YORK TIMES, May 21, 1949, p. 6, col 3.

[6] Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857 (1951).

that so long as the action contemplated by the appeal to reason was sufficiently remote to permit time for counterappeals to reason, the advocacy, even of the right of violence, should be treated as within the protection of freedom of speech."[7]

The rationale of such a position must be that, if in the process of social adjustment the deliberative forces are to prevail over the arbitrary, the community must have access to all available ideas; that a major purpose of the First Amendment is to safeguard such access; and that the only legitimate way for bringing on changes in public policy is through the peaceful devices of democracy, i.e., by public discussion and acceptance or rejection of all available proposals. As Justice Brandeis, his brother Holmes concurring, observed, "Those who won our independence believed . . . that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through *public discussion,* they eschewed silence coerced by law. . . . To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the *processes of popular government,* no danger flowing from speech can [justify repression unless] it may befall before there is opportunity for full discussion."[8] Or as Justice Holmes, referring to suppression as a cure for noxious doctrine, observed, "the ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution."[9]

In short, *democratic give-and-take is the antidote for bad doctrine*—"the fitting remedy for evil counsels is [the] good ones" which according to the basic democratic faith will spring from public discussion. Then what of him whose speech, intentionally or otherwise, threatens to bring on changes without first proposing them for public discussion? How are we to be protected from "evil counsels" which we do not have an opportunity to refute? Surely the answer lies in the proposition—of which the danger test is merely a special application—that only utterance which is subject to the antidote of public discussion comes within the very special immunity from public control that the First Amendment does, and democracy must, afford. As Professor Freund puts it, "The state may not punish open talk, however hateful; not for

[7] 63 HARV. L. REV. 1167 at 1174 (1950).

[8] Whitney v. California, 274 U.S. 357 at 375-377, 47 S.Ct. 641 (1927), concurring opinion (emphasis added).

[9] Abrams v. United States, 250 U.S. 616 at 630, 40 S.Ct. 17 (1919), dissenting opinion.

the hypocritical reason that Hyde Parks are a safety valve, but because a bit of sense may be salvaged from the odious by minds striving to be rational, and this precious bit will enter into the amalgam which we forge."[10]

In all of the cases in which Justice Holmes and Brandeis used the danger test the utterance at issue was open and directed to a broad public. Consequently the crucial question for them was whether the threatened danger was sufficiently remote to provide ample "opportunity for full discussion . . . to avert the evil by the processes of education. . . ."[11] But surely the same principle would apply in a case where, although there is ample *time* "for counter appeals to reason" other circumstances foreclose opportunity for them. The crucial issue is not whether a threatened danger is present or remote, but whether there is opportunity to forestall it by the rational processes of democracy.

Suppose, for example, a Smith Act[12] prosecution for conspiracy to teach and advocate the violent overthrow of government. The evidence (obtained by F.B.I. infiltration tactics) indicates that the teaching and advocacy in question was intended to, and did, take place only in a widespread, network of secret underground "study groups" open only to carefully selected totalitarian party members, such "study groups" being in design incipient cells for revolutionary action whenever the propitious moment might arrive. Suppose further that, as clearly as such things may be, "the propitious moment" was, at the time of the indictment, still so far away that there was no clear and present danger of an eruption.

Assuming in short that so far as time alone is concerned there was ample occasion to refute in the market place of reason what the defendants conspired to teach and advocate, still reasonable men could conclude there was no real opportunity for refutation because the "evil counsels" at issue were hidden from the public. What is there in such a context for "the power of reason as applied through public discussion" to deal with? Surely adequate time to refute an argument, i.e., the absence of a clear and present danger, is not significant free-speech-wise unless we know what the argument is!

In this view a crucial question in any free expression case would be this: is the challenged utterance calculated to bypass the process of public discussion and to attain its ends, if at all, by other means? If

[10] FREUND, ON UNDERSTANDING THE SUPREME COURT 26 (1949).

[11] Whitney v. California, 274 U.S. 357 at 377, 47 S.Ct. 641 (1927), concurring opinion.

[12] 18 U.S.C. (1946) §11 (now §§2385, 2387).

the answer is no, the danger test would be relevant—the utterance would be protected "unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion."[13] If on the other hand the answer is yes, i.e., if the speaker is not willing, or if for other reasons there is no opportunity, to test "the power of [his] thought to get itself accepted in the competition of the market,"[14] then some other rule would apply. The *Dennis* case suggests the applicability of what may be called the probable danger test, i.e., "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."[15] The merits or demerits of this test and to what extent, if at all, it differs from the reasonable basis test is not our present concern. It will be enough here to suggest that in a society that stakes its life on *unfettered intellectual exchange*, with public control of action in accordance with those ideas that prevail in the market place of reason, clandestine utterance is not entitled to the same high level of protection that must be accorded its open counterpart.

Assuming that there is constitutional significance in the difference between clandestine and other utterance, was there in the *Dennis* case such a finding of secrecy on the part of the defendants as to justify rejection of the clear and present danger test in favor of some other rule?[16] The government's suggestion of this approach to the case has already been noted. This suggestion was at least partially reflected in Judge Medina's charge to the jury:

> "No such [necessary] intent could be inferred from the open and aboveboard teaching of a course on the principles and implications of communism in an American college or university, where everything is open to scrutiny of parents and trustees and anyone who may be interested to see what is going on. That is why it is so important for you to weigh with scrupulous care the testimony concerning secret schools, false names, devious ways, general falsification and so on, all alleged to be in the setting of a huge and well disciplined organization, spreading to practically every state of the union and all the principal cities and industries."[17]

[13] Whitney v. California, 274 U.S. 357 at 377, 47 S.Ct. 641 (1927), concurring opinion.

[14] Abrams v. United States, 250 U.S. 616 at 630, 40 S.Ct. 17 (1919), dissenting opinion.

[15] Dennis v. United States, 341 U.S. 494 at 510, 71 S.Ct. 857 (1951).

[16] The Supreme Court's plurality opinion does not purport to reject; it merely endorses the court of appeals' "reinterpretation" of the clear and present danger test—a "reinterpretation," one submits, that in effect produces a different rule. See Dennis v. United States, 341 U.S. 494 at 510, 71 S.Ct. 857 (1950).

[17] NEW YORK TIMES, October 14, 1949, p. 15, col. 6.

To be sure there was no special or express jury finding that defendants had conspired *secretly* to teach and advocate the overthrow of government.[18] But in view of the quoted instructions it is arguable that a general verdict of guilty implies a finding of significant secrecy on the part of defendants. In any case the Supreme Court's plurality opinion does note that for purposes of review under the limited grant of the writ of certiorari "the record in this case [must be considered] amply [to support] the necessary finding of the jury that petitioners . . . were unwilling to work within our framework of democracy, but intended to initiate a violent revolution whenever the propitious occasion appeared."[19] What is the significance of this reference to a finding of unwillingness "to work within our democratic framework," if it does not refer to a refusal of the Communist leaders to submit their views for acceptance or rejection via constitutional processes?[20] Justice Frankfurter's concurring opinion contains similar language:

> "The Communist Party was not designed by these defendants as an ordinary political party. For the circumstances of its organization, its aims and methods, and the relation of the defendants to its organization and aims we are concluded by the jury's verdict. The jury found that the Party rejects the basic premise of our political system—that change is to be brought on by nonviolent constitutional process."[21]

Whether the jury did in fact find that the defendant's teaching and advocacy was clandestine is not important for present purposes. But it is crucial that on review five members of the Supreme Court majority used language which at the very least gives color to the view that their position rested upon such a finding by the jury.[22] On this

[18] I am assuming here with Professor Nathanson that a jury rather than a court finding would be necessary.

[19] 341 U.S. 494 at 497, 71 S.Ct. 857 (1951).

[20] In his dissenting opinion Justice Douglas said, "So far as the present record is concerned, what petitioners did was to organize people to teach and themselves teach the Marxist-Leninist doctrine contained chiefly in four books . . ." all of which are available to the public. Dennis v. United States, 341 U.S. 494 at 582, 71 S.Ct. 857 (1951). At most these books disclose the strategy of the defendants. I suggest the Dennis record indicates tactical teachings that are not accessible to the public. But even if the books in question tell the whole story, is that sufficient free-speech-wise when the teachers and pupils involved are hidden from anyone who might want to refute their position? Is the requirement of public discussion that Justices Holmes and Brandeis had in mind satisfied by blind gropings after the needle in the haystack?

[21] 341 U.S. 494 at 514, 546, 71 S.Ct. 857 (1951).

[22] The Justices may have been more than usually willing to discover a necessary jury finding to avoid imposing upon another trial court the kind of ordeal that the defendants had inflicted upon Judge Medina's court. If there is merit in this suggestion, the defendants set their own trap.

basis *Dennis* is not, as it otherwise must be, a precedent for complete annihilation of the position for which Justices Holmes and Brandeis fought. Rather it is authority for a complementary rule which, like the pristine danger approach, is not an expression of anarchic individualism, but a recognition of the need for preserving self-government from the shoals where words cease to be keys of public discussion.[23] The purpose of the First Amendment is to protect the right of every man to offer his thoughts as an ingredient in "that public opinion which is the final source of government in a democratic state."[24] It would be a perversion of that purpose to give special constitutional protection to expressions of thought which are not so offered. To the extent that "citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered [and] ill-balanced. . . . It is that mutilation of the thinking process of the community against which the First Amendment is directed."[25] By keeping open the channels of communication for ideas, democracy seeks to make full use of the community's total thinking power—in striking contrast to the totalitarian reliance upon the intellectual resources of a dictator and his small circle of henchmen.

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[23] See Judge L. Hand in Masses Publishing Co. v. Patten, (D.C. N.Y. 1917) 244 F. 535 at 540.
[24] Ibid.
[25] MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948).
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