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JUDGE HAND'S VIEWS ON THE FREE SPEECH PROBLEM

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Judge Learned Hand has been for many years a lawyer's lawyer. His opinions are liberally sprinkled through the case books; commentaries on legal matters cite his opinions with increasing respect and admiration; but to many people he is the judge who upheld the conviction of the eleven communists in New York on a question involving the limits of free speech. Scholars of parts and even some lawyers do not know that he anticipated the Supreme Court's "clear and present danger" test by two years, or that his contribution to the law of free speech is by no means confined to his holding in the communist conspiracy case. Judge Hand has dealt with many aspects of this difficult and controversial problem. His early opinions were liberal but restrained; his later opinions applied the law as he understood it to operate within an industrial context; his final opinion distilled from long experience and a mature philosophy of law is now the law of the land. It fulfilled his early promise and exemplified his greatest gift and in the final analysis the object lesson of his judicial career—judges must compromise and balance contending interests, even as legislatures whose surrogates they are, but in so doing they must take heed of the social values underlying legal principles and weigh against each other interests of similar kind, pitting social interest against social interest and individual interest against individual interest to the end that justice shall flourish and the law be vindicated.

THE DIRECT INCITEMENT TEST

On July 24, 1917, Learned Hand, Judge of the United States District Court for the Southern District of the State of New York delivered an opinion in the case of *Masses Publishing Co. v. Patten*,[1] which is still quoted with approval by both Supreme Court justices and publicists of reputation and distinction.[2] In this case Judge Hand was asked to enjoin the Postmaster of the City of New York from excluding from the mails a monthly revolutionary journal called *The Masses* which, it was contended, hampered the government in its conduct of the war with Germany then raging and encouraged the enemies of the United States. The August 1917 issue of that journal contained articles exhorting conscientious objectors to resist the draft by sticking it out to

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1. 244 Fed. 535 (S.D.N.Y. 1917).
2. See Justice Robert Jackson's opinion in Dennis v. United States, 341 U.S. 494, 568 (1951).

the bitter end, extolling the virtues of those who were resisting conscription, and paying glowing and poetic tribute to Emma Goldman and Alexander Berkman, two incendiary publicists, who were at the time in prison for encouraging in their paper, *Mother Earth*, refusal to register for the draft. The August issue of *The Masses* also contained four cartoons generally lampooning the draft law and appealing in rather inflammatory fashion to the spirit of resistance.

On June 15, 1917, the Espionage Act had become the law of the land after several months of preparation and discussion by the Department of Justice and Congress. Title I, Section 3 of the Act[3] made it unlawful to make willfully or convey false statements with the intent to interfere with the operation or success of the military effort of the nation, or to cause or attempt to cause insubordination in the armed forces, or to obstruct willfully the recruiting or enlistment services of the United States. Title XII, Section 1, excluded from the mails any matter violative of any section of the Act, and made it the duty of the Postmaster-General to determine what matter was non-mailable. Pursuant to instructions from the Postmaster-General, the Postmaster of the City of New York had excluded the August issue of *The Masses* from the mails.

Judge Hand, after carefully rejecting any inquiry into the war powers of Congress as irrelevant to the issues to be decided, concluded that the language of the statute should not be construed to cover the case at bar. While he admitted that the tendency of the publication was to interfere with the war effort, he concluded that a distinction had to be drawn, nevertheless, between mere advocacy which is indirect incitement and advocacy which is direct in character and amounts to counseling disobedience of law. In this case Judge Hand refused to apply what later came to be known as the "bad tendency test" and instead framed another, at once both more liberal and more explicit and more easily administered. Wrote Hand:

> To counsel or advise a man to an act is to urge upon him either that it is his interest or his duty to do it. While, of course, this may be accomplished as well by indirection as expressly, since words carry the meaning they impart, the definition is exhaustive, I think, and I shall use it. Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of the law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them into execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight

3. Act of June 15, 1917, c. 30, § 3, 40 STAT. 219.

> for freedom, and the purpose to disregard it must be evident when the power exists. *If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me that one should not be held to have attempted to cause its violation.* If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be *apt to create a seditious temper* is illegal. I am confident that by such language Congress had no such revolutionary purpose in view.[4] (Emphasis added.)

In the same paragraph Judge Hand recognized that there must be a point beyond which agitation must not be permitted to trespass:

> Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law can not by any latitude of interpretation be a part of that public opinion which is a final source of government in a democratic state.[5]

What at once marked these passages as worthy of the highest respect was not merely the language, eloquent though it was, nor the emergence of a new and more liberal test for free speech cases, but rather the significant weighing and balancing of societal values which is characteristic of only great judges. Judge Hand balanced in this case the value to society of free speech, without which a free state is doomed, against a state's interest in preserving unity and cohesiveness in time of war. He concluded that the values flowing from free speech were under the circumstances of the case at bar to be preferred to the lesser value of silencing criticism of the war effort, which at most was rather annoying and perverse than effective and dangerous.

Zechariah Chafee pointed out in 1919 the weakness of a great deal of judicial construction of the Espionage Act:

> The great trouble with most judicial construction of the Espionage Act is that social interest has been ignored and free speech has been regarded as merely an individual interest, which must readily give way like other personal desires the moment it interferes with the social interest in national safety. . . . The true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and the search for truth.[6]

There was little question that Judge Hand had properly weighed the values involved in the decision, but whether or not he had interpreted the statute according to the intention of the framers became a subject of some discussion in the periodicals and in the press. The nation was at war, and people, who would have been disposed to reason calmly in less trying times, found the pressures of war an open invitation to

4. 244 Fed. at 540.
5. *Ibid.*
6. Chafee, *Freedom of Speech in War Time,* 32 HARV. L. REV. 932, 959-60 (1919).

emotionalism. Attorney General Thomas E. Gregory on April 16, 1918, in a speech before the Executive Committee of the American Bar Association, outlining his views as to the necessity of amending the act in question, spoke in a critical manner of those judges who, like Learned Hand, adopted a liberal construction of the statute. He said:

> We secured passage of the Espionage Act, but most of the teeth which we tried to put in were taken out. We got what we could, but Congress itself did not realize at that time the conditions that would confront us. . . .
>
> To give you an idea of the ineffectiveness of that law when applied by a judge not in accord with its purposes, I refer to a celebrated case recently decided by a district judge of the United States. . . . [A description of the case followed here.] It seems practically impossible in the district in which that judge presides to punish the disloyalty denounced by this statute.[7]

Thomas F. Carroll writing in the *Michigan Law Review*[8] made an exhaustive study of the Congressional debate leading up to the enactment of the Espionage Act. He concluded that the debaters generally agreed that the test of the limits of the freedom of the press was substantially that offered by Thomas M. Cooley in his edition of Blackstone's *Commentaries:*

> Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To punish any dangerous or offensive writings, which, when published, shall upon fair and impartial trial be adjudged of pernicious *tendency,* is necessary for the preservation of peace and good order of government and religion, the only foundations of civil liberty.[9]

The author's own view was that "Blackstone's definition was probably not accepted unanimously by the framers of the Constitution, but was adopted later by the Courts."[10] Carroll quoted a part of Judge Hand's decision in the *Masses* case, but there was no indication as to whether he approved the decision or not or whether he felt that it did violence to the views of the founding fathers.

A note commenting upon "Recent Important Decisions" observed:

> It would seem that such an interpretation of the act [referring to Learned Hand's interpretation in the *Masses* case] deprives it of much of its force; and that the opposition and agitation attendant upon its enactment was, in view of such an application of it, all a crossing of a bridge which has not been built as yet.[11]

7. *Suggestions of Attorney-General Gregory to Executive Committee in Relation to the Department of Justice,* 4 A.B.A.J. 306 (1918).
8. Carroll, *Freedom of Speech and of the Press in War Time: The Espionage Act,* 17 MICH. L. REV. 621, 626 (1919).
9. Quoted by Carroll and documented as Cooley's Blackstone, Book 4, 151–52.
10. Carroll, *supra* note 8, at 626 n.13.
11. 16 MICH. L. REV. 131 (1917).

No doubt the general opinion throughout America was that Judge Hand had rendered an opinion doing scant service to the efforts of those engaged in a crucial struggle, but the calm judgment that weighs values is not noticeable by its prevalence in wartime. No doubt there were among those who knew the decision people who felt that he had not read properly the intentions of those who made the law, but regardless of whether or not Judge Hand interpreted the statute according to the intentions of its framers, his view of it was not yet to be accepted as law. No sooner had the decision been rendered than counsel for the Department of Justice obtained from Judge Charles M. Hough of the United States Court of Appeals in New York a temporary stay of the injunction which Judge Hand had granted, pending the disposal of the issue by the Circuit Court of Appeals. Judge Hough in a short opinion answered what he considered to be the two important questions: First, was the view of the law expressed by Judge Hand correct? Second, was it so clearly correct that the court should interfere with the Postmaster General's findings? As to the first query, Judge Hough argued:

> [I]t is at least arguable whether there can be any more direct incitement to action than to hold up to admiration those who do act. *Oratio obliqua* has always been preferred by rhetoricians to *oratio recta;* the Beatitudes have for some centuries been considered highly hortatory, though they do not contain the injunction, "Go thou and do likewise." At all events, it is a point plainly suitable for the attention of an appellate court.[12]

With this reasoning he refused to accept Judge Hand's distinction between indirect and direct incitement. Answering the second query, Judge Hough concluded that courts should not interfere with an administrative interpretation of law affecting one of the great administrative departments of the executive domain except in the clearest cases of abuse of discretion. He reasoned that the Postmaster General had acted within his discretion.

In November 1917, the *Masses* case came on for hearing before the Circuit Court of Appeals consisting of Ward and Rogers, Circuit Judges, and Mayer, District Judge. Judge Rogers delivered the opinion of the Court. He disagreed flatly with Judge Hand's interpretation of the law and with his insistence that a distinction should be drawn between indirect and direct incitement. Quoting Hand's statement, "if one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me that one should not be held to have attempted to cause its violation,"[13] Judge Rogers remarked:

12. Masses Publishing Co. v. Patten, 245 Fed. 102, 106 (2d Cir. 1917).
13. *Id.* at 105.

> This court does not agree that such is the law. If the natural and reasonable effect of what is said is to encourage resistance to a law, and the words are used in an endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned, or the interest of the persons addressed in resistance is not suggested.[14]

The court went on to find that the Postmaster-General had not abused his discretion by excluding *The Masses* from the mails. This finding was justified by a discussion of the precedents and by reasoning that denial of a service was not repression and might be withheld on policy. It was pointed out that transportation facilities were still available and that property had not been confiscated. Judge Ward in a concurring opinion stressed that "not every writing the indirect effect of which is to discourage recruiting or enlistment is within the statute,"[15] and emphasized the requirement of specific intent.

When the two opinions, the one of Judge Hand, and the other by Judge Rogers, are compared, it becomes strikingly apparent that the one is the opinion of a judge who is a philosopher, a student of social values, the other the opinion of a judge who reasoned within the framework of legal principles and categories to the exclusion of broad issues of social value underlying national life. Judge Hand's opinion was destined to endure; it was made of the stuff of civilization; it was anticipatory of the direction of movement of future events. Judge Rogers' opinion was destined to consignment to the attic for legal antiquarians. Temporarily, however, the Rogers opinion was significant because it emphasized the test of the intent with which words are uttered in determining criminal liability. This was to result in the application of a substantive test that

> . . . allowed conviction for any words which had an indirect effect to discourage recruiting and the war spirit, like the poem about Emma Goldman and the wind, if only the intention to discourage existed. Intention thus became the crucial test of guilt in any prosecution of opposition to the government's war policies, and this requirement of intention became a mere form since it could be inferred from the existence of the indirect injurious effect.[16]

It resulted, furthermore, in fixing in the minds of the judiciary the legality of the "bad tendency doctrine."

Partially as a result of the reversal of Learned Hand by the Court of Appeals, in the year 1918 alone 998 cases were commenced under the Espionage Act of 1917. Of these prosecutions 336 resulted in convictions, 57 defendants were acquitted, and 96 cases were pending at the close of the year. Fines were levied amounting to the sum of

14. Masses Publishing Co. v. Patten, 246 Fed. 24, 38 (2d Cir. 1917).
15. *Id.* at 39.
16. CHAFEE, FREE SPEECH IN THE UNITED STATES 50 (1941).

$163,843.89.[17] The total number of persons convicted under the statute was stated by the Attorney General in his annual report at 887 out of 1,956 cases in which prosecution was initiated.[18] In at least one case people were imprisoned for criticizing the Red Cross and the Young Men's Christian Association.[19] In many of these cases acquittals would have been obtained by the application of Judge Hand's incitement test. Professor Zechariah Chafee, writing in 1920, did not doubt but that Judge Hand had been right in his construction of the law. "Look at the Espionage Act of 1917 with a post-armistice mind," wrote Chafee, "and it is clear that Judge Hand was right."[20] He considered that there was no finer judicial statement during the war than Hand's opinion.[21]

Mr. W. R. Vance, in an article dealing with the law regulating free speech recognized the merits of the Hand test.[22] Citing this article, Professor Chafee, wrote:

> In England freedom of speech is necessarily protected only by jury trial plus the common law rules of crimmal attempt and solicitation, unlawful meetings, etc. . . . without the guidance of these rules the jury would be far less valuable. Hence the merits of Judge Hand's test.[23]

In this connection Judge Charles F. Amidon wrote:

> For the first six months after June 15, 1917, I tried war cases before jurymen who were candid, sober, intelligent business men whom I had known for thirty years, and who under ordinary circumstances would have had the highest respect for my declarations of law, but during that period they looked back into my eyes with the savagery of wild animals, saying by their manner, "Away with this twiddling, let us get at him." Men believed during that period that the only verdict in a war case, which could show loyalty, was a verdict of guilty.[24]

If this state of affairs was typical of other jurisdictions, so fierce a willingness to convict could scarcely have been held in check by the inviting latitude of the "bad tendency test" as laid down by Judge Rogers when he overruled Learned Hand in the *Masses* case.

Although Judge Hand was obliged to adhere to the superior court's ruling in the next case that came before him involving the interpretation to be given the Espionage Act,[25] nevertheless, he pointed out that the pamphlets in question remained "entirely within the range of discussion, and at common law would not, I think, subject their

17. Carroll, *supra* note 8, at 655 n.90.
18. *Ibid.*
19. CHAFEE, *op. cit. supra* note 16, at 46.
20. *Ibid.*
21. *Ibid.*
22. Vance, *Freedom of Speech and of the Press,* 2 MINN. L. REV. 260 (1918).
23. CHAFEE, *op. cit. supra* note 16, at 70.
24. *Ibid.*
25. United States v. Nearing, 252 Fed. 223 (S.D.N.Y. 1918).

author to criminal responsibility . . . no matter what his intent."[26] Although Judge Hand recognized that he was bound by the holding of the upper court, he still narrowed the rule of the case considerably when he applied it in the *Nearing* case. In reference to that rule he wrote:

> Whatever may be the rule at common law, I understand *Masses Pub. Co. v. Patten,* 246 Fed. 24, 158 C.C.A., 250 Ann. Cas. 1918B 999, to lay down an added measure of criminal liability under this statute to the utterance of words which may cause insubordination, or may obstruct the enlistment service. In that case, it is true, there is language which, taken broadly, can be made to mean that the author is liable if he merely knows that his words will so result. This I can hardly think can have been the significance of the decision, since, as I have already shown, the inevitable consequence would be to imperil any discussion of public matters. It certainly was not the purpose of that case to do so, or indeed to insist that the style or manner of the discussion must measure with any standard of taste or temperance. Such a result would be foreign to the whole history of the subject.[27]

Judges like Hand and Amidon who attempted to liberalize the construction of the Act, however, were few and far between.[28] The passions of the war and the temper of the times were not to be assuaged. It took calmer years of peace to appreciate the wisdom of their views. Yet the *Masses* case was in the record and its philosophy was to win converts.[29]

THE ROOTS OF THE "CLEAR AND PRESENT DANGER" DOCTRINE

On March 3, 1919, Justice Oliver Wendell Holmes handed down for the Supreme Court his famous opinion in the case of *Schenck v. United States.*[30] By this time almost all of the district court cases had been disposed of, and the armistice had been signed. Judge Hand's opinion in the *Masses* case was by now almost two years old. Schenck and the other defendants had mailed circulars urging in impassioned language men who had passed exemption boards to assert their rights and charging that conscription was unconstitutional and despotic. Clearly, the language used could have been considered barred under Learned Hand's test of direct and dangerous incitement to unlawful resistance. Justice Holmes speaking for a unanimous Court upheld the convic-

26. *Id.* at 228.
27. *Ibid.*
28. CHAFEE, *op. cit. supra* note 16, at 74-79 for a discussion of charges by judges to juries.
29. Judge Charles Wyzanski thinks the merits of the case lay not in new constructional concepts, but "in its adherence to ancient doctrines of liberty in construing a statute loose in phraseology and uncertain in coverage." Wyzanski, *Judge Learned Hand's Contributions to Public Law,* 60 HARV. L. REV. 348-69 (1947).
30. 249 U.S. 47 (1919).

tion of Schenck in an opinion which contained the words of the famous "clear and present danger" test:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . *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.*[31] (Emphasis added.)

Whether Holmes in formulating his statement of the "clear and present danger" test was influenced directly by Hand's language in the *Masses* case opinion cannot be determined. The answer lies in the realm of conjecture. That Holmes was acquainted with the *Masses* case may be readily inferred. The case had made a splash in judicial waters. Holmes knew Hand, naturally enough, and soon was to write Sir Frederick Pollock that he considered him Supreme Court timber. Whatever the seminal relationship between the *Schenck* case and the *Masses* case may be, it cannot be denied that the two tests are strikingly similar. The greatest difference is that of the two formulas; Hand's is the more objective. From the viewpoint of content and historical background they are two limbs from the same tree. Under both tests words are criminal only because of their causal relationship to an evil from which society is justified in protecting itself. Under both tests the gravity and the imminency of the danger are material circumstantial factors. Both permit a wide latitude for hostile criticism and discussion in the realm of political ideas. Under both tests words and intentions are not punishable for their critical, caustic quality nor for their tendency to produce an evil but because of their direct incitement to action which society is justified in preventing.

In his opinion in the *Masses* case Judge Hand had recognized that the basis of his decision derived from the common law test of incitement to unlawful conduct. Karl N. Llewellyn said in 1919 of the Holmes formula:

> The test laid down by Justice Holmes in the above passage [quoting the "clear and present danger" passage] is that of common law incitement to crime. It is a sound test. The Constitution was never intended to privilege such incitement.[32]

In 1920 Edward S. Corwin recognized the relationship between Judge Hand's test and the Holmes doctrine. He wrote:

31. *Id.* at 52.
32. Llewellyn, *Free Speech in Time of Peace*, 29 YALE L.J. 337, 338 (1920).

> The issue raised by Justice Holmes is at basis the historical issue. He is at one with those who urge that Congress must stop short, in its regulation of speech and the press, with punishing words which "directly incite to acts in violation of law" and which "bring the speaker's [or writer's] unlawful intention reasonably near to success.[33]

Zechariah Chafee wrote in 1919:

> This portion of the opinion [quoting the Holmes "clear and present danger" passage in the *Schenck* case] especially the italicized sentence substantially agrees with the conclusion reached by Judge Hand, by Schofield, and by investigation of the history and political purpose of the First Amendment.[34]

Professor Chafee again in the 1941 edition of his study of free speech in the United States discussed the similarity of the two doctrines and expressed his admiration for Judge Hand's test as being administratively more objective:

> The Supreme Court's opinion in the *Schenck* case lends much support to the views of Judge Learned Hand, in the *Masses* case. Justice Holmes does interpret the Espionage Act somewhat more widely than Judge Hand, in making the nature of the words only one element of the danger, and in not requiring that the utterances shall in themselves satisfy an objective standard. Thus he loses the great administrative advantages of Judge Hand's test.[35]

Again in the same connection Professor Chafee commented:

> The *Debs* decision showed clearly the evils of the broad construction of the Espionage Act, which rejected Judge Learned Hand's objective standard of the meaning of the words used.[36]

In the final analysis, what is remarkable about Judge Hand's opinion in the *Masses* case is that he as a district judge had no formula to guide him—only the old opinions enshrining Blackstone's doctrine of no prior censorship, and the analogies to be drawn from the common law. This was scant judicial comfort to a courageous and enlightened judge steeped in Mill and Milton and gifted with the ability to see social values and individual values in the proper relationship. That he so early designed a test in substance so like the one that later became a judicial *vade mecum* is indicative of the breadth of his valor and the penetration of his intellectual vision.

Although it can be established beyond doubt that Judge Hand enun-

33. Corwin, *Freedom of Speech and Press Under the First Amendment: A Resume*, 30 YALE L.J. 48, 54 (1920).
34. Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 967 (1919).
35. CHAFEE, *op. cit. supra* note 16, at 82.
36. *Id.* at 85.

ciated in 1917 substantially the same test as that offered by Justice Holmes in 1919, the roots of both tests trail far into the judicial past. It is startling to discover that in the year 1818 the Council of Revision of the State of New York composed of Governor Clinton, Chancellor James Kent, Chief Justice Thompson, and Justices Van Ness, Yates, and Platt phrased almost the same doctrine. The circumstances were these: Eunice Chapman was married to James Chapman in New York in the year 1804 by whom she had three children and with whom she lived until 1811 when James Chapman abandoned his wife and joined a religious sect, the Shakers. Subsequently, he took his three children from his wife and kept them concealed from her, claiming that his marriage contract was at an end along with his obligation to support his wedded wife. The Legislature of the State of New York in an Act entitled, "Bill for the Relief of Eunice Chapman and for other Purposes . . ." dissolved the marriage by statutory authority and without judicial inquiry, and further empowered the chancellor to award the children of marriages, one spouse of which had joined the Shakers, to that parent who had not joined the sect. Said the Council of Revision, speaking through Judge Platt:

> If the Legislature can constitutionally deprive a parent of his parental rights merely because he is a Shaker, they have an equal right for the same cause to disfranchise him of every other privilege, or to banish him or even put him to death. If the principle be admitted, it must rest in discretion alone how far it shall be carried in the measure of punishment. There is no evidence that the Society of Shakers are guilty of any acts of licentiousness or any practice inconsistent with the peace and safety of this state; and although we lament what to us appear absurd errors in their religious creed, yet, so long as they preserve the character which they now possess for sobriety, industry, and peaceful habits, the Council can not regard them as having forfeited the protection afforded by that article of the Constitution. To justify such an act of denunciation *the danger to the peace and safety of this State must not be merely speculative, remote, and possible but imminent and certain.*[37]

Felicitously considering the equities, if not the constitutional issues involved, the Legislature passed the Act over the Council's revision.[38]

Several scholars, among them Zechariah Chafee, find the seeds of the "clear and present danger" doctrine in the common law of criminal attempt. Others have pointed to the analogy with the English law of seditious libel. Giles J. Patterson is among the latter. He wrote in 1939:

> This doctrine of "clear and present danger" finds a parallel in the English law of seditious libel upon the King's ministers and government. In those cases the jury is required to consider the state of the country and public

37. STREET, THE COUNCIL OF REVISION OF THE STATE OF NEW YORK AND ITS VETOES 386-87 (1859).
38. *Id.* at 388.

> opinion at the time of publication. Writings which might, in times of peace and public tranquility be innocent, might, in times of war or insurrection, be dangerous. For this reason criminal *ex officio* informations for seditious libel are permitted only in cases that are of so "dangerous a nature as to call for immediate suppression" and such as are "likely to cause immediate outrage, public riot, and disturbances."[39]

Justice Rutledge in a dissenting opinion in *Everson v. Board of Education* expressed the view that the origin of the "clear and present danger" rule could be found in the Virginia Statute for Establishing Religious Freedom. Wrote Justice Rutledge:

> Possibly the first official declaration of the "clear and present danger" doctrine was Jefferson's declaration in the Virginia Statute for Establishing Religious Freedom: "That it is time enough for the righteous purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."[40]

Wherever the roots of the doctrine may lead, it is evident that in its substance it did not spring full blown from the head of Oliver Wendell Holmes one March day. There is evidence to show that he had considered the problem before, and it is likely that the phraseology was a result of the fusion of ideas and words previously employed.[41] It is possible that Judge Learned Hand's thinking contributed to the Holmes formulation.

FREE SPEECH IN AN INDUSTRIAL CONTEST

After the subsidence of the passions engendered by World War I, fewer cases involving the issue of the latitude to be given speech reached the courts. The "clear and present danger" doctrine, however, was amplified and developed by Justices Holmes and Brandeis in a series of brilliant and famous dissenting opinions.[42] Their views, however, were not used by a Supreme Court majority to invalidate a conviction until 1937. After this date the Holmes-Brandeis philosophy experienced a remarkable development at the hands of the Roosevelt Court. It was expanded to protect a variety of social interests includ-

39. PATTERSON, FREE SPEECH AND A FREE PRESS 155 (1939).

40. Quoted in Antieau, *The Rule of Clear and Present Danger—Its Origin and Application*, 13 U. DET. L.J. 198, 199 (1950).

41. See Antieau, *supra* note 40, at 198-99. Also see Shientag, *From Seditious Libel to Freedom of the Press*, 11 BROOKLYN L. REV. 125-54 (1942), for an account of historical relationships. See also Hall, *The Substantive Law of Crimes 1887-1936*, 50 HARV. L. REV. 616-21 (1937); Green, *Liberty Under the Fourteenth Amendment*, 27 WASH. U.L.Q. 497-540 (1942); Note, *Verbal Acts and Ideas*, 16 U. CHI. L. REV. 328-33 (1949).

42. See dissenting opinions in Gitlow v. New York, 268 U.S. 652, 672 (1925); Gilbert v. Minnesota, 254 U.S. 325, 334 (1920) (Brandeis alone dissenting); Pierce v. United States, 252 U.S. 239, 253 (1920); Schaefer v. United States, 251 U.S. 466, 495 (1920); Abrams v. United States, 250 U.S. 616, 624 (1919).

ing, in addition to freedom of the press and speech, the freedoms of religion[43] and assembly.[44]

Judge Hand made no significant contribution to this development. Cases involving such issues did not come before his court, and the failure of the Chief Executive to appoint him to the Supreme Bench deprived the nation of his unusual talents as a judge. Several cases involving the use to be made of the new view in a context of industrial disputes do deserve examination because they revealed facets of his thinking on the subject of special values protected by the First Amendment.

In *NLRB v. Federbush Co.*,[45] Judge Hand had before him the question as to what extent an employer's words are privileged when addressed to an employee for the purpose of impeding the organization of a labor union. Federbush in a talk with one of his employees who was active in efforts to organize the Federbush factory had said that the union was "just a bunch of racketeers . . . trying to collect dues and it won't get you anywhere in the end. They won't secure you a job."[46] After the employee had informed him that he already held a union card, Federbush added words to the effect that if the plant were to be organized, the company would be unable to operate for more than six months out of the year. Later he asked the same employee "why he was turning against the firm by joining the union."[47]

Judge Hand thought this conversation a trivial matter but, since the Board had seen fit to make it the occasion for an injunction, he could not say that its order should not be enforced. To the respondent's argument that his privilege of free speech had been infringed, Judge Hand answered:

> No doubt an employer is as free as anyone else in general to broadcast any arguments he chooses against trade-unions; but it does not follow that he may do so to all audiences. The privilege of "free speech," like other privileges, is not absolute; it has its seasons; a democratic society has an acute interest in its protection and can not indeed live without it; but it is an interest measured by its purpose. That purpose is to enable others to make an informed judgment as to what concerns them, and ends so far as the utterances do not contribute to the result. Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such and pro tanto the privilege of free speech protects them; but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. The Board is vested with the power to measure

43. Cantwell v. Connecticut, 310 U.S. 296 (1940).
44. Herndon v. Lowry, 301 U.S. 242 (1937).
45. 121 F.2d 954 (2d Cir. 1941).
46. *Id.* at 955.
47. *Ibid.*

> these two factors against each other, a power whose exercise does not trench upon the First Amendment. Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first.[48]

Two important views are advanced in this passage. First, that the purpose for which society guards free speech is to enable people to secure information on which to base sound judgments, and second, that the true purport of language is to be determined from the context in which it is expressed and the setting in which it is used. From the first it appears that Judge Hand's statement is immune from the charge made by Alexander Meickeljohn[49] that the Holmes interpretation of the basis of free speech provided only a means for winning new truth and not a means for sharing the truth that has been won, since Hand stressed the basic value of sharing information available to men in society. From the second, it may be inferred that Judge Hand still regarded the nature and character of the words and the circumstances surrounding their use as prime elements in determining whether or not they should be held privileged.

The second case that demands consideration is *International Brotherhood of Electrical Workers, Local 501 v. NLRB.*[50] In this case the National Labor Relations Board filed a petition against the International Brotherhood and others for a review of an order directing the union to cease and desist from inducing and encouraging a secondary boycott as an unfair labor practice under the Labor Management Relations Act of 1947. The facts were these: A contractor named Giorgi, who had agreed to build a house for the owner of a lot in Greenwich, Connecticut, let out the carpentry to a sub-contractor named Deltorto, and the electrical work to another sub-contractor named Langer. On the day here involved, Deltorto had two carpenters on the job, members of an AFL union; but Langer, who was a non-union employer, had none. One Patterson, the business representative of the local, learning that the electrical work was being done by non-union labor, went to Deltorto and one of his carpenters and told them what he had learned. Later in the day Patterson told Deltorto and both carpenters that the job was unfair, and began to picket the premises with the usual slogan. As a result of Patterson's

48. *Id.* at 957.
49. MEICKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 88 (1948).
50. 181 F.2d 34 (2d Cir. 1950).

actions, the carpenters quit work. Georgi was told by Patterson that he would have to replace Langer, who was informed of the circumstances and agreed to throw up his contract.

Judge Hand, speaking for the Court of Appeals, affirmed the cease-and-desist order and entered an enforcement decree. Dealing with the free speech aspects of the case, he wrote:

> It has never been held, save by the most extreme partisans, if, indeed, even by them, that the First Amendment protected all verbal acts as such. The interest which it guards, and which gives it its importance, presupposes that there are no orthodoxies—religious, political, economic, or scientific—which are immune from debate or dispute. Back of that is an assumption—itself an orthodoxy, and the one permissible exception—that truth will be more likely to emerge, if no limitations are imposed upon utterances that can with any plausibility be regarded as efforts to present grounds for accepting or rejecting propositions whose truth the utterer asserts, or denies. No doubt it is difficult to know when an equivocal utterance has plainly emerged out of its penumbra into the full light of unalloyed incitement; and that difficulty may justify protecting all that are within the ambivalent area. . . . The First Amendment does not excuse picketing to compel the employer to join the combination [referring to a combination in restraint of trade] even though the pickets carry placards which bear statements of the grievances involved. Such utterances are not within any shadow zone which exempts them, as being addressed to the reason, as designed to convince others upon the merits. . . . Congress, in search for a compromise between the conflicting interests of employees in collective bargaining and that of neutrals in avoiding involvements in quarrels not their own, decided to draw a line at secondary boycotts; and the propriety of the decision is not for us. The constitutional limitations upon its realization are of course as absolute as upon the realization of any other legislative decision; but it should not be forgotten that the words which have so often been repeated as though they were a definite rubric in this field, [*Abrams* v. *United States*, 250 U.S. 616, 627] were introduced by the following clause: "I do not doubt for a moment that upon the same reasoning that would justify persuasion to murder, the United States constitutionally may punish . . . ."[51]

As in the decision in the *Federbush* case,[52] once more Judge Hand pointed up the social interests to be protected by providing a broad latitude for unrestrained speech. In this case Judge Hand stressed the truth-discovering function of free speech as in the *Federbush* case[53] he had emphasized the truth-sharing function. There are no orthodoxies immune from dispute. But what are the limits? For limits there are. When an equivocal utterance "has emerged out of its penumbra into the full light of unalloyed incitement,"[54] there the limit must be drawn! But even more important than the limits set for speech,

51. *Id.* at 40.
52. See text and note 45 *supra*.
53. *Ibid.*
54. See quoted text and note 51 *supra*.

limits which he had drawn before, was his reference to the "clear and present danger" rule—"words which have so often been repeated as though they were a definite rubric in this field."[55] Clearly, this is not the language of veneration. Implicit in the opinion is the Hand view that formulas outwear their usefulness when they are stretched to cover circumstances and purposes for which they were never invented. His reference to the words with which Justice Holmes prefaced his famous statement called attention to the reasoning behind it, and that reasoning was founded upon the old common law of incitement to unlawful conduct. *Only when an equivocal utterance can plainly be labeled incitement should it be suppressed, and doubtful cases may justify privilege.*

In two other cases Judge Hand dealt with the free speech issue as it directly affected instruments of communication. In *National Broadcasting Co. v. United States,*[56] he briefly referred to an argument drawn from the first amendment, but only to find that even though the action of the Federal Communication Commission in forbidding certain contracts with the networks did coerce their choice and freedom; yet, since it was done for the very purpose of protecting the same interests which the amendment guarded, no question of its applicability arose under the circumstances. This case evolved out of the practice of large networks compelling local stations not to broadcast any feature issued by a competing network, a practice which deprived people in certain localities of hearing programs in which they were interested. As a matter of fact, the practice had prevented the broadcasting of the World Series baseball playoff by stations that were affiliated with other networks than the Mutual Broadcasting Corporation. The Supreme Court agreed with Learned Hand and affirmed his decision.[57]

Perhaps an even more important decision came before a special three judge federal district court for the Southern District of New York in 1943. Judge Hand, speaking for the court, handed down the decision with Judge Swan dissenting.[58] Here the United States charged that the Associated Press and others had conspired to restrain and monopolize interstate commerce in violation of the Sherman Anti-Trust Act[59] and the Clayton Act[60] and asked that they be enjoined. The suit was instituted on the theory that the Associated Press by refusing its services to non-members or new newspapers except by leave of competitors who were already members, and upon financially well-nigh prohibitory terms, created an actionable re-

55. *Ibid.*
56. 47 F. Supp. 940 (S.D.N.Y. 1942).
57. National Broadcasting Co. v. United States, 319 U.S. 190 (1942).
58. United States v. Associated Press, 52 F. Supp. 362 (S.D.N.Y. 1943).
59. 26 STAT. 209-10 (1890), 15 U.S.C.A. §§ 1-7 (1951).
60. Act of Oct. 15, 1914, c. 323, §§ 1-2, 38 STAT. 730 (codified in scattered sections of 15, 28, 29 U.S.C.A.).

straint of trade. Although the decision involved principally questions of administrative law and the meaning and application of the Sherman Act, it became necessary for the court to dispose of the free speech aspect of the case because both sides sought to invoke the first amendment. The government argued that the practices complained of involved freedom of the press because they prevented newspapers from giving to the public as broad a news coverage as they could provide if they had the services of the Associated Press at their disposal. The Associated Press argued that any interference with their established practice in respect to a policy adopted for the promotion of their business was an interference with their ancient liberty. Judge Hand, while resting his opinion upon an interpretation of the statutes controlling and the facts of the case as they came within those legislative mandates, did recognize that the interests which the government sought to protect were closely akin to those protected by the first amendment. He wrote:

> However, neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that the right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.[61]

He answered the contention of the Associated Press that the freedom of the press would suffer by any interference with their practices by holding:

> The effect of our judgment will be, not to restrict AP members as to what they shall print, but only to compel them to make their dispatches accessible to others. We do not understand on what theory that compulsion can be thought relevant to this issue; the mere fact that a person is engaged in publishing does not exempt him from ordinary municipal law, so long as he remains unfettered in his own selection of what to publish. All we do is to prevent him from keeping that advantage for himself.[62]

This case reached the Supreme Court in 1944 and produced a freshet of concurring and dissenting opinions.[63] The Court upheld the decision of Judge Hand in its majority opinion but reached its conclusions by a different route. Justice Frankfurter, however, concurred in an opinion that rested squarely upon the reasoning of the opinion by the lower court. He quoted with approval Judge Hand's

61. 52 F. Supp. at 372.
62. *Id.* at 374.
63. Associated Press v. United States, 326 U.S. 1 (1945).

statement of the close relationship between the public interest protected by the first amendment and that which the lower court sought by its holding to protect and foster.[64] Justice Black, who wrote the minority opinion, while not quoting Judge Hand, agreed with him substantially on the freedom-of-the-press aspect of the case and wrote:

> Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.[65]

He further expressed himself in respect to a side of the free speech question that has as yet received little judicial attention by saying:

> Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[66]

Justice Roberts, in an opinion with which the Chief Justice joined, disagreed with the Hand opinion. He reasoned that the question involved matters of public policy that the courts should have left for legislative determination. Learned Hand knew that courts had been making peripheral policy decisions since the first judge climbed to a rickety bench. His answer to Justice Roberts' view was contained in his opinion:

> [I]t is a mistake to suppose that courts are never called upon to make similar choices; *i.e.*, to appraise and balance the value of opposed interests and to enforce their preference. The law of torts is for the most part the result of exactly that process, and the law of torts has been judge-made, especially in this very branch. Besides, even though we had more scruples than we do, we have here a legislative warrant, because Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case. Congress might have proceeded otherwise; it might have turned the whole matter over to an administrative tribunal, as indeed to a limited extent it has done to the Federal Trade Commission. But, though it has acted, it has left these particular controversies to the courts where they have been from very ancient times.[67]

THE DENNIS CASE

One more free speech case was to be decided before Learned Hand put aside his judicial robes for the retirement which he had so richly earned. This was the case of *Dennis v. United States*,[68] to some, one of the most crucial cases to come before the courts of the United States in many years.[69]

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64. *Id.* at 28.
65. *Id.* at 20.
66. *Ibid.*
67. United States v. Associated Press, 52 F. Supp. 362, 370 (S.D.N.Y. 1943).
68. 183 F.2d 201 (2d Cir. 1950).
69. See Justice Frankfurter's statement in Dennis v. United States, 341 U.S. 494, 517 (1951).

This case arose out of circumstances which the government believed fell within the prohibitions of the Smith Act of 1940.[70] This act makes it unlawful for any person:

> (1) to knowingly or willfully advocate, abet, advise, or teach the duty necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of such government;
> (2) with the intent to cause the overthrow or destruction of any government in the United States, to print, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising or teaching the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by force or violence;
> (3) to organize or help to organize any society, group or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

Section 3 of the Act provides:

> It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title.

The foregoing provisions were merely a part of an Act which was directed principally at revising the laws respecting aliens in the United States. Unfortunately, congressional debates offer little help concerning the proper interpretation to be given its words.[71] Obviously, it must have been supposed that the words used would be given their usual meaning. It is, however, clear that the provisions of the law quoted above were directed at the activities of the communists in the United States. Senator Connally while explaining the bill to his colleagues in the Senate remarked:

> Another provision makes it unlawful to organize or help to organize any society, group, or assembly of persons who seek, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence. That is probably the broadest provision in the bill. . . . That applies to such organizations as those of the Communists and others who openly advocate the overthrow of the government by force or violence. . . . [It] should not disturb anyone, because it relates only to those who advocate, not a change of the Government under constitutional processes, not a change of the Government under democratic institutions, but the overthrow of the Government by force or violence.[72]

Evidently the Congress desired to leave the problem of limiting the statute to square with the Constitution to the courts, for it provided

70. Act of June 28, 1940, c. 439, §§ 1-5, 54 STAT. 670.
71. See 86 CONG. REC. 8340-47, 9029-36 (1940), for debates.
72. *Id.* at 8342.

if any provision were held unconstitutional the remainder of the Act should not be affected thereby, and by further providing that if "the application thereof to any person or circumstance, is held invalid . . . the application . . . to other persons or circumstances" should not be affected.[73]

Whatever may be said in criticism of this willingness of Congress to write legislation in broad terms and pass the burden of interpretation to the courts, there can be little doubt that the framers desired to write as broad a law as possible and leave to the courts the question of fitting the shoe to the last. There can be little doubt, too, that the Act, as it was passed, represented the almost unanimous will of the representatives of the people in respect to what they considered to be a grave problem, for the final vote in the House on the Conference Committee report carried with only four dissents.[74]

Title II of the Alien Registration Act of 1940, commonly called the Smith Act, was by implication held constitutional when the Supreme Court in *Dunne* v. *United States*[75] refused certiorari; but it was not until the *Dennis* case that the Supreme Court directly passed upon the question of its constitutionality under the first amendment. Judge Learned Hand wrote the opinion for the court of appeals, and he was sustained by the majority of the Supreme Court. It was Judge Hand's interpretation of the "clear and present danger" doctrine that was adopted in the opinion of Chief Justice Vinson, and it is this opinion that is now the law of the land on such questions.

In the winter of 1949, Eugene Dennis and other leaders of the Communist Party were indicted for conspiracy to violate Section 2 of the Smith Act. The trial extended over many months and ultimately resulted in the conviction of the defendants in the United States District Court for the Southern District of New York presided over by Judge Harold Medina. The trial was widely discussed and publicized and soon became a cause celebre. In June 1950, the case was argued before the Court of Appeals for the Second Circuit, and on August 1, 1950, Learned Hand delivered the opinion of the court. This opinion affirmed the judgment of the district court and further amplified Judge Hand's views on freedom of speech and the press.

Having determined that the evidence was sufficient to support the verdict, Judge Hand concluded that three questions arose: First, was the Act constitutional as construed by the judge in the lower court? Second, was this construction the proper one? Third, was the evidence adduced admissible under the indictment? He proceeded to a discussion of the issues presented by the case. First came a discussion of

73. Act of June 28, 1940, c. 439, §§ 40-41, 54 STAT. 676 (codified in scattered sections of 8, 18, U.S.C.A.).
74. 86 CONG. REC. 9036 (1940).
75. 138 F.2d 137 (8th Cir. 1943), *cert. denied*, 320 U.S. 790 (1943).

the social interests protected by the first amendment. The Judge reasoned that the interests protected thereunder "rest upon a skepticism as to all political orthodoxy" and upon a "belief that there are no impregnable political absolutes," and that "a flux of tentative doctrines is preferable to any authoritative creeds." He admitted that the premise was as yet unproved and was perhaps "incompatible with men's impatience of a suspended judgment" when the stakes were high. He found it relatively easy to deal with utterances that were strictly incitement but hard to determine the privilege due utterances that were at once "both an effort to affect the hearer's beliefs and a call upon them to act when they have been convinced."[76] For help he turned to an analysis of the cases marking the emergence and the subsequent amplification of the "clear and present danger" rule in an attempt to discover its true meaning. He found that the cases failed to show a clear directive. Analyzing the opinion of Justice Brandeis in *Whitney v. California*[77] to the effect that he would hold a conspiracy protected, though its execution were deferred to the first propitious moment, he concluded that the reasoning behind those words was that delay in execution would provide opportunity for the corrective of public discussion. He felt that Justice Brandeis would have not been of the same opinion "if the conspirators had sought to mask their purposes by fair words" as in the case at bar, and he pointed out that even Brandeis agreed that the Court had not fixed the standard by which to determine when a danger should be adjudged clear or how imminent it should be to justify repression of speech. He agreed that in *American Communications Ass'n v. Douds*[78] all of the Justices had stressed that there must be some clear and present danger that the utterance would succeed in creating a substantive evil within the control of Congress; but he felt that other statements in the controlling opinion indicated that the rule was not an automatic formula for the solution of speech cases but rather a rubric for pointing up the necessity for a careful balancing of competing social interests in order to accord protection to the more demanding one under the particular circumstances presented by the case to be decided. Finally, from his analysis of the relevant cases he concluded that:

> No longer can there be any doubt, if indeed there was before, that the *phrase, "clear and present danger," is not a slogan or shibboleth to be applied as though it carried its own meaning; but that it involves in every case a comparison between interests which are to be appraised qualitatively.*[79] (Emphasis added.)

76. The phrases in quotation marks are found in 183 F.2d at 207.
77. 274 U.S. 357, 376 (1927).
78. 339 U.S. 382 (1950).
79. 183 F.2d at 212.

And again:

> [T]he phrase, "clear and present danger," has come to be used as a short hand statement of those among such mixed or compounded utterances (utterances which are at the same time persuasions to belief and calls to action) which the Amendment does not protect. Yet it is not a *vade mecum;* indeed from its very words it could not be. It is a way to describe a penumbra of occasions, even the outskirts of which are indefinable, but within which, as is so often the case, the courts must find their way as they can. *In each case they 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 have purposely substituted "improbability" for "remoteness," because that must be the right interpretation. Given the same probability, it would be wholly irrational to condone future evils which we should prevent were they immediate; that could be reconciled only by an indifference to those who come after us.[80] (Emphasis added.)

Utilizing the rule as he had interpreted it as "grave and probable danger," Judge Hand argued from a consideration of the nature and character of the Communist Party and from the record of its activities in America and its successful subversion in other lands as evidenced by recent history that such a conspiracy as charged in the indictment and substantiated by the admissible evidence created a danger of utmost gravity and of enough probability to justify its suppression.

Passing to the argument that the statute must be limited to be constitutional, the Judge admitted that the statute was so broad as to make criminal the "fulminations of a half crazy zealot on a soap box, calling for an immediate march upon Washington,"[81] but he found that Congress had limited the statute in a saving manner by explicitly declaring that it wanted the words to govern all cases where they constitutionally could. Nor was the act invalid for vagueness. True Congress could have added the qualifying clause, "when that constitutes clear and present danger" after the words "teach" and "help to organize," but since this phrase was so "imprecise" and involved in its interpretation such utmost difference of opinion, this would not have helped a great deal to clarify the act; nor could the Congress prescribe a rule for each occasion. The statute by requiring specific intent was cleared of any vagueness that might make it otherwise objectionable, since the conduct prohibited was made criminal only in case the accused knew that what he intended was unlawful.

The defendants had excepted to that part of Judge Harold Medina's charge that took from the jury the question of whether the danger to be avoided was sufficient to justify the act under the first amendment and left with them only the decision as to whether the defendants' intent was to overthrow the government as speedily as

80. *Ibid.*
81. *Id.* at 214.

circumstances would permit. Therefore Judge Hand had to pass upon the thorny question of whether or not the court had erred in this respect. He decided that, although the degree of probability or imminency of the danger is a question of fact, a determination of this fact involved a choice between conflicting social interests and therefore became a choice for the legislature or the courts when they became the legislature's surrogate for this purpose. To leave this question to juries would, in Judge Hand's opinion, preclude opportunity for judicial review and result in a multiplicity of decisions destructive of the necessary uniformity and certainty. He distinguished the holding in *Pierce v. United States*[82] on the ground that the holding there was addressed to the question of the sufficiency of the evidence to support the verdict. He further reasoned that a question of the constitutionality and interpretation of a statute was a judicial question upon which juries were not competent to pass under the American system of jurisprudence.[83]

Judge Hand concluded an opinion remarkable for its facility in extracting the really crucial issues by saying:

> The record discloses a trial fought with a persistence, an ingenuity and —we must add—with a perversity, such as we have rarely, if ever, encountered. It is of course possible that the defendants are inspired with the fanatical conviction that they are in possession of the only gospel which will redeem this sad Planet and bring on a Golden Age. If so, we need not consider how far that would justify the endless stratagems to which they resorted; and it is not for us to say whether such a prosecution makes against the movement, or, on the contrary, only creates more disciples; ours is only to apply the law as we find it. . . . We know no country where they would have been allowed any approach to the license here accorded them; and none, except Great Britain, where they would have had so fair a hearing. Their only plausible complaint is that that freedom of speech which they would be the first to destroy has been denied them. We acknowledge that freedom is not always easy to protect; and that there is no sharp line that marks its scope. We have tried to show that what these men taught and advocated is outside the zone.[84]

This decision has not been greeted by the publicists with the same enthusiasm with which other of his opinions have been received. Even Irving Dilliard, who has compiled and edited some of Judge Hand's non-legal papers and who is an ardent admirer of the man and his contributions to American life, expressed disapproval of the opinion.[85] John Wasnick, writing on recent cases in the *Catholic University of America Law Review,* thought that:

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82. 252 U.S. 239, 254 (1920).

83. Although Judge Hand denied the defendant's challenge to the array, since that question does not involve free speech issues it has not been analyzed.

84. 183 F.2d at 234.

85. HAND, THE SPIRIT OF LIBERTY xvii (Dilliard ed. 1952).

> Judge Hand, in the *Dennis* case, has extended the doctrine of clear and present danger to include clear and probable danger where the overthrow of the government by force is more than an obscure possibility. . . . There are, therefore, two tests which Judge Hand could have applied—the clear and present danger test, and the bad tendency test. He has chosen to apply neither, but has instead created a new test, the test of clear and probable danger. Apparently he found it impossible to find a clear and present danger, for had he so found, it would have been unnecessary to create this new doctrine.[86]

Stanley Levine in a note in the *Rutger's Law Review* saw

> . . . the introduction into the legal philosophy of doctrines governing regulation of civil liberties of a possible middle ground between the doctrine represented by *Schenck v. United States*, and *Gitlow v. New York*—but one which can very easily become a no-man's land which will draw the clear and present danger test into its quicksand.[87]

A note in the *University of Pennsylvania Law Review* expressed the opinion:

> In the instant case Judge Learned Hand decided not to follow the *Gitlow* case, but claimed to follow Holmes' doctrine, while still finding that the advocacy of the defendants did constitute a "clear and present danger." Although Judge Hand applied the test, he altered its classic meaning. The decision would permit suppression of words which created *a high probability* of danger in the future, although they did not present an imminent threat. . . . Though it lends itself to easier application, there is a possibility that the test will be too broadly applied in later cases . . . .[88]

Perhaps the most violent attack has come from Mr. Louis Boudin.[89] Mr. Boudin's chief objection was that Judge Hand had "definitely and irrevocably"[90] emasculated the Holmes-Brandeis rule "of any meaningful content."[91] He accused Judge Hand of following a tortuous course of reasoning in his review of precedents that resulted in the clear and present danger test's becoming under his treatment a thing of threads and patches. He quarrelled with the resort to history to show the probability of danger resulting from the conspiracy charged in the indictment and proceeded to expound his own view of history, fortified by references to two books, in an attempt to show that Hand was a poor historian. He especially objected to what he termed Hand's "labored"[92] reasoning that the presence or absence of a "clear and present danger" was a question to be decided by the judge. Mr. Boudin argued that the court should have interpreted the statute un-

86. 1 CATHOLIC U.L. REV. 103-04 (1951).
87. Levine, *The Clear and/or Present Danger Doctrine: A New Equation*, 5 RUTGERS L. REV. 413, 419 (1951).
88. 99 U. PA. L. REV. 407, 408-09 (1950).
89. Boldin, *"Seditious Doctrines" and the "Clear and Present Danger" Rule*, 38 VA. L. REV. 143-86, 315-56 (1952).
90. *Id.* at 329.
91. *Ibid.*
92. *Id.* at 330.

der the first amendment to require a showing of "clear and present danger," if it wished to apply that rule; and then permitted the jury to decide the fact of the degree of its imminency. He reinforced his argument on this point by citing the *Pierce* case, the *Whitney* case, and finally the *Schaefer* case where Justice Brandeis had said:

> 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. 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.[93]

These criticisms of Mr. Boudin are direct and of a serious nature, but they are answered by Judge Hand in his opinion. It is true that the matter of conclusions to be drawn from recent history are usually open to question, but it is also highly improbable that many qualified historians would feel disposed to question the facts upon which the Hand conclusions were based.

The several criticisms which have been offered all seem to boil down to the general charge that Judge Hand altered the "clear and present danger" rule to mean a grave danger of entertainable probability, and that in so doing he erred in his interpretation and performed a neat feat of judicial emasculation. Although it is apparent that he viewed with some distaste the veneration accorded a mere formula and one so imprecise and that he distrusted the labored stuffing of judicial reasoning into moulds of any kind to the exclusion of a consideration of the values which formed them,[94] yet it can scarcely be charged with validity that he deviated materially from the Holmes-Brandeis philosophy of free speech or that he neglected to consider the social values which their philosophy sought to protect and conserve. Justice Holmes himself wrote the opinions in the *Schenck* case,[95] the *Frohwerk*[96] case, and the *Debs*[97] case in all of which he sustained convictions

93. *Id.* at 353.
94. See Hand's opinion in International Brotherhood of Electrical Engineers, Local 501 v. NLRB, 181 F.2d 34 (2d Cir. 1950).
95. 249 U.S. 47 (1919).
96. 249 U.S. 204 (1919).
97. 49 U.S. 211 (1919). In an early case, Commonwealth v. Kennedy, 170 Mass. 18, 20 (1897), Holmes spoke of the "substantive evil," and said the act must come pretty near to accomplishing that result before the law will notice it. After he was elevated to the supreme bench, he spoke of "dangerous probability" in Swift & Co. v. United States, 196 U.S. 375, 396 (1905), and again of "dangerous proximity," in Hyde v. United States, 225 U.S. 347, 388 (1912).

under the Espionage Act of 1917. In the latter case he clearly equated "imminency" with "probability." In that case in discussing the relationship between the words used by Eugene Debs and the danger they carried to the war effort he said:

> If that was intended [obstruction of recruiting] and if, in all the circumstances that would be its *probable* effect, it would not be protected by reason of its being part of a general program and the expressions of a general and conscientious belief.[98] (Emphasis added.)

Although it is true that Judge Hand did not cite this case to buttress his conviction that "imminency" must be equated with "probability," it is significant that under the circumstances of the case before him he arrived at the same conclusion.

What Judge Hand did was to review the pertinent cases. From his reading he saw that there had been little agreement in the Supreme Court as to what the hallowed phrase meant or as to how it should be applied. Reasoning within the frame-work of the cases as they appeared in the record, he concluded that the danger to be averted by a repression of free speech under the First Amendment must be grave and probable. And even though the reasonable foundation of the doctrine rested upon a faith that, given time, free speech would reveal the falsity of pernicious doctrines, nevertheless, that faith itself grew out of another faith—that the rules of the market place would be observed by those who there purveyed their intellectual wares. It did not follow that Holmes and Brandeis would have protected a conspiracy of men who sought the protection of free speech only to destroy it, who worked to undermine the market place for the free exchange of ideas by subterraneous borings and secret sapping.

It is possible that Judge Hand would have employed the more objective test of incitement which he had devised in the *Masses* case if he had felt himself free so to do, but the Roosevelt Court by expanding and glorifying the "clear and present danger" test made it incumbent upon him as a lower court judge to apply it. In so doing he found the danger to free institutions from communist subversion grave. In choosing between the advantages flowing from an unrestricted exercise of free speech and those inhering in the duty of a free state to protect itself by a law agreed upon by the representatives of the people of the free state he chose the latter.

Justices Holmes and Brandeis were never confronted by a free speech decision in so grave a social context. They did not live to see the sad events of the past decade, nor the world threatened by the materialistic doctrine of men who, intent upon world revolution, move by stealth and strike with scientific violence to achieve their ends.

98. 249 U.S. 215 (1919).

Finally, it is doubtful that they ever thought of the "clear and present danger" tests as anything more than the statement of a broad and general principle useful as a judicial tool.

John A. Gorfinkle and Julian W. Mack II, writing in the *California Law Review*,[99] see the rule as merely the statement of a broad principle and support this thesis by quotations from the opinions of Holmes and Brandeis. They show that these two justices regarded the famous phrase as a rule of reason to be applied by the court and only then by the exercise of good judgment. They quote Justice Brandeis as saying, in *Whitney v. California:*

> This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection.[100]

The Hand opinion in the *Dennis* case does no injury to such views; rather it serves to reinforce them.

On June 4, 1951, the Supreme Court of the United States, having granted certiorari limited to the questions of whether the Smith Act violated the first amendment as construed and applied by the lower court, and as to whether it violated as applied the first and the fifth amendments because of indefiniteness, upheld Judge Hand in a majority opinion written by Mr. Chief Justice Vinson. Justices Burton, Reed, and Minton joined in the opinion; Justices Jackson and Frankfurter wrote separate concurring opinions; Justices Black and Douglas dissented in separate opinions; Mr. Justice Clark did not participate in the decision.

The Chief Justice accepted throughout the opinion of the court of appeals. The opinion adopted Judge Hand's definition of the meaning of the "clear and present danger" rule by saying:

> 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. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we can not expect from words.[101]

Mr. Justice Frankfurter in a separate concurring opinion approached the problem from another viewpoint. The theory behind his opinion is that great questions of public policy should be de-

99. Gorfinkle and Mack, *Dennis v. United States and the Clear and Present Danger Rule*, 39 CALIF. L. REV. 475, 479 (1951).
100. 274 U.S. 357, 374 (1927).
101. Dennis v. United States, 341 U.S. 494, 510 (1951).

cided by representatives of the people in legislatures assembled for that purpose. "To make the 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."[102] The court, he was convinced, should not set aside legislation unless it was palpably unreasonable and oppressive.[103] Justice Frankfurter very, very gently reprimanded Judge Hand for his interpretation of the "clear and present danger" doctrine by saying:

> In all fairness, the argument cannot be met by reinterpreting the Court's frequent use of "clear" and "present" to mean an entertainable "probability." In giving this meaning to the phrase "clear and present danger" the Court of Appeals was fastidiously confining the rhetoric of opinions to the exact scope of what was decided by them. We have greater responsibility for having given constitutional support over repeated protests, to uncritical libertarian generalities.[104]

It is to be observed that Justice Frankfurter agreed with Judge Hand that the hackneyed phrase was "imprecise." That the two jurists were at one on the values protected by the first amendment is evidenced by the fact that Justice Frankfurter quoted with approval Learned Hand's words on this subject in the case, *International Electrical Workers, Local 501 v. NLRB.*[105]

Mr. Justice Jackson presented another theory of the case. He would save the "clear and present danger" test for application in the kind of cases for which it was devised—when the issue is the criminality of a hot-headed speech on a street corner or circulation of a few incendiary pamphlets. . . ."[106] Where the case requires prediction and prophecy of the effects of a well organized, nation-wide conspiracy he would apply the law of conspiracy and common law incitement. He felt that the power to prohibit such conspiracies was within the constitutional power of Congress. If one should counsel and encourage violation of the law, he must be punished. In this connection Justice Jackson quoted the decision of Judge Hand in the *Masses* case:

> One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law can not by any latitude of interpretation be a part of that public opinion which is the final source of government in a democracy.[107]

Here again is the old rule pronounced by Judge Hand in 1917. Here is a reiteration of the theme that runs through all of Judge Hand's

102. *Id.* at 551.
103. *Id.* at 525.
104. *Id.* at 527.
105. See quoted text and note 45 *supra.*
106. 341 U.S. at 568.
107. Quoted by Justice Jackson. *Id.* at 571.

opinions in free speech cases. Learned Hand must have read this opinion with approval for it was an echo out of his own mouth. As a matter of fact every single justice on the majority side quoted from Judge Hand's free speech opinions, and each quoted from a different case.[108] This evidences the influence of Learned Hand in this field.

The dissenting opinions by Justices Black and Douglas repudiated the Hand-Vinson views. Justice Black charged that the "clear and present danger" doctrine had been undermined; that the law as written was an unconstitutional invasion of constitutional freedom because it was directed at teaching and advocacy. He expressed his often asserted belief that the first amendment enjoys a preferred position, and statutes written under its mandate should not be sustained merely because the court thinks them to be reasonable under the circumstances.[109] To Justice Douglas the evidence fell short of proving seditious conduct. Speech short of incitement to immediate unlawful conduct he believed to be protected. Provocateurs should be silenced only when they moved from speech to action.[110]

That Judge Hand's decision in the *Dennis* case did weaken the "clear and present danger" rule *as that rule was understood by libertarian publicists and those who had adopted the "double standard" of constitutional interpretation* cannot be doubted. That it embraced, however, and expressed the *rationale,* the *underlying values* to which that formula pointed equally cannot be doubted. Certainly he rendered a service by pointing out that shibboleth and formulas offer scant protection for anything valuable in society, being merely tools, judicial compasses for making clear the direction to be taken. Unfortunately men pin their faith to such phrases and become angry and sometimes vituperative when they feel them slighted or disregarded. To this point Judge Hand might have quoted Carlyle, who once wrote:

> What can be more unprofitable than to stretch out the old formula and law phraseology, so that it may cover the new, contradictory, entirely uncoverable Thing! Whereby the poor Formula does but *crack,* and one's honesty along with it! The thing that is palpably *hot,* burning, wilt thou prove it, by syllogism, to be a freezing mixture? This stretching out of Formulas till they crack is, especially in times of swift change, one of the sorrowfulest tasks poor Humanity has.[111]

Paul A. Freund has expressed Learned Hand's reaction to the "clear and present danger" doctrine to a nicety and in words that re-echo the Judge's own phrases:

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108. *Id.* at 510, 550, 571.

109. *Id.* at 579-80.

110. *Id.* at 590-91.

111. Quoted in Wigmore, *Abrams v. United States: Freedom of Speech and Freedom of Thuggery in War Time and Peace Time,* 14 ILL. L. REV. 539, 560 (1920).

> The truth is that the clear-and-present-danger test is an oversimplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of more moderate controls than those which the state has imposed; and perhaps the specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase, "clear and present danger," or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle.[112]

THE DOUBLE STANDARD

There remains yet another facet of Learned Hand's exposition of freedom of speech and press, which, though more pertinent to his concept of the limits of judicial discretion, deserves consideration because it impinges upon the relative value of freedom of expression. Judge Hand does not belong to that school of constitutional interpretation that expounds the gospel of the "double standard"—that is, that the Bill of Rights offers a wide latitude for those who tinker with the institution of property but a much narrower margin to those who would limit what have been called civil rights. To Judge Hand the generalized statement, making up the Bill of Rights are not law in the strict sense of that term but rather a summing up of historical experience, counsels of moderation, admonitions to forbearance "directed against the spirit of faction when factions sought to press political advantage to ruthless extremes."[113] There are no eternal and immutable verities. Each generation must pour into the moulds the amalgam of its own experience; each generation must be permitted freedom to solve the vexing political problems occasioned by its own development. Under the American system, law is enacted by the public assemblies of representatives of the people. There competing interests must compromise their strife, and a court has no more right to invalidate that compromise when freedom of expression is the subject of law than when the interests of property are affected by legislation.

Judge Hand made this clear in an address delivered at a commemoration meeting of the New York City Bar Association for Chief Justice Stone.[114] In that speech he called for judicial consistency in viewing the personal interest in property as at least the equivalent of the personal interest in freedom of expression. He realized that one of the most powerful currents in the national tradition was and is

112. FREUND, ON UNDERSTANDING THE SUPREME COURT 27-28 (1949).

113. Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 COLUM. L. REV. 696-97 (1946).

114. *Id.* at 697.

concern for the social value inhering in the ownership of property. This speech revealed again the clarity and balance of Judge Learned Hand's mind. What he was insisting upon was that judges should balance against each other values of the same categories or kinds; when they applied a standard they should apply it consistently. The same standard that determined the constitutionality of legislation respecting property should determine the constitutionality of legislation respecting free speech, or religious freedom, or freedom of assembly; for all of these are personal rights; they are all necessary attributes for the development of the maximum human potential.

By implication Judge Hand revealed the basic anomaly in the position of those liberals who welcome each legislative refashioning of the institution of property and howl with anguish when the representatives of the people dare limit in any way "civil rights."

Paul A. Freund thinks that:

> The most impressive challenge to the double standard has come from Judge Learned Hand. . . . Judge Hand has contributed to the clarity of analysis by reminding us that the relevant comparison is not between the enduring values of free inquiry and expression on the one hand, and transitory measures for the control of property on the other; the problem is harder than that. We are obliged to compare the ultimate values of property with those of free inquiry and expression, or to compare the legislative compromises in the two realms; for laws dealing with libel or sedition or sound trucks, or a non-political civil service are as truly adjustments and accommodations as are laws fixing prices or making grants of monopolies.[115]

115. Freund, *op. cit. supra* note 112, at 12-14. *Compare* Judge Hand's own statement in United States v. Dennis, 183 F.2d 201, 212, and his statement in NLRB v. Federbush, 121 F.2d 954 (2d Cir. 1914).