

Smith Act within our domestic scene. If antisocial acts, as distinguished from words, may clearly be reached, and in fact are reached by law—whether acts of sabotage, espionage, or other similar acts, including violence—then we may seriously question whether it is worth the risk to become enmeshed in the stifling attempts to proscribe speech as such. The late Professor Chafee, speaking in the early 1950s at the height of the controversy over the Smith Act prosecutions, laid to rest rather effectively the argument that runs: “Well, yes, but it’s different now. Before there were only little dangers.” He reviewed in a dramatic fashion documents of the 1920s illustrating the extent to which people then thought the danger was something more than little, and he eloquently concluded: “Reading what everybody now agrees about the panic-stricken alarmists of 1920, I wonder what will be said thirty years from now about the alarmists of 1952.”<sup>109</sup> And what will they say in 1996?

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#### A COMMENT ON PROFESSOR NEWHOUSE'S PAPER

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The only aspect of Professor Newhouse's analysis that I am inclined to question is the failure to distinguish between warlike, defamatory, or subversive propaganda directed to the American people and that deliberately beamed abroad. The distinction that I have in mind is not the one which he does mention between attacks upon a foreign government and those directed against our own government. I agree with him that this distinction is not a satisfactory one because the directions of our own foreign policy may well be responsive to the popular opinion of foreign governments. But the opinion which the people of other countries have of their own governments is quite another matter. To the extent that anyone subject to the law of the United States is primarily and distinctively engaged in attempting to influence the public opinion of the people of another country, it seems to me that there are distinctive considerations which are not allowed for in Professor Newhouse's analysis.

In the first place, the clear-and-present-danger test as conventionally stated and as used by Professor Newhouse himself has little, if any, application to the situation which I am positing. The attempt to arouse other people against their own government does not involve advocacy of, or incitement to, the kind of action which our own government has a right to prevent. The ultimate action is more properly described as one which is none of our government's business. Should it follow from this that

<sup>109</sup> Chafee, *Thirty-Five Years With Freedom of Speech*, 1 KAN. L. REV. 1, 6 (1952).

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the attempt to induce such action is also none of our government's business, that such advocacy or incitement, even if there is a clear and present danger of its success or a reasonable probability of its success, should be immune from our own governmental control? Or should we restate the rule to make it apply to incitement to action which another government would have a right to prevent even if it were bound by our own constitutional standards? It seems to me that either alternative is to wrench the clear-and-present-danger test out of its setting and to apply it to a situation where the whole rationale of the rule has no application.

It will be recalled that the philosophy of the clear-and-present-danger test is based primarily on two postulates—first, that we as a nation are committed to the preservation of a free market for ideas and, second, that the best test of truth is what will ultimately prevail in that free market. Applied more specifically to the problem of subversive propaganda, the rationale developed by Mr. Justice Brandeis was primarily a composite of courage and faith—courage to risk permitting attack upon the foundations of our society coupled with faith that so long as there was time for discussion reason would prevail over error. Presumably reason in this connection might involve two aspects—(1) recognition of the folly of resort to violence and (2) recognition and also use of the power of the democratic process to remedy any evils serious enough to warrant resort to violence. As I have suggested elsewhere, the clear-and-present-danger test thus expresses our conviction that “no government which is worth preserving can be seriously endangered by advocacy of the propriety or necessity of its violent overthrow.”<sup>1</sup> To paraphrase Mr. Justice Holmes, this might be regarded as one of the prophecies, based perhaps upon imperfect knowledge, upon which we have wagered our salvation.<sup>2</sup>

To return again to the terms of our hypothetical problem, all this has little relevance to subversive propaganda aimed at inciting foreign people against their own government. It is not for us to say whether those people should adopt the concepts of the free market in ideas or whether they should wager their own salvation upon the prophecy that no government worth preserving can seriously be endangered by advocacy of its overthrow. Still less would it make sense to apply the Meiklejohn version of the absolute protection of the first amendment for any expression of ideas. For Meiklejohn, at least, freedom of speech is an essential part of the process of self-government—“a deduction from the basic American agreement that public issues shall be decided by universal suffrage.”<sup>3</sup> Whether this is a wise or appropriate reading of the first amendment has been questioned on the ground that it may be both too broad in permitting all types of comment on public issues irrespective of circumstances and too narrow in withdrawing all constitutional protection from other

<sup>1</sup> Nathanson, *The Communist Trial and the Clear-and-Present Danger Test*, 63 HARV. L. REV. 1167, 1175 (1950).

<sup>2</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion).

<sup>3</sup> ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 27 (1948).

types of expression such as the arts and sciences.<sup>4</sup> Whatever may be the merits of that debate, it clearly has no application to our hypothetical problem. The propaganda we are considering may or may not be directed at a democratic society committed to the principles of self-government. If it is not, the exercise of freedom of speech directed toward that society can hardly be justified as an integral part of the process of self-government. In short, the rationale of the first amendment, at least insofar as it depends upon the value of freedom of speech to the listener rather than the speaker, seems inapposite to propaganda deliberately directed abroad whether one adopts the clear-and-present-danger test or the seriousness-of-the-evil-discounted-by-its-improbability approach or the Meiklejohn philosophy rooted in the principles of self-government.

Is there then some other approach which would make sense in applying the first amendment to such propaganda? Perhaps it might be suggested that freedom of speech, like freedom of travel, is not confined to our domestic frontiers; that the exchange of opinion across national boundaries is part of the freedom of expression protected by the first amendment; that this freedom is not confined to the *receipt* of ideas and information from abroad, as demonstrated by the *Lamont* decision,<sup>5</sup> but also extends to transmission of ideas and information abroad. Probably it would shock most of us sufficiently to raise at least constitutional doubts if Congress were to prohibit entirely the sending of books, magazines, newspapers, and pamphlets to other countries, as well as ordinary personal correspondence and foreign broadcasts. It might also be suggested that communication is usually a two-way street; that any country which attempts to prevent its own citizens from communicating their ideas to the peoples of other countries would suffer, at least to some extent, in the receipt of ideas and information from abroad. Scientists, for example, might find themselves cut off from foreign scientific developments; artists and authors might suffer a similar isolation. In general, it might be said that our participation in the international dialogue with respect to both public affairs and the arts and sciences would be seriously impeded if not virtually destroyed.

Shall we conclude then that the right to transmit our ideas abroad is part of freedom of expression protected by the first amendment or simply that, like freedom to travel abroad, it is part of liberty protected by the due process clause from arbitrary restraint? To me it does not seem that this particular choice goes to the essence of the problem. My only concern is that there be recognition of a different order of considerations where international rather than national communication is the subject of regulation; that the tests developed with only the national scene in mind do not really make sense at the international level; and that the interests of both the individual and the Government are sufficiently different to justify the striking of quite a different balance. I would not go as far as to suggest that there are no first amend-

<sup>4</sup> Chafee, Book Review, 62 HARV. L. REV. 891 (1949).

<sup>5</sup> *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

ment considerations so far as the individual is concerned, but neither would I regard the Holmes-Brandeis philosophy of the first amendment or the Meiklejohn philosophy or the Black philosophy as especially pertinent or helpful.<sup>6</sup> Instead, it seems to me that government regulation of international communication based upon either legislative or executive judgment as to the requirements of the national interest would be entitled to a presumption of validity, provided that the extent of the restriction upon individual freedom seemed on its face fairly coterminous with the extent of the national interest. In other words, the restriction must be no broader than necessary to meet the asserted evil.

It remains only to emphasize again that this comment is directed to but a small corner of the small corner of international propaganda with which Professor Newhouse is concerned. Perhaps the isolation of propaganda destined for consumption abroad from that intended for the home market is so difficult and insignificant that the constitutional problems envisaged in its separate treatment would never arise. Nevertheless, during the conference out of which these papers developed, we heard an enlightening description of the operations of Radio Free Europe as an example of private expression on the international scene designed primarily, if not exclusively, for foreign consumption. Would it not be shocking if such an operation could, with constitutional immunity, be conducted so irresponsibly as seriously to embarrass the official conduct of American foreign policy?

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<sup>6</sup> I am not sure how Mr. Justice Black would analyze this particular problem. Is it regulation of "action" rather than words when the government undertakes to prevent the transmission of propaganda abroad?