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## Dennis v. United States and the Clear and Present Danger Rule

*John A. Gorfminkel\* and Julian W. Mack II†*

THE GREATEST single problem confronting the Supreme Court today is the task of reconciling our traditional concepts of individual liberty, particularly freedom of expression, with the demands of national security. During the past three terms, the Court has decided fifteen cases touching on various aspects of this problem.<sup>1</sup> All but one<sup>1a</sup> were by divided courts. The most recent of these decisions, as well as the most far reaching in its implications, is *Dennis v. United States*<sup>2</sup> which sustained the conviction of eleven leaders of the Communist Party for conspiracy to violate section 2 of the Smith Act<sup>3</sup> which makes it unlawful for any person:

(1) to knowingly or wilfully 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;

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<sup>1</sup> Only those cases which involved the federal loyalty and security programs, action under similar state laws, and state prosecutions for speech of a type that might be regarded as incitement to riot or attack on governmental institutions, have been listed. Cases involving labor disputes, religious liberty and contempts not involving investigations under loyalty and security programs are omitted.

Decisions involving attacks on religious, racial or political groups: *Feiner v. New York*, 340 U.S. 315 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

Federal employees loyalty programs: *Bailey v. Richardson*, 341 U.S. 918 (1951).

Communist affidavit provisions of the Labor Management Relations Act: *Osman v. Douds*, 339 U.S. 846 (1950); *American Communications Assn. v. Douds*, 339 U.S. 382 (1950).

Attorney General's list of subversive organizations: *Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1951).

State employees loyalty programs: *Garner v. Los Angeles Board*, 341 U.S. 716 (1951).

Contempts of court; refusal to answer questions re communist affiliation: *Rogers v. United States*, 340 U.S. 367 (1951); *Blau v. United States*, 340 U.S. 159 (1950).

Jury trial in District of Columbia for contempt of Congress for refusal to answer questions on communist affiliation; scope of inquiry into effect of loyalty program on federal employees as prospective jurors: *United States v. Fleischman*, 339 U.S. 349 (1950); *United States v. Bryan*, 339 U.S. 323 (1950); *Morford v. United States*, 339 U.S. 258 (1950); *Dennis v. United States*, 339 U.S. 162 (1950); *Christoffel v. United States*, 338 U.S. 84 (1949). See also, *Barsky v. United States*, 167 F.2d 241 (D. C. Cir. 1948), *cert. denied*, 334 U.S. 843 (1948); *Lawson v. United States*, 176 F.2d 49 (D. C. Cir. 1949), *cert. denied*, 339 U.S. 934 (1950).

<sup>1a</sup> *Blau v. United States*, *supra* note 1.

<sup>2</sup> 341 U.S. 494 (1951).

<sup>3</sup> 54 STAT. 670 (1940), 18 U.S.C. § 10 (1946).

(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, 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 affiliated with, any such society, group, or assembly of persons, knowing the purposes thereof.

The indictment charged the defendants had conspired

(1) to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence.<sup>4</sup>

Although the statute is written in broad terms of advocate, advise and teach, section 2 was construed by the trial judge, in his charge to the jury, as requiring

the intent that such teaching and advocacy be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, all with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit.<sup>5</sup>

As so construed and applied, the Court of Appeals for the Second Circuit affirmed the convictions.<sup>6</sup> The Supreme Court granted certiorari, limited to two questions:<sup>7</sup>

1. Whether either section 2 or section 3 of the Smith Act, inherently or as construed and applied in the instant case, violates the First Amendment and other provisions of the Bill of Rights.

2. Whether either section 2 or section 3 of the Act, inherently or as construed and applied in the instant case, violates the First and Fifth Amendments because of indefiniteness.

The Supreme Court accepted the construction placed upon the statute by the trial court and the court of appeals, and held the act, as so construed, constitutional on its face and as applied.<sup>8</sup>

*Dennis* was no exception to the fact that decisions in this area of constitutional law are marked by wide divergence of opinion among the justices. Five separate opinions were filed by the eight justices who partici-

<sup>4</sup> *Supra* note 2 at 497.

<sup>5</sup> *Id.* at 512.

<sup>6</sup> *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950).

<sup>7</sup> 340 U.S. 863 (1950).

<sup>8</sup> *Supra* note 2 at 499 *et seq.*

pated in the decision.<sup>9</sup> The nearest approach to a majority opinion was that written by the Chief Justice and concurred in by Justices Reed, Burton and Minton. Justices Frankfurter and Jackson wrote separate opinions, sustaining the convictions, but on grounds differing substantially from those expressed in the Vinson opinion. Justices Black and Douglas filed separate dissenting opinions.

The importance of the issues and the wide split of opinion among the justices require the most careful analysis to determine what *Dennis* stands for and what it portends for the future. That analysis, in turn, requires first, a brief review of the decisions respecting freedom of speech<sup>10</sup> prior to *Dennis*; second, a consideration of the several opinions in *Dennis*; and finally, a critique of *Dennis* in the light of what freedom of speech has meant in the past and should mean in the future. It is believed that such an analysis will disclose that the application of the Smith Act in the *Dennis* case has fundamentally modified prior interpretations of the guaranty of freedom of speech and unless some of the more sweeping statements in the opinions are limited to narrow factual situations, the *Dennis* decision can result in serious limitations on that freedom.

Only the first of the questions considered by the Supreme Court is discussed here; the question of indefiniteness and the various matters passed upon by the court of appeals and not considered by the Supreme Court are outside the scope of this article.<sup>11</sup>

#### FREEDOM OF SPEECH, PRIOR TO *Dennis*

Freedom of speech, protected against abridgment by the First<sup>12</sup> and Fourteenth<sup>13</sup> Amendments, is not an absolute, but a qualified right.<sup>14</sup> The

<sup>9</sup> Mr. Justice Clark was Attorney General while the case was on trial in the district court and did not participate in the decision.

<sup>10</sup> Although this article uses the expressions "freedom of speech" and "speech," no distinction is intended between speech and press; the expression of ideas verbally or in print, or in any other form or media would carry the same protection. See *Stromberg v. California*, 283 U.S. 359 (1931), and note 49 *infra*.

<sup>11</sup> The assignments of error included misconduct of the trial court, insufficiency of the evidence, and improper selection of the jury. All are fully considered in the court of appeals' opinion. This article does not consider one other matter, whether the issue of "clear and present danger" is a matter of law for the court, or fact for the jury. The trial court ruled it was a matter of law; the Supreme Court affirmed on this issue, Black and Douglas dissenting.

<sup>12</sup> "Congress shall make no law . . . abridging the freedom of speech, or of the press."

<sup>13</sup> "[N]or shall any State deprive any person of life, liberty, or property without due process of law." There is no longer room for doubt that "liberty" in the due process clause of the Fourteenth Amendment includes the fundamental guaranties of the First Amendment; see *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>14</sup> The classic statement is by Mr. Justice Holmes in *Schenck v. United States*, 249 U.S. 47, 52 (1919): "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." See also his statement in the companion case of *Frohwerk v. United States*, 249 U.S. 204, 206 (1919): "the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."

guiding principle was first stated by Mr. Justice Holmes, speaking for a unanimous Court, in *Schenck v. United States*<sup>15</sup> as

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. It is a question of proximity and degree.

Schenck was convicted of violation of the Espionage Act of June 15, 1917,<sup>16</sup> for causing, or attempting to cause, insubordination in the armed forces and interfering with or obstructing recruitment and enlistment, in time of war. The acts by which the offense was committed were the publication and dissemination of various articles which the defendant had written. The important point is that the statute, unlike others to be considered shortly, did not make certain speech or teaching or advocacy, criminal; it made certain action criminal and the speech or writing was the means by which such action was effected. The clear and present danger rule as thus established was accepted as the standard and was followed in all subsequent decisions involving the Espionage Act.<sup>17</sup>

In 1925 the Supreme Court first considered the application of this rule to a statute which made speech of a specified subject matter illegal. The New York act<sup>18</sup> considered in *Gillow v. New York*<sup>19</sup> was the prototype of various state criminal syndicalism acts and is substantially identical with section 2 of the Smith Act.<sup>20</sup> The Court distinguished between such a statute and one of the type involved in *Schenck*<sup>21</sup> and held that when the legislature proscribed a certain type of speech or publication as illegal, the clear and present danger rule was not applicable.<sup>22</sup> The Court stated that the legislature could determine that certain language was dangerous or created a danger and that every presumption was in favor of the validity of the

<sup>15</sup> *Supra* note 14 at 52.

<sup>16</sup> 40 STAT. 217, 219 (1917).

<sup>17</sup> *Frohwerk v. United States*, *supra* note 14; *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Schaefer v. United States*, 251 U.S. 466 (1920); *Pierce v. United States*, 252 U.S. 239 (1920); *Hartzel v. United States*, 322 U.S. 680 (1944). *Hartzel* was the only case prosecuted under this Act during, or subsequent to, World War II which reached the Supreme Court.

<sup>18</sup> Laws 1902, c. 371; N. Y. PEN. LAWS, §§ 160, 161.

<sup>19</sup> *Supra* note 13.

<sup>20</sup> See the comment of Judge Hand in the *Dennis* case, text at note 74 *infra*.

<sup>21</sup> "It is clear that the question in such cases [*i.e.*, like *Gillow*] is entirely different from that involved in those cases [*Schenck* and others] where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There . . . it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection." *Supra* note 13 at 670-671. See also notes 22-24 *infra*.

<sup>22</sup> In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition." *Id.* at 670.

act.<sup>23</sup> Therefore, if any reasonable basis existed for the legislative determination, there was no need to establish, in the particular case, that the words were used in such circumstances and were of such a nature as to create a clear and present danger.<sup>24</sup>

The *Gitlow* decision thereby divided freedom of speech cases into two classes. When the statute specified an offense in "non-speech" terms, speech was evidence of violation, or of a "verbal act" constituting such violation, only when it could be shown that such speech created a clear and present danger of accomplishing or attempting the substantive offense. However, if the legislature specified the offense in "speech" terms, then the courts accepted the legislative determination that such speech created a "clear and present danger." In effect, if not in words, the speech itself became the substantive evil.

Justices Holmes and Brandeis dissented in *Gitlow*, urging that no such distinction should exist and that the question, in every case, under the *Schenck* type or the *Gitlow* type of statute, was whether the challenged speech created a clear and present danger under the circumstances.<sup>25</sup>

The *Gitlow* distinction was followed in subsequent decisions involving state criminal syndicalism laws,<sup>26</sup> with objection from Justices Holmes and Brandeis.<sup>27</sup> The case has been cited with approval on numerous occasions.<sup>28</sup> It has never been expressly overruled.<sup>29</sup>

The clear and present danger rule as formulated in *Schenck* and applied in later cases admittedly is not a rule, but a statement of a broad principle.<sup>30</sup> Its authors recognized this.<sup>31</sup> It is not surprising, therefore, that people have

<sup>23</sup> *Id.* at 668-670.

<sup>24</sup> "[T]he general statement in the *Schenck* Case . . . has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character . . . .

"It was sufficient if such acts were advocated in general terms; and it was not essential that their immediate execution should have been advocated. Nor was it necessary that the language should have been 'reasonably and ordinarily calculated to incite certain persons' to acts of force, violence, or unlawfulness." *Id.* at 671-672. See also note 22 *supra*.

<sup>25</sup> *Id.* at 673 *et seq.*

<sup>26</sup> *Whitney v. California*, 274 U.S. 357 (1927); *Fiske v. Kansas*, 274 U.S. 380 (1927).

<sup>27</sup> See their concurring opinion in *Whitney v. California*, *supra* note 26 at 372. They concurred in the result in *Whitney* on the grounds that the issue of "clear and present danger" had not been properly raised.

<sup>28</sup> The cases are collected in the concurring opinion of Judge Chase in the court below. *United States v. Dennis*, *supra* note 6 at 237. See also *American Communications Assn. v. Douds*, *supra* note 1 at 400-401; *Dunne v. United States*, 138 F.2d 137, 145 (8th Cir. 1943).

<sup>29</sup> "[N]o case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases." Vinson, C. J., in *Dennis v. United States*, *supra* note 2 at 507.

<sup>30</sup> "What we do say is 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 . . ." L. Hand, J., in *United States v. Dennis*, *supra* note 6 at 212.

<sup>31</sup> It is referred to by Holmes and Brandeis as "a question of proximity and degree," *Schenck v. United States*, *supra* note 14 at 52; and as a "rule of reason" to be applied "only by the exercise of good judgment," *Schaefer v. United States*, *supra* note 17 at 482-483. "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." Brandeis, J., in *Whitney v. California*, *supra* note 26 at 374.

disagreed as to its meaning. "All agree that it means something very important but no two seem to agree on what it is."<sup>32</sup>

It would appear that "clear" and "present" are not synonymous but have independent meanings. "Clear" implies the equivalent of a "proximate cause" test;<sup>33</sup> the danger must reasonably be anticipated as the result or effect of the speech.<sup>34</sup> "Present" refers to the time when the evil may reasonably be expected, and there has been repeated insistence that "present" means "imminent" or "immediate."<sup>35</sup>

A substantive evil that the state has a right to prevent has been defined in terms of balancing interests, of weighing the importance of the interest to be protected against the degree of interference with the freedom.<sup>36</sup>

Some interests which the state desires to protect may be so insignificant as not to warrant even the slightest interference with free speech. In this category courts have placed the interest of the state in keeping its streets clean,<sup>37</sup> the protection of the householder from the annoyance of having his doorbell rung<sup>38</sup> and the right of one not to be subjected to verbal abuse.<sup>39</sup>

At the other extreme are certain narrowly drawn restrictions which are so insignificant in their impact that they do not interfere in any substantial degree with the right to speak, and do not condition that right on the ideas expressed.<sup>40</sup> In this category are statutes which prevent speaking at certain

<sup>32</sup> Jackson, J., in footnote 9 to his concurring opinion in *Dennis v. United States*, *supra* note 2 at 567.

<sup>33</sup> To warrant interference with speech "the public interest must be threatened not doubtfully or remotely." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

<sup>34</sup> Opinions speak in terms of "probable effect." See *Debs v. United States*, *supra* note 17 at 214-215.

<sup>35</sup> Expressions such as these have appeared in opinions explaining or applying the rule: "The degree of imminence must be extremely high." *Pennekamp v. Florida*, 328 U.S. 331, 334 (1946), quoting *Bridges v. California*, 314 U.S. 252, 263 (1941). "There must be reasonable ground to believe that the danger apprehended is imminent." Brandeis, concurring in *Whitney v. California*, *supra* note 26 at 376. "[Speech] will bring about forthwith certain substantive evils," and there must be "present danger of immediate evil or an intent to bring it about . . ." Holmes, dissenting in *Abrams v. United States*, *supra* note 17 at 627-628. "Grave and immediate danger." *Board of Education v. Barnette*, 319 U.S. 624, 639 (1943).

<sup>36</sup> See the discussion on this point in *American Communications Assn. v. Douds*, *supra* note 1 at 397-400. See also Justice Brandeis' opinion in *Whitney v. California*, *supra* note 26, quoted in part, *infra* note 60.

<sup>37</sup> *Lovell v. Griffin*, 303 U.S. 444 (1938); *Schneider v. State*, 308 U.S. 147 (1939); holding invalid ordinances limiting or licensing distribution of handbills. *Cf. Valentine v. Chrestensen*, 316 U.S. 52 (1942), where the handbills being distributed were primarily advertising, and their informational value was either a subterfuge or at best incidental. *Accord: Marsh v. Alabama*, 326 U.S. 501 (1946); *Tucker v. Texas*, 326 U.S. 517 (1946); involving distribution of religious literature in a company owned town and on property of the United States administered by the Public Housing Authority, respectively.

<sup>38</sup> *Martin v. Struthers*, 319 U.S. 141 (1943), a 6-3 decision holding invalid a statute prohibiting doorbell ringing as applied to one distributing religious literature. *Cf. Breard v. Alexandria*, 341 U.S. 622 (1951), decided the same day as *Dennis* and holding valid (Vinson, Black and Douglas dissenting) the application of a similar statute to one soliciting magazine subscriptions.

<sup>39</sup> *Cantwell v. Connecticut*, 310 U.S. 296 (1940). See also note 42 *infra*. *Cf.* the views expressed by Jackson, J., dissenting, in *Kunz v. New York*, *supra* note 1.

<sup>40</sup> *E.g.*, *Prince v. Massachusetts*, 321 U.S. 158 (1944), child labor law held applicable to minor selling religious literature.

designated times or places,<sup>41</sup> or using offensive words<sup>42</sup> or an offensive volume of sound.<sup>43</sup>

While the substantive evil must be serious and pose a substantial danger to society, it must not be supposed that the only evils the state has a right to prevent are those which threaten its existence, or the preservation of public peace and order.<sup>44</sup> In *Schenck* the substantive evil was either an interference with recruitment or enlistment, or the attempt to cause such interference;<sup>45</sup> it was not the effect of such interference or attempt as a danger to the stability or safety of the government. The state's interest in protecting free opportunity for employment, unhindered by considerations of race or union membership,<sup>46</sup> or in preventing combinations that would violate state anti-trust acts<sup>47</sup> or action interfering with the free flow of interstate commerce,<sup>48</sup> will justify restraint that would otherwise violate freedom of speech.

Can an "idea" or a belief be a substantive evil prior to the time that it becomes transmitted into words that pose a clear and present danger of ensuing activity?<sup>49</sup> *Gitlow v. New York* and the subsequent criminal syndicalism cases could be so interpreted.<sup>50</sup> To the extent that *Gitlow* held the legislature could forbid certain types of utterances on the grounds that, in the judgment of the legislature, the words themselves were a clear and present danger, then the mere utterance was punishable regardless of the consequences or lack of consequences that flowed from it in the particular case. The result would be to make the statement of the idea, and not the effect of the statement, the offense. *Gitlow* has never been pushed to that extreme, and expressions to the contrary abound in the decisions even with

<sup>41</sup> *E.g.*, statutes restricting political campaigning within a designated distance of the polls on election days; statutes restricting noise or speaking in certain areas, such as near hospitals and the like, where quiet is essential. See Justice Jackson's reference in *Kunz v. New York*, *supra* note 1 at 309, to the act of Congress restricting demonstrations in the vicinity of the Supreme Court building. See also *Cantwell v. Connecticut*, *supra* note 39 at 304.

<sup>42</sup> *E.g.*, *Hannegan v. Esquire*, 327 U.S. 146 (1946); Justice Douglas' dissent in *Dennis v. United States*, *supra* note 2 at 581, and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Limitations of space forbid a full exploration of the problem of words as an evil in themselves.

<sup>43</sup> *Kovacs v. Cooper*, 336 U.S. 77 (1949). *Cf.* *Saia v. New York*, 334 U.S. 558 (1948). Justices Frankfurter, Black, Douglas and Rutledge regarded *Kovacs* as overruling *Saia*; the majority distinguished on the grounds that the ordinance considered in *Kovacs* prohibited only sound trucks emitting "loud and raucous" noises while *Saia* vested undue administrative discretion in a local official authorized to issue licenses for sound amplifying devices in public places. The terms "loud and raucous" were held not to be uncertain by the majority in *Kovacs*.

<sup>44</sup> "[I]n suggesting that the substantive evil must be serious and substantial, it was never the intention of this Court to lay down an absolutist test measured in terms of danger to the Nation." *American Communications Assn. v. Douds*, *supra* note 1 at 397.

<sup>45</sup> *Supra* note 14. See also Justice Brandeis' dissent in *Schaefer v. United States*, *supra* note 17 at 483.

<sup>46</sup> *Building Service Union v. Gazzam*, 339 U.S. 532 (1950); *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Teamsters Union v. Hanke*, 339 U.S. 470 (1950).

<sup>47</sup> *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949).

<sup>48</sup> *American Communications Assn. v. Douds*, *supra* note 1.

<sup>49</sup> Perhaps the idea does not even have to be expressed in words. Morris L. Ernst in his book of reminiscences, *THE BEST IS YER . . .*, 120-122 (1945), refers to two incidents where it was claimed that musical notes were obscene. And compare also the "Red Flag" statute considered in *Stromberg v. California*, *supra* note 10.

<sup>50</sup> *Gitlow v. New York*, *supra* note 13 at 668; see also *Whitney v. California*, *supra* note 26 at 371.



respect to the views and beliefs of those who advocate overthrow of the government.<sup>51</sup> We may reasonably conclude that prior to *Dennis* there was no basis for proscribing speech merely because of the idea or belief expressed.<sup>52</sup> Furthermore, there has been such a withdrawal from the position taken in the *Gitlow* case as to indicate the equivalent of an overruling *sub silentio*. This is particularly apparent in the development of the so-called "preferred position," and is better explored under that subject.

During the past twelve years, practically every decision involving freedom of speech has stated or assumed that the rights protected by the First Amendment and incorporated in the Fourteenth Amendment enjoy a "preferred position."<sup>53</sup> This preferred position is that action or legislation affecting those rights is not presumptively valid and the burden is on the government to justify restraint.<sup>54</sup> This is the reverse of the position of the Court with respect to legislation affecting economic or commercial transactions, where the existence of facts supporting the legislative judgment is presumed and the legislation is not to be pronounced unconstitutional unless there is no conceivable rational basis for the legislative determination.<sup>55</sup>

This preferred position is a corollary of the views expressed by Justices Holmes and Brandeis in their dissent in *Gitlow*.<sup>56</sup> If *Gitlow* stands, with its emphasis on the legislative finding, there can be no preferred position; if the preferred position be accepted, there is no room for the *Gitlow* rationale.

The first clear indication of a "preferred position" approach in a majority opinion was in 1937, in *Herndon v. Lowry*, where the Court stated:<sup>57</sup>

The power of a state to abridge freedom of speech and of assembly is the *exception* rather than the rule and the penalizing even of utterances of a *defined character* must find justification in a reasonable apprehension of danger to organized government.

While obviously not stating a preferred position in so many words, the emphasis and import of that statement is so opposed to one made earlier by the same justices:<sup>58</sup>

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever *economic*

<sup>51</sup> "Beliefs are inviolate," and the First Amendment "requires that one be permitted to believe what he will." *American Communications Assn. v. Douds*, *supra* note 1 at 393, 412. "Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute . . ." *Cantwell v. Connecticut*, *supra* note 39 at 303-304, referring to religious belief.

<sup>52</sup> "The interest, which [the First Amendment] guards, and which gives it its importance, presupposes that there are no orthodoxies—religious, political, economic, or scientific—which are immune from debate and dispute." *International Brotherhood v. National Labor Rel. Bd.*, 181 F.2d 34, 40 (2d Cir. 1950).

<sup>53</sup> The cases are collected in Justice Frankfurter's concurring opinion in *Kovacs v. Cooper*, *supra* note 43.

<sup>54</sup> See *Board of Education v. Barnette*, *supra* note 35 (a religious freedom case); *Thomas v. Collins*, *supra* note 33 at 527, 530.

<sup>55</sup> See, e.g., *Nebbia v. New York* quoted, text at note 58 *infra*; *U.S. v. Carolene Products Co.*, quoted, *infra* note 60.

<sup>56</sup> *Supra* note 25. See also their concurrence in *Whitney v. California*, quoted in part, *infra* note 60.

<sup>57</sup> 301 U.S. 242, 258 (1937). (Emphasis added.)

<sup>58</sup> *Nebbia v. New York*, 291 U.S. 502, 537 (1934). (Emphasis added.)

policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.

as clearly to indicate a substantially different approach between legislation affecting speech and legislation affecting other matters. A year later, this preferred position was again referred to,<sup>59</sup> in this language:

There may be narrower scope for the operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

Since 1938, there has been reference to and reliance on this "preferred position," and a refusal to give the usual deference to legislative judgment in speech cases, by all justices except Mr. Justice Frankfurter.<sup>60</sup>

<sup>59</sup> U.S. v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938).

<sup>60</sup> His views in opposition to such a "preferred position" were first stated at length in his concurring opinion in *Kovacs v. Cooper*, *supra* note 43 at 90-97. He suggests that the doctrine was announced in a footnote in *U.S. v. Carolene Products Co.*, *supra* note 59 at 152, n. 4, and repeats this view in *Dennis*, stating: "It has been suggested, with the casualness of a footnote, that such legislation is not presumptively valid, see *United States v. Carolene Products Co.* . . ." *Dennis v. United States*, *supra* note 2 at 526. This view seems to ignore what was implicit in the Holmes-Brandeis dissent in *Gillow* and their concurrence in *Whitney*. Their approach to problems of constitutionality of legislation in the economic field with insistence upon the right of the legislature to be the judge of need, desirability, or reasonableness is well known, through such classic statements as Justice Holmes' dissent in *Lochner v. New York*, 198 U.S. 45 (1905), and the following excerpt from Justice Brandeis' dissent in *New State Ice Company v. Liebmann*, 285 U.S. 262, 286 (1932): "Our function is only to determine the reasonableness of the legislature's belief in the existence of evils and in the effectiveness of the remedy provided. In performing this function we have no occasion to consider whether all statements of fact which may be the basis of the prevailing belief are well-founded; and we have of course, no right to weigh conflicting evidence."

Compare this with the approach advocated in *Whitney v. California*, *supra* note 26 at 378-379: "Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied."

The difference between the two approaches is sufficiently clear to indicate a complete difference in orientation, if not the about-face of the "preferred position." The same difference in orientation can be traced down to the date of the *Carolene* decision. The majority opinion by Justice Roberts in *Nebbia v. New York*, concurred in by Chief Justice Hughes and Justices Brandeis, Stone and Cardozo, contains the statement quoted in text at note 58 *supra*.

Three years later, in *Herndon v. Lowry*, the opinion by Mr. Justice Roberts, concurred in by the Chief Justice and Justices Brandeis, Stone and Cardozo, contained the statement quoted in the text at note 57 *supra*. *Carolene* was decided in 1938, almost exactly a year after *Herndon*. In the course of that opinion, Mr. Justice Stone stated: "[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *U.S. v. Carolene Products Co.*, *supra* note 59 at 152. (Emphasis added.)

To this was appended the now famous footnote quoted in text at note 59 *supra*. The footnote referred, among other decisions, to *Herndon v. Lowry*, Justice Holmes' dissent in *Gillow* and Justice Brandeis' concurrence in *Whitney*. It would appear that Mr. Justice Stone was not making a casual pronouncement but was recognizing that for some period of time the Court,

THE *Dennis* OPINIONS

While recognizing the danger of attempting to compress into a page or a paragraph judicial opinions from twelve to twenty pages in length, it is believed that a summary of the several opinions in *Dennis* is essential to an understanding of what follows. Furthermore, in order to get the flavor of the opinions, the actual words of the justices have been used to the extent possible in this summary.

*The Vinson Opinion*,<sup>61</sup> *Justices Reed, Burton and Minton Joining*

The defendants "intended to initiate a violent revolution whenever the propitious occasion appeared." There is no "right to rebellion . . . where the existing structure of the government provides for peaceful and orderly change," and the overthrow of the government by force and violence is a substantive evil which the state has a right to prevent.

The Smith Act, as construed and applied, does not prevent academic discussion; it does prohibit "advocacy." Freedom of speech is not unlimited or unqualified, but "the societal value of speech must, on occasion, be subordinated to other values and considerations." The accepted test of whether speech can be prohibited is the classic "clear and present danger" rule, that is, clear and present danger of an act the state has a right to prohibit or prevent. If *Gitlow v. New York* indicated that "a certain kind of speech was itself harmful and unlawful . . . there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis" view that there can be no restriction unless such speech creates a clear and present danger of a substantive evil, other than the speech itself. The Holmes-Brandeis view is accepted and "we are squarely presented with the application of the 'clear and present danger' test."

The meaning of "clear and present" is reexamined and redefined. The new definition is the statement of Chief Judge Learned Hand, author of the majority opinion in the court below:<sup>62</sup>

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.

The substantive evil here guarded against is not the overthrow of the government by force and violence, but the *attempt* at such overthrow.<sup>63</sup> The existence of a group "ready to make the attempt . . . when the leaders, these petitioners, felt that the time had come for action,"—"the existence of the conspiracy"—created the danger. This "conspiracy" is not a conspiracy to *plan* and eventually *attempt* the overthrow of the government by force and violence, but a "conspiracy to advocate" with the intent of caus-

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or some members of it, had been fully conscious of the fact that there was a difference in its approach to questions of constitutionality between statutes in the economic area and statutes in the freedom of speech area.

<sup>61</sup> *Dennis v. United States*, *supra* note 2 at 495.

<sup>62</sup> *Id.* at 510.

<sup>63</sup> *Id.* at 509-511, 517.

ing such overthrow. The existence of such a conspiracy is a question of fact for the jury. The question of whether such conspiracy, if established as a fact, creates sufficient danger of a substantive evil to justify restraint, is a question of law for the court.

#### *The Frankfurter Opinion*<sup>64</sup>

The application of the guaranty of freedom of speech to any given situation requires a process of weighing relevant factors and making an adjustment between conflicting interests. "Not every type of speech occupies the same position on the scale of values." "Speech of this sort [*i.e.*, advocating overthrow of the government by force and violence] ranks low" and "deserves little protection." The primary responsibility for making such adjustments and weighing the relevant factors is vested in the legislature and not the court. "To make validity of legislation depend on judicial reading of events still in the womb of time . . . is to charge the judiciary with duties beyond its equipment." The court should not set aside the judgment of the legislature unless "there is no reasonable basis for it."

The "preferred position" of the First Amendment is questioned. However, the decision in the *Dennis* case "does not mean that the Smith Act can constitutionally be applied to facts like those in *Gilow v. New York*."<sup>65</sup>

The clear and present danger rule is accepted but that rule is "not a substitute for the weighing of values" and "there is ample justification for a legislative judgment that the conspiracy now before us [*i.e.*, a conspiracy to advocate, in violation of section 2] is a substantial threat to national order and security" even though the conspiracy as charged "is not a conspiracy to overthrow the government." There is a distinction between a "statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken."

#### *The Jackson Opinion*<sup>66</sup>

The clear and present danger rule is a rule of limited applicability. It cannot be applied, and should not be used, as a standard in cases of this character which require prophecy and prediction as to the effectiveness of communist propaganda, the degree of danger it poses, when a time will come that will be ripe for an attempt at action, and the capacity of the government to meet such an attempt.

It is not forbidden to interfere with speech that counsels, incites or ad-

<sup>64</sup> *Id.* at 517.

<sup>65</sup> *Id.* at 542. He gives no clue to his reasons for this remark. Is it because he accepts Justice Holmes' view that Gitlow's remarks were "drool" in a "trivial case" (Justice Holmes' comment in letters to Sir Frederick Pollock, June 2, and 18, 1925, quoted in Justice Jackson's opinion, *id.* at 567, n. 10) like the "puny anonymities" in *Abrams v. United States*, *supra* note 17 at 629, or is it because Gitlow's intent or lack of intent to produce action was regarded as irrelevant by the majority in his case while in *Dennis* there is the finding of a specific intent? See *Dennis v. United States*, *supra* note 2 at 541.

Compare the interpretation by the Court in the *Gilow* case, that the New York statute required no intent to bring about the acts advocated, with the interpretation in *Dennis*, text at note 5 *supra*.

<sup>66</sup> *Dennis v. United States*, *supra* note 2 at 561.

vocates action that the state may make criminal. Since the government may forbid force or violence, since it may make criminal an attempt at overthrow of government by force and violence, it may prohibit its advocacy. "I think direct incitement by speech or writing can be made a crime." "It is not forbidden to put down force or violence, it is not forbidden to punish its teaching or advocacy, and the end being punishable, there is no doubt of the power to punish conspiracy for the purpose."

The entire emphasis of the opinion is on conspiracy. "What really is under review here is a conviction of conspiracy." "In conspiracy cases the Court not only has dispensed with proof of clear and present danger, but even of power to create a danger." "The basic rationale of the law of conspiracy is that a conspiracy may be an evil in itself, independently of any other evil it seeks to accomplish."

### *The Black Opinion*<sup>67</sup>

The affirmance of these convictions repudiates the "clear and present danger" rule. It has not been established that there is a clear and present danger; there is merely teaching and advocacy. Laws interfering with the freedoms protected by the First Amendment cannot be sustained merely because the Court or legislature deems them reasonable under the circumstances.

### *The Douglas Opinion*<sup>68</sup>

Admittedly certain types of speech are not protected. "If this were a case where [defendants] were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts . . . [T]he teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality."<sup>69</sup> The evidence here falls short of that proof and merely shows speech without seditious conduct or acts. Speech alone cannot be proscribed unless an immediate injury to society is likely if the speech is allowed; unless it appears that "immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."<sup>70</sup> Advocacy alone is not enough; there must be incitement or indication "that the advocacy would be immediately acted on."<sup>71</sup> "How it can be said that there is a clear and present danger that this advocacy will succeed is . . . a mystery." "Unless and until extreme and

<sup>67</sup> *Dennis v. United States*, *supra* note 2 at 579.

<sup>68</sup> *Id.* at 581.

<sup>69</sup> *Id.* at 581. Is the basis for this distinction between teaching the techniques of terror and teaching the need for or desirability of terror one of kind, or of degree? Is it anything more than, in the first situation, that there is a clearer and more imminent danger that the pupils will put their lessons into practice? Is Douglas inferring this or is he implying some distinction in kind? And if so, how would he express it other than certain kinds of ideas cannot be taught or advocated, in short, cannot legally be expressed?

<sup>70</sup> *Id.* at 586, quoting from Justice Brandeis' concurring opinion in *Whitney v. California*, *supra* note 26 at 376-377.

<sup>71</sup> *Dennis v. United States*, *supra* note 2 at 586, again quoting from *Whitney*.

necessitous circumstances are shown, our aim should be to keep speech unfettered and to allow the processes of law to be invoked only when the provocateurs among us move from speech to action."

#### A CRITIQUE OF *Dennis*

The *Dennis* decision poses these questions:

1. What is the present status of the *Gitlow* decision and the distinction it made?
2. Is the clear and present danger rule still the standard?
3. If it is, has there been a substantial, or any change in the meaning of the words "clear" and "present"?
4. What is the substantive evil that the Smith Act seeks to prevent and to which the clear and present danger rule is being, or should be, applied?

#### *The Present Status of the Gitlow Decision*

For all practical purposes *Gitlow* should be regarded as overruled. As earlier pointed out,<sup>72</sup> the distinction made by *Gitlow* between statutes specifying an offense in speech terms and statutes specifying an offense in non-speech terms, lost its vitality when the "preferred position" of freedom of speech was established. In the *Dennis* case, only one judge in the court of appeals was willing to rely on *Gitlow*,<sup>73</sup> notwithstanding the statement that the statute considered in *Gitlow* "was so close to parts of the statute at bar [the Smith Act] that it must have been its model *pro tanto*."<sup>74</sup> No justice of the Supreme Court placed any express reliance on *Gitlow*. The Vinson opinion, after discussing *Gitlow* and *Whitney v. California*, refers to the opinions of Mr. Justice Holmes and Mr. Justice Brandeis in those cases in these words:<sup>75</sup>

In their concurrence [in *Whitney*] they repeated that even though the legislature had designated certain speech as criminal, this could not prevent the defendant from showing that there was no danger that the substantive evil would be brought about.

Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale.

While Mr. Justice Frankfurter's emphasis on legislative judgment was a restatement of the *Gitlow* rationale, he acknowledged that "it would be disingenuous to deny that the dissent in *Gitlow* has been treated with the respect usually accorded to a decision."<sup>76</sup>

Nothing in Mr. Justice Jackson's opinion lends support to *Gitlow*<sup>77</sup> and

<sup>72</sup> See text at notes 53 *et seq.* *supra*.

<sup>73</sup> Chase, J., *United States v. Dennis*, *supra* note 6 at 237. *Cf.*, however, *Dunne v. United States*, *supra* note 28 at 145.

<sup>74</sup> L. Hand, J., *United States v. Dennis*, *supra* note 6 at 208.

<sup>75</sup> *Dennis v. United States*, *supra* note 2 at 507.

<sup>76</sup> *Id.* at 541.

<sup>77</sup> He makes only a footnote reference to *Gitlow*. *Id.* at 567, n. 10.

the opinions of Justices Black and Douglas in *Dennis*, as well as their previous pronouncements<sup>78</sup> indicate their disapproval of that decision.

Furthermore, the distinction made by the *Gilow* decision seems objectionable. The specific guarantees of the First Amendment (deemed equally specific when applied to the states through incorporation in the Fourteenth Amendment<sup>79</sup>) are express limitations on governmental power, wholly unlike the "vague contours"<sup>80</sup> of due process when applied as a restriction on police power legislation in the economic area.<sup>81</sup> The command of the First Amendment should be the same, regardless of whether the legislature frames a statute in speech or non-speech terms; *Gilow* has the effect of permitting the legislature to determine the scope and impact of that command and the applicability of the clear and present danger rule. Thus, if *Gilow* still stands, there are two separate standards for judging the scope of freedom of speech. When legislation is drawn in non-speech terms, the scope of the freedom is to be determined by the court, by its own determination of the application of the clear and present danger rule. When legislation is drawn in speech terms, the legislative judgment determines the application, unless the court can say such judgment is clearly unreasonable. To permit the legislature thus to determine which standard will apply, and therefore, the meaning and scope of the constitutional provision, is a reversal of all previous views of the judicial function in constitutional cases.

A clear cut overruling of *Gilow* would serve to remove one uncertainty in a very uncertain field. Respect for the vigorous dissenting opinion of Justices Holmes and Brandeis calls for no less than a decent burial for *Gilow v. New York*.

### *Is "Clear and Present Danger" the Standard for Speech Covered by the Smith Act?*

Two fundamentally different alternatives were available to the Court in deciding *Dennis*. On the one hand it could have held that the clear and present danger rule did not apply to speech of the type proscribed by the Smith Act; that advocacy of overthrow of the government by force and violence is not protected at all. On the other hand it could have held that all limitations on speech, regardless of its content, involve an application of the clear and present danger rule, and therefore the question to be decided was whether the Smith Act, as applied, was consistent with the rule.

Seven of the eight justices accept the rule in principle,<sup>82</sup> but (except for Justices Black and Douglas) with such modifications and exceptions as to

<sup>78</sup> Particularly their concurrence in the "preferred position." See, e.g., *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940); *Thomas v. Collins*, *supra* note 33 at 529 *et seq.*

<sup>79</sup> *U.S. v. Carolene Products Co.*, *supra* note 59 at 152.

<sup>80</sup> Holmes, J., dissenting in *Adkins v. Children's Hospital*, 261 U.S. 525, 568 (1923): ". . . in the present instance the only objection [to the validity of the District of Columbia minimum wage law] that can be urged is found within the vague contours of the Fifth Amendment . . . ."

<sup>81</sup> See text at notes 58 and 59 *supra*. See also, *Thornhill v. Alabama*, *supra* note 78 at 103 *et seq.*

<sup>82</sup> The Vinson opinion expressly states: "In this case we are squarely presented with the application of the 'clear and present danger' test, and must decide what that phrase imports."

indicate that while the words remain the same, their meaning has been altered.

The Vinson opinion accepts the rule as redefined by Judge Hand.<sup>83</sup>

Only Justice Jackson expressly repudiates it as a basis for decision in this case. He would regard advocacy of overthrow of the government by force and violence (at least when accompanied by a conspiracy so to advocate) as outside the protection of free speech.<sup>84</sup> At times, Justice Frankfurter approaches, but does not quite reach, the same conclusion.<sup>85</sup> He adheres to the view that clear and present danger must exist, but offers the suggestion that there are varying degrees of protection, depending on the nature of the speech, and that "on any scale of values which we have hitherto recognized, speech of this sort ranks low" and "deserves little protection."<sup>86</sup>

Although there is one statement in the Vinson opinion—"Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction"<sup>87</sup>—which seems akin to the Jackson thesis,<sup>88</sup> the entire tenor of the Vinson opinion, is an approval of the clear and present danger rule as restated. The real point of departure, in the Vinson opinion, is in the meaning of "present";<sup>89</sup> therein it differs basically from the views of Jackson and the quoted expressions of Frankfurter which place greater emphasis upon the nature of the idea expressed.<sup>90</sup>

Is there any justification for assigning different "values" to different types of speech; for regarding certain speech as beyond protection or as deserving "little protection"?

Previous reference was made to cases considering freedom of speech in the light of the words used;<sup>91</sup> vituperative and abusive language, name calling, "fighting words" and the like may rank low on the scale of free speech because they are not necessary to discourse or conducive to the expression

Dennis v. United States, *supra* note 2 at 508. See also, for analysis of the other opinions, text at note 64 *et seq. supra*.

<sup>83</sup> Text at note 62 *supra*.

<sup>84</sup> "Also, it is urged that since the conviction is for conspiracy to teach and advocate, and to organize the Communist Party to teach and advocate, the First Amendment is violated, because freedoms of speech and press protect teaching and advocacy regardless of what is taught or advocated. I have never thought that to be the law." Dennis v. United States, *supra* note 2 at 574.

Note that Justice Jackson's opinion implies that if the end be punishable, teaching or advocacy of that end is also punishable; in short, any teaching or advocacy of force or violence is punishable. Does this mean *any* teaching or advocacy, either in the sense of incitement or in the sense of exposition or explanation? *Id.* at 572. See text at note 121 *infra*; note 128 *infra*. Does he mean, for example, that since polygamy may be punished, the state may prohibit teaching or advocating the desirability of polygamy? Compare *Musser v. Utah*, 333 U.S. 95 (1948).

<sup>85</sup> "Even though advocacy of overthrow deserves little protection, we should hesitate to prohibit it if we thereby inhibit the interchange of rational ideas so essential to representative government and free society." Dennis v. United States, *supra* note 2 at 545-546. And see also his emphasis on the need for free criticism and interchange of ideas. *Id.* at 548-550.

<sup>86</sup> *Id.* at 542-545.

<sup>87</sup> *Id.* at 508.

<sup>88</sup> *Supra* note 84.

<sup>89</sup> Dennis v. United States, *supra* note 2 at 509-511.

<sup>90</sup> See text at note 86 *supra*.

<sup>91</sup> See note 42 *supra*.



of ideas,<sup>92</sup> but there is nothing in the Frankfurter and Jackson opinions to indicate that their views are based on the language used, that speech of the sort involved in the *Dennis* case deserved little or no protection because of the *words* used or the *manner* in which the idea was being advocated. Rather, it appears that the speech is regarded as outside the pale, or as deserving "little protection" because of the idea that is being advocated.<sup>93</sup>

There is some basis for arguing that speech which seeks or advocates force and violence, unlike speech which seeks to convince, may stand on a different footing. Mr. Justice Jackson is probably correct in his statement that the rule, as originally stated in *Schenck*, did not contemplate speech of this character,<sup>94</sup> and there is the statement of Mr. Justice Holmes in his dissenting opinion in *Abrams v. United States* explaining the basis of our insistence on freedom of speech as:<sup>95</sup>

. . . the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground on which their wishes safely can be carried out. That at any rate is the theory of our Constitution . . . I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country . . . Of course I am speaking only of expressions of opinion and exhortations . . . .

If we emphasize the view that the purpose of freedom of speech is to permit full interchange of ideas, with victory to go to that which "get[s] itself accepted in the competition of the market" then Mr. Justice Jackson has support for the view that speech of the character involved in *Dennis*, which seeks to prevail in spite of non-acceptance in the competition of the market, has no standing.<sup>96</sup>

The objections to such an approach are many.

The line between one who speaks with intent to convince and one who speaks with intent to override those who are not convinced is, at best, unclear. Freedom of speech is too precious and too fundamental to our lib-

<sup>92</sup> *Chaplinsky v. New Hampshire*, *supra* note 42, and *Cantwell v. Connecticut*, *supra* note 39.

<sup>93</sup> Although Justice Frankfurter cites *Chaplinsky* in support of his "scale of values" statement, he indicates that it is the nature of the idea that ranks low. *Dennis v. United States*, *supra* note 2 at 544-545. For Justice Jackson's views, see note 84 *supra*.

<sup>94</sup> *Dennis v. United States*, *supra* note 2 at 567-568.

<sup>95</sup> *Supra* note 17 at 630.

<sup>96</sup> See a similar approach, also citing *Abrams*, in the Vinson opinion in *American Communications Assn. v. Douds*, *supra* note 1 at 396, where, referring to section 9 (h) of the Labor Management Relations Act of 1947, the Court states: "On the contrary, it [the Board] points out that such strikes are called by persons who, so Congress has found, have the will and power to do so without advocacy or persuasion that seeks acceptance in the competition of the market."

Judge Hand made a similar observation in the court below: "The violent capture of all existing governments is one article of the Creed of that [the Communist] faith, which abjures the possibility of success by lawful means." *United States v. Dennis*, *supra* note 6 at 212. See also Judge Hand's discussion of the First Amendment, *id.* at 207. *Cf.* *Thornhill v. Alabama*, *supra* note 78 at 104-105.

erties to permit a court or jury to speculate on the subtle differences in motivation that such a test would require.

There seems to be no instance in recent years which would justify a scale of values for speech based on ideas expressed, which would give some ideas a zero rating and other various percentages. On the contrary, a concept of evaluating ideas for constitutional preference, based on either legislative or judicial determination, is inconsistent with the one fundamental orthodoxy of our governmental system that in the realm of idea and belief there are no orthodoxies.<sup>97</sup> Our tradition has clearly been opposed to censorship of ideas and we repent the departures from that tradition. We have acknowledged the error, and are ashamed when reminded, of the Alien and Sedition laws,<sup>98</sup> we still blush over the "witch hunts" that followed the first World War. And we have accepted the Holmes-Brandeis view that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate."<sup>99</sup> It would be idle to contend that "free thought" did not include the right to express that thought.<sup>100</sup>

With such a background there seems no basis for proscribing speech because the idea is hateful, unpopular or potentially dangerous unless and until there is some likelihood that a real danger or evil will ensue, and that of course, brings us to the meaning of "clear and present."

#### *The Meaning of "Clear" and "Present"*

If, as it seems, "clear" and "present" have separate meanings,<sup>101</sup> and "clear" indicates the need for a causal connection,<sup>102</sup> then that part of the standard remains unaltered in the Vinson opinion.<sup>103</sup> The construction placed upon the Smith Act by all three courts required that the speech, in order to be punishable, be with the intent and purpose of effecting a course of action.<sup>104</sup> To that extent, the opinion is consistent with the views expressed in prior opinions.<sup>105</sup>

<sup>97</sup> See notes 51 and 52 *supra*.

<sup>98</sup> Act of July 14, 1798, c. 73, 1 STAT. 596. See Justice Holmes, dissenting, in *Abrams v. U.S.*, *supra* note 17 at 630.

<sup>99</sup> *United States v. Schwimmer*, 279 U.S. 644, 654 (1929) (dissenting opinion).

<sup>100</sup> See *Thornhill v. Alabama*, *supra* note 78 at 101-104.

<sup>101</sup> See text at notes 33-35 *supra*.

<sup>102</sup> See text at note 33 *supra*.

<sup>103</sup> The decision emphasizes that petitioners intended to initiate a violent revolution, *Dennis v. United States*, *supra* note 1 at 499; that "[t]he general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence," *id.* at 498; and that the Party had "an apparatus designed and dedicated to the overthrow of the Government," *id.* at 510.

<sup>104</sup> See the instructions of the trial court, text at note 5 *supra*; the court of appeals decision, *United States v. Dennis*, *supra* note 6 at 214, 215; the Vinson opinion, *Dennis v. United States*, *supra* note 2 at 499.

<sup>105</sup> See Justice Murphy's opinion in *Hartzel v. United States*, *supra* note 17, and the dissenting opinions in *Abrams v. United States*, and *Schaefer v. United States*, *supra* note 17. In *Hartzel* the conviction was reversed on the grounds that the publication was not proved to have been made with the intent to cause or attempt a violation of the Espionage Act. The dissents in *Abrams* and *Schaefer* were on the same issue, lack of intent or purpose to cause the substantive evil.

It is the meaning of "present"<sup>106</sup> as "imminent" or "immediate" that is substantially altered.

The Vinson-Hand restatement of the rule<sup>107</sup> is a far cry from the original concept. Granting the premise that as originally stated, and as expounded, "clear and present danger" was a rule of reason,<sup>108</sup> and that the court had not "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,"<sup>109</sup> all prior applications seem far removed from the elastic concept that as the seriousness of the evil grows, the need for clear or present recedes.<sup>110</sup>

Here is the area of sharpest cleavage among the justices. It is questionable whether out of the opinions, or any one of them, a satisfactory analysis or standard emerges.

It is unrealistic to accept the Douglas view that we must be "on the edge of great peril,"<sup>111</sup> or that there must be a clear and present danger that an attempt is imminent, or that "this advocacy will succeed."<sup>112</sup> Frankfurter's refusal to prophecy as to events still "within the womb of time"<sup>113</sup> and Jackson's refusal to accept the rule if it requires a prophecy in the guise of a legal decision,<sup>114</sup> seem far sounder on this point. And it should be noted that the Vinson-Hand restatement, which requires discounting the gravity of the evil according to its probability or improbability, also requires prophecy.<sup>115</sup>

Nor is anything added by the various characterizations of the speech here as advocacy or incitement.

Throughout all the freedom of speech cases there has been a recognition

<sup>106</sup> See text at note 35 *supra*.

<sup>107</sup> See text at note 62 *supra*.

<sup>108</sup> Holmes, J., dissenting, in *Schaefer v. United States*, *supra* note 17 at 482.

<sup>109</sup> Brandeis, J., concurring in *Whitney v. California*, *supra* note 26 at 374.

<sup>110</sup> There is a possibility that the Vinson-Hand restatement can grow into something akin to the Frankfurter "scale of speech values." If the need for "present" recedes with the gravity of the evil, then there can be constructed a scale of evils, and accordingly a scale of speech values, based on the "evil" (or idea) advocated, with the result that some speech could be stopped only when the evil was upon us and other speech prohibited at its inception, if there were any probability (or is it possibility?) of such speech producing the evil.

<sup>111</sup> "If we are to proceed on the basis of judicial notice, it is impossible for me to say that the Communists in this country are so potent or so strategically deployed that they must be suppressed for their speech. I could not so hold unless I were willing to conclude that the activities in recent years of committees of Congress, of the Attorney General, of labor unions, of state legislatures, and of Loyalty Boards were so futile as to leave the country on the edge of grave peril." *Dennis v. United States*, *supra* note 2 at 589.

"Unless and until extreme and necessitous circumstances are shown, our aim should be to keep speech unfettered and to allow the processes of law to be invoked only when the provocateurs among us move from speech to action." *Id.* at 590-591.

<sup>112</sup> "How it can be said that there is a clear and present danger that this advocacy will succeed is, therefore a mystery. Some nations less resilient than the United States, where illiteracy is high and where democratic traditions are only budding, might have to take drastic steps and jail these men for merely speaking their creed. But in America they are miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful." *Id.* at 588-589.

<sup>113</sup> *Id.* at 551.

<sup>114</sup> *Id.* at 570.

<sup>115</sup> Judge Hand recognizes this problem. *United States v. Dennis*, *supra* note 6 at 212.

that an idea can be dangerous, when that idea has been expressed in words. Words have been said to be the "triggers of action,"<sup>116</sup> and in efforts to distinguish between words that were not punishable and words that were, a scale of terms was constructed ranging from "expression of an idea" through "opinion," "counsel," "exhortation" and "advocacy," to "incitement."<sup>117</sup>

All of these expressions appear throughout the *Dennis* opinions. The Vinson opinion states that the Smith Act is directed at "advocacy, not discussion."<sup>118</sup> Justice Frankfurter speaks of the "underlying validity in the distinction between advocacy and the interchange of ideas."<sup>119</sup> Justice Jackson speaks of "direct incitement"<sup>120</sup> and of "teaching or advocacy in the sense of incitement [as distinguished] from teaching or advocacy in the sense of exposition or explanation."<sup>121</sup> Justice Douglas distinguishes between advocacy and incitement and speaks of "advocacy [that] falls short of incitement."<sup>122</sup> And there is reference to Mr. Justice Holmes' statement in *Frohwerk v. United States*<sup>123</sup> that "counselling of a murder" would not be within the protection of free speech.<sup>124</sup>

The Vinson opinion adds another terms to the existing list, "conspiracy to advocate, as distinguished from the advocacy itself," and states "it is the existence of the conspiracy which creates the danger."<sup>125</sup>

It is difficult to determine just what significance is or should be given to "conspiracy to advocate" as distinguished from "advocacy." The statement in the Vinson opinion implies something more than the number of people who advocate and connotes an agreement to advocate which may be illegal even though similar advocacy by individuals, not acting in concert, would be protected.<sup>126</sup> If a single person may legally or constitution-

<sup>116</sup> "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 cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state." *Masses Pub. Co. v. Patten*, 244 Fed. 535, 540 (1917), quoted by Jackson, J., in *Dennis v. United States*, *supra* note 2 at 571.

<sup>117</sup> "I am speaking only of expressions of *opinion* and *exhortations*, which were all that were uttered here." Holmes, J., dissenting in *Abrams v. United States*, *supra* note 17 at 631. For "counselling of murder" see *Frohwerk v. United States*, quoted *supra* note 14. For "counsel or advise" see Judge Hand's statement in *Masses Pub. Co. v. Patten*, quoted *supra* note 116. "[W]e might permit *advocacy* of lawbreaking, but only so long as the *advocacy* falls short of *incitement*." Rutledge, J., dissenting in *Musser v. Utah*, *supra* note 84 at 102. (Emphasis added.) *Semble*: Brandeis, J., concurring in *Whitney v. California*, *supra* note 26 at 376.

<sup>118</sup> *Dennis v. United States*, *supra* note 2 at 502.

<sup>119</sup> *Id.* at 546.

<sup>120</sup> *Id.* at 571.

<sup>121</sup> *Id.* at 572.

<sup>122</sup> *Id.* at 586, quoting Justice Brandeis' opinion in *Whitney v. California*, *supra* note 26 at 376.

<sup>123</sup> *Supra* note 14.

<sup>124</sup> Jackson, J., *Dennis v. United States*, *supra* note 2 at 571.

<sup>125</sup> *Id.* at 511.

<sup>126</sup> This conspiracy, it should be remembered, was a conspiracy to teach, etc., in violation of section 2 of the Smith Act. Text at note 4 *supra*. It was not a conspiracy to do or perform any act other than teaching or advocacy. See Justice Douglas' statement, *Dennis v. United States*, *supra* note 2 at 584: "I repeat that we deal here with speech alone, not with speech *plus*

ally urge, teach, counsel or advocate an idea or a doctrine, why should it be prohibited to a group? And calling that group a "conspiracy" begs the question. If three persons possess the constitutional right to say something individually, the fact that they agree to say it together, or as part of a program, should not make them conspirators. It would seem that calling it a conspiracy to advocate is no help and that we are back at the basic question of whether the advocacy prohibited by the Smith Act can constitutionally be restrained, with or without conspiracy to advocate.<sup>127</sup> As to the element of danger, of course, we may concede that the greater the number of advocates, the more likely the danger, but in that case the danger exists whether the advocates "conspire to advocate" or work independently and without agreement or conspiracy.

As an exercise in semantics it might be interesting to pursue the subtle differences among those words. As a guide to the application of the clear and present danger rule, they do no more than characterize a reaction to a given situation; they decide the issue by begging the question, rather than by analyzing the situation.<sup>128</sup>

Every discussion, unless it be so sterile as to be meaningless, is to some degree advocacy, be it advocacy for or advocacy against the idea discussed. Certainly, no subject as controversial as communism can be discussed among intelligent people without some note of advocacy creeping into that discussion. And "every idea is an incitement."<sup>129</sup> The extent to which speech may be a philosophical statement of a proposition, rather than a spur to action, can be determined only by careful appraisal of such matters as time and place, tone of voice or manner of speech, temper and mood of audience. One need but re-read Marc Antony's oration<sup>130</sup> to realize that words may be expressions of opinion, statements of fact, or incitements to violent ac-

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acts of sabotage or unlawful conduct. Not a single seditious act is charged in the indictment. To make a lawful speech unlawful because two men conceive it is to raise the law of conspiracy to appalling proportions." See also Judge Hand's opinion in the court of appeals: "The sufficiency of the evidence therefore comes down to whether it is a crime to form a conspiracy to advocate or teach the duty and necessity of overthrowing the government by violence, and to organize the Communist Party as a group so to teach and to advocate." *United States v. Dennis*, *supra* note 6 at 206.

<sup>127</sup> Compare Jackson: "I do not suggest that Congress could punish conspiracy to advocate something, the doing of which it may not punish." *Dennis v. United States*, *supra* note 2 at 575. Note also that Jackson, with his emphasis on conspiracy, assumes that the advocacy or teaching here was punishable. See text at note 66 *supra*; note 84 *supra*.

<sup>128</sup> The clearest proof of the danger in using these words as if they possessed legal significance is the extent to which they are defined in terms of each other. See text at notes 118-122 *supra*. See Jackson's concurring opinion: "[I]t is not always easy to distinguish teaching or advocacy in the sense of incitement from teaching or advocacy in the sense of exposition and explanation. It is a question of fact in each case." *Dennis v. United States*, *supra* note 2 at 572.

In order to avoid the unconstitutionality that would result if "advise" and "teach" were given their normal meanings, these words in the Smith Act were defined in the charge to the jury as "teaching and advocacy . . . by language reasonably and ordinarily calculated to incite . . ." *Id.* at 512.

Compare also the distinction as to the meaning of "advocacy" between Vinson's opinion in *Dennis*, *id.* at 502, and Rutledge's opinion in *Musser v. Utah*, *supra* note 84 at 100-103.

<sup>129</sup> Holmes, J., dissenting, *Gitlow v. New York*, *supra* note 13 at 673.

<sup>130</sup> *Julius Caesar*, Act. III, Scene III.

tion, depending upon where one pauses, where one accents, and how one pitches his voice.

For Brutus is an honorable man;  
So are they all, all honorable men;

becomes not a statement of fact, not words of praise, but incitement to banishment and death. This fact has not escaped the attention of the Court in recent freedom of speech cases.<sup>131</sup>

It is doubtful whether anything constructive can come of repeating these intangible distinctions between expressions of ideas, and advocacy and incitement; between counseling and expressing an opinion. Every so often, there is discussion of the idea of euthanasia. At what point does a medical or philosophical discussion of the idea cease to be protected and become advocacy or counselling of murder? Does it help to say that it is permissible when the discussion merely advocates that the law be changed but it becomes punishable when it is suggested that it be practiced even though the law not be changed?<sup>132</sup> Advocacy that a law be changed can be couched in such language and the existing law be characterized as so immoral or unfair, that some people may be led to violate it without waiting for the legislative process to function.<sup>133</sup> Are not all these expressions merely another way of saying that one who speaks of violation of the law with the intent<sup>134</sup> and in such a manner and under such circumstances as to create a danger that violation of the law will presently follow, has overstepped the bounds; that such speech can then be restrained because of the consequences that are about to flow from it?

What then becomes of "present" as applied to the Smith Act in the *Dennis* case? Nothing in any opinion indicates that overthrow, or attempt at overthrow, was "present" in any previously accepted sense of that term, that is, imminent, immediate, or probably threatened in the foreseeable future. We can concede there was advocacy, but we must recognize that that word of many meanings and subtle shadings is more descriptive of a result than analytical.

There are, it would appear, two alternatives.

We can accept *Dennis* as meaning, in the Vinson-Hand formulation, that "present" does not mean "present" when the substantive evil is sufficiently great; that where we are dealing with the basic problem of the

<sup>131</sup> "An effective and safer way is to incite mob action while pretending to deplore it, after the classic example of Antony, . . ." Jackson, J., dissenting, *Terminiello v. Chicago*, *supra* note 1 at 35.

<sup>132</sup> See the discussion of this point in Justice Rutledge's dissenting opinion in *Musser v. Utah*, *supra* note 84 at 101-103, which he concludes with: ". . . [the] position, that the state may prevent any conduct which induces people to violate the law, or any advocacy of unlawful activity, cannot be squared with the First Amendment." See also Justice Brandeis' concurring opinion in *Whitney v. California*, *supra* note 26 at 376.

<sup>133</sup> See Rutledge, J., dissenting, *Musser v. Utah*, *supra* note 84 at 101-102.

<sup>134</sup> The following discussion assumes that intent (as expressed in the Vinson opinion, text at note 61 *supra*; *Hartzel v. United States*, *supra* note 17; Justice Holmes' dissents in *Abrams v. United States*, *supra* note 17; *Schaefer v. United States*, *supra* note 17) must be established. See also note 105 *supra*.

safety of a society, "present" means "possible," or "potential." Factually that is as close as the danger of overthrow or attempt at overthrow ever approaches in the *Dennis* case. If that be the teaching of *Dennis*, then that decision, by redefining "present," or by establishing a sliding scale of speech values in which the need for "present" varies directly with the value assigned to the subject of the speech, has so modified the original "clear and present danger rule" as to require a complete reorientation to the guaranty of the First Amendment.

The other alternative is to reexamine the matter of "substantive evil" and ascertain whether there is or may be a substantive evil, other than overthrow or attempt at overthrow, the danger of which was sufficiently "present" to justify application of the Smith Act consistently with prior doctrine.

### *The Substantive Evil*

The text of the Smith Act and its application in *Dennis* offer four possibilities as to the nature of the substantive evil:<sup>135</sup>

- (1) Advocacy of, or a conspiracy to advocate, overthrow of the government by force and violence.
- (2) An attempt to overthrow the government by force and violence.
- (3) The successful overthrow of the government by force and violence.
- (4) The existence of a conspiracy to plan the overthrow of the government by force and violence.

Which, if any, of these was (a) "present" and (b) accepted as the "substantive evil"? And which, if any, should be accepted as a "substantive evil," the danger of which was sufficiently "clear and present," to justify the application of the rule in its original form?

There is no doubt that advocacy and conspiracy to advocate were "present" in every accepted sense of that term.<sup>136</sup> But can such advocacy, or conspiracy to advocate, be itself a substantive evil? We have already

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<sup>135</sup> The quoted instructions of the trial judge merely referred to "a substantive evil." *Dennis v. United States*, *supra* note 2 at 512. The Vinson opinion accepts "an attempt to overthrow . . . even though doomed from the outset . . ." *id.* at 509, as a sufficient substantive evil for Congress to prevent. The Douglas opinion can be interpreted as regarding the evil either as attempt or overthrow. He quotes from *Whitney v. California* about advocacy that "would be immediately acted on," *id.* at 586, and he speaks of advocacy that "will succeed." *Id.* at 588. He would apparently agree that violence or the attempt at violence is a sufficient substantive evil and require only such advocacy as would indicate that violence was imminent, again quoting from *Whitney*, *id.* at 588. Elsewhere in his opinion, Justice Douglas gives some indication that he would accept a conspiracy to overthrow the government as a substantive evil. He states: "This case was argued as if those [the teaching of methods of terror and other seditious conduct] were the facts. The argument imported much seditious conduct into the record. That is easy and it has popular appeal . . . But the fact is that no such evidence was introduced at the trial. There is a statute which makes a seditious conspiracy unlawful. Petitioners, however, were not charged with a 'conspiracy to overthrow' the government . . . It may well be that indoctrination in the techniques of terror to destroy the Government would be indictable under either statute." *Id.* at 581-582.

Jackson seems to accept a conspiracy to advocate or teach as the substantive evil. *Id.* at 574.

<sup>136</sup> *Id.* at 497-499.

commented upon the dangers of that approach<sup>137</sup> and that only Justice Jackson would accept it as the evil in *Dennis*.<sup>138</sup> It is clear from the Vinson opinion that the substantive evil to be guarded against was the attempt at overthrow,<sup>139</sup> and the conspiracy to advocate merely created the danger.<sup>140</sup>

No one would dispute the proposition that an attempt at overthrow of the government, "even though doomed from the outset"<sup>141</sup> is a sufficient substantive evil. Since the government unquestionably enjoys the power to put down the attempt with such force as may be necessary, it must, perforce, have the power to prevent the attempt being made.<sup>142</sup> But that still leaves open the crucial question of when does speech, advocacy, teaching or counsel create a sufficiently present danger that the attempt will be made. And, as previously pointed out,<sup>143</sup> in the accepted sense of the word "present," there was no present danger of any such attempt resulting from the speech involved in *Dennis*.

At this point, if attempt at overthrow is the substantive evil, we run into the fundamental dilemma that the *Dennis* opinions pose.

If we are to adhere to the Black-Douglas insistence on "present" as immediate or imminent,<sup>144</sup> then their application of that test to the substantive evil of attempted overthrow requires, in the words of Justice Douglas, that we be "in the extreme case of peril from the speech itself,"<sup>145</sup> that we be "on the edge of grave peril."<sup>146</sup> If this is what clear and present danger means, it demands too much, and jeopardizes national safety and security by holding the government captive in a "verbal trap"<sup>147</sup> while those who threaten its existence proceed with impunity.

On the other hand, if we accept the Vinson approach, we have a flexible test in which the need for "present" diminishes as the gravity of the evil increases.<sup>148</sup> Thus we open the door to inroads on freedom of speech whenever court or legislature deems the objectives of the speech sufficiently obnoxious. The result is substantially that of Justice Frankfurter's scale of speech values.<sup>149</sup> As applied to overthrow of the government, we may agree that we have a substantive evil of the first magnitude. But where do we stand with respect to other ideas that pose what society, or some parts of society, may regard as evils?<sup>150</sup> Do we prohibit all talk about them—even

<sup>137</sup> See text at notes 96-100, 128-134 *supra*.

<sup>138</sup> See text at note 84 *supra*.

<sup>139</sup> *Dennis v. United States*, *supra* note 2 at 509-510.

<sup>140</sup> *Id.* at 511.

<sup>141</sup> *Id.* at 509.

<sup>142</sup> See Justice Frankfurter's opinion, *id.* at 519-520.

<sup>143</sup> See text at note 133 *supra*.

<sup>144</sup> See text at notes 67-71 *supra*.

<sup>145</sup> *Dennis v. United States*, *supra* note 2 at 590.

<sup>146</sup> *Id.* at 589.

<sup>147</sup> *Id.* at 568.

<sup>148</sup> See text at note 110 *supra*.

<sup>149</sup> See text at note 86 *supra*.

<sup>150</sup> See Justice Black's historical reviews of proscriptions of various beliefs, in *American Communications Assn. v. Douds*, *supra* note 1 at 446 *et seq.*; *Anti-Fascist Committee v. McGrath*, *supra* note 1 at 146 *et seq.*

Note also Justice Jackson's collection of sayings that would fall under the ban, in n. 12 to his opinion in *American Communications Assn. v. Douds*, *supra* at 440.



the opportunity to secure acceptance "in the competition of the market"<sup>151</sup>—by those in authority?

There seems to be one way out of this dilemma; a way that, while it might not affect the result in *Dennis*, offers both the security that the Vinson, Jackson and Frankfurter opinions seek, and safeguards freedom of speech without incurring the danger of extreme peril present in the Black and Douglas dissents. That way out is by reexamining the subject of the substantive evil to which the Smith Act should be applied. Except for that of Mr. Justice Jackson, all the opinions see "attempt at overthrow" as the substantive evil and seek to bring the result in *Dennis* into harmony with the existing decisions by making that evil sufficiently "present." There is the other alternative of finding something short of an attempt at overthrow that can legitimately be classified as a substantive evil, and which is "present" in the *Dennis* case, and like situations, in a sense not straining the historical meaning of the word "present." It seems that there was such an evil.

A conspiracy to plan the overthrow of the government by force and violence should be a sufficient substantive evil to justify interference with speech that creates a clear and present danger of aiding or abetting that conspiracy.<sup>152</sup> And even though the actual existence of the conspiracy not be established, if that speech creates a clear and present danger that such a conspiracy is being, or is about to be, organized, interference is warranted.

In either event it would be the existence of a conspiracy, pending or impending, to plan overthrow which constitutes the evil and not the words spoken, the intent with which they were uttered, or the eventual result of such a conspiracy.

Concededly, nothing in any of the *Dennis* opinions justifies the conclusion that any such conspiracy, as the substantive evil, was the reason for that decision.<sup>153</sup> There are indications that it could have been. There are expressions in this and other cases that at least some of the justices of the Supreme Court and various judges of courts of appeals have regarded the Communist Party as a criminal conspiracy, wholly apart from the conspiracy to advocate which the Smith Act forbids.<sup>154</sup>

<sup>151</sup> *Abrams v. United States*, quoted text at note 95 *supra*.

<sup>152</sup> See text at note 44 *et seq.*

<sup>153</sup> As noted above the only conspiracy considered was the conspiracy to advocate; the Vinson opinion regards that conspiracy as the danger; the Jackson opinion treats it as a substantive evil. See text at notes 61, 66, 84, 125 *supra*; note 126 *supra*.

<sup>154</sup> *E.g.*, see the summarization of the conclusions of the court of appeals in *Dennis v. United States*, *supra* note 2 at 497-499. Justice Jackson's views are expressed in *American Communications Assn. v. Douds*, *supra* note 1 at 423-424:

" . . . Congress reasonably could have concluded that the Communist Party is something different in fact from any other substantial party we have known, and hence may constitutionally be treated as something different in law.

"From information before its several Committees and from facts of general knowledge, Congress could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system."

The Vinson opinion states: "The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence

Thus the Vinson opinion, at one point states: "They [Justices Holmes and Brandeis] were not confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis,"<sup>155</sup> and it accepts the court of appeals conclusion that petitioners "intended to initiate a violent revolution whenever the propitious occasion appeared."<sup>156</sup> The idea of an "apparatus" plus the intent to initiate (not merely talk about, advocate or discuss) violent revolution carries the connotation of a conspiracy to revolt.

The opinion of the court of appeals accepts the premise that the American Communist Party is a conspiracy<sup>157</sup> and the jury's implied finding "that the conspirators will strike as soon as success seems possible."<sup>158</sup> Is this any different from a conspiracy to burglarize a home as soon as the inhabitants leave on their vacation? The fact that the occupants of the home have no present vacation plans, or may not ever take that vacation, does not make the conspiracy innocuous. It admittedly is punishable. If this analysis be correct, then a conspiracy existed to strike to overthrow the government by force and violence and was an existing substantive evil which the government had a right to prevent at the time the acts laid in the indictment took place. The speech, or advocacy, or teaching charged as violation of the Smith Act could have been found to be an aid to, a furtherance and augmentation of, the conspiracy. If this be true then the relation between teaching and evil was clear and present under the strictest construction of the Holmes-Brandeis test.

#### CONCLUSION

There is a saying about the need for keeping one's feet on the ground while walking about with one's head in the clouds. And there have been frequent admonitions concerning the danger of losing our liberties by suppression of thought and belief while engaged in a struggle to preserve those liberties.<sup>159</sup> The need to strike a proper balance between freedom and security is our main concern today.

It is our opinion that such a balance is not reached in any of the *Dennis* opinions. It clearly asks too much of organized government that it be prevented from interfering with speech that advocates or teaches or advises its overthrow by force and violence until it is faced with an imminent at-

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is of course no answer to the fact that there was a group that was ready to make the attempt." *Dennis v. United States*, *supra* at 510. See also the Jackson opinion, *id.* at 564-567.

<sup>155</sup> *Id.* at 510.

<sup>156</sup> *Id.* at 497.

<sup>157</sup> Of course, this may be only the "conspiracy to advocate" but note such an expression, in the Hand opinion as "so thoroughly planned and so extensive a *confederation*." (Emphasis added.) *United States v. Dennis*, *supra* note 6 at 213, and the implications of the opinion are that the conspiracy was one to plan and act, not merely talk about, although it is clear that the conspiracy charged in the indictment and for which defendants were convicted, was a conspiracy to talk and not to act. See note 126 *supra*.

<sup>158</sup> *United States v. Dennis*, *supra* note 6 at 213.

<sup>159</sup> See for examples Justice Frankfurter's opinion, *Dennis v. United States*, *supra* note 2 at 553-557; Justice Jackson's opinion, *id.* at 577-579; Justice Douglas' opinion, *id.* at 591; Justice Jackson's opinion in *Terminiello v. Chicago*, *supra* note 1 at 32-37.

tempt at action. To this extent the views of the Vinson, Frankfurter and Jackson opinions and their objections to the Black-Douglas approach seem sound. But it equally asks too great a surrender of individual rights to subject to punishment or suppression the expression of one's views whenever the objective of those views is proscribed by the legislature as a substantive evil and the Court finds that there is any likelihood that the expression of such views may lead to action some time in the future. To this extent the objections of Justices Black and Douglas to the result in *Dennis* likewise seem sound.

We believe that a balance between security and freedom—between the extreme of the Vinson, Frankfurter and Jackson opinions on the one hand, and the Black and Douglas views on the other—can be attained in the application of the Smith Act and others of like character by treating the conspiracy to plan the overthrow of the government, rather than the attempt at such overthrow, as the substantive evil to be guarded against. As applied to the communist problem in the United States, it would permit the application of the Smith Act, if or when the proof exists that the Communist Party is in fact a conspiracy which *plans* the overthrow of the government by force and violence. In other situations we would avoid the danger that similar legislation might be used to strike down advocacy of a program or policy merely because some people might regard that program or policy as an evil and there was some possibility that the program might be carried out, unless action was imminent or there was a conspiracy, with an existing or impending plan for action, to carry out that program by illegal means.

While the suggested approach might not affect the eventual result in *Dennis*, it seems to provide safeguards to both individual liberties and government security that are not present in the *Dennis* opinions.

It accepts without modification the clear and present danger rule as originally developed and applied in *Schenck*. With few exceptions, that rule, as historically applied, has been a safeguard to individual liberty, and has imposed little, if any, burden on the maintenance of public order and security. The Vinson-Hand test comes perilously close to inflicting on American thought a new sword of Damocles, with an elastic band substituted for a single hair, and with the tensile strength of the elastic and the weight of the sword adjusted to whatever ideas may be advocated by the immediate occupant of Damocles' chair. The Frankfurter and Jackson opinions give even less security to individual expression and leave it open to Court or legislature to proscribe certain types of speech if there is some basis for legislative judgment that it will produce an evil, or if the idea advocated ranks low on the scale of speech values, or is sufficiently obnoxious to be completely beyond the pale.

The approach here suggested would require that before there could be a conviction under the Smith Act (or any similar act charging violation in speech terms) for advocating, advising or teaching a doctrine, the objective of which is a substantive evil that the state has a right to prevent, there exist a clear and present danger that the speech will presently result in (1) accomplishing the evil, or (2) aiding or abetting an organized group

or conspiracy dedicated to that objective and having a plan of action, by illegal means (other than speech) or for illegal purposes, to be placed in operation at a propitious moment, or (3) aiding or abetting the formation of such an organized group or conspiracy. An organization to spread a doctrine, even with the intent it be a rule of action, would be protected *unless the organization to act and the plan for action* were either in existence or impending. Philosophical discussion, advocacy and the opportunity to test doctrine and secure its acceptance as "truth in the market place" would be protected. As applied to the *Dennis* case, this approach would conform to the Holmes-Brandeis dissents in *Abrams* and *Gitlow* and their concurrence in *Whitney*.

From the government's point of view, its protection and security are not measureably weakened. The extreme position of Justices Black and Douglas is avoided. No forecast or prophecy of the eventual outcome of the conspiracy, or when, if at all, it will make the attempt at violent action, or the likelihood of its success, is required. No one need wait until the evil of violent action is upon us and the "verbal trap" is eliminated.

It may be argued that as thus analyzed, the Smith Act adds little to the existing offense of seditious conspiracy;<sup>160</sup> that since a conspiracy to overthrow, put down, or destroy, by force, the government of the United States is already punishable, why prove that crime in order to convict of another? There are two answers. One is that to the extent the Smith Act is applicable to prevent or punish speech, with the intent to aid or abet the formation of a seditious conspiracy, which speech creates a clear and present danger that such a conspiracy is imminent, it moves the line of defense one step forward. The other is that if, in fact, it adds nothing substantial to the existing crime of seditious conspiracy, then the Smith Act and others like it are unnecessary. The machinery already exists, in legislation specifying violation in non-speech terms, adequately to deal with any situation that the Smith Act covers, or should constitutionally cover, and we can then return to the basic principles of *Schenck v. United States*.

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<sup>160</sup> 18 U.S.C. § 2384 (Supp. 1951).