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222. FOUNDATIONS OF THE FIRST AMENDMENT

January 2005

Dr. Robert W. Sutherland, Instructor

[Click here](#) for a version that is easier to print using Adobe Acrobat Reader 4.0. Reading assignments are subject to change, so the online syllabus is the only definitive version. Changes in reading assignments will not be made within 24 hours immediately preceding class meetings.

HOW TO REACH THE INSTRUCTOR: 305 South Hall, Ext. 4226, early in the day (8-9am). Other times by appointment arranged before and after class or by e-mail. I rarely check my voice mail and often forward my calls to the South Hall Faculty Secretary, so a prompt response from me is best gained by e-mail. rsutherland@cornellcollege.edu

CLASS MEETINGS: 1:00 pm daily 302 South Hall except on exam days when the class will meet at 9 am in the 2nd floor of the Library. See the [schedule](#) below.

TEXTS: J. S. Mill, *On Liberty* ([on line edition](#)); David Lowenthal, *Present Dangers* (Bookstore)

GRADES:

- PAPER-30%
- EXAMS & QUIZZES--70%, two midterms (15, 20%) and a final exam (25%) plus various unannounced quizzes (10%). Quizzes may not be made up, except for documented (e.g. trauma center registration) emergencies. Both the final exam and the final paper remain with me for future reference in revising and improving the course. They can be picked up at my office immediately after Politics 222 is offered again.
- Portions of the *Catalog* on adding and dropping courses and portions of the *Compass* on dishonesty in academic work are incorporated here by reference. A discount of 5% per hour will be applied to the grades of late papers, except for documented emergencies. The grading scale for the course is A = 1750-2000, A- = 1650-1749, B+ = 1550-1649, B = 1450-1549, B- = 1350-1449, C+ = 1250-1349, C = 1150-1249, C- = 1050-1149, D+ = 950-1049, D = 850-949, D- = 750-849, F = 000-749. The number of points possible on any given exam or paper can be calculated by multiplying 20 points (A++) by the value (a percentage) of the exam or paper in determining the final grade. For letter grade equivalents, multiply the percentage times: 18 = A, 17 = A-, 16 = B+, 15 = B, 14 = B-, 13 = C+, 12 = C, 11 = C-, 10 = D+, 9 = D, 8 = D-.

ASSIGNMENTS--To be done before class on the day indicated:

| Wk | DAY | TIME | READING | EXAM/PAPER |
|----|-----|------|---------|------------|
|----|-----|------|---------|------------|

| | | | | |
|-----|----|------|---|---------------------------|
| I | 2 | 1:00 | <i>Shenck v. U.S.; Brandenburg v. Ohio; On Liberty</i> , Ch. 1 | |
| | 3 | 1:00 | <i>On Liberty</i> , Ch. 2 | |
| | 4 | 1:00 | <i>On Liberty</i> , Ch. 3 | |
| | 5 | 1:00 | <i>On Liberty</i> , Ch. 4-5 | |
| II | 6 | 9:00 | Come to 2nd Floor, Library | 1st Exam |
| | 7 | 1:00 | <i>Present Dangers</i> , pp. ix-xxxii, 3-44 | |
| | 8 | 1:00 | <i>Present Dangers</i> , pp. 45-86 | |
| | 9 | 1:00 | <i>Present Dangers</i> , pp. 89-137 | |
| | 10 | 1:00 | <i>Present Dangers</i> , pp. 138-178 | |
| III | 11 | 9:00 | Come to 2nd Floor Library | 2nd Exam |
| | 12 | 1:00 | <i>Present Dangers</i> , pp.181-233 | |
| | 13 | 1:00 | <i>Present Dangers</i> , pp.234-270 + an article on the Supreme Court | |
| | 14 | 1:00 | <i>Present Dangers</i> , pp.271-283 + Two Short Articles | |
| | 15 | 1:00 | Optional Rough Draft of Final Paper Due | |
| IV | 16 | 1:00 | "Secularism & its Discontents" | |
| | 17 | 9:00 | Come to 2nd Floor Library | Final Exam |
| | 18 | NOON | | Paper Due |

STUDY GUIDE QUESTIONS & OUTLINES

Note: These questions are designed to help you get the most out of what you read. They should be largely ignored during your first reading of the assignment but carefully studied during a second reading in order to identify main ideas and to fix them securely in mind. Notes based on these questions may be used on quizzes but not on exams.

SCHENCK V. US:

1. What is the indictment, including specific counts & the finding for each?
2. What arguments and objections were made in behalf of the defendant?
3. What conclusion does Holmes draw about the their intention and expected effect?
4. Why weren't public figures that said the same things as the defendant similarly charged?
5. What is the action of the Court?

BRANDENBURG V. OHIO:

1. What is the indictment & the action of the lower court?
2. What argument was made in behalf of the defendant?
3. What principle or test does the Court invoke to decide the case?
4. What conclusion and action follows?

5. What is Douglas's caveat and by what means does he explain it?

SCHENCK v. UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN
DISTRICT OF PENNSYLVANIA.

Nos. 437, 438. Argued January 9, 10, 1919.-Decided March 3, 1919.

Evidence held sufficient to connect the defendants with the mailing of printed circulars in pursuance of a conspiracy to obstruct the recruiting and enlistment service, contrary to the Espionage Act of June 15, 1917. P.49.

Incriminating documents seized under a search warrant directed against a Socialist headquarters, held admissible in evidence, consistently with the Fourth and Fifth Amendments, in a criminal prosecution against the general secretary of a Socialist party, who had charge of the office. P.50.

Words which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment, may become subject to prohibition when of such a nature and used in such circumstances as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent. The character of every act depends upon the circumstances in which it is done. P.51.

A conspiracy to circulate among men called and accepted for military service under the Selective Service Act of May 18, 1917, a circular tending to influence them to obstruct the draft, with the intent to effect that result, and followed by the sending of such circulars, is within the power of Congress to punish, and is punishable under the Espionage Act, ' 4, although unsuccessful. P.52.

The word "recruiting" as used in the Espionage Act, ' 3, means the gaining of fresh supplies of men for the military forces, as well by draft as otherwise. P.52.

The amendment of the Espionage Act by the Act of May 16, 1918, c. 75, 40 Stat. 553, did not affect the prosecution of offenses under the former. P.53.

Affirmed.

The case is stated in the opinion.

Mr. Henry John Nelson and Mr. Henry J. Gibbons for Plaintiffs in error.

Mr. John Lord O'Brian, Special Assistant to the Attorney General, with whom Mr. Alfred Bettman, Special Assistant to the Attorney General, was on the brief, for the United States.

Mr. Justice Holmes delivered the opinion of the court.

This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, 1917, c. 30, ' 3, 40 Stat. 217, 219, by causing and attempting to cause insubordination, &c., in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to-wit, that the defendants wilfully conspired to have printed and circulated to men who had been called and accepted for military service under the Act of May 18, 1917, a document set forth and alleged to be calculated to cause such insubordination and obstruction. The count alleges overt acts in pursuance of the conspiracy,

ending in the distribution of the document set forth. The second count alleges a conspiracy to commit an offence against the United States, to-wit, to use the mails for the transmission of matter declared to be non-mailable by Title XII, '2 of the Act of June 15, 1917, to-wit, the above mentioned document, with an averment of the same overt acts. The third count charges an unlawful use of the mails for the transmission of the same matter and otherwise as above. The defendants were found guilty on all the counts. They set up the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech, or of the press, and bringing the case here on that ground have argued some other points also of which we must dispose.

It is argued that the evidence, if admissible, was not sufficient to prove that the defendant Schenck was concerned in sending the documents. According to the testimony Schenck said he was general secretary of the Socialist party and had charge of the Socialist headquarters from which the documents were sent. He identified a book found there as the minutes of the Executive Committee of the party. The book showed a resolution of August 13, 1917, that 15,000 leaflets should be printed on the other side of one of them in use, to be mailed to men who had passed exemption boards, and for distribution. Schenck personally attended to the printing. On August 20 the general secretary's report said "Obtained new leaflets from printer and started work addressing envelopes" &c.; and there was a resolve that Comrade Schenck be allowed \$125 for sending leaflets through the mail. He said that he had about fifteen or sixteen thousand printed. There were files of the circular in question in the inner office which he said were printed on the other side of the one sided circular and were there for distribution. Other copies were proved to have been sent through the mails to drafted men. Without going into confirmatory details that were proved, no reasonable man could doubt that the defendant Schenck was largely instrumental in sending the circulars about. As to the defendant Baer there was evidence that she was a member of the Executive Board and that the minutes of its transactions were hers. The argument as to the sufficiency of the evidence that the defendants conspired to send the documents only impairs the seriousness of the real defense.

It is objected that the documentary evidence was not admissible because obtained upon a search warrant, valid so far as appears. The contrary is established. *Adams v. New York*, 192 U. S. 585; *Weeks v. United States*, 232 U. S. 383, 395, 396. The search warrant did not issue against the defendant but against the Socialist headquarters at 1326 Arch Street and it would seem that the documents technically were not even in the defendants' possession. See *Johnson v. United States*, 228 U. S. 457. Notwithstanding some protest in argument the notion that the evidence even directly proceeding from the defendant in a criminal proceeding is excluded in all cases by the Fifth Amendment is plainly unsound. *Holt v. United States*, 218 U. S. 245, 252, 253.

The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act and that a conscript is little better than a convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said "Do not submit to intimidation," but in form at least confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that any one violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, &c., &c., winding up "You must do your share to maintain, support and uphold the rights of the people of this country." Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well-known public men. It well may be that the prohibition of the laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado*, 205 U. S. 454, 462. We admit that

in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. *Aikens v. Wisconsin*, 195 U. S. 194, 205, 206. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 439. The question in every case is whether the words used are used in such circumstance 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. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in ' 4 punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. *Goldman v. United States*, 245 U. S. 474, 477. Indeed that case might be said to dispose of the present contention if the precedent covers all media concludendi. But as the right to free speech was not referred to specially, we have thought fit to add a few words.

It was not argued that a conspiracy to obstruct the draft was not within the words of the Act of 1917. The words are "obstruct the recruiting or enlistment service," and it might be suggested that they refer only to making it hard to get volunteers. Recruiting heretofore usually having been accomplished by getting volunteers the word is apt to call up that method only in our minds. But recruiting is gaining fresh supplies for the forces, as well by draft as otherwise. It is put as an alternative to enlistment or voluntary enrollment by the amending Act of May 16, 1918, c. 75, 40 Stat. 553, of course, does not affect the present indictment and would not, even if the former act had been repealed. *Rev. Stats.*, ' 13.

Judgments affirmed.

BRANDENBURG v. OHIO.
APPEAL FROM THE SUPREME COURT OF OHIO.
No. 492. Argued February 27, 1969.-Decided June 9, 1969.

Appellant, a Ku Klux Klan leader, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions refined the statute's definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action. Held: Since the statute, by its words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action, it falls within the condemnation of the First and Fourteenth Amendments. Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. *Whitney v. California*, 274 U. S. 357, overruled.

Reversed.

Allen Brown argued the cause for appellant. With him on the briefs were Norman Dorsen, Melvin L. Wulf, Eleanor Holmes Norton, and Bernard A. Berkman.

Leonard Kirschner argued the cause for appellee. With him on the brief was Melvin G. Rueger.

Paul W. Brown, Attorney General of Ohio, pro se, and Leo J. Conway, Assistant Attorney General, filed a brief for the Attorney General as amicus curiae.

Per Curiam.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Ohio Rev. Code Ann. ' 2923.13. He was fined \$1,000 and sentenced to one to 10 years' imprisonment. The appellant challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal, sua sponte, "for the reason that no substantial constitutional question exists herein." It did not file an opinion or explain its conclusions. Appeal was taken to this Court, and we noted probable jurisdiction. 393 U. S. 948 (1968). We reverse.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews⁽¹⁾ Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

"This is an organizers' meeting. We have had quite a few members here today which are-we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.

"We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revengeance" was omitted, and one sentence was added: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Though some of the figures in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. E. Dowell, A History of Criminal Syndicalism Legislation in the United States 21 (1939). In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, Cal. Penal Code " 11400-11402, the text of which is quite similar to that of the laws of Ohio. *Whitney v. California*, 274 U. S. 357 (1927). The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and

economic change involves such danger to the security of the State that the State may outlaw it. Cf. *Fiske v. United States*, 341 U. S. 494, at 507 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action⁽²⁾ As we said in *Noto v. United States*, 367 U. S. 290, 297-208 (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." See also *Herndon v. Lowry*, 301 U. S. 242, 259-261 (1937); *Bond v. Floyd*, 385 U. S. 116, 134 (1966). A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. Cf. *Yates v. United States*, 354 U. S. 298 (1957); *De Jonge v. Oregon*, 299 U. S. 353 (1937); *Stromberg v. California*, 283 U. S. 359 (1931). See also *United States v. Robel*, 389 U. S. 258 (1967); *Keyishian v. Board of Regents*, 385 U. S. 589 (1967); *Elfbrandt v. Russell*, 384 U. S. 11 (1966); *Aptheker v. Secretary of State*, 378 U. S. 500 (1964); *Baggett v. Bullitt*, 377 U. S. 360 (1964).

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action⁽³⁾

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action⁽⁴⁾ Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California*, supra, cannot be supported, and that decision is therefore overruled.

Reversed.

Mr. Justice Black, concurring.

I agree with the views expressed by Mr. Justice Douglas in his concurring opinion in this case that the "clear and present danger" doctrine should have no place in the interpretation of the First Amendment. I join the Court's opinion, which, as I understand it, simply cites *Dennis v. United States*, 341 U. S. 494 (1951), but does not indicate any agreement on the court's part with the "clear and present danger" doctrine on which *Dennis* purported to rely.

Mr. Justice Douglas, concurring.

While I join the opinion of the Court, I desire to enter a caveat.

The "clear and present danger" test was adumbrated by Mr. Justice Holmes in a case arising during world War I—a war "declared" by congress, not by the Chief Executive. The case was *Schenck v. United States*, 249 U. S. 47, 52, where the defendant was charged with attempts to cause insubordination in the military and obstruction of enlistment. The pamphlets that were distributed urged resistance to the draft, denounced conscription, and impugned the motives of those backing the war effort. The First Amendment was tendered as a defense. Mr. Justice Holmes in rejecting that defense said:

"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."

Frohwerk v. United States, 249 U. S. 204, also authored by Mr. Justice Holmes, involved prosecution and punishment for publication of articles very critical of the war effort in World War I. Schenck was referred to as a conviction for obstructing security "by words of persuasion." *Id.*, at 206. And the conviction in *Frohwerk* was sustained because "the circulation of the paper was in quarters where a little breath would be enough to kindle a flame." *Id.*, at 209.

Debs v. United States, 249 U. S. 211, was the third of the trilogy of the 1918 Term. Debs was convicted of speaking in opposition to the war where his "opposition was so expressed that its natural and intended effect would be to obstruct recruiting." *Id.*, at 215.

"If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief." *Ibid.*

In the 1919 Term, the Court applies the Schenck doctrine to affirm the convictions of other dissidents in World War I. *Abrams v. United States*, 250 U. S. 616, was one instance. Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, dissented. While adhering to Schenck, he did not think that on the facts a case for overriding the First Amendment had been made out:

"It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country." *Id.*, at 628.

Another instance was *Schaefer v. United States*, 251 U. S. 466, in which Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented. A third was *Pierce v. United States*, 252 U. S. 239, in which again Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented.

Those, then, were the World War I cases that put the gloss of "clear and present danger" on the First Amendment. Whether the war power—the greatest leveler of them all—is adequate to sustain that doctrine is debatable. The dissents in *Abrams*, *Schaefer*, and *Pierce* show how easily "clear and present danger" is manipulated to crush what Brandeis call "[t]he fundamental right of free men to strive for better conditions through new legislation and new institutions" by argument and discourse (*Pierce v. United States*, *supra*, at 273) even in time of war. Though I doubt if the "clear and present danger" test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace.

The Court quite properly overrules *Whitney v. California*, 274 U. S. 357, which involved advocacy of ideas which the majority of the Court deemed unsound and dangerous.

Mr. Justice Holmes, though never formally abandoning the "clear and present danger" test, moved closer to the First Amendment ideal when he said in dissent in *Gitlow v. New York*, 268 U. S. 652, 673:

"Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

We have never been faithful to the philosophy of that dissent.

The Court in *Herndon v. Lowry*, 301 U. S. 242, overturned a conviction for exercising First Amendment rights to incite insurrection because of lack of evidence of incitement. *Id.*, at 259-261. And see *Hartzel v. United States*, 322 U. S. 680. In

Bridges v. California, 314 U. S. 252, 261-263, we approved the "clear and present danger" test in an elaborate dictum that tightened it and confined it to a narrow category. But in Dennis v. United States, 341 U. S. 494, we opened wide the door, distorting the "clear and present danger" test beyond recognition⁽⁵⁾

In that case the prosecution dubbed an agreement to teach the Marxist creed a "conspiracy." The case was submitted to a jury on a charge that the jury could not convict unless it found that the defendants "intended to overthrow the Government as speedily as circumstances would permit." Id., at 509-511. The Court sustained convictions under that charge, construing it to mean a determination of "whether the gravity of the "evil," discounted by its improbability, justifies such danger."⁽⁶⁾ Id., at 510, quoting from United States v. Dennis, 183 F. 2d. 201, 212.

Out of the "clear and present danger" test came other offspring. Advocacy and teaching of forcible overthrow of government as an abstract principle is immune from prosecution. Yates v. United States, 354 U. S. 298, 318. But an "active" member, who has a guilty knowledge and intent of the aim to overthrow the Government by violence, Noto v. United States, 367 U. S. 290, may be prosecuted. Scales v. United States, 367 U. S. 203, 228. And the power to investigate, backed by the powerful sanction of contempt, includes the power to determine which of the two categories fits the particular witness. Barenblatt v. United States, 360 U. S. 109, 130. And so the investigator roams at will through all of the beliefs of the witness, ransacking his conscience and his innermost thoughts.

Judge Learned Hand, who wrote for the Court of Appeals in affirming the judgment in Dennis, coined the "not improbable" test, 183 F. 2d 201, 214, which this Court adopted and which Judge Hand preferred over the "clear and present danger" test. Indeed, in his book, The Bill of Rights 59 (1958), in referring to Holmes' creation of the "clear and present danger" test, he said, "I cannot help thinking that for once Homer nodded."

My own view is quite different. I see no place in the regime of the First Amendment for any "clear and present danger" test, whether strict and tight as some would make it, or free-wheeling as the Court in Dennis rephrased it.

When one reads the opinions closely and sees when and how the "clear and Present danger" test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous. Second, the test was so twisted and perverted in Dennis as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.

Action is often a method of expression and within the protection of the First Amendment.

Suppose one tears up his own copy of the Constitution in eloquent protest to a decision of this Court. May he be indicted?

Suppose one rips his own bible to shreds to celebrate his departure from one "faith" and his embrace of atheism. May he be indicted?

Last Term the court held in United States v. O'Brien, 391 U. S. 367, 382, that a registrant under Selective Service who burned his draft card in protest of the war in Vietnam could be prosecuted. The First Amendment was tendered as a defense and rejected, the Court saying:

"The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration." 391 U. S., at 377-378.

But O'Brien was not prosecuted for not having his draft card available when asked for by a federal agent. He was indicted, tried, and convicted for burning the card. And this Court's affirmance of that conviction was not, with all respect, consistent with the First Amendment.

The act of praying often involves body posture and movement as well as utterances. It is nonetheless protected by the Free Exercise Clause. Picketing, as we have said on numerous occasions, is "free speech plus." See *Bakery Drivers Local v. Wohl*, 315 U. S. 769, 775 (Douglas, J., concurring); *Giboney v. Empire Storage Co.*, 336 U. S. 490, 501; *Hughes v. Superior Court*, 339 U. S. 460 465; *Labor Board v. Fruit Packers*, 377 U. S. 58 77 (Black, J., concurring), and *id.*, at 93 (Harlan, J., dissenting); *Cox v. Louisiana*, 379 U. S. 559, 578 (opinion of Black, J.); *Food Employees v. Logan Plaza*, 391 U. S. 308, 326 (Douglas, J., concurring). That means that it can be regulated when it comes to the "plus" or "action" side of the protest. It can be regulated as to the number of pickets and the place and hours (see *Cox v. Louisiana*, *supra*), because traffic and other community problems would otherwise suffer.

But none of these considerations are implicated in the symbolic protest of the Vietnam war in the burning of a draft card.

One's beliefs have long been thought to be sanctuaries which government could not invade. *Barenblatt* is one example of the ease with which that sanctuary can be violated. The lines drawn by the court between the criminal act of being an "active" Communist and the innocent act of being a nominal or inactive Communist mark the difference only between deep and abiding belief and casual or uncertain belief. But I think that all matters of belief are beyond the reach of subpoenas or the probings of investigators. That is why the invasions of privacy made by investigating committees were notoriously unconstitutional. That is the deep-seated fault in the infamous loyalty-security hearings which, since 1947 when President Truman launched them, have processed 20,000,000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs, and convictions. They were the most blatant violations of the First Amendment we have ever known.

The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.

The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre.

This is, however, a classic case where speech is brigaded with action. See *Speiser v. Randall*, 357 U. S. 513, 536-537 (Douglas, J., concurring). They are indeed inseparable and a prosecution can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of political action as in *Scales*. The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience⁽⁷⁾

1. The significant portions that could be understood were:

"How far is the nigger going to-yeah."

"This is what we are going to do to the niggers."

"A dirty nigger."

"Send the Jews back to Israel."

"Let's give them back to the dark garden."

"Save America."

"Let's go back to constitutional betterment."

"Bury the niggers."

"We intend to do our part."

"Give us our state rights."

"Freedom for the whites."

"Nigger will have to fight for every inch he gets from now on."

2. It was on the theory that the Smith Act, 54 Stat. 670, 18 U.S.C. ' 2385, embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. *Dennis v. United States*, 341 US 494 (1951). That this was the basis for *Dennis* was emphasized in *Yates v.*

United States, 354 U. S. 298, 320 324 (1957), in which the Court overturned convictions for advocacy of the forcible overthrow of the Government under the Smith Act, because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.

3. The first count of the indictment charged that appellant "did unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform. . . ." The second count charged that appellant "did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism. . . ." The trial judge's charge merely followed the language of the indictment. No construction of the statute by the Ohio courts has brought it within constitutionally permissible limits. The Ohio Supreme Court has considered the statute in only one previous case, *State v. Kassay*, 126 Ohio St. 177, 184 N. E. 521 (1932), where the constitutionality of the statute was sustained.

4. Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action, for as Chief Justice Hughes wrote in *De Jonge v. Oregon*, *supra*, at 364: "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." See also *United States v. Cruikshank*, 92 U. S. 542, 552 91876); *Hague v. CIO*, U. S. 496, 513, 519, (1939); *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449, 460-461 (1958).

5. See McKay, *The Preference For Freedom*, 34 N.Y.U.L. Rev. 1182, 1203-1212 (1959).

6. "See *Feiner v. New York*, 340 U. S. 315, where a speaker was arrested for arousing an audience when the only "clear and present danger" was that the hecklers in the audience would break up the meeting.

7. See Mr. Justice Black, dissenting, in *Communications Assn. v. Douds*, 339 U. S. 382, 446, 449 *et seq.*

ON LIBERTY

Chapter #1--

1. What has been the progress of liberty up to Mill's day? (3 stages)
2. What is the gravest threat to further progress; what question must be answered before the threat can be addressed?
3. Why has so little additional progress been made? (4 reasons)

4. In what sense is religion an exception?
5. What answer does Mill give to the questions referred to in #2 above?
6. What exceptions apply? What limitation?
7. What three implications may be drawn from the answer?
8. How urgent is the need for further progress?

Chapter #2--

1. What are four objections to free speech for dissenters who are right in what they say and how does Mill reply to each?
2. What are three objections to free speech for dissenters who are wrong? Mill's replies?
3. Which relationship between right and wrong is most common in politics and what conclusion does Mill draw from its prevalence?

Chapter #3--

1. What force stands opposed to individuality, what is Mill's criticism of it, and what objection does he anticipate?
2. What is the utility of individuality to the one who has it?
3. What two great benefits does individuality offer to those who don't have it?

Chapter #4--

1. How does Mill respond to the charge that he promotes "selfish indifference?"
2. What response is appropriate in the case of objectionable self-regarding actions?
3. What objection does he anticipate to the distinction between self & other regarding actions?
4. What two replies does Mill offer to it? What examples support the second?

Chapter #5--

1. What two maxims form the subject here?
2. What limitations pertain to which?
3. What issues lie on the boundary between them?
4. What self-regarding actions are forbidden?
5. What "misapplied notions (at least two) of liberty" does Mill address in this chapter?
6. What three reasons does Mill give for restrictions on government interference?

Present Dangers

First Assignment, pp. ix-xxxii, 3-44

1. What three questions form the "basis for the tripartite organization of this book?" p. xxiii
2. What is the "internal coherence" of the 1st Amendment and how is it related to Locke's philosophy of government?
3. How are "founders" distinguished from "framers"? Who is a "libertarian"?
4. Why has the author put his discussion of religion and the 1st Amendment last rather than first and how is the shift related to recent events?
5. What is the more general purpose of the book and why should it be read, even by those who disagree with some of the author's specific interpretations?
6. What is the current understanding of the 1st Amendment's protection for revolutionary groups and why is it dangerous to freedom?

7. What understanding preceded the current one and why is more likely to preserve freedom? Be specific about Blackstone as a source of such understanding and how it was reflected in the the constitutions of both the US and the states but also in the Alien and Sedition Acts of 1798? What was Hamilton's understanding of the "liberty of the press?" To what extent was it still recognized as late as 1917?
8. What early sources provided a partial basis for the current understanding? What "constitutional revolution" led to the current understanding, who led it, when and how did it succeed?

Second Assignment, pp. 45-86

1. Who is the "new founding father" and how faithful was he to his creation? What expectations render his creation flawed from the beginning?
2. How was the reinterpretation of the Constitution accomplished? What was the key concept and who were its promoters?
3. Why is it fair to consider the results dangerous? What is the danger and how does Justice Jackson attempt to address it in *Dennis*? To what extent is it confirmed by Berns?
4. How does history and current events confirm their concerns?
5. What are the ten defects of the "clear and present danger" rule?
6. What does the author propose doing and why?

Third Assignment, pp. 89-137

1. What is the "moral revolution," how long ago did it become a force, and what promotes it?
2. How do Washington and Jefferson point the nation in a very different direction?
3. Against what background must the Supreme Court's consideration of obscenity be understood?
4. What cases apply, what standards do they offer, and how adequate are they in the face of the harm done by obscenity, especially in the mass media?
5. What role have D. H. Lawrence, the Kronhausens, and J. S. Mill played in preparing the way for the direction in which Justice Douglas would lead the Court and the nation?

Fourth Assignment, pp. 138-178

1. What advances in the Court's understanding of obscenity are reflected in the *Paris Adult Theater* and *Miller* cases and what were the practical effects?
2. To what extent does the author both agree and disagree with Justice Burger's principles in these cases and why is a renewal of judicial federalism an attractive prospect?
3. What changes in the definition of obscenity does the author propose?
4. What impact on movies and television are projected by the author in the reregulation of obscenity?
5. What kind of statutes would advance efforts to renew society and how might they be related to Milton's understanding of moral education?

Fifth Assignment, pp. 181-233

1. What is the "wall of separation" principle, what are its origins, and what extensions or applications of it did advocates of the principle on the Court wish to see?
2. What was Jefferson's understanding of the relation between religion and public education and how does it differ from later efforts to advance other principles?
3. What did the "establishment of religion" and "free exercise" clauses mean to the generation who first embraced the Constitution?
4. What variety in uses of the term "religion" characterized our early decades and what singular conviction underlay such variety. Why is that conviction important for the debate between public and private morality?

5. What recent opinions have undermined such a basic conviction?
6. What is the "incorporation" controversy and why is it important for the establishment provision of the First Amendment?

Sixth Assignment, pp. 234-270 + "The Coming Firestorm," Dec. 29, 2004. *The Economist*. Full text available on line via the Library's EbscoHost database or in print from the Library Periodical shelves or from me.

1. Explain briefly Lowenthal's account of the Constitution's "establishment clause" and the simplest issues arising from its national application.
2. Explain also federal aid to education in parochial schools and to religion itself.
3. Explain the issues at stake in public school prayer and other activities associated with democratic citizenship.
4. What errors does Lowenthal claim to find in Justice Black's opinion for *Engel v. Vitale*.
5. How does Lowenthal's position escape, in his view, the equal protection requirements of the 14th Amendments?
6. What does the Court understand "free exercise" to mean in *Cantwell v. Connecticut*, why is it important, and what concerns does Lowenthal express with it?
7. Why does Lowenthal insist that the Court is likely to make matters worse in future flag salute cases rather than better?
8. What evidence of judicial "presumption" does Lowenthal cite in the last 12 pages of the chapter?
9. What is the current balance of opinion on the Supreme Court and why is it unlikely to continue?
10. What has been the practice of most presidents in appointing new justices and why is it likely to cause a "firestorm" now?
11. How do the pundits divide over what will happen as vacancies open on the Court? What speculation does the author offer?
12. Why is "strict constructionism" a poor basis for predicting what judges will do?

Seventh Assignment, pp. 271-283 & Two Articles on a "Christmas Conspiracy" in the White House

1. What background does Lowenthal offer to his assessment of the modern Court's interpretation of the 1st Amendment?
2. What is the fundamental error that Lowenthal finds underlying the Court's treatment of 1st Amendment questions?
3. What simple remedy does Lowenthal propose and how does it directly lead to a better interpretation of the 1st Amendment?
4. What area of 1st Amendment concern is not subject to such a remedy and why?
5. How does President Bush's chief speech writer defend the religious references he made during the Christmas Season?
6. What charges does Ms. Noonan attempt to address in her discussion of President Bush's religious references? What alternative view does she offer?
7. According to Professor Wilson, how does the First Amendment serve to distinguish America from Europe in ways that insure religious vitality in one and religious decline in the other?
8. Why are fearful secularists having an effect that is the opposite of the one they intend?

"Secularism & its Discontent"

1. According to the author, what explanation of President Bush's reelection is more common among liberals and why is it more a matter of habit or reflex than rational observation or assessment?
2. What resemblance do liberals see between the supporters of President Bush and the followers of Osama bin Laden?
3. What range of views on religious liberty enables readers to understand how confused and exaggerated is the assertion of such a resemblance?
4. What confusion and exaggeration among liberals plagues the debate over stem-cell research?
5. Why is liberalism in danger of betraying its claim to "promote civil peace?"

PAPER TOPIC

Justice Jackson in *Barnette* refers to a "fixed star" to be followed in First Amendment jurisprudence. Explain what the "star" represents and how it is related to the competing sources for First Amendment interpretation, as Lowenthal defines them in his discussion of *Barnette*. Which source is supported by Lowenthal and to what extent does he think coercion has a place in political education. What shift in the Court's understanding of its constitutional role is advocated by Lowenthal and why is the shift necessary?

INSTRUCTIONS:

- No additional research needed; the reading assignments through January 21st are sufficient.
- Quality counts much more than quantity; most papers will be 1000-1250 words
- Be sure to proofread your paper well; grammar, style, and usage count in this assignment.
- Documentation requirements are simple: use page references in parentheses in the text, if the title of the source from which you are borrowing is clear from the context.

CRITERIA FOR EVALUATING PAPERS

An "A" paper has the following elements:

1. Good, clear, complete discussion of major parts of the topic
2. A penetrating thesis statement connecting the parts,
3. Accurate, skillful use of argument and evidence in supporting the thesis,
4. A strong conclusion anchored in a tightly drawn organization of thesis, argument, and evidence, plus
5. No more than one error per page of the sort outlined in *English Simplified*.

A "B" paper has the following:

1. Adequate discussion of the parts, using familiar phrases from the class discussion & the readings,
2. Clear thesis but more weakly stated than in an "A" paper,
3. Argument and evidence systematically offered but not finely gauged to the difficulty or complexity of the issue; transitions become increasingly tentative,
4. Broad, general conclusion based on adequate organization with no more than two errors per page of the sort outlined in *English Simplified*.

A "C" paper has:

1. Incomplete discussion with weak thesis followed by loosely related arguments or evidence to which objections are obvious, missing transitions,
2. Brief conclusion, sketchy organization, no more than three errors per page

A "D" paper: Garbled, inaccurate discussion, no thesis, little evidence or argument, abuse of quotations, assertion in place of conclusion, gaps in organization, no more than four errors per page.

Maintained by: politics@cornellcollege.edu

600 First Street West, Mt. Vernon, Iowa, 52314

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