*Brandenburg v. Ohio*

**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 the Congress, not by the Chief Executive. The case was *Schenck v. United States,* 249 U. S. 47, 249 U. S. 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 249 U. S. 206. And the conviction in *Frohwerk* was sustained because "the circulation of the paper was Page 395 U. S. 451 in quarters where a little breath would be enough to kindle a flame." *Id.* at 249 U. S. 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 249 U. S. 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 applied 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 250 U. S. 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. Page 395 U. S. 452

The dissents in *Abrams*, *Schaefer*, and *Pierce* show how easily "clear and present danger" is manipulated to crush what Brandeis called "[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 252 U. S. 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, 268 U. S. 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.

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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 301 U. S. 259-261. *And see Hartzel v. United States*, 322 U. S. 680. In *Bridges v. California*, 314 U. S. 252, 314 U. S. 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. [Footnote 2/1]

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 341 U. S. 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 invasion of free speech as is necessary to avoid the danger." [Footnote 2/2]"*

*Id.* at 341 U. S. 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, 354 U. S. 318. But an "active" member, who has a guilty knowledge and intent of the aim to overthrow the Government Page 395 U. S. 454 by violence, *Noto v. United States*, 367 U. S. 290, may be prosecuted. *Scales v. United States*, 367 U. S. 203, 367 U. S. 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, 360 U. S. 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? Page 395 U. S. 455

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, 391 U. S. 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 391 U. S. 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, 315 U. S. 775 (DOUGLAS, J., concurring); *Giboney v. Empire Storage Co.*, 336 U. S. 490, 336 U. S. 501; *Hughes v. Superior Court*, 339 U. S. 460, 339 U. S. 465; *Labor Board v. Fruit Packers*, 377 U. S. 58, 377 U. S. 77 (BLACK, J., concurring), *and id.* at 377 U. S. 93 (HARLAN, J., dissenting); *Cox v. Louisiana*, 379 U. S. 559, 379 U. S. 578 (opinion of BLACK, J.); *Food Employees v. Logan Plaza*, 391 U. S. 308, 391 U. S. 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 Page 395 U. S. 456 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 is 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, 357 U. S. 536-537 (DOUGLAS, J., concurring). They are indeed inseparable, and a prosecution can be launched for the overt Page 395 U. S. 457 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 abstract ideas, as in *Yates*, and 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. [Footnote 2/3]

[Footnote 2/1]

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

[Footnote 2/2]

*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.

[Footnote 2/3]

*See* MR. JUSTICE BLACK, dissenting, in *Communications Assn. v. Douds*, 339 U. S. 382, 339 U. S. 446, 339 U. S. 449 *et seq.*