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DENNIS v. UNITED STATES—PRECEDENT, PRINCIPLE OR PERVERSION?

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Every socio-political group must determine when its survival necessitates proscription of subversive activity. Although some scholars feel no limitation upon *speech* is therefor justified,[1] most students of the problem are agreed that when national security is at stake somewhere there must be imposed some limitations upon freedom of expression. The Blackstonian[2] notion that, although there could be no prior restraints, anything could be punished *after* utterance is unworthy. Prior restraints of some kind, such as a prohibition upon publishing in time of war the sailing dates of troopships, are permissible under any rational analysis while, on the other hand, if anything can be punished after utterance severe punishments will as effectively deter communication as any prior restraint. The truth is that no objective standard can contribute much to the delimitation of liberty.[3]

During the First World War utterances were punished so long as they had a "bad tendency" or a "reasonable tendency" to produce the prohibited evil. The dangers and inadequacy of a tendency test were perceived as early as 1785 by Thomas Jefferson[4] and others, and it has proved most unsatisfactory —through its use hundreds of unnecessary and unwise convictions were condoned, if not encouraged, when indiscreet individuals uttered observations silly and foolish but certainly not dangerous to the survival of the state.[5] The *Gitlow* case[6] in 1925 marks the last application of this test by the United States Supreme Court. More recently there have been those who would permit

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1. BATES, THIS LAND OF LIBERTY (1930); MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); SCHROEDER, "OBSCENE" LITERATURE AND CONSTITUTIONAL LAW (1911).

2. 4 BL. COMM. *150

3. For further analyses see Antieau, *Judicial Delimitation of the First Amendment Freedoms,* 34 MARQ. L. REV. 57 (1950); Antieau, *The Task of Delimiting Fundamental Freedoms,* 22 TEMP. L.Q. 413 (1949); Antieau, *The Limitation of Liberty,* 5 WYO. L.J. 69 (1950).

4. Preamble, Act for Religious Freedom, 12 LAWS OF VIRGINIA 84 (Hening 1785).

5. There are extensive collections of cases in CHAFEE, FREEDOM OF SPEECH app. II (1920); and in Carroll, *Freedom of Speech and of the Press in War Time,* 17 MICH. L. REV. 621 (1919).

6. Gitlow v. New York, 268 U.S. 652, 45 Sup. Ct. 625, 69 L. Ed. 1138 (1925).

the fundamental freedoms[7] to be abridged, notwithstanding the language of the First Amendment,[8] whenever some legislative body thought it reasonable.[9] To treat the preferred freedoms specifically guaranteed in the United States Constitution and necessary to the basic premise of our society—the dignity of the individual, as well as to the successful functioning of a democracy, in the same way that the judiciary treats legislative regulation of an economic "liberty" to sell impure foodstuffs is to read out of the Constitution the First Amendment and to fail miserably to capture the spirit of our institutions and the role of the judiciary in our Constitutional society.

In 1919 a unanimous United States Supreme Court, through Mr. Justice Holmes, indicated that freedom of expression was to be denied because of an alleged need to protect the state only when there was a clear and present danger to the survival of the political entity.[10] Although there have been occasional judicial aberrations from this guiding principle and some criticism of it, it was rather clear in 1951 that abridgments of political speech and assembly were to be condoned only when there was such a clear and present danger of substantive evil.[11]

When eleven leaders of the Communist Party were tried for conspiring (1) to organize a group teaching and advocating the overthrow and destruction of the government by force and violence, and (2) knowingly and wilfully to advocate and teach the necessity of overthrowing and destroying the Government, all in violation of the Smith Act,[12] they were convicted after the trial court took from the jury all questions but one: was the intent of the defendants to overthrow the government "as speedily as circumstances would permit it to be achieved." The Court of Appeals for the Second Cir-

7. "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties." Mr. Justice Roberts for the Court in Schneider v. New Jersey, 308 U.S. 147, 161, 60 Sup. Ct. 146, 84 L. Ed. 155 (1939).

8. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. AMEND. I.

9. The leading advocate is Mr. Justice Frankfurter. See his dissent in Bridges v. California, 314 U.S. 252, 295-96, 62 Sup. Ct. 190, 86 L. Ed. 192 (1941); his dissent in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 663, 63 Sup. Ct. 1178, 87 L. Ed. 1628 (1943); and his concurring opinion in Pennekamp v. Florida, 328 U.S. 331, 352-53, 66 Sup. Ct. 1029, 90 L. Ed. 1295 (1946).

10. Schenck v. United States, 249 U.S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470 (1919).

11. "[T]he causal connection between utterance and apprehended evil must be close. . . . The soundness of this . . . has hardly been questioned." Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1, 7 (1951). See also Antieau, *The Rule of Clear and Present Danger—Its Origin and Application*, 13 U. of DETROIT L.J. 198 (1950); Antieau, *The Rule of Clear and Present Danger: Scope of its Applicability*, 48 MICH. L. REV. 811 (1950).

12. 54 STAT. 671 (1940), 18 U.S.C. § 11 (1946), now 18 U.S.C. § 2385 (1948).

cuit affirmed the conviction after an amazing "interpretation" of the clear and present danger criterion into what might well be denominated a "perhaps and probable" test. "In each case," the court of appeals said, 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."[13] The United States Supreme Court granted certiorari but confined review, somewhat questionably, to whether the Smith Act as construed violated the First Amendment and whether it violated the First and Fifth Amendments because of indefiniteness. This limitation of review in grave cases affecting our very way of life and our national destiny is, as has already been noted,[14] very disturbing. The Court then affirmed the conviction in an opinion by the Chief Justice joined in only by Justices Reed, Burton and Minton. Mr. Justice Frankfurter and Mr. Justice Jackson concurred separately and Justices Black and Douglas dissented. Mr. Justice Clark took no part in the decision of the case. Finally, the Court denied, unfortunately, it is suggested, a petition for re-hearing filed by an eminent counsel who should have been heard.[15]

The opinion of the majority indicates that the time-honored test of clear and present danger is to survive. It is to be hoped that the amazing interpretation of the court of appeals said to have been "adopted" here will be heard of no more.

The majority of the Court were right, this author believes, in holding that the *court* is to determine the existence of a clear and present danger and a substantive evil, albeit perfectly wrong in conjuring up such danger from the political utterances of the defendants. In fact, at the argument the Solicitor General of the United States admitted that traditional application of the clear and present danger test would require reversal.[16] When the Founding Fathers deliberately enshrined in our Constitution the fundamental freedoms of speech, press, assembly and religion they did so with the hope and the firm belief that the Supreme Court, supposedly insulated from the passions of the moment, would recognize its dedication to these fundamental values of our society and refuse to condone any infringement unless *imperatively* nec-

13. United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950).

14. Mr. Justice Black was compelled to express his "objection to the severely limited grant of certiorari in this case." Dennis v. United States, 341 U.S. 494, 581, 71 Sup. Ct. 857, 95 L. Ed. 1137 (1951). See also Jaffe, *Foreword to The Supreme Court, 1950 Term*, 65 HARV. L. REV. 107, 111 (1951): "But the professional performance in the case was not as high as one might have hoped in a matter of such importance. The Chief Justice and three of his colleagues interpreted the grant of the writ of certiorari as excluding from the Court's consideration the question whether on the record petitioners did in fact conspire to advocate the overthrow of the government by force and violence. The question of constitutional protection here is closely tied to a correct judgment as to the meaning and significance of the defendants' conduct. This task should not have been divorced from the exercise of ultimate judgment."

15. 72 Sup. Ct. 20 (1951). John Raeburn Green, of St. Louis.

16. 19 U.S.L. WEEK 3166 (1951).

essary because of an *immediate* danger to the survival of the state.[17] And in *West Virginia State Board of Education v. Barnette*[18] the Supreme Court, through Mr. Justice Jackson in one of his better moments, well said: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[19] To imagine that juries inflamed with the passions and the prejudices of the day would have any more difficulty in finding a "probable" danger than a "bad tendency" is rather naive. The clear and present danger test, created as it was to give proper legal significance to the First Amendment to the Constitution, poses what is properly a question of law for the court. From this view Justices Douglas and Black dissent and in their belief that the question of causal connection between utterance and evil is for the jury they have support from a decision involving the tendency test.[20]

However, it is urged, the majority of the Court erred in their understanding and application of the clear and present danger principle. Admittedly, the evil here is "substantive"; no further discussion of this is necessary. However, the heart, the core, the particular contribution of the criterion lies in its rightful insistence that the danger be *both* clear and present, not doubtful, not remote nor possible nor probable. As Justices Holmes and Brandeis have counseled, "the test to be applied . . . is not the remote or possible effect. There must be . . . clear and present danger."[21] Will the nation survive so long as these misguided defendants speak and write and campaign? So long as the Court must answer this in the affirmative the Constitution and the applicable criterion were distorted. To insulate the American people from the ideas and candidates proposed by these men is to deny the democratic faith. Surely our people are able to see the nonsense of communism for what it is, an illusory, chimeratic dangling of the false goals of mad materialism, a shabby apologetics for Russian expansionism.

If there is time for the idea to be met in the open market place of thought by tomorrow's rationality, then there is no clear and present danger. The Chief Justice and the majority admit, as well they must, "that the basis of the First Amendment is the hypothesis that speech can rebut speech, propa-

17. "If they [the fundamental freedoms] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." James Madison on the floor of Congress. 1 ANNALS OF CONG. 440 (1789).

18. 319 U.S. 624, 63 Sup. Ct. 1178, 87 L. Ed. 1628 (1943).

19. *Id.* at 638.

20. Pierce v. United States, 252 U.S. 239, 244, 40 Sup. Ct. 205, 64 L. Ed. 542 (1920).

21. Schaefer v. United States, 251 U.S. 466, 486, 40 Sup. Ct. 254, 64 L. Ed. 360 (1920) (concurring in part and dissenting in part).

ganda will answer propaganda, free debate of ideas will result in the wisest governmental policies."[22] And this importance of the temporal element in the clear and present danger test has been admitted on other occasions by both Chief Justice Vinson[23] and Mr. Justice Reed.[24] Surely today, and tomorrow too, the ideas cherished in our American heritage will survive attack from the nonsense uttered by these poor peddlers of pap and promise. But these defendants must be free to preach, orate and harangue to their hearts' content. Many, many times it has been emphasized by the members of the Supreme Court that there must be an *emergency* in the sense that there is no market place of thought before there is a clear and present danger to the state. Mr. Justice Brandeis said there may be a "clear and present danger . . . [when] the *emergency* does not permit reliance upon the slower conquests of error by truth."[25] Again he added: ". . . no danger flowing from free speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. . . . Only an *emergency* can justify repression. . . . It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no *emergency* justifying it."[26] And Mr. Justice Holmes emphasized that "Only the *emergency* that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law . . . abriding the freedom of speech.' "[27] This is the meaning of the clear and present danger in which freedom of expression may be limited—can newspapers be printed and radio stations broadcast the better ideas and ideals of free democracy, the call to sanity and rationality, and is there yet time for the truth to be heard and realized? According to the Chief Justice, freedom of communication can be denied if the "Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit. . . ."[28] Substitute for the first phase "if an administration fears" and the "extent of fear" test is easily cognizable. The test of constitutional freedoms can not be the hollow fears of scared, suspicious men without faith in democratic processes.

22. 341 U.S. 494, 503, 71 Sup. Ct. 857, 95 L. Ed. 1137 (1951).

23. American Communications Ass'n v. Douds, 339 U.S. 382, 70 Sup. Ct. 674, 94 L. Ed. 925 (1950).

24. Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 320, 61 Sup. Ct. 552, 85 L. Ed. 836 (1941).

25. Gilbert v. Minnesota, 254 U.S. 325, 338, 41 Sup. Ct. 125, 65 L. Ed. 887 (1920) (dissenting) (emphasis supplied).

26. Whitney v. California, 274 U.S. 357, 377, 47 Sup. Ct. 641, 71 L. Ed. 1095 (1927) (concurring) (emphasis supplied).

27. Abrams v. United States, 250 U.S. 616, 630-31, 40 Sup. Ct. 17, 63 L. Ed. 1173 (1919) (dissenting).

28. Dennis v. United States, 341 U.S. 494, 509, 71 Sup. Ct. 857, 95 L. Ed. 1137 (1951).

To apply a "gravity of the evil discounted by its improbability" interpretation of the clear and present danger principle is assuredly to permit denial of the fundamental freedoms at any time the evil of peril to the state is feared by any legislature, any municipal council, any judge. This is retrogression anterior to the bad tendency test of World War I, for the "gravity discounted by its improbability" notion requires *no* causal connection between the expressions of the accused and the substantive evil! Judge Hand's theory, "adopted" for the moment by the Chief Justice and three others, is that "in each case [the court] must ask whether the gravity of the 'evil' discounted by its improbability" justifies suppression of freedom of communication[29]—not, mind you, an improbability that the evil will result from the defendant's thoughts or speech. Since the language quoted can certainly be construed to mean "probable" *from any cause* a speaker without fault can now be criminally guilty. This is even worse than punishing a speaker because a hostile audience is predetermined to riot—universally condemned.[30]

The whole heart of the case of those who would uphold this conviction is based upon a suspicion that these are dangerous *men*. If they have committed or are committing dangerous deeds then they should be punished under existing statutes,[31] or newly framed ones getting at dangerous nonspeech activities should be enacted. So, too, these men should be punished if they are *attempting* such crimes. But one does not attempt a crime by encouraging people to read books, no matter how foolish their content. The majority in the *Dennis* case are gravely in error in supposing people can be punished for thinking of attempts at crime.[32] The Chief Justice opines: "[T]here was a group *that was ready to make the attempt.*"[33] This satisfies no test known to Anglo-American law and is dangerous language. But it does indicate that the Court is punishing these men who have spoken and assembled because they think these "miserable merchants of unwanted ideas"[34] are getting ready to attempt to commit some grave crime. They are punished then, not for a crime, not for an attempt, but because someone is "aware" that they are thinking of attempting some crime! This is perhaps the most insidious idea ever indorsed outside the totalitarian police state. Punishing a man for evil thoughts may be acceptable to the ancient Visigoths, the pre-Revolutionary British rulers or the recent Japanese militarists but it is hardly in the American tradition.

29. United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950).

30. Note, *Freedom of Speech and Assembly: The Problem of the Hostile Audience,* 49 COL. L. REV. 1118 (1949).

31. 18 U.S.C. §§ 791-97, 951, 2151-56, 2383, 2384, 2386 (1948); 22 U.S.C. §§ 611 *et seq.* (1946); 50 U.S.C.A. §§ 781-826 (1951).

32. Hall, *The Substantive Law of Crimes—1887-1936,* 50 HARV. L. REV. 616 (1937).

33. Dennis v. United States, 341 U.S. 494, 510, 71 Sup. Ct. 857, 95 L. Ed. 1137 (1951) (emphasis added).

34. *Id.* at 589 (Douglas, J., dissenting).

By this decision men are punished and freedom of expression is denied—not because they have committed dangerous deeds, the indictment charges not a single seditious act; not because there was an attempt at overthrowing the state, this was not charged; not because they said or wrote anything advocating the forcible overthrow of the government, the indictment doesn't even allege this; but simply because there was a conspiracy amounting, so the Court felt, to a *probable* danger *of an attempt* at *advocating bad ideas* that would *sometime* break out into disquieting deeds. In fact, the majority go so far as to say "It is the existence of the conspiracy which creates the danger."[35] Henceforth, when the relevant substantive evil is peril to the political group, is clear and present danger to be found whenever two *believers* in overthrow meet on the street—without any seditious deeds, without any attempt at sabotage or anything else, without any advocacy? Realize how far in advance of seditious activity any speaker can, under such a theory, now be punished by a perverted and misunderstood clear and present danger test combined with the dangerous dragnet of conspiracy—a concept which must itself be recognized as perilous to the lives and interests of free men and requiring immediate re-examination and rein. The fears of Justices Jackson,[36] Douglas[37] and others[38] for our American rights and liberties with conspiracy run wild are well justified as this case abundantly illustrates.

Furthermore, it is something less than respect for judicial tradition to convert the constitutional criterion of clear and present danger, applied as such by the Court over 32 years, into a test of what is an attempt. The majority say: "The rule we deduce from these cases is that where an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying

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35. *Id.* at 511.

36. *Id.* at 572 (concurring). "The modern crime of conspiracy is so vague that it almost defies definition. . . . The hazard from loose application of rules of evidence is aggravated *where the Government institutes mass trials.* . . . A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the mind of jurors who are ready to believe that birds of a feather are flocked together." Krulewitch v. United States, 336 U.S. 440, 446, 453-54, 69 Sup. Ct. 716, 93 L. Ed. 790 (1940) (Jackson, J., concurring) (emphasis added).

37. Dennis v. United States, 341 U.S. 494, 582, 71 Sup. Ct. 857, 95 L. Ed. 1137 (1951) (dissenting).

38. Chief Justice Taft, Conference of Senior Circuit Judges in 1925, reported in REP. ATT'Y GEN. 5-6 (1925); Frankfurter, J., dissenting in Nye & Nissen v. United States, 336 U.S. 613, 626, 69 Sup. Ct. 766, 93 L. Ed. 919 (1949), and joining in concurring opinion of Jackson, J., in Krulewitch v. United States, 336 U.S. 440, 69 Sup. Ct. 716, 93 L. Ed. 790 (1949); Murphy, J., dissenting in Nye & Nissen v. United States, *supra* at 630, ("Guilt by association is a danger in any conspiracy prosecution"), and joining also in concurring opinion of Jackson, J., in Krulewitch v. United States, *supra.* See also CHAFEE, FREE SPEECH IN THE UNITED STATES 470-84 (1941); Harno, *Intent in Criminal Conspiracy,* 89 U. OF PA. L. REV. 624, 646 (1941); Notes, 62 HARV. L. REV. 276 (1948), 17 U. OF CHI. L. REV. 148 (1949), 56 YALE L.J. 371 (1947). Note also the remarks of Rep. Coffee of Washington at the House hearings on the Smith Bill, 84 CONG. REC. 9536 (1939). See Antieau, *Judicial Delimitation of the First Amendment Freedoms,* 34 MARQ. L. REV. 57, 81 *et seq.* (1950).

upon speech or press as evidence of violation may be sustained only when the speech or publication created a 'clear and present danger' *of attempting* or accomplishing the prohibited crime. . . ."[39] Regrettably the Court confuses a constitutional determinant for a guide to what is an attempt, assuming apparently that all attempts at anything are constitutionally punishable regardless of the effect upon freedom of communication. And is the scope of constitutional protection to hinge upon the ingenuity of any municipal council in simply drafting an ordinance in "non-speech" terms? This is not only nonsensical and an obvious perversion of the governing principle but a sad misunderstanding of the nature of our constitutional society and the obligations of the judiciary thereto.

As though the clear and present danger criterion has ever been alleged to be an absolute, the Chief Justice and his brethren of the majority reflect that "all concepts are relative" and that there is no room for absolutes.[40] Far less absolute is Holmes' test intelligently applied than an absolute judicial abnegation to the legislature which can now seemingly do what it will to the fundamental freedoms in the name of reasonableness, remembering that the Constitution states that the Congress shall pass *no* law abridging these preferred rights. And, the revulsion of the Chief Justice and Mr. Justice Frankfurter to "absolutes" is rather intriguing in the light of their insistence in the *McCollum* case[41] upon an *absolute* wall of separation between church and state. This in an interpretation of the same First Amendment.

The majority justify the Smith Act by saying it is "directed at advocacy, not discussion."[42] In 1925 Mr. Justice Holmes emphatically exploded the unwisdom of an advocacy-discussion criterion. In *Gitlow v. New York* he wrote: "It is said that this manifesto was more than a theory, that it was an incitement. 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."[43] It is simply unfortunate, impracticable and ill-advised to try to make constitutional protections so large as discussion but not so large as advocacy. The line cannot be drawn intelligently at that point. Discussion becomes advocacy by intonation of voice, warmth of expression and gesture, by dozens of subtleties incapable of juristic measure-

39. Dennis v. United States, 341 U.S. 494, 505, 71 Sup. Ct. 857, 95 L. Ed. 1137 (1951) (emphasis added).

40. *Id.* at 508.

41. Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 68 Sup. Ct. 461, 92 L. Ed. 649 (1948).

42. Dennis v. United States, 341 U.S. 494, 502, 71 Sup. Ct. 857, 95 L. Ed. 1137 (1951).

43. 268 U.S. 652, 673, 45 Sup. Ct. 625, 69 L. Ed. 1138 (1925) (dissenting).

ment. And, above all else, the ardent, enthusiastic advocacy of all ideas pertinent to the institutions and mechanics of government is necessary to the success of our democracy.

Lastly, when in 1951 another case was before the Court, this time not involving the destinies and rights of millions of us to hear even unsound ideas but the affairs of *one* milk-distributer, it insisted with remarkable vigor that the legislature has a *constitutional* duty to explore all available reasonable alternative means of reaching the desired and permitted legislative objective, and this under the Commerce Clause, not the First Amendment. So, because it appeared to the Court "that reasonable and adequate alternatives are available,"[44] it invalidated the legislation. Isn't it apparent that when the right to peddle milk requires a legislative exhaustion of alternatives, this is constitutionally mandatory when a legislative body sets about denying the fundamental freedoms enshrined in the First Amendment. This the clear and present danger criterion requires,[45] and the Constitution demands, unless this Court is reading out of that document the First Amendment. In fact, the Supreme Court has itself recognized that an exhaustion of alternatives less limitative of freedom is required under the Constitution by any test.[46] The rule, then, is that no legislative denial of free speech and assembly is constitutional if the substantive evil, here safety to the state, can be guarded against by the legislature in any other effective way that does not so stringently deny freedom of expression. It is probable that this was inadequately presented to the Court until the petition for rehearing but the error is no less.

From the four-man majority opinion and the two concurring ones there must be, as Chief Justices Hughes said so aptly, an "appeal to the brooding spirit of the law, to the intelligence of a future day."[47]

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44. Dean Milk Co. v. City of Madison, 340 U.S. 349, 354, 71 Sup. Ct. 295, 95 L. Ed. 329 (1951).

45. FREUND, ON UNDERSTANDING THE SUPREME COURT 27-28 (1949). "[J]ust as the gravity of the evil should be discounted by its improbability, so it should also be discounted by the availability of other means of preventing the evil." Richardson, *Freedom of Expression and the Function of Courts,* 65 HARV. L. REV. 1, 22 (1951).

46. Schneider v. New Jersey, 308 U.S. 147, 162, 60 Sup. Ct. 146, 84 L. Ed. 155 (1939).

47. HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928).