2005

Fear and Loathing in Constitutional Decision-Making

Christina E. Wells
University of Missouri School of Law, wellsc@missouri.edu

FEAR AND LOATHING IN CONSTITUTIONAL DECISION-MAKING

CHRISTINA E. WELLS*

---

* Enoch N. Crowder Professor of Law, University of Missouri-Columbia School of Law. I am grateful to Dale Whitman, Adrienne Stone, Geof Stone, Jean Sternlight, James Stellios, Jennifer Robbennolt, Richard Reuben, John Mollenkamp, Ron Krotoszynski, and Kent Gates for their thoughtful comments on earlier drafts of the paper. My thanks also to faculty workshops at the University of Kansas and the University of Missouri, and to the symposium at the Australian National University, where I presented earlier versions of this Article. I am indebted to Sarah Baron, Eric Bohl, Michael Held, Mark Lyons, and Jennifer Pugh, whose research and willingness to criticize dramatically improved the Article. Finally, I am grateful for the generous financial support provided by the University of Missouri Law School Foundation.

INTRODUCTION

"Fears of alien ideologies have frequently agitated the nation and inspired legislation aimed at suppressing advocacy of those ideologies. At such times the fog of public excitement obscures the ancient landmarks set up in our Bill of Rights. Yet then, of all times, should this Court adhere most closely to the course they mark."[1]

"Some legal doctrines are more important as manifestations of attitude than as guides to decision[s] in specific cases."[2]

In times of national crisis, passion and fear often grip the country, thereby causing oppressive actions toward allegedly threatening groups or individuals. Such actions, while lamentable, are nevertheless understandable, perhaps even predictable. Faced with a threat to the nation, fear and prejudice generate demand for action. Congress and executive officials respond, often to the detriment of civil liberties.[3] When those actions are challenged in court, however, we expect judges to respond differently. Judges are supposed to be above the political and emotional fray, dispassionately resolving disputes regarding civil liberties with reference only to the law and facts of the case.[4]

---

1. Am. Communications Ass'n v. Douds, 339 U.S. 382, 453 (1950) (Black, J., dissenting) (footnote omitted).

2. Wallace Mendelson, *Clear and Present Danger—From* Schenck *to* Dennis, 52 COLUM. L. REV. 313, 313 (1952).

3. *See* David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2590–92 (2003) (recounting the history of congressional and executive responses to crises); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1035–42 (2003) (noting that times of crisis cause people and government representatives to support draconian action against suspected groups); Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903, 909–21 (2004) (discussing public and government responses to perceived threats during World War I, World War II, and the Cold War).

4. *See, e.g.*, Gordon Bermant and Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence & Accountability*, 46 MERCER L. REV. 835, 839 (1995) ("It is the essence of good judicial process that it is uncontaminated by pressures for decision beyond those presented by the particular facts and the applicable

History, however, tells another story. Time and again, courts, including the Supreme Court, have deferred to questionable, if not outright illegitimate, government actions taken in the name of national security.[5] Some observers view the courts' poor performance during national security crises as a reason for judges to stay away from the delicate task of balancing security and civil liberties.[6] Far more observers, however, argue that adequate protection of civil liberties requires a more active role for the judiciary.[7] Recently, the Supreme Court apparently agreed, at least in principle. In *Hamdi v. Rumsfeld*,[8] the Court affirmed that the Constitution "envisions a role" for judges "when individual liberties are at stake," and rejected the notion that "a state of war is . . . a blank check for the President when it comes to the rights of the Nation's citizens."[9]

The normative argument that courts ought to protect civil liberties in times of crisis is an attractive one. It is one thing, however, for us to say that courts *should* take a more active role in protecting civil liberties. It is quite another to say that they the *will*. Judges are, after all, human. They remain subject to the same passions, fears, and prejudices that sweep the rest of the nation. While in the legal paradigm, adherence to the law and its objective criteria is supposed to

---

law."); Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 31–32 (2001) ("Legal theory is derived from the idea that judges are neutral and reasoned arbiters who defer to rules to guide their decisions.").

5. *See* Wells, *supra* note 3, at 903; Christina E. Wells, *Discussing the First Amendment*, 101 MICH. L. REV. 1566, 1578–87 (2003) (reviewing ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA (Lee C. Bollinger & Geoffrey R. Stone eds., 2002)).

6. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 292–98 (2003); WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 205–06 (1998); Gross, *supra* note 3, at 1022–23; Mark Tushnet, *Defending* Korematsu*?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 307.

7. *See, e.g.*, ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES (Athenum 1969) (1941); MICHAEL LINFIELD, FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR (1990); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (2004); Aharon Barak, *The Supreme Court, 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002); Cole, *supra* note 3; Thomas I. Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975 (1968); Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 U. HAW. L. REV. 649 (1997); Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL'Y 441, 456 (2002); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1409–12 (1989); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945); and Hon. Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 1605 (2004).

8. 124 S. Ct. 2633 (2004).

9. *Id.* at 2650.

prevent fear and prejudice from infecting judicial resolution of issues, even the Supreme Court's doctrine most protective of civil liberties has proven no match for the infecting atmosphere associated with national security crises.

Nowhere is this more evident than in the Cold War prosecutions of Eugene Dennis and other leaders of the Communist Party USA ("CPUSA"). A "[t]rial of [i]deas"[10] from the very beginning, the defendants in *Dennis v. United States* were convicted of conspiring to advocate the forcible overthrow of the government in violation of the Smith Act.[11] The evidence against them was weak, as there was no proof that they agreed to overthrow or advocate overthrow of the government. Rather, the defendants' trial proceeded on the theory that, as leaders of the CPUSA, they taught Marxist-Leninist doctrine, which allegedly involved forcible overthrow as a necessary aspect of a communist revolution.[12]

The defendants appealed their convictions, claiming that the convictions violated the First Amendment,[13] which was the reasonable thing to do given the state of free speech doctrine at the time. In the decade preceding *Dennis*, the Supreme Court scrutinized speech-based prosecutions using a protective test that required a clear and present danger of imminent and serious harm before speech could be punished.[14] Because the prosecution had presented no evidence of planned, attempted, or advocated overthrow of the government, the defendants had reason to hope for reversal of their convictions. Yet, both the U.S. Court of Appeals for the Second Circuit and the Supreme Court upheld them, applying a reinterpreted and much weaker version of the clear and present danger test.[15]

Conventional wisdom roundly condemns *Dennis*, attributing the result to a Cold War hysteria that gripped the country and infected the

---

10. *See* PETER L. STEINBERG, THE GREAT "RED MENACE": UNITED STATES PROSECUTION OF AMERICAN COMMUNISTS, 1947–1952, at 157 (1984); *see also* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 193 (Jamie Kalven ed., 1988) (characterizing the charges against the defendants as amounting to "organizing a group to commit a speech crime").

11. 183 F.2d 201, 205 (2d Cir. 1950). For in-depth discussions of the trial, see MICHAL R. BELKNAP, COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES 35–116 (1977); and STEINBERG, *supra* note 10, at 157–77.

12. *See* United States v. Foster, 9 F.R.D. 367, 374–75 (S.D.N.Y. 1949) (setting forth the grand jury indictment).

13. *See* Dennis v. United States, 341 U.S. 494, 495–96 (1951).

14. *See* KALVEN, JR., *supra* note 10, at 125–89; cases cited *infra* note 201.

15. *Dennis*, 183 F.2d at 213, 234, *aff'd*, 341 U.S. at 516–17 (plurality opinion).

judges' reasoning.[16] As one scholar noted, "*Dennis* served mainly to give the imprimatur of the Supreme Court to an assault upon freedom of expression and association that was the essence of McCarthyism."[17] Conventional wisdom, however, provides few answers regarding how to guard against *Dennis*'s failings in the future. We cannot simply assume that judges armed with an understanding of past errors will act courageously. In fact, psychological research suggests that, left to their own devices in times of stress, people, including judges, tend to vastly exaggerate and react against the threats posed by disfavored groups.

What we need, then, is a doctrine that can counteract the effects of fear and prejudice that lead to such action, one that serves as a "guide[] to decisions" rather than simply a "manifestation of attitude." The clear and present danger test could not serve this function. With its probabilistic roots and manipulable nature, the clear and present danger test actually facilitated the psychological phenomena referred to above. To the Court's credit, its rejection of that test in favor of the strictly protective test in *Brandenburg v. Ohio*[18] reflects a conscious attempt to formulate a doctrine with more concrete criteria. Unfortunately, much of the Court's modern doctrine, especially its reliance on strict and intermediate scrutiny, suffers from many of the same flaws that disabled the clear and present danger test, suggesting that it too may provide ineffective protection for speech in current and future national security crises.

Using *Dennis* as a case study, this Article explores the psychological influences that may lead judges to succumb to fear and prejudice in times of crisis and, consequently, to abdicate their judicial role. With an understanding of these influences in hand, the Article further suggests a possible approach to free speech doctrine that may

16. *See, e.g.*, 341 U.S. at 581, 588 (Douglas, J., dissenting); ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO 1976, at 368 (rev. ed. 2001); MILTON R. KONVITZ, EXPANDING LIBERTIES: FREEDOM'S GAINS IN POSTWAR AMERICA 122 (1966); ARTHUR J. SABIN, IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY 51 (1999); STEINBERG, *supra* note 10, at ix–xiv; Michal R. Belknap, *Cold War in the Courtroom: The Foley Square Communist Trial*, *in* AMERICAN POLITICAL TRIALS 207, 208 (Michal R. Belknap ed., rev. & expanded ed. 1994); Jeffrey M. Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273, 1328 n.228 (1983); Morton J. Horwitz, Commentary, *"Contracted" Biogruphies and Other Obstacles to "Truth"*, 70 N.Y.U. L. REV. 714, 715 (1995); Carl Landauer, *Deliberating Speed: Totalitarian Anxieties and Postwar Legal Thought*, 12 YALE J.L. & HUMAN. 171, 197–98 (2000); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 816 (1983).

17. Michal R. Belknap, Dennis v. United States*: Great Case or Cold War Relic?*, 1993 J. SUP. CT. HIST. 41, 55.

18. 395 U.S. 444, 447–48 (1969) (per curiam) (allowing punishment of speech only when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

allow judges to avoid debacles such as *Dennis*. Part I describes the history associated with anticommunist sentiment, and the resulting paranoia that generally existed during the *Dennis* defendants' trial and appeals. Part II discusses the *Dennis* decisions, examining both the conduct of the trial and the free speech issue that was the focus of the defendants' appeals. Part III discusses two possible psychological phenomena relevant to the *Dennis* decisions. First, this Part reviews psychological research regarding cognitive biases that can skew risk estimations such as those involved in application of the clear and present danger test. Second, this Part reviews research about prejudice, discussing how the desire to take action against abhorrent groups can result from faulty threat perception. Part III concludes with a discussion of the potential influence of both psychological phenomena on Americans' perceptions of the threat posed by the CPUSA. Part IV examines those same phenomena in the context of the *Dennis* decisions, arguing that the courts' applications of the clear and present danger test are consistent with the operation of either or both of those phenomena. Part V concludes with a discussion of the possible implications of these findings. Specifically, it discusses the nature of the clear and present danger test and how the Cold War image of the CPUSA inevitably perverted its application. It also examines the Court's later attempts to move away from that test, some of which reflect an intuitive understanding of the earlier test's failings and others of which suffer from similar failings. Finally, building on *Brandenburg* and psychological notions of accountability, Part V briefly offers some thoughts on possible changes to the Court's modern doctrine that may allow judges to gauge more effectively potential infringements of the right to expression during national security crises.

I. *DENNIS* IN HISTORICAL CONTEXT

The *Dennis* defendants were indicted under the Smith Act (also known as the Alien Registration Act), which prohibited (1) advocacy of violent overthrow of the government and (2) organizing a group designed to teach or advocate violent overthrow of the government.[19] Adopted in 1940, the Smith Act was one of several legal tools resulting from a rising tide of anticommunist hysteria in the 1930's.[20] Although

19. Section 2 of the Smith Act made criminally punishable the knowing or willful advocacy of violent overthrow of the government, and also prohibited persons from organizing as a group to teach or advocate the violent overthrow of the government. Pub. L. No. 76-670, § 2, 54 Stat. 670, 671. Section 3 of the Smith Act made it "unlawful for any person . . . to conspire to commit" any of the acts in section 2. *Id.* § 3, 54 Stat. at 671.

20. Although persecution and fear of communists in the United States started much earlier than the 1930s, the anticommunist hysteria that infected the *Dennis*

anticommunist sentiment abated somewhat during World War II,[21] it reappeared in full force in the late 1940s and early 1950s, the period in which the *Dennis* defendants were tried. A particular view of domestic communists emerged during these periods—one that cast them as obedient and nearly super human soldiers in a vast and powerful conspiracy directed by the Soviet Union. In order to give context to the Smith Act prosecutions of the *Dennis* defendants, this Part discusses the evolution and nature of anticommunist sentiment during these critical periods.

A. Domestic Communists Pre-World War II

As the economic difficulties of the Great Depression caused many to question capitalism, domestic communists gained ground in the emerging labor movement, helping to unionize many heavy industries.[22] Under the New Deal's expansion of government services, communists also took government jobs that potentially allowed them to influence official policy.[23] The rise of the antifascist Popular Front in 1935, during which the Soviet Union alone acted to oppose fascist expansion in Europe, made communism even more attractive to Americans seeking to right social injustice.[24] Consequently,

> By the late 1930s, a broad left-wing movement had grown up around the Communist party. . . . [It] encompassed dozens of organizations that not only enabled the party to extend its political influence far beyond the ranks of its own members but also created an institutional basis for an entire way of life.[25]

---

proceedings had its most direct roots in the 1930s, and this Article limits its examination to the years following 1930. For discussion of anticommunism prior to the 1930s, see GOLDSTEIN, *supra* note 16, at 103–91; ROBERT K. MURRAY, RED SCARE: A STUDY OF NATIONAL HYSTERIA, 1919–1920 (1955); and William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 SUP. CT. REV. 375.

21. Wiecek, *supra* note 20, at 403.

22. BELKNAP, *supra* note 11, at 10–11; ELLEN SCHRECKER, THE AGE OF MCCARTHYISM 5 (1994).

23. BELKNAP, *supra* note 11, at 11; EARL LATHAM, THE COMMUNIST CONTROVERSY IN WASHINGTON: FROM THE NEW DEAL TO MCCARTHY 75–78 (1966).

24. RICHARD M. FRIED, NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE 12–13 (1990); HARVEY KLEHR, THE HEYDEY OF AMERICAN COMMUNISM: THE DEPRESSION DECADE 170–71 (1984).

25. SCHRECKER, *supra* note 22, at 5.

Membership in the CPUSA thus grew from 7000 in 1930 to 82,000 by 1938.[26] Though "still small and marginal," the CPUSA "now had a real role within the American polity."[27]

As the CPUSA gained strength, however, it revived dormant fears of communism.[28] Much of this antipathy resulted from the organization's obvious foreign influences.[29] Such xenophobia was not new—American antipathy to foreigners and foreign ideologies existed for decades prior to the 1930s.[30] But, fascism's rise throughout Europe—ironically, one of the very things that aided communism's resurgence in the United States—also increased antipathy to foreign influences,[31] a sentiment greatly exacerbated by the Nazi-Soviet nonaggression pact in 1939.[32] The CPUSA, with its close ties to the USSR and its heavily immigrant-oriented membership, suffered the effects of this general xenophobia. Many people began to view the rise in communism as evidence of the fact that "outsiders . . . threatened the nation from within."[33] Others wrongly believed that communists' increasing presence in government jobs evidenced a plan to infiltrate the U.S. government.[34] As one contemporary observer noted, during the 1930s, "a general hysteria of fear gripp[ed] the Nation against communism."[35]

Fear of communist influence resulted in a number of government actions aimed at communists. Although CPUSA members rarely did more than advocate communist doctrine, numerous states revived or enacted sedition laws under which they prosecuted CPUSA members for advocating violent overthrow of the government.[36] State and local

---

26. *See* KLEHR, *supra* note 24, at 413 (discussing Communist Party USA ("CPUSA") recruitment in the late 1930s); ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA 15 (1998).

27. SCHRECKER, *supra* note 26, at 15.

28. BELKNAP, *supra* note 11, at 11; Wiecek, *supra* note 20, at 395–97.

29. KLEHR, *supra* note 24, at 381 (noting that "foreign-born" individuals originally comprised the bulk of the CPUSA, although that situation began to change in 1929 as more American born individuals joined).

30. ROBERT GRIFFITH, THE POLITICS OF FEAR: JOSEPH R. MCCARTHY AND THE SENATE 30 (1970); SCHRECKER, *supra* note 22, at 9–10.

31. BELKNAP, *supra* note 11, at 20.

32. KLEHR, *supra* note 24, at 386.

33. SCHRECKER, *supra* note 22, at 9.

34. *See* FRIED, *supra* note 24, at 45; GRIFFITH, *supra* note 30, at 31–32.

35. H.R. REP. No. 74–1869, at 6 (1935) (remarks of Rep. Emanuel Celler).

36. *See* Legislation, *Federal Sedition Bills: Speech Restriction in Theory and Practice*, 35 COLUM. L. REV. 917, 918 n.5 (1935); Legislation, *State Control of Political Thought*, 84 U. PA. L. REV. 390, 392–94 (1936). By the end of the 1930s, there were sedition prosecutions in Ohio, New Jersey, Pennsylvania, California, Kentucky, Oregon, Michigan, Utah, Iowa, Georgia, Washington, Illinois, and Virginia. SCHRECKER, *supra* note 26, at 66; *see also* BELKNAP, *supra* note 11, at 11–12

authorities also used pretextual charges to break up labor organization picketing and other groups' peaceful activities.[37] States also embarked upon aggressive campaigns to root out communist influences in education. By 1936, twenty-one states and the District of Columbia had adopted teacher loyalty oaths and several legislators were investigating the corrosive influence of communism on children and young adults.[38]

The federal government's anticommunist response grew more slowly. Despite calls for legislative action as early as 1930, Congress, preoccupied with the economic emergency of the 1930s, was initially unreceptive to calls for action.[39] In the latter half of the 1930s, however, Republican politicians began to brand their Democratic opponents as communist sympathizers—claiming, for example, that "[t]he Democratic party 'ha[d] been seized by alien and un-American elements.'"[40] At the same time, a private anticommunist network grew and solidified into a national force. A coalition of (mostly conservative) businessmen, labor leaders, religious leaders, journalists, patriotic organizations, and individual private citizens, this network worked tirelessly to "eradicat[e] Communism from American life."[41] Such persons became recognized as experts on the evils of communism,

---

(discussing sedition prosecutions that took place in those as well as other jurisdictions); GOLDSTEIN, *supra* note 16, at 202–03 (same).

37. *See* GOLDSTEIN, *supra* note 16, at 204–06, 217–33.

38. *See* ELLEN W. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES 68–71 (1986); *see also* FRIED, *supra* note 24, at 101–04.

39. In 1930, the U.S. House of Representatives overwhelmingly voted to establish a committee to investigate organizations and individuals who allegedly advocated the violent overthrow of the government. *See* GOLDSTEIN, *supra* note 16, at 201. Although it had little evidence of wrongdoing by communists, the Fish Committee, as it was called, recommended wholesale repression of communist activity and the adoption of a peacetime sedition law. *Id.*; SCHRECKER, *supra* note 26, at 66–67. The Hoover Administration largely ignored those recommendations. GOLDSTEIN, *supra* note 16, at 201; SCHRECKER, *supra* note 26, at 66–67. In 1934, Congress, this time via the McCormack-Dickstein Committee, began another investigation of subversion, which resulted in another proposal for a peacetime sedition law. *See* BELKNAP, *supra* note 11, at 16–18; FRIED, *supra* note 24, at 46–47. Again, Congress—by that time dominated by many New Deal liberals—ignored the committee's recommendations. *See* BELKNAP, *supra* note 11, at 18–19; FRIED, *supra* note 24, at 46–47.

40. *See* ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL 606 (5th prtg. 1960) (quoting Vice Presidential Candidate Frank Knox, who also stated that "'[t]he New Deal candidate . . . has been leading us toward Moscow'"); *id.* at 619–20 (noting Republican allegations that Moscow had ordered American communists to work for President Franklin Delano Roosevelt); *id.* at 625 ("Roosevelt [is] 'the Kerensky of the American revolutionary movement.'") (quoting the Republican National Committee).

41. SCHRECKER, *supra* note 26, at 42–43; *see also* Wiecek, *supra* note 20, at 396–98.

enabling them to "dominate the national debate" and influence public and congressional opinion.[42]

J. Edgar Hoover, director of the Federal Bureau of Investigation (FBI), also stepped up anticommunist activities. In August of 1936, he convinced President Franklin Delano Roosevelt that communists were attempting to take control of significant labor organizations and gain influence through government jobs.[43] President Roosevelt thus authorized Hoover to develop "more systematic intelligence about 'subversive activities in the United States, particularly Fascism and Communism.'"[44] By 1939, Hoover had thousands of informants in private industry and had developed his "Custodial Detention List"—a list of persons (mostly communist) who were to be detained as national security threats during a time of war or national emergency.[45] Although Hoover's list and investigations remained secret at this stage,[46] they provided an evidentiary foundation both for future anticommunist sentiment and the *Dennis* prosecutions.

The rise of the private anticommunist network, Hoover's activities, and Republican anticommunist rhetoric also coincided with economic events which cast doubt on the benefits of communism. In 1937, a severe economic recession caused many to question the principles underlying the New Deal.[47] A wave of sit-down strikes in the late 1930s further alienated Americans from pro-labor economic policies, especially given the association between unions and communists.[48] By 1938, Congressman Martin Dies, sensing that anti-New Deal sentiment among conservative lawmakers created an atmosphere ripe for anticommunist action, called for the creation of a congressional committee to investigate subversive and un-American propaganda.[49]

---

42. SCHRECKER, *supra* note 26, at 45.

43. *See* FINAL REPORT OF THE SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, at 393-94 (1976) (describing the 1936 meetings and communications between J. Edgar Hoover and President Roosevelt).

44. *Id.* at 394 (quoting an August 24, 1936 Hoover memorandum); *see also* KENNETH O'REILLY, HOOVER AND THE UN-AMERICANS: THE FBI, HUAC, AND THE RED MENACE 21-22 (1983); STEINBERG, *supra* note 10, at 10-11.

45. STEINBERG, *supra* note 10, at 11.

46. *Id.*

47. FRIED, *supra* note 24, at 47; SCHRECKER, *supra* note 26, at 90.

48. GOLDSTEIN, *supra* note 16, at 239; *see also* WALTER GOODMAN, THE COMMITTEE: THE EXTRAORDINARY CAREER OF THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 51 (1st prtg. 1968).

49. FRIED, *supra* note 24, at 47-48; *see also* SCHRECKER, *supra* note 22, at 12. Congressman Martin Dies's focus on anticommunism was as much a political vehicle with which to attack President Roosevelt's New Deal policies as it was an attack on the threat of communism. *See* RICHARD M. FREELAND, THE TRUMAN DOCTRINE AND THE

The Dies Committee (later to become the infamous House Un-American Activities Committee ("HUAC")) was charged with investigating

> (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution.[50]

In the summer of 1938, the Dies Committee held hearings during which legislators and witnesses slung allegations of communism at various Democratic candidates, public officials,[51] and private organizations, particularly at labor organizations such as the Congress of Industrial Organizations (CIO).[52] By the end of the hearings, 640 organizations, 483 newspapers, and 280 labor unions had been labeled as communist.[53]

Such allegations were utterly irresponsible. Witnesses made broad, conclusory claims, most of which had no evidentiary support.[54] The committee rarely allowed the accused to defend themselves in the hearings.[55] Many of the accusers went unquestioned because much of the testimony was never directly presented to the committee and was instead simply provided to the printer for inclusion in the hearings' printed version.[56] Nevertheless, the allegations gained much media attention, thus spurring Dies and others to make even further allegations, which gained more media attention in a sort of self-

---

ORIGINS OF MCCARTHYISM: FOREIGN POLICY, DOMESTIC POLITICS, AND INTERNAL SECURITY 1946–1948, at 118–19 (1972); SCHRECKER, *supra* note 26, at 90–91.

50. 83 CONG. REC. 7568 (1938).

51. *See* GOLDSTEIN, *supra* note 16, at 242.

52. GOODMAN, *supra* note 48, at 32. Although the House Un-American Activities Committee ("HUAC") was supposed to investigate all subversive propaganda, including Nazi propaganda, Dies turned it into an examination of communist activities. BELKNAP, *supra* note 11, at 21.

53. BELKNAP, *supra* note 11, at 21.

54. For example, a single witness identified 280 labor officials as communists, although he supported very few of such allegations with evidence. *See* D.A. Saunders, *The Dies Committee: First Phase*, 3 PUB. OP. Q. 223, 228 (1939). Furthermore, committee members rarely tried to obtain support for such accusations, instead often feeding testimony to witnesses. *Id.* at 236; *see also* GOODMAN, *supra* note 48, at 32.

55. *See* Saunders, *supra* note 54, at 235 ("[O]f the hundreds or perhaps thousands of persons who were accused of being 'Communists' or (infrequently) 'Nazis' . . . with a single possible exception not one of the accused has been called to the stand.").

56. *Id.* at 237–38.

reinforcing loop.[57] Furthermore, because the Dies Committee's opponents were loath to speak out for fear of being branded as subversives themselves,[58] the public information generated by the 1938 hearings was remarkably one-sided.

Such one-sidedness had a significant impact on public opinion. By December of 1938, a Gallup poll revealed that seventy-four percent of Americans familiar with the Dies Committee's activities favored continued investigations.[59] The announcement of the Nazi-Soviet nonaggression pact in August of 1939 and the outbreak of war in Europe further solidified fears of subversive groups perceived to be spreading totalitarian ideology worldwide. By 1939, polls showed that "many respondents—even [forty] percent of CIO members, whose unions the Communists had helped build—favored 'drastic measures' against Communists."[60]

By 1939, Congress also suffered overwhelmingly from anticommunist sentiment.[61] Inundated with proposals aimed at stemming un-American activities,[62] Congress enacted three important laws:[63] the Hatch Act, which prohibited communists and other subversives advocating overthrow of the government from holding government employment;[64] the Voorhis Act, which required groups with foreign affiliations or who advocated overthrow of the government to register with the federal government;[65] and the Smith Act,[66] which criminalized

---

57. *See* GOLDSTEIN, *supra* note 16, at 243; GOODMAN, *supra* note 48, at 30–31. Although many people claimed innocence, newspapers, focusing on the sensationalist aspects of the hearings, relegated such information to their back pages. GOODMAN, *supra* note 48, at 31.

58. *See* SCHRECKER, *supra* note 26, at 91.

59. 1 GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1935-1971, at 128 (1972).

60. FRIED, *supra* note 24, at 60.

61. As one contemporary commentator noted, "if you brought in the Ten Commandments today and asked for their repeal and attached to that request [a law aimed at aliens and un-American sentiment], you could get it." 84 CONG. REC. 10,370 (1939) (statement of Rep. Thomas F. Ford).

62. *See* CHAFEE JR., *supra* note 7, at 442.

63. During this period, Congress also reauthorized the Espionage Act of 1917, the statute used to repress politieal protest during World War I. *See* ch. 72, 54 Stat. 79. For a discussion of the Espionage Act, see sources cited *supra* note 20.

64. Pub. L. No. 76-252, ch. 410, § 9, 53 Stat. 1147, 1148–49.

65. Pub. L. No. 76-870, ch. 897, § 2, 54 Stat. 1201, 1202–03.

66. 54 Stat. 670. The Smith Act was a conglomeration of several proposals aimed at communists. *See* BELKNAP, *supra* note 11, at 22–27; CHAFEE JR., *supra* note 7, at 440–42 & 440 n.1. For a discussion of the legislative history of the Smith Act, see Brief for Petitioners at 59–70, *Dennis* (No. 336), *reprinted in* 47 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 163, 244–55 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS].

advocacy of overthrow of the government[67] and allowed deportation[68] and registration[69] of aliens within the United States. Although one might have expected outcry over the nation's first peacetime sedition law (especially given the country's woeful history with respect to such laws during wartime),[70] there was actually little vocal opposition to the Smith Act—even most newspapers ignored its passage.[71] Most newspapers "regard[ed] the Smith bill as a routine expression of prevailing public opinion."[72]

B. Post-World War II: Domestic Communism as a National Security Issue

Although domestic communists suffered significant repression as the 1930s moved into the 1940s,[73] World War II, and the alliance between the USSR and the United States brought them a brief reprieve.[74] Nevertheless, much of the anticommunist network remained in place,[75] and beginning in 1945, the federal anticommunist crusade enjoyed a full-blown revival that was aided in large part by world events. After the United States and the Soviet Union failed to reach an amicable postwar settlement at Yalta, most American policymakers began to view the Soviet Union as a hostile power that threatened the stability of the United States.[76] A series of Soviet-related espionage incidents in the United States and Canada contributed to this view.[77] Additional

---

67. § 2, 54 Stat. at 671.
68. *Id.* §§ 20–23, 54 Stat. at 671–73.
69. *Id.* §§ 30–31, 54 Stat. at 673–74.
70. *See* sources cited *supra* note 20.
71. BELKNAP, *supra* note 11, at 23; CHAFEE JR., *supra* note 7, at 442–43.
72. BELKNAP, *supra* note 11, at 23.
73. *See* GOLDSTEIN, *supra* note 16, at 239–84.
74. Wiecek, *supra* note 20, at 403.
75. For example, state and local officials continued to harass and pursue communists. *Id.* at 403–04. Hoover covertly continued his investigations. FRIED, *supra* note 24, at 56; GOODMAN, *supra* note 48, at 132. Dies continued to expose government employees with communist leanings. FRIED, *supra* note 24, at 56; GOODMAN, *supra* note 48, at 131–32. And red-baiting, though ineffective, flourished in the 1944 federal election campaigns. FRIED, *supra* note 24, at 56–58.
76. SCHRECKER, *supra* note 22, at 16–17.
77. In February of 1945, government agents discovered over one thousand classified documents in the offices of the *Amerasia*, a left-wing magazine run by an individual with ties to the CPUSA. STEINBERG, *supra* note 10, at 21–22; *see also* FRIED, *supra* note 24, at 60–61; GRIFFITH, *supra* note 30, at 34–38. In 1946, the Canadian Royal Commission issued a report on Soviet espionage activities within the Canadian government. STEINBERG, *supra* note 10, at 22. Around that same time, Elizabeth Bentley voluntarily disclosed to the Federal Bureau of Investigation (FBI) her experience with Soviet espionage, including several names of government officials who were involved. *See* CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 340–44 (1991). Her testimony was featured prominently in the HUAC hearings of the late

international crises involving communists—the Soviet-backed coup in Czechoslovakia in 1948, the 1949 fall of China to Mao Zedong, the Soviet detonation of an atom bomb in that same year, and the advent of the Korean War in 1950—solidified Americans' fear of Soviet aggression.[78]

As these events unfolded, President Harry S. Truman became convinced that the Soviet Union was bent on expansion and threatened Western civilization.[79] As a result, he adopted and publicly campaigned in favor of a policy designed to contain the Soviet Union's influence.[80] President Truman's view of the Soviet Union eventually came to dominate American culture so that by the end of the 1940s, Americans felt a "sense of imminent apocalypse."[81]

President Truman's campaign against the Soviet Union also contributed to a new view of the CPUSA as a more insidious threat. Although he never apparently believed that domestic communists posed much of a threat to national security,[82] President Truman deliberately equated Soviet imperialism and communism in order to gain support for his containment policy.[83] As a result, he fueled the image of domestic communists as part of the Soviet Union's overall world strategy of dominance. Consequently, with the advent of the Cold War, "anticommunism moved to the ideological center of American politics. . . . [It] transform[ed] domestic communism from a matter of political opinion to one of national security."[84]

Various other groups and individuals also demonized domestic communists. Republicans raised the threat of domestic communists, and the Democrats' alleged alliance with them, during the 1946 midterm

---

1940s. *See id.* By 1945, the government was actively investigating Whittaker Chambers's allegations that Alger Hiss, a U.S. State Department official, was a secret communist. *Id.* at 344–49. The Hiss investigation involved many appearances before HUAC and other congressional committees, and ultimately resulted in his 1949 trial on perjury charges. *See id.* at 360–66. In that same year, Judith Coplon, a U.S. Department of Justice (DOJ) official, was tried and convicted for sharing sensitive information with Soviet intelligence, although FBI misconduct resulted in reversal of the convictions on appeal. *See id.* at 367–73; Wiecek, *supra* note 20, at 416. A series of highly publicized arrests apparently linked to Soviet espionage occurred in 1950, including those of Julius and Ethel Rosenberg. GOLDSTEIN, *supra* note 16, at 321.

78. *See* Christina E. Wells, *Of Communists and Anti-Abortion Protestors: The Consequences of Falling into the Theoretical Abyss*, 33 GA. L. REV. 1, 12–13 (1998); *see also* Wiecek, *supra* note 20, at 416–17.

79. SCHRECKER, *supra* note 26, at 158.

80. BELKNAP, *supra* note 11, at 41–42; SCHRECKER, *supra* note 26, at 157–59; STEINBERG, *supra* note 10, at 8–9. For a more in-depth discussion of the origins of the Truman Doctrine, see FREELAND, *supra* note 49, at 70–114.

81. *See* Wiecek, *supra* note 20, at 416.

82. STEINBERG, *supra* note 10, at xii.

83. BELKNAP, *supra* note 11, at 42.

84. SCHRECKER, *supra* note 22, at 16.

elections.[85] The private anticommunist network renewed arguments that domestic communists threatened the American way of life.[86] The Knights of Columbus argued, for example, that communism threatened morality and family values.[87] In 1946, the U.S. Chamber of Commerce issued a much-publicized report claiming that communists "had made substantial inroads into *non*governmental groups, especially labor unions,"[88] as well as governmental agencies, including the U.S. State Department.[89] Some government officials argued that domestic communists were attempting to seize control of labor[90] and that domestic communists "'unquestionably would sabotage this country's effort in resisting Russia.'"[91]

Hoover was especially instrumental in shaping and politicizing this emerging view of domestic communists. Like the Catholic Church, he too reiterated the danger that communism, as a "moral foe to Christianity," posed to American values.[92] Primarily, however, Hoover focused on the diabolic nature of the communists themselves. They were, in his estimation, utterly loyal to the Soviet Union: "'every American Communist is potentially an espionage agent of the Soviet Government, requiring only the direct instruction of a Soviet superior to make the potentiality a reality.'"[93] The communists were also

---

85. GOLDSTEIN, *supra* note 16, at 295–96; STEINBERG, *supra* note 10, at 20–21.

86. *See* GOLDSTEIN, *supra* note 16, at 295; SCHRECKER, *supra* note 26, at 45. *See generally* THE SPECTER: ORIGINAL ESSAYS ON THE COLD WAR AND THE ORIGINS OF MCCARTHYISM (Robert Griffith & Athan Theoharis eds., 1974) [hereinafter THE SPECTER].

87. CHRISTOPHER J. KAUFFMAN, FAITH & FRATERNALISM: THE HISTORY OF THE KNIGHTS OF COLUMBUS 1882–1982, at 360–68 (1982); STEPHEN J. WHITFIELD, THE CULTURE OF THE COLD WAR 77–100 (1996).

88. PHILIP M. STERN, THE OPPENHEIMER CASE: SECURITY ON TRIAL 95 (1969).

89. Peter H. Irons, *American Business and the Origins of McCarthyism: The Cold War Crusade of the United States Chamber of Commerce*, *in* THE SPECTER, *supra* note 86, at 72, 78–89.

90. Hoover argued that the CPUSA would "'be a menace to [the] U.S. if [it] can seize labor control [and] this they are gradually doing.'" SCHRECKER, *supra* note 26, at 184 (quoting a 1944 Hoover memorandum). President Harry S. Truman's advisors agreed with this assessment. Presidential aide Clark Clifford wrote in a report that the CPUSA was trying "'to capture the labor movement'" and "'cripple the industrial potential of the United States by calling strikes at those times and places which would be advantageous to the Soviet Union.'" *Id.* (quoting a 1946 Clifford memorandum). A wave of sit-down strikes in 1946 further lent credence to the claims that communists were trying to disrupt the United States' security and economy. *See* GOLDSTEIN, *supra* note 16, at 289–90; Wiecek, *supra* note 20, at 411–12.

91. *Id.* (quoting an FBI Washington field office report).

92. RICHARD GID POWERS, SECRECY AND POWER: THE LIFE OF J. EDGAR HOOVER 311 (1987).

93. CLARK CLIFFORD, COUNSEL TO THE PRESIDENT: A MEMOIR 177 (1991) (quoting a 1946 report written by Hoover to President Truman); *see also* SCHRECKER,

exceedingly clever, enabling them not only to hide in plain view,[94] but to manipulate innocent Americans to do their bidding.[95] Hoover's testimony before HUAC in 1947 aptly illustrates his view:

> The Communist, once he is fully trained and indoctrinated [by the Soviet Union], realizes that he can create his order in the United States only by "bloody revolution."
>
> . . . .
>
> . . . [Cleverly, however, the] American progress which all good citizens seek, such as old-age security, houses for veterans, child assistance, and a host of others is being adopted as window dressing by the Communists to conceal their true aims and entrap gullible followers. . . .
>
> The numerical strength of the party's enrolled membership is insignificant. But it is well known that there are many actual members who because of their position are not carried on party rolls.
>
> . . . .
>
> . . . [R]ather than the size of the Communist Party, the way to weigh its true importance is by testing its influence, its ability to infiltrate.
>
> The size of the party is relatively unimportant because of the enthusiasm and iron-clad discipline under which they operate.[96]

In light of this alleged internal threat, Hoover and other anticommunists saw exposure as the only solution. In 1946, the FBI reinvigorated its investigations of the CPUSA on the theory that "each member . . . was to be considered a possible saboteur and espionage

---

supra note 26, at 133 (quoting Hoover as commenting that "'Communist members . . . body and soul, are the property of the party'").

94. The "they are everywhere" sentiment was especially prevalent among Hoover and his supporters. SCHRECKER, *supra* note 26, at 141. One government official, for example, claimed in a speech to New York businessmen that communists were "'everywhere . . . in factories, offices, butcher stores, on street corners, in private businesses.'" *Id.*

95. *Id.* at 142.

96. SCHRECKER, *supra* note 22, at 114–15 (third omission in original) (quoting from an excerpt of Hoover's March 26, 1947 testimony before HUAC).

agent."[97] The FBI further began a massive "educational" campaign to inform Americans about the dangers of domestic communism, feeding clandestine information to reporters and private anticommunist groups who reported it to the general public.[98] Hoover also traveled throughout the country giving speeches imbued with "religious fervor," warning that "communists were infiltrating every aspect of life in the United States."[99]

Perhaps most importantly, Hoover collaborated with HUAC, which in 1947 held rejuvenated hearings to "'ferret out'" communists and communist sympathizers who threatened the "'American way of life.'"[100] Over the next decade, HUAC and other congressional committees[101] heard thousands of allegations of communist activities against various groups and organizations, the source of which was usually FBI files.[102] So influential was the FBI's relationship with HUAC that one scholar characterized the hearings' purpose as "publicizing information in FBI files."[103] This publication came not simply through media coverage of the hearings, but also through the issuance of regular indices of "communist sympathizers,"[104] which operated as blacklists resulting in job loss and societal shunning for

---

97. STEINBERG, *supra* note 10, at 12–13.

98. FRIED, *supra* note 24, at 85; SCHRECKER, *supra* note 22, at 23.

99. STEINBERG, *supra* note 10, at x.

100. GRIFFITH, *supra* note 30, at 38 (quoting Speaker of the House Joseph W. Martin, Jr.); *see also* ROBERT K. CARR, THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES: 1945–1950, at 37–38 (1952).

These highly publicized hearings included inquiries into a wide range of activities, including the Hiss and Elizabeth Bentley espionage incidents, *see* GOODMAN, *supra* note 48, at 244–67, the influence of communists in Hollywood, and communist infiltration of labor unions and the American education system, *see* GOLDSTEIN, *supra* note 16, at 344–46; GOODMAN, *supra* note 48, at 297–309, 325–32.

101. Aside from HUAC, Senator Joseph McCarthy's congressional investigations are most widely remembered, but other committees also investigated communists during this period. On McCarthy's activities, see DAVID CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER (1978); and FRIED, *supra* note 24. On the operation of various congressional investigations, see GOLDSTEIN, *supra* note 16, at 343–44.

102. CARR, *supra* note 100, at 168–69; GOLDSTEIN, *supra* note 16, at 345, 376.

103. CARR, *supra* note 100, at 169. HUAC's various chairmen publicly declared that its major purpose was the "'exposure of un-American individuals and their un-American activities.'" *Id.* at 280 n.14 (quoting 93 CONG. REC. A4277 (1947) (statement of Rep. J. Parnell Thomas)); *see also* FRANK J. DONNER, THE UN-AMERICANS 63–64 (1961).

104. *See* CAUTE, *supra* note 101, at 102–03 (1978) (noting that HUAC provided information to employers regarding approximately 60,000 people between 1949 and 1959); SCHRECKER, *supra* note 38, at 126–307 (discussing HUAC information used by colleges and universities).

those listed.[105] As in the earlier HUAC hearings, the fear of "exposure" as a communist sympathizer silenced many who disagreed with the congressional investigations.[106]

Formal legal tools were also part of this process of public exposure. In 1947, President Truman issued Executive Order 9835, establishing boards to investigate all existing and prospective employees for potential disloyalty.[107] President Truman's order expanded grounds for potential disloyalty beyond criminal acts to include such things as membership or sympathy with a subversive organization.[108] In addition, the use of such oaths spread to state and local governments and private industry.[109] Such programs became so widespread that one scholar estimated that at least one in five members of the total labor force was subject to them.[110]

In conjunction with these boards, the U.S. Attorney General, guided by Hoover, published a list of "subversive" organizations which, like the loyalty board inquiries themselves, reached far beyond dangerous organizations.[111] The list's highly publicized release in December of 1947 alerted the public to the presence of dangerous organizations within the United States.[112] As with the HUAC hearings, the loyalty hearings damaged the lives of thousands of people and eventually silenced critics who feared being named as communist sympathizers.[113]

---

105. GOLDSTEIN, *supra* note 16, at 345, 376; SCHRECKER, *supra* note 26, at 359–68.

106. *See* SCHRECKER, *supra* note 26, at 368; Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 22 (1991).

107. Exec. Order No. 9835, 3 C.F.R. 627 (1943–1948).

108. *Id.* at 630; *see also* GENTRY, *supra* note 77, at 355–56.

109. *See* RALPH S. BROWN, JR., LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES 92–163 (1958).

110. *Id.* at 181.

111. STEINBERG, *supra* note 10, at 29–30; *see also* GENTRY, *supra* note 77, at 356.

112. *See* STEINBERG, *supra* note 10, at 29–30.

113. *See* BROWN, *supra* note 109, at 181–92; GOLDSTEIN, *supra* note 16, at 298–305, 374–83. Although most of those called before the boards were cleared of disloyalty, Lloyd K. Garrison, Some Observations on the Loyalty-Security Program, Speech at the Third National Conference of Law Reviews (Apr. 1, 1955), *in* 23 U. CHI. L. REV. 1, 4 (1955), the hearings nevertheless took their toll. Even if not fired or jailed, those called before loyalty boards suffered severe economic and emotional hardships:

> [O]nce an employee has been through one of these ordeals, even though he comes out with flying colors and is restored to his job, that man is deeply damaged for a long, long time to come, perhaps forever. They are gun-shy, they are timid, they've been scarred and humiliated; their neighbors and even some of their friends have looked upon them with a question mark.

Id.; *see also* GOLDSTEIN, *supra* note 16, at 376–77 (discussing societal shunning, physical attacks, and humiliation accompanying allegations of disloyalty).

Eventually, the process of public exposure culminated in the passage of the Internal Security Act of 1950,[114] which provided for the registration and possible detention of communist and "communist front" organizations and their members, and expanded the government's authority to deport subversive aliens.[115] Symbolically, the fact that Congress felt the need to provide such drastic remedies, coupled with an increase in deportations,[116] must have reinforced in the minds of the public that domestic communists posed a serious threat to the country. Section 2 of the Internal Security Act, for example, stated:

> The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when . . . overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. . . . The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions . . . .[117]

C. *The Popular Image of Domestic Communists: Myth and Reality*

Worldwide events and the anticommunist campaign took their toll upon the CPUSA during the late 1940s and early 1950s, the period in which the *Dennis* defendants were tried. Polls taken in 1946 revealed that 57% of Americans believed "there were a great many" communists in the United States,[118] and 48% of those polled believed that domestic communists were loyal to the Soviet Union rather than to the United States.[119] Polls in 1947 and 1948 revealed similar results.[120] In

---

114. Pub. L. No. 81-831, 64 Stat. 987.

115. *Id.* §§ 7–8, 22, 64 Stat. at 993–95, 1006–10. For discussions of the McCarran Act and its history, see Arthur E. Sutherland, Jr., *Freedom and Internal Security*, 64 HARV. L. REV. 383 (1951). Despite some opposition, the McCarran Act overwhelmingly passed. GRIFFITH, *supra* note 30, at 117–22.

116. GOLDSTEIN, *supra* note 16, at 331–32.

117. § 2(15), 64 Stat. at 987–89.

118. PUBLIC OPINION 1935–1946, at 132 (Hadley Cantril ed., 1951).

119. *The Quarter's Polls*, 10 PUB. OPINION Q. 602, 608 (1946).

120. 1 GALLUP, *supra* note 59, at 639–40 (stating that 61% of respondents believed that CPUSA members were loyal to the Soviet Union, while only 18% believed they were loyal to the United States, and that 61% favored legal prohibition of CPUSA,

addition, almost half of those responding to a 1948 survey believed that the CPUSA was rapidly gaining strength and already controlled many industries and unions; a few even believed that the CPUSA was almost strong enough to dominate the United States.[121] Forty-four percent of the respondents to a 1950 poll believed communists to be a significant danger to the country, a figure that rose to 81% by 1954.[122] A 1947 poll indicated that 72% of respondents believed that communists wanted to eradicate Christianity.[123] A 1948 poll reflected that roughly 60% of the respondents believed that "steps should be taken right away to outlaw the Communist Party in this country."[124] Increasingly, the vast majority of Americans polled favored placing the following restrictions on communists: registration requirements, restrictions on employment in government and educational jobs, and their right to speak freely.[125]

---

while 26% opposed such a prohibition); *The Quarter's Polls*, 12 PUB. OPINION Q. 146, 150 (1948) (stating that in December of 1947, 59% of those polled believed that communists were loyal to the Soviet Union rather than to the United States, while 19% believed communists were loyal to the United States); *The Quarter's Polls*, 12 PUB. OPINION Q. 530, 537 (1948) [hereinafter *Third 1948 Quarter's Polls*] (stating that in May of 1948, 65% of those polled believed that communists were loyal to the Soviet Union rather than to the United States, while 16% believed communists were loyal to the United States).

121. *The Quarter's Polls*, 12 PUB. OPINION Q. 348, 350–51 (1948) (stating that 35% believed that the CPUSA was getting stronger and controlled many industries and unions, with an additional 10% believing that the CPUSA was almost able to dominate the United States).

122. NAT'L OPINION RESEARCH CTR., NORC SURVEY # 1950-0294: ATTITUDES TOWARD JEWS AND COMMUNISM (1950) (reporting results of a poll showing that 44% of those surveyed believed American communists were a "[g]reat danger" to the country, and 35% of those surveyed believed that there was "[s]ome but not too much" danger to the country), *available at* http://roperweb.ropercenter.ucoun.edu/Catalog40/StartQuery.html (on file with author); SAMUEL A. STOUFFER, COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES: A CROSS-SECTION OF THE NATION SPEAKS ITS MIND 75–76 (1955) (reporting a 1954 survey showing that 81% of respondents felt domestic communists posed at least "[s]ome danger" to the country).

123. *The Quarter's Polls*, 11 PUB. OPINION Q. 639, 643 (1947).

124. *The Quarter's Polls*, 13 PUB. OPINION Q. 154, 156 (1949).

125. 2 GALLUP, *supra* note 59, at 808 (stating that 83% of those polled in 1949 favored a requirement that communists register with the DOJ); *id.* at 853 (stating that 73% of those polled in 1949 believed that active communists should not be allowed to teach in colleges and universities, and 72% believed that universities should require loyalty oaths of teachers); *The Quarter's Polls*, *supra* note 123, at 642 (reporting the results of a 1947 poll revealing that 64% of respondents believed communists should be prevented from holding public office or executive positions in labor unions); *Third 1948 Quarter's Polls*, *supra* note 120, at 537 (stating that in a 1948 poll, 77% of respondents favored a law requiring communists to register with the DOJ); *The Quarter's Polls*, 12 PUB. OPINION Q. 754, 756 (1948) (stating that 57% of those surveyed in a 1948 poll believed that communists should not be allowed to speak on the radio); *The Quarter's Polls*, 13 PUB. OPINION Q. 537, 540 (1949) (stating that 83% of respondents to a 1949 poll favored a registration requirement for communists); *id.* (stating that 87% of respondents believed that communists should be removed from defense industry jobs);

As these surveys show, many Americans adopted the view of the CPUSA propagated by anticommunist forces, eventually coming to believe that domestic communists constituted a vast, uniform network of soldiers willing to commit sabotage or espionage on behalf of the Soviet Union. This image of the CPUSA was largely inaccurate, not because it was utterly false, but because it was grossly exaggerated and based on broad generalizations rather than actual evidence of individual or group wrongdoing.

Although violence was common in the Soviet Union, CPUSA members were involved in few, if any, such incidents in the United States,[126] and there was certainly no evidence of such tactics.[127] CPUSA members were also active in labor unions and some strike movements, but there was no evidence that they engaged in politically inspired strikes designed to interfere with the economy or national security.[128] Finally, the CPUSA's involvement with espionage was far more complex than the image projected by the anticommunists.

As many as 300 members and leaders of the CPUSA did spy on behalf of the Soviet Union,[129] but that figure means that the vast majority

---

The Quarter's Polls, 13 PUB. OPINION Q. 709, 712 (1949) [hereinafter *Fourth 1949 Quarter's Polls*] (stating that 73% of respondents to a 1949 poll believed that college and university teachers should not be allowed to continue teaching if they belonged to the CPUSA); *The Quarter's Polls*, 14 PUB. OPINION Q. 174, 175–76 (1950) (reporting the results of a 1949 poll showing that 68% believed the Communist party should be forbidden, and 77% favored a registration requirement for communists).

126. SCHRECKER, *supra* note 26, at 138.

127. MAURICE ISSERMAN, WHICH SIDE WERE YOU ON?: THE AMERICAN COMMUNIST PARTY DURING THE SECOND WORLD WAR 94 (1982).

128. *See* SCHRECKER, *supra* note 26, at 184–85; *see also* ISSERMAN, *supra* note 127, at 93.

129. Maurice Isserman & Ellen Schrecker, *"Papers of a Dangerous Tendency": From Major Andre's Boot to the VENONA Files*, *in* COLD WAR TRIUMPHALISM: THE MISUSE OF HISTORY AFTER THE FALL OF COMMUNISM 149, 154 (Ellen Schrecker ed., 2004). In the 1990s, the U.S. and Russian governments allowed public access to previously secret documents. JOHN EARL HAYNES & HARVEY KLEHR, VENONA: DECODING SOVIET ESPIONAGE IN AMERICA 1–7 (1999). Those documents included CPUSA files in the Soviets' possession, KGB foreign intelligence files, and highly classified communications intercepted by the U.S. Army's Signal Intelligence Service but kept secret even from other government officials for national security reasons. *Id.* at 1–2; Allen Weinstein, *Introduction* to ALLEN WEINSTEIN & ALEXANDER VASSILIEV, THE HAUNTED WOOD: SOVIET ESPIONAGE IN AMERICA—THE STALIN ERA (1999). The most thorough examinations of these documents include HAYNES & KLEHR, *supra*; HARVEY KLEHR ET AL., THE SECRET WORLD OF AMERICAN COMMUNISM (1995); and WEINSTEIN & VASSILIEV, *supra*. John Earl Haynes and Harvey Klehr estimate that as many as 349 citizens and resident aliens, many of them CPUSA members, or "fellow travelers," committed or were associated with espionage on behalf of the Soviets, including Earl Browder and Eugene Dennis, both leaders of the CPUSA. HAYNES & KLEHR, *supra*, app. A at 339, 344, 346; *see also* Isserman & Schrecker, *supra*, at 154. Other historians more conservatively estimate the number of CPUSA-affiliated spies to be "at least a hundred." Isserman & Schrecker, *supra*, at 154. Although these historians

of CPUSA members—49,700 of the then-50,000 strong organization—did not.[130] Furthermore, many of those spying on behalf of the Soviet Union viewed themselves as acting in American interests rather than traitors. Much espionage, for example, was committed during or immediately prior to World War II by CPUSA spies who apparently believed they were helping the Allied cause.[131] It is also not clear, as some historians recently claimed, that "any American Communist would have been proud to be chosen to spy for the Soviet Union."[132] Many of those who spied for the Soviet Union were kept in the dark regarding the final destination of stolen information due to fear that they would refuse to cooperate.[133] Consequently, although some CPUSA members were involved with espionage, one can hardly extrapolate their activities to the entire group.

Furthermore, there was little evidence available at the time regarding those CPUSA members who did spy for the Soviet Union.[134] Instead, anticommunists such as the FBI based their beliefs on

---

differ regarding the import of these newly revealed documents, they agree that in the 1930s and 1940s, the "top leaders of the [CPUSA] . . . were well aware of these [espionage] activities and actually helped to recruit agents and coordinate their efforts." *Id.* at 152.

130. Isserman & Schrecker, *supra* note 129, at 159; *see also* HAYNES & KLEHR, *supra* note 129, at 333.

131. *See* SCHRECKER, *supra* note 26, at 181–82. As one government insider noted, "[m]ost members of the American Communist Party had joined out of misplaeed idealism or naiveté. Although their views were misguided and served Moscow's political interests, only a small number ever consciously acted against their own government, and even fewer would ever have accepted 'direct instruction of a Soviet superior.'" CLIFFORD, *supra* note 93, at 177 (quoting the Clifford-Elsey report); *see also* Isserman & Schrecker, *supra* note 129, at 167 (noting that CPUSA spies managed to "persuade themselves that their actions were harmless, or even beneficial for American interests, properly understood").

132. HERBERT ROMERSTEIN & ERIC BREINDEL, THE VENONA SECRETS: EXPOSING SOVIET ESPIONAGE AND AMERICA'S TRAITORS 11 (2000); *see also* KLEHR ET AL., *supra* note 129, at 324 ("[S]ome rank-and-file members [of the CPUSA] were willing to serve the USSR by spying on their own country. There but for the grace of not being asked went other American Communists.").

133. Isserman & Schrecker, *supra* note 129, at 159, 166–67. According to Maurice Isserman and Ellen Schrecker, American handlers of CPUSA spies "struggled constantly to isolate their KGB superiors from their Washington oporatives, fearing that direct contact with the Russians would alert their more skittish sources that their materials were going to Soviet intelligence agencies instead of party headquarters in New York." *Id.* at 166.

134. Prior to the recent release of previously secret documents by the Soviet government and U.S. intelligence agencies—documents to which most government officials did not have access—historians had concluded from available evidence that the CPUSA was largely uninvolved in such activity. *See, e.g.*, CAUTE, *supra* note 101, at 54; HARVEY KLEHR & JOHN EARL HAYNES, THE AMERICAN COMMUNIST MOVEMENT: STORMING HEAVEN ITSELF 108 (1992).

"hunches." As two notable historians of American communism described:

> The FBI *understood* that the Soviet Union, in alliance with the American Communist party, was mounting a major espionage attack on the United States. But although the bureau grasped the broad outlines of the espionage offensive, its knowledge of specific operations was spotty and its understanding of Soviet intelligence practices limited. Though convinced that espionage was taking place, in most cases the FBI did not feel it had sufficient evidence to bring successful criminal prosecutions.[135]

The fact that the FBI's intuition was correct in some individual cases hardly justifies its relentless branding of an entire organization as traitorous based upon little or no evidence, especially given that such activities ceased soon after World War II.[136]

Despite the lack of evidence supporting anticommunist charges, Americans' beliefs about the CPUSA nevertheless persisted, in large part because of anticommunists' continuous, vivid portrayals of CPUSA members as secretive disciples loyal to Joseph Stalin's every command.[137] By characterizing the CPUSA as a secretive, monolithic unit of automatons, widespread evidence of group wrongdoing was unnecessary. Even the most individualized of CPUSA actions—for example, espionage by a particular member—was imputed to the group. The same was true of atrocities committed by the Soviet government (of which there were many). If CPUSA members were rigidly loyal to Stalin, then, ipso facto, they must also have been willing to commit violence to further Soviet policies in the United States. In essence, the public saw the CPUSA as a conspiracy between domestic communists and the Soviet Union.[138]

---

135. HAYNES & KLEHR, *supra* note 129, at 46 (emphasis added).

136. COMM'N ON PROTECTING AND REDUCING GOV'T SECRECY, SECRECY: REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at A-37 (1997). The Commission on Protecting and Reducing Government Secrecy reported:

> [B]y the onset of the Cold War the Soviet attack in the area of espionage and subversion had been blunted and turned back. . . . By the close of the 1940s, Communism was a defeated ideology in the United States, with its influence in steep and steady decline, and the KGB reduced to recruiting thieves as spies.

Id.

137. SCHRECKER, *supra* note 22, at 17.

138. SCHRECKER, *supra* note 26, at 135 (noting Americans' belief that the CPUSA "belong[ed] to a worldwide conspiracy"). One state analog to HUAC, for example, argued in a report on communists in public education:

CPUSA practices contributed to this conspiracy theory. The organization operated in a "highly authoritarian manner" with a "Bolshevik-style command structure" allowing for little debate; its leaders were often rigid and uncompromising.[139] Furthermore, "American communists invested the Soviet Union with special qualities born of its status as the first socialist state in the world."[140] Because of their romantic vision of it, party members viewed "[a]ny deviation from support of the Soviet Union . . . [as] treachery."[141] These aspects of the party thus lent credence to claims that its members were mindlessly loyal to the Soviet Union.

Here too, however, CPUSA practices reveal a more complex picture of the organization than the anticommunist portrayal. Most CPUSA members did not view themselves as Stalin's disciples, but, rather as radicals for social change.[142] CPUSA members often combined Stalinist and American ethics, seeing "themselves as vindicating the ideals of Jefferson and Lincoln as much as those of Marx and Lenin."[143] Even CPUSA leaders, those most likely to adhere closely to the Stalinist party line, were more complicated than typically portrayed. Earl Browder, the leader of the CPUSA prior to 1945,[144] tried to reconcile American ideals with Soviet-inspired dogma, believing that communists would eventually join the mainstream of American life to effect cooperative change.[145] Browder's successor, William Z. Foster, who was substantially more dogmatic, similarly "had within him an indigenous, authentically American radical streak that made him something greater than the automaton of conservative stereotype."[146]

> "The Communist Party is not a political party as that term has historically been understood in this country. It is a political conspiracy aimed both at the social structure and the political framework of this nation. . . . The very acceptance of Communist Party membership is, in and of itself, an overt act incompatible with the public service."

ISSERMAN, *supra* note 127, at 69 (quoting a 1941 report by the Rapp-Coudert Committee to the New York legislature).

139. SCHRECKER, *supra* note 22, at 20–21.

140. STEINBERG, *supra* note 10, at 67.

141. *Id.*

142. SCHRECKER, *supra* note 22, at 17–18.

143. Wiecek, *supra* note 20, at 409; *see also* ISSERMAN, *supra* note 127, at 8.

144. HAYNES & KLEHR, *supra* note 129, app. A at 344.

145. *See* STEINBERG, *supra* note 10, at 62–63.

146. Wiecek, *supra* note 20, at 409. Historian Edward Johanningsmeir argues, for example, that William Z. Foster's communism was influenced by his early years as a labor radical, and that "Foster fought for years after he became a Communist to establish an 'exceptionalist' perspective for American Communism." EDWARD P. JOHANNINGSMEIER, FORGING AMERICAN COMMUNISM: THE LIFE OF WILLIAM Z. FOSTER 4–5 (1994). Historian James Barrett, on the other hand, attributes more of Foster's actions and beliefs to Soviet direction, although he too notes that Foster's beliefs were a product of both his "own political experience and instinct and his adherence to Marxism-

Unfortunately, other CPUSA practices, particularly its secretiveness and waffling on political issues, also worked against it. The party engaged in many furtive practices, including the use of underground networks, forged passports, and false names.[147] Furthermore, many CPUSA members hid or lied about their affiliation with the organization.[148] Much of this secrecy was a result of earlier and ongoing repression that made it risky for the CPUSA and its members to engage openly in political and other activities.[149] Nevertheless, it contributed to the CPUSA's conspiratorial image, as it allowed anticommunists to portray CPUSA members as "pretending to be ordinary liberals or concerned citizens so that they could worm themselves into other organizations and take them over."[150]

The CPUSA also "flip-flopped" on various social and political issues as a result of changes in Soviet policy. Thus, when the Soviet leadership vowed to fight the spread of fascism, the CPUSA embraced the Popular Front.[151] When the Soviet leadership entered into the disastrous Nazi-Soviet nonaggression pact, seemingly disavowing its past opposition to fascism, the CPUSA followed suit.[152] Anticommunists used these rapid ideological changes as evidence of the CPUSA's total control by the Soviet Union. Such a picture was not completely accurate. While the CPUSA took much direction from the Soviet Union, some local organizations enjoyed a great deal of autonomy.[153] Furthermore, substantial disagreements regarding the CPUSA's direction often lay underneath the surface of what appeared to be a united, public front,[154] suggesting that the image of party members as mindlessly loyal automatons was greatly exaggerated.

Unfortunately, the 1945 reconstitution of the CPUSA solidified the popular image of domestic communists as utterly loyal to the Soviet Union. Prior to that date, then-CPUSA leader Browder developed an American version of communism that envisioned working within the democratic system to establish progressive policies and make capitalism

---

Leninism." JAMES R. BARRETT, WILLIAM Z. FOSTER AND THE TRAGEDY OF AMERICAN RADICALISM 8 (1999).

147. HAYNES & KLEHR, *supra* note 129, at 57–92; SCHRECKER, *supra* note 26, at 23–26, 139–41.

148. SCHRECKER, *supra* note 26, at 25.

149. *See* GOLDSTEIN, *supra* note 16, at 370–71; Isserman & Schrecker, *supra* note 129, at 163–64.

150. SCHRECKER, *supra* note 26, at 140–41.

151. *See* KLEHR, *supra* note 24, at 170–85; SCHRECKER, *supra* note 26, at 14.

152. *See* ISSERMAN, *supra* note 127, at 32–37; KLEHR, *supra* note 24, at 386–400.

153. ISSERMAN, *supra* note 127, at 9, 13; SCHRECKER, *supra* note 26, at 22.

154. For example, after the signing of the Nazi-Soviet pact, there was substantial disagreement among CPUSA members regarding how to respond to World War II. *See* ISSERMAN, *supra* note 127, at 40–43, 73.

work for more Americans.[155] Browder's policy, though deviating from pure Marxist-Leninist principles, appeared consistent with then-existing Soviet foreign policy and was widely accepted by domestic communists who formed a new group—the Communist Political Association.[156] As Soviet foreign policy became increasingly hostile to its former allies after World War II, Soviet leaders directed the CPUSA to adhere more closely to Marxist-Leninist ideology.[157] American communists complied, isolating Browder and replacing him with a more ideologically acceptable leader, Foster.[158] Such immediate and unified action reinforced beliefs that the Soviet Union controlled the CPUSA and eventually served as a linchpin in the case against the *Dennis* defendants.[159]

Even this loyalty, however, was more complex than it appears on the surface. At the time of Browder's apparently unanimous ouster, there was substantial debate regarding the CPUSA's direction, with many leaders expressing concern over abandonment of Browder's philosophy.[160] The installation of Foster and his new colleagues further did not completely unify CPUSA ideology—leaders disagreed regarding how hard of a line to take, with Foster representing the Soviet hard-line and Eugene Dennis, the new general secretary, representing the "center" (and "apparent[ly] majority") view.[161] Furthermore, rank-and-file members used the CPUSA's new direction and Browder's ouster as occasions to criticize publicly the CPUSA's rigid governing structure and hostility toward internal debate.[162] This picture hardly suggests a group whose members or leaders were automatons willing to accept thoughtlessly every Soviet directive. CPUSA members were generally obedient, but they were not robots answering only to one master.

Ultimately, there existed a disconnection between the true state and the popular image of the CPUSA. That popular image, though having roots in the actions and words of domestic communists, was essentially a powerful, political creation—the result of machinations by various government and private anticommunist crusaders. Although some of

155. STEINBERG, *supra* note 10, at 62–63.

156. ISSERMAN, *supra* note 127, at 190–92; STEINBERG, *supra* note 10, at 63. Although the policy was widely accepted, dissension among the ranks still existed. ISSERMAN, *supra* note 127, at 192–99.

157. *See* ISSERMAN, *supra* note 127, at 216–21.

158. STEINBERG, *supra* note 10, at 64–66.

159. *See infra* notes 195–96 and accompanying text.

160. ISSERMAN, *supra* note 127, at 221–23; STEINBERG, *supra* note 10, at 65–66. One historian posits that Browder was largely responsible for his own downfall by refusing to listen to any criticism or defend his convictions. *See* ISSERMAN, *supra* note 127, at 226–29. In other words, Browder's ouster was not the result of Soviet demands, but rather, of his unwillingness to play politics.

161. STEINBERG, *supra* note 10, at 68–69.

162. *See* ISSERMAN, *supra* note 127, at 230–33.

these crusaders believed in the dangers of communism generally, and possibly even that the CPUSA was dangerous, many were under no illusion that the CPUSA posed any real threat to the United States.[163] Nevertheless, the image they purveyed became embedded in the national psyche, and by the time of the *Dennis* trial, "Americans at every level of society genuinely believed that Communism endangered the nation."[164]

II. *DENNIS V. UNITED STATES*

The *Dennis* trial and appeals occurred in the midst of the sentiments described above, timing that had a significant impact on the proceedings. At each level, the popular image of domestic communists played a role in the conduct of trial, coloring such things as the evidence admitted to the tests used to determine the constitutionality of the defendants' convictions.

A. The Trial

The Smith Act indictment of the CPUSA leaders[165] was some time in the making. It began as early as 1940 with the Smith Act's passage, but accelerated in 1946 when the FBI and U.S. Department of Justice (DOJ) began preparing a case against the defendants. Using information gathered over a ten-year period regarding the CPUSA's activities within the United States, the FBI ultimately produced an 1850 page brief (with 846 exhibits) recounting the CPUSA's activities.[166] This brief was "the most complete summary of the activities and aims of American

---

163. For example, President Truman, who authorized the loyalty boards and used the specter of domestic communism to further his foreign policy agenda, never really believed the CPUSA posed a threat to national security. BELKNAP, *supra* note 11, at 41–45. President Truman's attorney general, Tom Clark, who initially prosecuted the *Dennis* defendants, "also considered the party a minimal threat to national security." Belknap, *supra* note 16, at 210. Similarly, anticommunist liberal Arthur Schlesinger, Jr. wrote that "it is hard to argue that the CPUSA in peacetime presents much of a threat to American security. . . . Does anyone seriously believe that even the Communist Party is absurd enough to contemplate a violent revolution in the United States?" ARTHUR M. SCHLESINGER, JR., THE VITAL CENTER: THE POLITICS OF FREEDOM 129 (DaCapo Press, Inc. 1988) (1949). Finally, Dies, although anticommunist, was far more interested in using a fear of communism to advance an anti-New Deal political agenda. *See supra* note 49.

164. SCHRECKER, *supra* note 26, at 154.

165. In addition to Dennis, the other defendants were Foster, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter, and Gus Hall. *See Foster*, 9 F.R.D. at 374. For health reasons, Foster was never tried.

166. BELKNAP, *supra* note 11, at 46.

communism ever assembled."[167] Based upon the its contents, Dennis and the other leaders of the CPUSA were indicted on July 20, 1948[168] for

> conspir[ing] with each other . . . [from 1945 to 1948] to organize as the [CPUSA] a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and knowingly and willfully . . . advocat[ing] and teach[ing] the duty and necessity of overthrowing and destroying the Government of the United States by force and violence.[169]

Notably, the defendants were not indicted for conspiring to overthrow the government or for advocating overthrow of the government, both of which were also crimes under the Smith Act. Despite the FBI's voluminous research, government officials knew there was little or no evidence that CPUSA members advocated force or violence. In fact, one of the attorneys responsible for drafting the indictments against the defendants advised that "'a reading of this [FBI] report makes one realize that the Government will be faced with a difficult task in seeking to prove beyond a reasonable doubt . . . that the Communist Party advocates revolution by violence.'"[170] Hoover also openly acknowledged that building a Smith Act case against the CPUSA defendants was "'going to be a tough case at its best.'"[171]

Lacking sufficient evidence of advocacy of violent overthrow of the U.S. government, prosecutors charged the defendants with *conspiracy* to advocate violent overthrow.[172] A conspiracy indictment, the government apparently reasoned, made proof that each defendant planned or advocated overthrow of the government unnecessary; instead, the government need only prove that they knowingly agreed to advocate such an event at some point in the future. The fact that the defendants never discussed using force or violence against the United States still posed problems for a conspiracy indictment.[173] The government thus

---

167. *Id.*

168. *See Foster*, 9 F.R.D. at 379.

169. *Id.* at 374–75.

170. STEINBERG, *supra* note 10, at 108 (quoting a George F. Kneip memorandum entitled "The Communist Party of the United States of America").

171. SCHRECKER, *supra* note 26, at 192 (quoting a Hoover memorandum to D. Milton Ladd).

172. *Foster*, 9 F.R.D. at 374–75.

173. According to the petitioners' brief to the U.S. Supreme Court, the government introduced into evidence one statement by a defendant regarding the possible need of violence, and no current CPUSA literature advocating violence. Brief for Petitioners, *supra* note 66, at 6–7 & 6 n.3, *reprinted in* 47 LANDMARK BRIEFS, *supra*

shifted its focus to the group, arguing by virtue of its adherence to Marxist-Leninist principles that the CPUSA was itself a conspiracy to advocate overthrow of the government.

According to the government, the defendants:

> [B]rought about meetings in New York City in June and July of 1945 of the National Committee and the National Board and the National Convention of the Communist Political Association, in order to dissolve that Association and to organize in its stead the [CPUSA]. . . . [I]t was a part of the conspiracy that these defendants would assume leadership of the [CPUSA] . . . that the defendants would organize clubs, district and state units of their party . . . that they would recruit new members of their party; and that they, the defendants, would publish books, magazines, and newspapers; that they would organize schools and classes, in all of which it was planned that there would be taught and advocated the Marxist-Leninist principles . . . .
>
> . . . .
>
> . . . [Such principles include the notions:]
> (1) that Socialism cannot be established by peaceful evolution but, on the contrary can be established only by violent revolution; by smashing the machinery of government, and setting up in its stead . . . a dictatorship of the proletariat.
>
> (2) That this smashing of the machinery of government and setting up of the dictatorship of the proletariat can be accomplished only by the violent and forceful seizure of power by the proletariat under the leadership of the Communist Party.[174]

By focusing on the CPUSA's organization and ideology and the defendants' roles within the CPUSA, the government's conspiracy theory operated much like the anticommunist campaign, viewing the CPUSA not as individuals, but as part of a monolithic unit.

---

note 66, at 191–92 & 191 n.3. The government did not contest this statement. It had, however, introduced evidence that random CPUSA members, who were not the defendants, had discussed violence. *Id.* at 11–12, *reprinted in* 47 LANDMARK BRIEFS, *supra* note 66, at 196–97.

174. SCHRECKER, *supra* note 22, at 174–75 (excerpt of the prosecutor's opening statement); *see also Dennis*, 183 F.2d at 206; Louis B. Boudin, *"Seditious Doctrines" and the "Clear and Present Danger" Rule* (pt. 1), 38 VA. L. REV. 143, 178–81 (1952).

The government supported its conspiracy theory with Marxist-Leninist literature, interpretive testimony from witnesses, and evidence regarding the organizational structure and activities of the CPUSA. During the trial, the prosecution introduced a "small mountain of literary evidence"[175]—including Karl Marx and Frederich Engels' *The Communist Manifesto*, Vladimir Lenin's *The State and Revolution*, Joseph Stalin's *Foundations of Leninism*, and the *Program of the Communist International*[176]—ostensibly proving that Marxism-Leninism embraced the necessary establishment of a forcible proletariat dictatorship.[177] This evidence, however, was quite dated, much of it written decades before the defendants' alleged conspiracy.[178] Thus, the prosecution needed witnesses to "'testify that such literature [was] not mere rhetoric but rather that it completely expresse[d] the present-day objectives of the Communist Party.'"[179]

The government's key witness was Louis Budenz, a former CPUSA member who had become a prominent anticommunist lecturer.[180] Asked to interpret a statement in the CPUSA's newly reconstituted 1945 constitution that the organization "bas[ed] itself upon the principles of scientific socialism, Marxism-Leninism," Budenz stated:

> "This sentence, as is historically meant throughout the Communist movement, is that the Communist Party bases itself upon . . . the theory and practice of so-called scientific socialism as appears in the writings of Marx, Engels, Lenin and Stalin, therefore as interpreted by Lenin and Stalin, who have specifically interpreted scientific socialism to mean that socialism can only be attained by the violent shattering of the capitalist state, and the setting up of a dictatorship of the proletariat by force and violence in the place of that state. In the United States this would mean that the [CPUSA] is basically committed to the overthrow of the Government of the

---

175. Belknap, *supra* note 16, at 217.

176. For a description of this evidence, see Brief for the United States at 117-41, *Dennis* (No. 336), *reprinted in* 47 LANDMARK BRIEFS, *supra* note 66, at 459, 586-610.

177. Boudin, *supra* note 174, at 179-80.

178. BELKNAP, *supra* note 11, at 84.

179. SCHRECKER, *supra* note 26, at 195 (quoting an unidentified prosecutorial aide).

180. *Id.* at 83-86; *see also* Belknap, *supra* note 16, at 216. Louis Budenz was one of several witnesses called by the government, most of whom were FBI informants. BELKNAP, *supra* note 11, at 83-90. While those witnesses added little to the government's case, *id.* at 86-90, historians agree that Budenz's testimony dramatically affected the trial, *see, e.g.*, SCHRECKER, *supra* note 26, at 197; STEINBERG, *supra* note 10, at 167.

> United States as set up by the Constitution of the United States."[181]

Although the defense attorneys objected to this interpretation as merely that of one man, the trial judge, believing Budenz's testimony to be the "common understanding of Communists concerning the meaning of the sentence," allowed it.[182] The trial judge further refused to allow the defendants to testify regarding their interpretation of Marxist-Leninist principles,[183] which were less insidious than the government's portrayal.[184]

While Budenz's testimony arguably linked Marxist-Leninist tenets and inevitable revolution (and this was very arguable),[185] the government's case faced another hurdle. The CPUSA's constitution contained an explicit platform calling for expulsion of members who advocated violence,[186] which flatly contradicted Budenz's interpretation of the CPUSA's beliefs. Budenz responded that the CPUSA engaged in doublespeak. According to his testimony, "'portions of [the CPUSA's] constitution which are in conflict with Marxism-Leninism are null in effect. They are merely window dressing asserted for protective purposes, the Aesopian language of V.I. Lenin.'"[187] In essence, Budenz claimed that one could dismiss the CPUSA's prohibition of violence as an attempt to mislead the public about the organization's true aims.[188]

---

181. BELKNAP, *supra* note 11, at 84–85 (quoting Budenz's testimony); *see also* Brief for the United States, *supra* note 176, at 25–26, *reprinted in* 47 LANDMARK BRIEFS, *supra* note 66, at 494–95.

182. BELKNAP, *supra* note 11, at 84.

183. Petition for Writ of Certiorari to the Court of Appeals for the Second Circuit at 40–47, *Dennis* (No. 336) [hereinafter Petition for Writ of Certiorari], *reprinted in* 47 LANDMARK BRIEFS, *supra* note 66, at 3, 47–54.

184. Brief for Petitioners, *supra* note 66, at 7–24, *reprinted in* 47 LANDMARK BRIEFS, *supra* note 66, at 192–209.

185. Both the defendants and objective observers argued that the prosecution had taken these quotations out of context. SCHRECKER, *supra* note 26, at 198; Belknap, *supra* note 16, at 219–20; Boudin, *supra* note 174, at 181–86.

186. Brief for Petitioners, *supra* note 66, at 25, *reprinted in* 47 LANDMARK BRIEFS, *supra* note 66, at 210 (describing the CPUSA constitution's provisions); *see also* SCHRECKER, *supra* note 26, at 194; STEINBERG, *supra* note 10, at 162–63.

187. STEINBERG, *supra* note 10, at 163 (quoting Budenz's March 29, 1949 testimony); *see also* BELKNAP, *supra* note 11, at 85–86. The phrase "Aesopian language" refers to Vladimir I. Lenin's earlier statement that "in order to avoid Tsarist censorship, he had to make political observations 'with extreme caution by hints in that Aesopian language—in that cursed Aesopian language to which Czarism compelled all revolutionaries to have recourse whenever they took up their pens to write a "legal" work.'" SCHRECKER, *supra* note 26, at 194.

188. Budenz's testimony largely tracked the FBI's strategy. In compiling its brief, the FBI was "particularly troubled by the fact that the prospective defendants not only did not call for the overthrow of the American government by force and violence, but also explicitly denied that they wanted to do so. Even worse were the inconvenient

Although there was no concrete evidence that the CPUSA used Aesopian language,[189] Budenz's claim became a central aspect of the case against the defendants.

From an evidentiary standpoint, Budenz's testimony dealt a near-death blow to the CPUSA's defense. Although the prosecution never established a single, concrete incident in which any of the defendants agreed to teach or advocate the use of violence against the U.S. government, his statements drew the necessary links. As one commentator noted, "[b]y equating the Communist party's creed with the violent overthrow of the government and then defining anything tending to contradict this characterization as, for that reason alone, a lie, Budenz had not only settled the crucial issue in the case but also rendered any real defense impossible."[190]

The defendants, however, had one final argument. Relying on the First Amendment, the defendants argued that the Smith Act was unconstitutional because it allowed the government to try them for their beliefs.[191] Judge Harold Medina, who presided over the trial, had similar concerns. In his jury instructions, Judge Medina began by noting that freedom of speech is

> [a]mong the most vital and precious liberties which we Americans enjoy by virtue of our Constitution . . . . We must be careful to preserve these rights unimpaired in all their vigor.
>
> . . . .

---

passages in the party's constitution that specifically abjured revolutionary violence . . . ." SCHRECKER, *supra* note 26, at 194. The FBI thus turned to the "Aesopian" language argument to bolster its case against the defendants. *Id.* at 194–95.

189. During its investigation, the FBI asked its field offices "to investigate the party's use of the term. From Boston, Detroit, Chicago, Philadelphia, San Francisco, and elsewhere, the responses were all the same. Informants were 'not aware of the existence of the Aesopian language'. . . ." *Id.* at 194–95.

190. Belknap, *supra* note 16, at 216.

191. *See* United States v. Foster, 80 F. Supp. 479, 483 (S.D.N.Y. 1948). The trial judge denied the defendants' motion for a directed verdict, which claimed that the prosecution had shown no "clear and present danger" of harm as required by First Amendment doctrine. *See* Nathaniel L. Nathanson, *The Communist Trial and the Clear-and-Present-Danger Test*, 63 HARV. L. REV. 1167, 1167–68 (1950). In a pretrial motion to dismiss the indictments, which the judge also denied, the defendants made a similar argument. *See Foster*, 80 F. Supp. at 483–85. The constitutional argument is discussed more fully below. *See infra* Parts II.B–C.

> . . . [I]t is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by [the Smith Act] . . . .[192]

Rather, Judge Medina instructed that the defendants violated the Smith Act only if they intended to accomplish particnlar action by using language that was "reasonably and ordinarily calculated" to incite people:

> You must be satisfied from the evidence beyond a reasonable doubt that the defendants had an intent to cause the overthrow or destruction of the Government of the United States by force and violence, and that it was with this intent and for the purpose of furthering that objective that they conspired both (1) to organize the [CPUSA] as a group or society [that] teach[es] and advocate[s] the overthrow or destruction of the Government of the United States by force and violence and (2) to teach and advocate the duty and necessity of overthrowing or destroying the Government of the United States by force and violence. And you must further find that it was the intent of the defendants to achieve this goal . . . as speedily as circumstances would permit it to be achieved.[193]

While Judge Medina avoided the constitutional problem of trying the defendants for their beliefs, he did so only by turning the conspiracy charge from one involving advocacy of overthrow into one involving attempted overthrow of the government.[194] The defendants, however, were not indicted for conspiring to overthrow the government. Moreover, if there was no evidence that the defendants agreed to advocate overthrow of the government, there was certainly no evidence that they had actually planned one. Thus, Judge Medina's transformation of the conspiracy charge itself lacked solid foundation. In order to solve this problem, Judge Medina relied on a different evidentiary foundation—the clandestine operations of the CPUSA.

Throughout the trial, the prosecution portrayed the CPUSA in much the same way as the anticommunists—that is, as an autocratic organization that trained rigidly disciplined members completely loyal to

192. *Foster*, 9 F.R.D. at 389–91.

193. *Id.* at 391.

194. *See* Louis B. Boudin, *"Seditious Doctrines" and the "Clear and Present Danger" Rule* (pt. 2), 38 VA. L. REV. 315, 324–25 (1952); Nathanson, *supra* note 191, at 1172.

the Soviet Union.[195] The government believed that its portrayal gave the CPUSA a conspiratorial cast, transforming it from an organization merely discussing overthrow as an abstract doctrine to an organization actually taking steps toward such overthrow.[196] Judge Medina relied on a similar reading of the evidence, instructing the jury that, while it could not infer intent to incite "from the open and aboveboard teaching of a course on the principles and implications of Communism," it was "to weigh with scrupulous care the testimony concerning secret schools, false names, devious ways, general falsification and so on, all alleged to be in the setting of a huge and well-disciplined organization, spreading to practically every State of the Union and all principal cities, and industries."[197] The popular image of the CPUSA thus became an integral aspect of its alleged guilt.

This was the state of affairs as the jury began to deliberate. A trial that began with an indictment for conspiring to organize as a group advocating violent overthrow of the government concluded as a trial about something very different—the defendants' alleged conspiracy to overthrow the government. What little documentary evidence there was related entirely to advocacy of overthrow rather than conspiracy of actual overthrow, and that evidence did little more than reflect communist ideology. Nevertheless, combined with allegations of CPUSA secrecy and jury instructions designed to fill in the blanks, the literary evidence proved quite compelling. The jury reached a guilty verdict in under eight hours, and on October 20, 1949, Judge Medina sentenced the defendants to three to five years in jail and $10,000 each in fines.[198]

B. Appeal to the Second Circuit

The defendants immediately appealed their convictions to the U.S. Court of Appeals for the Second Circuit, arguing that the prosecution violated their right to free expression[199] under the Supreme Court doctrine that the government could criminally punish speech only if there existed "a clear and present danger that [it] will bring about the

---

195. *See* Brief for the United States, *supra* note 176, at 37–61, *reprinted in* 47 LANDMARK BRIEFS, *supra* note 66, at 506–30.

196. STEINBERG, *supra* note 10, at 165–66; *see also* BELKNAP, *supra* note 11, at 109.

197. *Foster*, 9 F.R.D. at 391. Judge Harold Medina refused to allow introduction of much of the defendants' evidence explaining its organization and clandestine behavior. Petition for Writ of Certiorari, *supra* note 183, at 44–46, *reprinted in* 47 LANDMARK BRIEFS, *supra* note 66, at 51–53.

198. Belknap, *supra* note 16, at 221.

199. *Dennis*, 183 F.2d at 205–07. The defendants also raised issues with respect to jury selection and the admissibility of certain evidence. *Id.* at 215–34.

substantive evils that Congress has a right to prevent."[200] In the years leading up to *Dennis*, the Supreme Court had applied that test quite stringently, requiring that "the substantive evil . . . be extremely serious and the degree of imminence extremely high before utterances can be punished."[201] According to the defendants, because the evidence showed only that the CPUSA adhered to certain beliefs, the government could never satisfy this strict version of the test.[202] Moreover, they argued, Judge Medina's construction of the Smith Act violated the clear and present danger test because it read the doctrine's "imminence" requirement out of existence, instead replacing it with a requirement that harm occur "as speedily as circumstances would permit."[203]

The Second Circuit nevertheless upheld the defendants' convictions, holding that they did not violate the First Amendment. Judge Learned Hand, author of the majority opinion, agreed that the clear and present danger test was appropriate for judging the constitutionality of the defendants' convictions.[204] After a thorough review of earlier cases, he also acknowledged that current versions of the test made "immediacy of the 'substantive evil' a condition" of punishment.[205] He concluded, however, that the imminence requirement reflected a belief that "a substantial intervening period between the utterance and its realization may check its effect and change its importance"—that is, nonimminent harm was often less probable because the opportunity for counterdebate might stop it.[206] In some

200. Schenck v. United States, 249 U.S. 47, 52 (1919).

201. Bridges v. California, 314 U.S. 252, 263 (1941); *see also* Schneiderman v. United States, 320 U.S. 118, 125 (1943); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 663 (1943) (Frankfurter, J., dissenting); Taylor v. Mississippi, 319 U.S. 583, 589–90 (1943); Thornhill v. Alabama, 310 U.S. 88, 104–05 (1940).

202. *See* BELKNAP, *supra* note 11, at 125.

203. *See Dennis*, 183 F.2d at 215.

204. *Id.* at 212–13, 234. This was initially a small, if temporary and ultimately empty, victory for the defendants. Beginning with its opposition to the defendants' earlier motion for a directed verdict at trial, the government maintained that the Court should apply the doctrine in *Gitlow v. New York*, 268 U.S. 652 (1925), rather than the clear and present danger test. Nathanson, *supra* note 191, at 1167–68. In *Gitlow*, the Court held that the clear and present danger test was inapplicable to statutes that directly targeted speech, as opposed to acts, and instead ruled that deference to a legislative finding of danger was appropriate. 268 U.S. at 670–72. Because the Smith Act targeted speech advocating overthrow of the government, the *Gitlow* doctrine, though generally thought to have fallen out of favor, arguably applied. At trial, Judge Medina may have believed that *Gitlow* was controlling, although he never actually said so when denying the defendants' motion for a directed verdict. Nathanson, *supra* note 191, at 1167–68. Judge Harry Chase, who concurred in the U.S. Court of Appeals for the Second Circuit's opinion, also argued that the more deferential *Gitlow* doctrine should have been applied. *Dennis*, 183 F.2d at 237 (Chase, J., concurring).

205. *Dennis*, 183 F.2d at 208.

206. *Id.* at 212.

cases, however, the probability of an event was unrelated to its imminence. Thus, Judge Hand refined the test to ask "whether the gravity of the 'evil,' discounted by its improbability, justifie[d] such invasion of free speech as [was] necessary to avoid the danger."[207] According to Judge Hand, he had "purposely substituted 'improbability' for 'remoteness' . . . . Given the same probability, it would be wholly irrational to condone future evils which we should prevent if they were immediate."[208]

Judge Hand then explained why the evidence against the defendants satisfied his version of the test. That evidence, he argued, established that the defendants advocated Marxism-Leninism, which had as a central tenet the "temporary . . . but inescapable" use of violence to overthrow existing regimes.[209] Indeed, the evidence on this point was so clear that a "jury could scarcely have found otherwise."[210] In a tortured passage discussing the nature of the CPUSA, Judge Hand continued:

> The [CPUSA] . . . is a highly articulated, well contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined . . . . It seeks converts far and wide by an extensive system of schooling, demanding of all an inflexible doctrinal orthodoxy. The violent capture of all existing governments is one article of the creed of [its] faith, which abjures the possibility of success by lawful means. That article . . . is a part of the homiletics for novitiates, although . . . it is covered by an innocent terminology, designed to prevent its disclosure. . . . The advocacy of violence may, or may not, fail; but in neither case can there be any "right" to use it. Revolutions are often "right," but a "right of revolution" is a contradiction in terms, for a society which acknowledged it, could not stop at tolerating conspiracies to overthrow it, but must include their execution. . . . When does the conspiracy become a "present danger"? The jury has found that the conspirators will strike as soon as success seems possible, and obviously, no one in his senses would strike sooner.[211]

---

207. *See id.*
208. *Id.*
209. *Id.* at 206.
210. *Id.*
211. *Id.* at 212–13. During oral argument, Judge Learned Hand similarly seems to have pursued the notion that the defendants were essentially guilty of a conspiracy to overthrow the government. *See* BELKNAP, *supra* note 11, at 125.

Judge Hand thus concluded that the evil of attempted overthrow, if not imminent, was probable. World conditions bolstered his argument:

> We need not say that even so thoroughly planned and so extensive a confederation would be a "present danger" at all times and in all circumstances; the question is how imminent: that is, how probable of execution—it was in the summer of 1948, when the indictment was found. We must not close our eyes to our position in the world at that time. By far the most powerful of all the European nations had been a convert to Communism for over thirty years; its leaders were the most devoted and potent proponents of the faith . . . . Moreover in most of West Europe there were important political Communist factions, always agitating to increase their power; and the defendants were acting in close concert with the movement. . . . Any border fray, any diplomatic incident, any difference in construction of the *modus vivendi*—such as the Berlin blockade . . . might prove a spark in the tinder-box, and lead to war.[212]

Given these facts, he could not "understand how one could ask for a more probable danger, unless we must wait till the actual eve of hostilities."[213]

In upholding the defendants' convictions, Judge Hand engaged in a sleight of hand similar to Judge Medina's. Recognizing that mere advocacy of an idea could not be punished consistent with the Constitution, Judge Hand transformed the CPUSA's activities from advocacy of political ideology into those of a sinister, secretive, and widespread organization biding its time before attempting an inevitable, violent revolution.[214] He accomplished this transformation by focusing on the CPUSA's character and by taking judicial notice of world events that were unrelated to the CPUSA.[215]

With the harm characterized as such, Judge Hand could far more easily justify his dramatic departure from the existing formulation of the clear and present danger test, and, Judge Hand's characterization notwithstanding, a dramatic departure it was.[216] In earlier decisions,

---

212. *Dennis*, 183 F.2d at 213.

213. *Id.*

214. *See Dennis*, 183 F.2d at 206–07, 212–13. For similar characterizations, see Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 217–18 (1952); and Frances D. Wormuth, *Learned Legerdemain: A Grave but Implausible Hand*, 6 W. POL. Q. 543, 549 (1953).

215. *See Dennis*, 183 F.2d at 212–13.

216. Scholars almost universally agree regarding this fact. *See, e.g.*, KALVEN, JR., *supra* note 10, at 190–91; Chester James Antieau, Dennis v. United States—

imminence was part of the assessment of the probability of harm. That is, imminence and probability were integrally related, with the imminence of harm being very good evidence that it was probable and unlikely to be affected by counterspeech.[217] The Supreme Court had arrived at the imminence requirement as a result of earlier, heavily criticized decisions allowing punishment of speech based upon minimal evidence of possible, future harm.[218] By focusing on probability not as a function of imminence, but as a function of the CPUSA's character, Judge Hand both gutted the clear and present danger test and provided the Second Circuit with an easy, but circular, justification for upholding the defendants' convictions.

C. The Supreme Court Weighs In

Having lost in the Second Circuit, the defendants' last hope lay with the Supreme Court. The defendants' appeal again relied on free speech arguments. The petitioners had some reason to hope for success in the Supreme Court. In *Schneiderman v. United States*, decided eight years earlier, the Court struck down the government's attempt to strip a CPUSA leader of citizenship because of the organization's alleged dedication to violent overthrow of the United States.[219] According to the Court, the evidence—much of which was identical to the literature presented in *Dennis*—could lead one to conclude "that the [CPUSA] in

---

Precedent, Principle or Perversion?, 5 VAND. L. REV. 141, 142–43 (1952); Boudin, *supra* note 194, at 329; Robert McCloskey, *Free Speech, Sedition and the Constitution*, 45 AM. POL. SCI. REV. 662, 668 (1951); Rostow, *supra* note 214, at 219; Note, *Clear and Present Danger Re-Examined*, 51 COLUM. L. REV. 98, 104–05 (1951); Note, *Post-*Dennis *Prosecutions Under the Smith Act*, 31 IND. L.J. 104, 116 (1955).

217. *See* Chester James Antieau, *"Clear and Present Danger"—Its Meaning and Significance*, 25 NOTRE DAME LAW. 603, 603–07 (1950); Antieau, *supra* note 216, at 144–45; McCloskey, *supra* note 216, at 667–68.

218. As originally applied, the Court used the clear and present danger test to uphold convictions based on little more than political criticism. *See* Abrams v. United States, 250 U.S. 616, 619–24 (1919); Debs v. United States, 249 U.S. 211, 214–15 (1919); Frohwerk v. United States, 249 U.S. 204, 209–10 (1919); *Schenck*, 249 U.S. at 51–53. During this period, the test's primary proponents, Justices Oliver Wendell Holmes and Louis Brandeis, nevertheless argued that it was stringent, requiring both a substantive evil and a danger of imminent harm before speech could be punished. *See* Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring); *Gitlow*, 268 U.S. at 672–73 (Holmes, J., dissenting); *Abrams*, 250 U.S. at 627–28 (Holmes, J., dissenting). In the decade preceding *Dennis*, the Supreme Court accepted the Holmes-Brandeis version of the test. *See supra* note 201. For discussions tracing the meaning and evolution of the clear and present danger test, see Chester James Antieau, *The Rule of Clear and Present Danger: Scope of Its Applicability*, 48 MICH. L. REV. 811, 811–16 (1950); Boudin, *supra* note 174, at 154–77; Mendelson, *supra* note 2, at 314–28; and Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 SAN DIEGO L. REV. 1, 31–36 (1991).

219. 320 U.S. at 158–59.

1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner."[220] The government thus had not demonstrated a clear and present danger of harm justifying denaturalization.[221] "There is a material difference," the Court wrote, "between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time."[222] Both the Court's interpretation of the clear and present danger test and its characterization of the CPUSA's teachings favored the *Dennis* defendants.

Unfortunately, a year before *Dennis*, the Court issued a less favorable opinion regarding communists. In *American Communications Ass'n v. Douds*, the Court upheld the National Labor Relations Act's requirement that union officers file oaths certifying that they did not belong to an organization advocating violent overthrow of the government.[223] The *Douds* Court indicated that the CPUSA's alleged involvement in political strikes supported the oath requirement, specifically relying on a vision of the CPUSA similar to the popular image:

> Substantial amounts of evidence were presented to various committees of Congress . . . that Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government.[224]

Because the *Douds* Court relied on the commerce clause,[225] the decision was not controlling authority in *Dennis*. Nevertheless, its less favorable view of the CPUSA ultimately triumphed, as the *Dennis* Court upheld, in a six to two vote, the constitutionality of the Smith Act.[226]

Chief Justice Fred M. Vinson authored the plurality opinion on behalf of himself and Justices Stanley Reed, Harold Burton, and Sherman Minton.[227] Chief Justice Vinson rejected the defendants' facial

220. *Id.* at 157.
221. *Id.* at 157–58.
222. *Id.* at 157.
223. 339 U.S. at 415.
224. *Id.* at 388.
225. *See id.* at 406.
226. 341 U.S. at 516–17.
227. *Id.* at 495.

attack on the statute, concluding that the Smith Act punished only speech advocating overthrow of the government, and not discussion of the merits of Marxism-Leninism.[228] He acknowledged, however, that the statute's application might violate the First Amendment if the targeted speech did not present a clear and present danger of harm.[229] The essential question in the case thus centered around the meaning and application of that phrase.

Like Judge Hand, Chief Justice Vinson reviewed previous clear and present danger cases.[230] Acknowledging that many of those cases rejected the government's attempt to punish speech, he nevertheless distinguished them as involving qualitatively different harm than that posed by the CPUSA and far less evidence of danger.[231] According to Chief Justice Vinson, *Dennis* involved "[o]verthrow of the Government by force and violence [which] is certainly a substantial enough interest for the Government to limit speech. . . . [F]or if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected."[232] Given the enormity of this potential harm, the Chief Justice argued that a rigid application of the clear and present danger test would "paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket."[233] Chief Justice Vinson thus adopted Judge Hand's version of the test—that is, asking "'whether the gravity of the "evil," discounted by its improbability,'" justified a restriction of speech.[234]

---

228. *Id.* at 501–02.

229. *Id.* at 505.

230. *Id.* at 503–08.

231. *See id.* at 508–09.

232. *Id.* at 509.

233. *Id.* at 508. As Chief Justice Fred M. Vinson further noted, the clear and present danger test could not possibly mean that

> before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If 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, action by the Government is required.

Id. at 509.

234. *Id.* at 510. Chief Justice Vinson's adoption of that version of the test was not a total surprise. In *Douds*, he also described the clear and present danger test as flexible:

> [I]t was never the intention of this Court to lay down an absolutist test measured in terms of danger to the Nation. When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity.

339 U.S. at 397.

Applying this test, Chief Justice Vinson found that the gravity of the evil justified the government's actions.[235] He further found that the harm of attempted overthrow, though not imminent, was probable:

> [T]he Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language . . . is rigidly controlled . . . unlike other political parties, tolerate[s] no dissension from the policy laid down by the guiding forces, but . . . the approved program is slavishly followed by the members of the Party . . . [and] the literature of the Party and the statements and activities of its leaders . . . advocate, and the general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force or violence.
>
> . . . .
>
> . . . The formation . . . of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that [the petitioners'] convictions were justified. . . .[236]

Ultimately, Chief Justice Vinson, like Judges Hand and Medina, relied heavily on the popular image of the CPUSA to transform what was

---

235. *See Dennis*, 341 U.S. at 510.

236. *Id.* at 498, 510–11. Chief Justice Vinson did not review the evidence supporting his argument that the clear and present danger test was satisfied because he interpreted the limited grant of certiorari as "remov[ing] from our consideration any question as to the sufficiency of the evidence to support the jury's determination that petitioners are guilty of the offense charged." *Id.* at 497. Rather than consider the evidentiary issues that so dominated the lower courts' attention, the plurality instead took as a given the findings of the court of appeals, which Chief Justice Vinson concluded "amply supports . . . that petitioners, the leaders of the Communist Party in this country, were unwilling to work within our framework of democracy, but intended to initiate a violent revolution whenever the propitious occasion appeared." *Id.* Several scholars criticized this limited interpretation of the grant of certiorari, noting that the issue of whether advocacy posed a clear and present danger depended heavily upon the evidence regarding the defendants' conduct, not simply an analysis of the legal test. *See* Antieau, *supra* note 216, at 143; Boudin, *supra* note 194, at 332; Louis L. Jaffe, *The Supreme Court, 1950 Term—Foreward*, 65 HARV. L. REV. 107, 111 (1951).

essentially an ideological belief into a conspiracy to overthrow the government.

Justice Felix Frankfurter concurred in the result. Arguing that the clear and present danger test required the Court to engage in a difficult balancing process for which it was ill-equipped, Justice Frankfurter concluded that the justices should defer to Congress's determination regarding the danger posed by the CPUSA's beliefs.[237] That Congress had a reasonable basis for adopting the Smith Act was obvious to Justice Frankfurter:

> We may take judicial notice that the Communist doctrines which these defendants have conspired to advocate are in the ascendancy in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country. We may [also] take account of evidence brought forward at this trial and elsewhere, much of which has long been common knowledge. In sum, it would amply justify a legislature in concluding that recruitment of additional members for the Party would create a substantial danger to national security.
>
> In 1947 . . . at least 60,000 members were enrolled in the Party. . . . [T]he membership was organized in small units, linked by an intricate chain of command, and protected by elaborate precautions designed to prevent disclosure of individual identity. There are no reliable data tracing acts of sabotage or espionage directly to these defendants. But a Canadian Royal Commission appointed in 1946 to investigate espionage reported that it was "overwhelmingly established" that "the Communist movement was the principal base within which the espionage network was recruited." The most notorious spy in recent history was led into the service of the Soviet Union through Communist indoctrination. Evidence supports the conclusion that members of the Party seek and occupy positions of importance in political and labor organizations.[238]

Justice Robert H. Jackson also concurred in the result, although his reasoning differed from both Chief Justice Vinson and Justice Frankfurter. According to Justice Jackson, the clear and present danger test applied in cases in which the defendants openly advocated the use of

---

237. *See Dennis*, 341 U.S. at 525–27 (Frankfurter, J., concurring in affirmance of the judgment).

238. *Id.* at 547–48 (Frankfurter, J., concurring in affirmance of the judgment) (footnotes omitted).

force or violence.[239] The CPUSA, however, operated by a "strategy of stealth [which] preclude[d] premature or uncoordinated outbursts of violence, except, of course, when the blame will be placed on shoulders other than their own. . . . Force or violence, as they would resort to it, may never be necessary, because infiltration and deception may be enough."[240] Application of the clear and present danger test in these circumstances held the government "captive in a judge-made verbal trap,"[241] and should have been discarded.

Justices Hugo L. Black and William O. Douglas dissented, with both accusing their colleagues of falling prey to passion and fear.[242] Justice Black's opinion was relatively brief, noting primarily that the affirmance of the convictions required repudiation of the clear and present danger test, a move he believed inconsistent with the First Amendment.[243] Justice Douglas was far more scathing, attacking the plurality and concurring justices for obfuscating the real issues.[244] "This case," he wrote, "was argued as if [seditious conduct] were the facts. . . . That is easy and it has popular appeal, for the activities of Communists in plotting and scheming against the free world are common knowledge. But the fact is that no such evidence was introduced at the trial."[245]

The present record, he continued, showed nothing more than that the CPUSA members "organize[d] people to teach and themselves [taught] the Marxist-Leninist doctrine contained chiefly in four books."[246] Without more, these teachings did not present a clear and present danger to the United States, notwithstanding the plurality's reliance on world conditions and the popular image of the CPUSA.[247] "We might as well say," he scoffed, "that the speech of petitioners is outlawed because Soviet Russia and her Red Army are a threat to world peace."[248] Because there was no evidence that the CPUSA as an entity posed an internal threat—indeed, the evidence showed exactly the

---

239. *See id.* at 568–70 (Jackson, J., concurring).

240. *Id.* at 564–65 (Jackson, J., concurring). As with Chief Justice Vinson, Justice Robert H. Jackson's concurring opinion in *Douds* presaged his *Dennis* conclusions. *See Douds*, 339 U.S. at 424 (Jackson, J., concurring in part and dissenting in part) ("Congress could rationally conclude that, behind its political party façade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system.").

241. *Dennis*, 341 U.S. at 568 (Jackson, J., concurring).

242. *See id.* at 581 (Black, J., dissenting); *id.* at 589–90 (Douglas, J., dissenting).

243. *Id.* at 579–80 (Black, J., dissenting).

244. *See id.* at 581 (Douglas, J., dissenting).

245. *Id.* (Douglas, J., dissenting).

246. *Id.* at 582 (Douglas, J., dissenting).

247. *See id.* at 587–88 (Douglas, J., dissenting).

248. *Id.* (Douglas, J., dissenting).

opposite—Justice Douglas argued that the convictions violated the First Amendment.[249]

III. THE PSYCHOLOGY OF THREAT PERCEPTION

Dennis occurred during a period of extreme intolerance—that is, an "[un]willingness to 'put up with' those things that one rejects"[250]—toward the CPUSA, which profoundly and negatively affected the legal proceedings. Accordingly, most observers characterize *Dennis* as a cautionary tale about the effects of such intolerance on presumably dispassionate tribunals.[251] If we wish more effectively to insulate judges from such influences, however, we must attempt to understand (1) the mechanisms by which intolerance against the CPUSA came about, and (2) whether those mechanisms operated within the courts.

Political scientists conclude that intolerance is primarily a function of threat perception.[252] The more threatening a group appears to be, the more likely we are to be intolerant of it.[253] During the period in which the *Dennis* legal proceedings occurred, Americans considered domestic communists to be a significant threat and, consequently, either engineered, demanded, or supported politically repressive acts such as the *Dennis* prosecutions. This intolerance was not irrational, but it was based upon greatly exaggerated views of the CPUSA's dangerousness.

There are two ways in which Americans' perceptions of the CPUSA's dangerousness might have become exaggerated.[254] First, Americans could have exaggerated the threat after a process of risk assessment—that is, assessment of the nature and probability of certain events (in this case, overthrow of the U.S. government).[255] Much

---

249. *Id.* at 587–91 (Douglas, J., dissenting).

250. John L. Sullivan et al., *An Alternative Conceptualization of Political Tolerance: Illusory Increases 1950s–1970s*, 73 AM. POL. SCI. REV. 781, 784 (1979); *see also* JOHN L. SULLIVAN ET AL., POLITICAL TOLERANCE AND AMERICAN DEMOCRACY 52 (1982) [hereinafter POLITICAL TOLERANCE].

251. *See supra* note 16.

252. POLITICAL TOLERANCE, *supra* note 250, at 251 ("The factors most strongly and consistently related to tolerance are perceptions of threat from target groups and two psychological constructs, self-esteem and dogmatism.").

253. *Id.*; John Mueller, *Trends in Political Tolerance*, 52 PUB. OPINION Q. 1, 16–17 (1988); *see also* Donald R. Kinder, *Opinion and Action in the Realm of Politics*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 778, 790 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

254. Political scientists have identified two routes to political tolerance judgments: "people either can respond to the group (e.g., 'I do not like communists') or to the possible consequences of the act (e.g., 'if communists hold a public rally, they may incite a riot')." James H. Kuklinski et al., *The Cognitive and Affective Bases of Political Tolerance Judgments*, 35 AM. J. POL. SCI. 1, 4 (1991).

255. *See, e.g.*, Klaus Knorr, *Threat Perception*, *in* HISTORICAL DIMENSIONS OF NATIONAL SECURITY PROBLEMS 78, 79 (Klaus Knorr ed., 1976) ("Perception of actual or

research shows that psychological biases can cause individuals to overestimate the likelihood of a particular event.[256] Such biases could have affected individuals considering the dangers posed by domestic communists. Second, Americans could have focused not on a particular event but on the threatening nature of the CPUSA as a group. In that scenario, Americans' perceptions that the CPUSA threatened their values may have caused prejudice and hostility leading to intolerance.[257] This Part will discuss these psychological phenomena and their potential role in the anticommunist hysteria surrounding the *Dennis* decision.

A. The Psychology of Threat Perception

1. THREAT PERCEPTION AND RISK ASSESSMENT[258]

Accurate assessment of risk requires a complex balancing of the nature of the risk, the probability of its occurrence, and the implications of acting or failing to act. While people engage in risk assessment all of the time,[259] this complex balancing is time consuming. Thus, people use heuristics (that is, mental shortcuts based upon past experience) to make judgments about whether events will occur.[260] While these shortcuts are generally useful and reasonably accurate ways to assess risk, they can also lead to "biases," which lead people to overestimate the likelihood of a particular risk.[261]

---

potential threats involves the estimate of probabilities about whether the anticipated harm will materialize.").

256. *See, e.g., id.* at 85.

257. GEORGE E. MARCUS ET AL., WITH MALICE TOWARD SOME: HOW PEOPLE MAKE CIVIL LIBERTIES JUDGMENTS 102, 113 (1995); POLITICAL TOLERANCE, *supra* note 250, at 186-94; *see also* Dennis Chong, *How People Think, Reason, and Feel About Rights and Liberties*, 37 AM. J. POL. SCI. 867, 889 (1993).

258. Portions of Part III.A are adapted from Wells, *supra* note 3, at 921-29.

259. *See* Paul Slovic et al., *Decision Processes, Rationality and Adjustment to Natural Hazards* [hereinafter Slovic et al., *Decision Processes*], *in* PAUL SLOVIC, THE PERCEPTION OF RISK 1, 9 (Ragnar E. Lofstedt ed., 2000) [hereinafter PERCEPTION OF RISK] (noting the "importance of probabilistic reasoning to decision-making in general"). Even the simplest of tasks often involves risk assessment. For example, the determination of whether to take an umbrella to work depends upon one's assessment of the likelihood that it will rain that day.

260. *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 3 (Daniel Kahneman et al. eds., 1982) [hereinafter JUDGMENT UNDER UNCERTAINTY].

261. *Id.*; *see also* Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 769 (1990). Many of these biases can also lead to underestimation of the probability of certain risks. *See* Tversky & Kahneman, *supra* note 260, at 3. This Article focuses on the overestimation of risk because of the circumstances in which risk assessment took place.

The most relevant of these heuristics for purposes of threat perception is the availability heuristic. The term "availability" refers to individuals' tendency to assess "the probability of an event by the ease with which instances or occurrences can be brought to mind."[262] When examples come to mind quickly, people tend to assume that there "must be a lot of them."[263] Conversely, when examples do not come to mind easily, people tend to assume there are few of them. Thus, the easier it is to bring something to mind, the more "available" it is, and the more available an incident is, the more likely one is to overestimate its occurrence.

An event's "salience" is a significant factor regarding its availability, and possibly one of the biggest aspects of skewed risk assessment.[264] Many things can make an event salient. An event that is very familiar to an individual—for example, due to personal experience—is more available to her than if she simply heard or read news reports about it.[265] While one who has personally experienced an event will find it more salient than one who has simply heard or read news reports about it, intense media coverage can also make an event salient.[266] This is especially true if an event is vivid, such as an airplane crash, as opposed to mundane, such as a traffic accident.[267] Recent events also tend to be more salient.[268]

Finally, events are also more available to an individual as they become more imaginable.[269] That is, people are more likely to

---

262. Tversky & Kahneman, *supra* note 260, at 11; *see also* Slovic et al., *Decision Processes*, *supra* note 259, at 13.

263. Shelley E. Taylor, *The Availability Bias in Social Perception and Interaction*, *in* JUDGMENT UNDER UNCERTAINTY, *supra* note 260, at 190, 191–92.

264. *See id.* at 192 ("Salience biases refer to the fact that colorful, dynamic, or other distinctive stimuli disproportionately engage attention and accordingly disproportionately affect judgments.").

265. Tversky & Kahneman, *supra* note 260, at 11. For example, if a person has several family members who have suffered from cancer, she will likely predict that cancer occurs more frequently than if she has no family members with cancer. Although the actual incidence of cancer does not change, the individual's familiarity with the disease leads her to overestimate its likelihood of occurrence.

266. *See* MAX BAZERMAN, JUDGMENT IN MANAGERIAL DECISION MAKING 14 (4th ed. 1998) ("The availability of instances in the media frequently biases our perception of the frequency of events.").

267. *See* Tversky & Kahneman, *supra* note 260, at 11.

268. For example, after an earthquake, "the proportion of people carrying earthquake insurance rises sharply—but it declines steadily from that point, as vivid memories recede." Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 64 (2002); *see also* Slovic et al., *Decision Processes*, *supra* note 259, at 14 (noting that, "in making forecasts of future flood potential, individuals 'are strongly conditioned by their immediate past and limit their extrapolation to simplified constructs, seeing the future as a mirror of that past'") (quoted source omitted).

269. *See* Slovic et al., *Decision Processes*, *supra* note 259, at 12–13.

overestimate the occurrence of an event the easier it is to conceive of, which can have special ramifications for events with potentially catastrophic but unlikely occurrences.[270] According to Professors Daniel Kahneman and Amos Tversky:

> The risk involved in an adventurous expedition . . . is evaluated by imagining contingencies with which the expedition is not equipped to cope. If many such difficulties are vividly portrayed, the expedition can be made to appear exceedingly dangerous, although the ease with which disasters are imagined need not reflect their actual likelihood.[271]

In sum, an event is more available to an individual if she has previously personally experienced it, or if it is highly imaginable or is the subject of widespread and intense media coverage. Although the probability of that event's occurrence might be low, individuals may nevertheless overestimate its likelihood.

The perception that a threatened event is calamitous may also skew probability assessments and, consequently, result in misperception of the alleged threats. The magnitudes of threatened harms vary drastically, ranging from minor to significant to catastrophic. How do people discriminate between such potentially harmful events? Although risk means different things to different people, Professor Paul Slovic has developed a taxonomy regarding risk attitudes that spans the population, making it possible to gauge societal assessments of the comparative magnitude of certain harms.[272] According to Slovic, individuals perceive risks as more serious the more dreaded and unknown they are.[273] A risk is considered to be "dreaded" if people perceive that: (1) it is potentially catastrophic or fatal, (2) it is involuntary, and (3) they lack control over it.[274] A risk is "unknown" if it is (1) new, (2) unobservable, (3) lacking in immediacy, and (4) not understood.[275] A

---

270. *See id.* at 13.

271. Tversky & Kahneman, *supra* note 260, at 13.

272. Paul Slovic, *The Perception of Risk*, *in* PERCEPTION OF RISK, *supra* note 259, at 220.

273. *Id.* at 226; *see also* Paul Slovic et al., *Facts and Fears: Understanding Perceived Risk*, *in* PERCEPTION OF RISK, *supra* note 259, at 137, 141.

274. *See* Slovic, *supra* note 272, at 225; Slovic et al., *supra* note 273, at 141; *see also* HOWARD MARGOLIS, DEALING WITH RISK 111 (1996) (discussing the "controllability" of risk as a factor in its acceptability); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 708–09 (1999) ("In addition to controllability, ordinary people pay special attention to risks that are potentially catastrophic, likely to affect future generations, inequitably distributed, or involuntarily incurred.").

275. *See* Slovic, *supra* note 272, at 225–26; Slovic et al., *supra* note 273, at 141.

terrorist attack, for example, involves a "dreaded" risk because it is potentially catastrophic, we lack control over terrorists, and we do not voluntarily become terrorist victims. Such an attack might also represent an "unknown" risk if it involved chemical weapons. The average person lacks knowledge of such weapons, their effects aren't immediately observable, and the possibility of their use outside of war is reasonably new to us.

Slovic's taxonomy has significant implications for risk assessment. As risks become increasingly dreaded and unknown, people demand that regulators do something about them regardless of the probability of their occurrence, the costs of avoiding the risk, and the benefits of declining to avoid the risk.[276] Other research shows that, when intense emotion such as fear is involved, individuals tend to overestimate the likelihood of an event's occurrence[277] or ignore the probability that an event will occur, and instead focus on the possible harm from the outcome.[278] As a result of these findings, we know the perceived magnitude of the threatened harm can affect our assessment of its probability and our desire for preventive action. When individuals perceive the possibility of a highly dreaded or unknown event occurring, they may overestimate the likelihood of this event or ignore the low likelihood of the event and demand action to prevent it.

Two additional psychological phenomena are relevant to understanding skewed risk assessment. The "confirmation trap" bias may exacerbate already skewed assessments. When people make tentative decisions, they tend to seek confirmatory evidence to the exclusion of disconfirming evidence when finalizing that decision.[279] If one is predisposed to believe that a risk is likely to occur, she will often seek out confirmatory evidence that solidifies her assessment. Falling into this trap can significantly skew risk assessment due to failure to consider relevant contradictory evidence suggesting that the risk is less probable than believed. The "overconfidence" bias may similarly exacerbate skewed risk assessment. Researchers have noted that

276. Slovic et al., *supra* note 273, at 152; *see also* MARGOLIS, *supra* note 274, at 171–72; Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1028–29 (1990).

277. Jennifer S. Lerner & Dacher Keltner, *Fear, Anger, and Risk*, 81 J. PERSONALITY & SOC. PSYCHOL. 146, 146–47 (2001).

278. George F. Loewenstein et al., *Risk as Feelings*, 127 PSYCHOL. BULL. 267, 276–78 (2001); *see also* Yuval Rottenstreich & Christopher K. Hsee, *Money, Kisses, and Electric Shocks: On the Affective Psychology of Risk*, 12 PSYCHOL. SCI. 185, 188 (2001).

279. BAZERMAN, *supra* note 266, at 35. *See generally* Dieter Frey, *Recent Research on Selective Exposure to Information*, *in* 19 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 41 (Leonard Berkowitz ed., 1986). For example, when hiring an employee who seems highly desirable, employers may seek out evidence confirming that employee's competence while never asking questions about possible problems.

"people tend to be overconfident of their judgments, particularly when accurate judgments are difficult to make."[280] Such overconfidence is a "particularly potent [problem] when individuals possess some expertise."[281] Thus, the overconfidence bias may have particular ramifications for policymakers responding to perceived crises, exacerbating problems resulting from already skewed assessments or failure to attend to countervailing evidence.[282]

2. THREAT PERCEPTION AND INTERGROUP CONFLICT: THE ROLE OF STEREOTYPES AND PREJUDICE

Intolerance may also be a result of prejudice, defined here as:

> "a prejudgment or a preconception reached before the relevant information has been collected or examined and therefore based on inadequate or even imaginary evidence . . . [that] involves an attitude for or against [a person or object and] a readiness to express in action the judgments and feelings which we experience, to behave in a manner which reflects our acceptance or rejection of others."[283]

Prejudice frequently results from faulty threat perception regarding a particular group. This form of threat perception differs from that involved with risk assessment because, rather than focus on the probability or catastrophic nature of an event, it centers on the nature of the group itself.

According to psychological research, "[t]he fundamental prerequisite for prejudice . . . is the division of human society into

---

280. SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 219 (1993). Research shows that subjects estimating that they were between 65% and 70% confident in the correctness of their answers to a survey were actually correct only about 50% of the time. Sarah Lichtenstein & Baruch Fischhoff, *Do Those Who Know More Also Know More About How Much They Know?*, 20 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 159, 164–65 (1977); *see also* PLOUS, *supra*, at 219.

281. Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1172–73 (2003); *see also* Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, 24 COGNITIVE PSYCHOL. 411, 412 (1992).

282. *See* Rachlinski, *supra* note 281, at 1173, 1196.

283. HENRI TAJFEL, HUMAN GROUPS AND SOCIAL CATEGORIES: STUDIES IN SOCIAL PSYCHOLOGY 131 (1981) (quoted source omitted); *see also* RUPERT BROWN, PREJUDICE: ITS SOCIAL PSYCHOLOGY 8 (1995) (defining prejudice as "the holding of derogatory social attitudes or cognitive beliefs, the expression of negative affect, or the display of hostile or discriminatory behaviour towards members of a group on account of their membership of that group") (emphasis omitted).

groups or social categories."[284] Professor Gordon Allport noted as early as 1954 that we categorize objects in order to simplify our existence.[285] While such categories are often based on rational assessments of category objects, he further concluded that categorization is subject to generalizations that "oversimplify" our experience, leading to irrational beliefs about categorized objects.[286] Categorization thus produces an "us" and "them" mentality that Allport believed was a necessary precursor to prejudice.[287] Professor Henri Tajfel and his colleagues subsequently found that the simple act of categorization significantly affected intergroup relations: "the mere perception of belonging to two distinct groups . . . [was] sufficient to trigger intergroup discrimination favoring the in-group" as opposed to the out-group.[288] Several cognitive processes resulting from categorization apparently lead to this in-group bias.

First, members enhance the differences among their groups, coming to believe that their in-group was far different from the out-group.[289] Second, even if categorization occurs randomly, group members assume that members of their own group are similar to themselves and that members of the out-group are similar to each

284. John Duckitt, *Prejudice and Intergroup Hostility*, *in* OXFORD HANDBOOK OF POLITICAL PSYCHOLOGY 559, 559 (David O. Sears et al. eds., 2003) [hereinafter POLITICAL PSYCHOLOGY]. Psychologists originally conceived of prejudice as an individual personality trait, arguing that prejudiced persons had "personalities render[ing] them susceptible to those racist or fascist ideas prevalent in a society at a given time." BROWN, *supra* note 283, at 19. T.W. Adorno and his colleagues posited the most famous of these approaches, claiming that prejudiced persons suffered from "authoritarian personality syndrome." T.W. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY (1950). While a relationship between prejudice and individual personality is still accepted, recent thinking conceives prejudice as being not so much an individual phenomenon, but an intergroup phenomenon. For a discussion of the possible relationship between individual and intergroup explanations of prejudice, see Duckitt, *supra*, at 589–92.

285. GORDON W. ALLPORT, THE NATURE OF PREJUDICE 20–21 (25th Anniversary ed. 1979) (1954). Such categories, Professor Gordon Allport claimed, are "an accessible cluster of associated ideas which as a whole has the property of guiding daily adjustments." *Id.* at 171; *see also* David L. Hamilton & Tina K. Trolier, *Stereotypes and Stereotyping: An Overview of the Cognitive Approach*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 127, 128–29 (John F. Dovidio & Samuel L. Gaertner eds., 1986) ("[W]e categorize individuals into groups as a means of reducing the amount of information we must contend with . . . .")

286. *See* ALLPORT, *supra* note 285, at 27.

287. *See id.* at 175–76.

288. Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*, *in* THE PSYCHOLOGY OF INTERGROUP RELATIONS 33, 38 (William G. Austin & Stephen Worchel eds., 1979); *see also* Henri Tajfel, *Social Psychology of Intergroup Relations*, 33 ANN. REV. PSYCHOL. 1, 21 (1982) [hereinafter Tajfel, *Intergroup Relations*].

289. Henri Tajfel, *Cognitive Aspects of Prejudice*, J. SOC. ISSUES, Autumn 1969, at 79, 81–83 (1969). For a general discussion of psychologists' work in this area, see JOHN DUCKITT, THE SOCIAL PSYCHOLOGY OF PREJUDICE 59, 81–84 (1992).

other.[290] Third, the out-group is perceived to be especially homogeneous.[291] Fourth, in-group members rate out-group members "as more extreme on various psychological characteristics than members of the ingroup."[292] Fifth, in-group members tend to have "favorable expectations" of the in-group and "unfavorable expectations" of the out-group, which leads to memory biases allowing in-group members more readily to retrieve negative information about the out-group.[293] Finally, researchers found that in-group members attribute positive behaviors of other in-group members to internal factors, such as the nature or essence of the person (that is, she's very smart) while attributing similar behavior of out-group members to external, situational factors (that is, he's lucky to have found a job he is good at).[294] Attributions are switched for negative behaviors, with negative out-group behaviors attributed to internal dispositional factors and similar in-group behaviors attributed to situational factors.[295]

These cognitive processes can lead the in-group to hold negative stereotypes about out-groups—that is, "generalized expectancies about categories or groups that bias the perception of and behavior to individual members of those groups."[296] As we enhance differences between ourselves and other groups, we increasingly believe that out-group members are "all alike." We further tend to view the psychological characteristics of this monolithic unit as far more extreme than our own, a situation exacerbated by (1) the relative ease with which we remember negative aspects of out-group behavior and (2) our tendency to attribute those negative behaviors to the very essence of out-group members' being rather than other factors.

---

290. Vernon L. Allen & David A. Wilder, *Group Categorization and Attribution of Belief Similarity*, 10 SMALL GROUP BEHAV. 73, 79 (1979); Tajfel, *Intergroup Relations*, *supra* note 288, at 23; David A. Wilder, *Perceiving Persons as a Group: Effects on Attributions of Causality and Beliefs*, 41 SOC. PSYCHOL. 13, 21 (1978).

291. Edward E. Jones et al., *Perceived Variability of Personal Characteristics in In-Groups and Out-Groups: The Role of Knowledge and Evaluation*, 7 PERSONALITY & SOC. PSYCHOL. BULL. 523, 527 (1981); Patricia W. Linville et al., *Stereotyping and Perceived Distributions of Social Characteristics: An Application to Ingroup-Outgroup Perception*, *in* PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 285, at 165, 167.

292. Hamilton & Trolier, *supra* note 285, at 131.

293. *Id.* at 132.

294. *See, e.g.*, Thomas F. Pettigrew, *The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 461 (1979).

295. *Id.*

296. Duckitt, *supra* note 284, at 562; *see also* Tajfel, *Intergroup Relations*, *supra* note 288, at 3 (defining stereotype as the "over-simplified mental image of . . . some category of person, institution or event which is shared, in essential features, by large numbers of people") (internal quotations omitted).

Research shows that substantial discrimination favoring the in-group results from categorization and stereotypes.[297] Such discrimination does not, however, necessarily amount to hostility toward or derogation of an out-group—the core aspect of prejudice.[298] Categorization and negative stereotypes resulting in prejudice require other conditions to be present. Specifically, "intergroup threat, or at least the perception of intergroup threat, is a powerful determinant of intergroup prejudice and hostility."[299]

Researchers have identified multiple, potential causes of perceived threat resulting in prejudice toward out-group members. First, according to social identity theory, prejudice may result from perceived threats to in-group member's social identity—that is, those aspects of an "individual's self-image that derive from the social categories to which he perceives himself as belonging."[300] People generally seek to maintain a positive social identity.[301] When perceived threats to social identity become significant enough, they result in in-group hostility toward the out-group.[302] For example, belief that an out-group has disparaged an in-group's status or accomplishments has aroused prejudice and hostile feelings in the in-group.[303] Other research shows that affronts to national pride, prestige, and status of identified groups can also arouse hostility.[304]

Second, symbolic threats—that is, threats that "arise from intergroup differences in basic values, norms, and beliefs that seem to undermine or challenge a group's worldview"—may trigger prejudice.[305] According to terror management theory, humans develop a "cultural anxiety buffer" to protect themselves from the anxiety or terror associated with knowledge of their own mortality.[306] "The conception of

297. *See supra* note 288 and accompanying text.

298. In-group bias could simply result in favorable treatment of the in-group. For a discussion of the difference between in-group bias and out-group hostility, see Marilynn B. Brewer & Rupert J. Brown, *Intergroup Relations*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 253, at 554, 559.

299. Duckitt, *supra* note 284, at 585.

300. Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, *in* PSYCHOLOGY OF INTERGROUP RELATIONS 7, 16 (Stephen Worchel & William G. Austin eds., 2d ed. 1986).

301. *Id.*; *see also* BROWN, *supra* note 283, at 170; DUCKITT, *supra* note 289, at 84.

302. *See* BROWN, *supra* note 283, at 174–76.

303. *See id.*

304. Duckitt, *supra* note 284, at 586; Leonie Huddy, *Group Identity and Political Cohesion*, *in* POLITICAL PSYCHOLOGY, *supra* note 284, at 511, 531–32.

305. Duckitt, *supra* note 284, at 585.

306. Sheldon Solomon et al., *A Terror Management Theory of Social Behavior: The Psychological Functions of Self-Esteem and Cultural Worldviews*, *in* 24 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 93, 101 (Mark P. Zanna ed., 1991).

reality espoused by [a] given culture"[307] and supported by various cultural rituals and social interactions,[308] this buffer protects against anxiety by providing a context in which people perceive themselves as "valuable participant[s] in a meaningful world."[309] Because each individual's cultural anxiety buffer is fragile,[310] people tend to respond negatively to those who threaten their cultural worldview.[311] This is especially true when a person's worldview is threatened by others who violate cultural norms, people who hold discrepant ideas, and people who are dissimilar.[312] Other research confirms that dissimilarity in beliefs, values, and culture may cause prejudice toward out-groups.[313]

Ultimately, one's perception that a group poses a threat to her values or way of life can result in substantial hostility and discrimination against that group. The threat posed by such a group need not be real. In fact, such perceptions may be vastly exaggerated as a result of cognitive mechanisms similar to those that give rise to negative stereotypes. Psychologists Joel Cooper and Russell Fazio found that, under conditions of group conflict, "people invent the most outrageous logic to convince themselves of the evil inherent in the out-group member."[314] Such faulty logic apparently occurs through a series of attribution errors that bias an otherwise rational process of threat perception. Specifically, the more that an out-group's behavior interferes with an in-group member's values, the more likely an in-group member is to assume that the out-group member *intends* to interfere with the in-group's goals (as opposed to simply promoting the

---

307. Abram Rosenblatt et al., *Evidence for Terror Management Theory: I. The Effects of Mortality Salience on Reactions to Those Who Violate or Uphold Cultural Values*, 57 J. PERSONALITY & SOC. PSYCHOL. 681, 681 (1989).

308. Jeff Greenberg et al., *Evidence for Terror Management Theory II: The Effects of Mortality Salience on Reactions to Those Who Threaten or Bolster the Cultural Worldview*, 58 J. PERSONALITY & SOC. PSYCHOL. 308, 309 (1990).

309. Rosenblatt et al., *supra* note 307, at 681.

310. *Id.* at 688; Solomon et al., *supra* note 306, at 105.

311. Rosenblatt et al., *supra* note 307, at 682, 688.

312. *See* Greenberg et al., *supra* note 308, at 313–17; Rosenblatt et al., *supra* note 308, at 682–89; Solomon et al., *supra* note 306, at 125–33.

313. DUCKITT, *supra* note 289, at 77–81. *See generally* MARILYNN B. BREWER & DONALD T. CAMPBELL, ETHNOCENTRISM AND INTERGROUP ATTITUDES: EAST AFRICAN EVIDENCE (1976); ROBERT A. LEVINE & DONALD T. CAMPBELL, ETHNOCENTRISM: THEORIES OF CONFLICT, ETHNIC ATTITUDES, AND GROUP BEHAVIOR (1972); Milton Rokeach et al., *Two Kinds of Prejudice or One?*, *in* MILTON ROKEACH, THE OPEN AND CLOSED MIND: INVESTIGATIONS INTO THE NATURE OF BELIEF SYSTEMS AND PERSONALITY SYSTEMS 132 (1960).

314. Joel Cooper & Russell H. Fazio, *The Formation and Persistence of Attitudes that Support Intergroup Conflict*, *in* PSYCHOLOGY OF INTERGROUP RELATIONS, *supra* note 288, at 183, 184.

out-group's goals).[315] This attribution of intent to injure the in-group thus results in

> an evaluation of out-group members that is more negative than a dispassionate inference process would predict and one that is held with an extreme degree of certainty. A simplistic correspondent inference about the evil nature of the out-group members is made. Negatively valued dispositions are ascribed to the members of the goal-discordant group, and negative attitudes toward them are formed.[316]

In this sense, the perception of a group as threatening may take on some of the characteristics of Slovic's "dreaded" risks, with individuals coming to rate the group's threat to their way of life as potentially dreaded and unknown.

3. THE INFLUENCE OF SOCIAL DYNAMICS

Threat perception does not occur in a vacuum. Personal, historical, and political factors may influence it.[317] Additionally, threat perception is as much a social as it is an individual phenomenon. As Professors Timur Kuran and Cass Sunstein explain: "people consult each other; they learn from each other; they influence one another's values; they defer to each other; they share sources of public information; they try to mold each other's beliefs and values; and their social interactions shape their knowledge, perceptions, and interpretations."[318] Any discussion of the psychological biases associated with threat perception thus must account for potential social influences upon decision-making. Such influences, generally termed "availability cascades," take two forms—informational and reputational.

Because it is costly to gather information, many perceptions are arrived at via indirect information from others.[319] Thus, "[m]ost of us think and fear what we do because of what we think other people think and fear."[320] For example, if one person in a group believes strongly that an event will occur or that a particular group is noxious, that belief

---

315. *Id.* at 186.

316. *Id.*

317. *See, e.g.*, Tajfel, *Intergroup Relations*, *supra* note 288, at 22 (noting that our impressions of others "are generated in their social and historical contexts and then transmitted to individual members of groups and widely shared through a variety of channels of social influence").

318. Kuran & Sunstein, *supra* note 274, at 710.

319. *Id.* at 717.

320. Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1132–33 (2002) (reviewing PERCEPTION OF RISK, *supra* note 259).

may influence others in the group who are less sure or who simply trust that individual's judgment. This phenomenon, known as an "informational cascade," may significantly skew threat perception on a large scale. If the initial source has overestimated the probability of an event due to its availability or because the event is highly dreaded, the exaggerated belief can cascade through society becoming widespread and self-reinforcing.[321] Similarly, an individual's strongly held belief that a group threatens her values may trickle down to others who trust her judgment, especially if it is highly publicized.

Social dynamics can influence threat perception in another way. Most people care about the ways others view them.[322] Such concern for what others think may affect an individual's beliefs with respect to the likelihood of a particular risk or noxiousness of a particular group. For example, an individual member of a social group may not believe in the dangerousness of another group, but because other members do, the individual expresses a view consistent with the group out of concern for her reputation.[323] This phenomenon, called a "reputational cascade," can affect public threat perception by pressuring individuals to reconsider their public expression of views based upon what they consider to be "the dominant view within . . . society."[324] As with informatioual cascades, such events can become self-reinforcing. As individuals self-censor the expression of inconsistent viewpoints, society may come to hold the dominant view even more strongly.

Informational and reputational cascades need not occur in any particular situation. Rather, they often occur because an individual or group instigates them. Such persons, whom Kuran and Sunstein deem "[a]vailability entrepreneurs," often have a political or ideological stake in policy control[325] and are adept at attracting media coverage and understanding issues around which their intended audience might rally.[326] Availability entrepreneurs thus attempt "to shape . . . pressures in order to mold public discourse and control the policy selection process."[327] Once availability entrepreneurs have triggered cascades,

---

321. *See* Kuran & Sunstein, *supra* note 274, at 685; *see also* Roger E. Kasperson, *The Social Amplification of Risk: A Conceptual Framework*, *in* PERCEPTION OF RISK, *supra* note 259, at 232.

322. Sunstein, *supra* note 320, at 1133.

323. *See* Kuran & Sunstein, *supra* note 274, at 727–29.

324. *Id.* at 729.

325. *Id.* at 727; *see also* Timur Kuran, *Ethnic Norms and Their Transformation Through Reputational Cascades*, 27 J. LEGAL STUD. 623, 627 (1998).

326. Kuran & Sunstein, *supra* note 274, at 713, 733–35.

327. *Id.* at 727; *see also* Stephen Daniels & Joanne Martin, *Punitive Damages, Change and the Politics of Ideas: Defining Public Policy Problems*, 1998 WIS. L. REV. 71, 76 (noting with respect to public policy agenda-setting, that "'groups, individuals, and government agencies deliberately and consciously design portrayals so as to promote

the media often exacerbates them by focusing on dramatic stories likely to attract attention—for example, stories involving vivid or compelling threats[328]—and reporting them with little or no investigation of their basis in fact.[329]

Informational and reputational cascades can occur on a variety of levels—personal, institutional, local, state, and national. Thus, a cascade may cause a particular fear to grip the nation or it may be localized within a group of people, such as a community or organization. Furthermore, when such cascades occur, they necessarily result in commensurate "unavailability cascade[s] that progressively free[] public discourse of voices out of tune with the evolving chorus," making it "increasingly difficult for people with stated or unstated reservations about the developing public consensus to retain their misgivings."[330] Such cascades are often closely related to the phenomenon psychologists call "pluralistic ignorance," where individuals incorrectly perceive that the attitudes of others are different from their own, causing them to alter their behavior or stated beliefs to more closely approximate the erroneously perceived norm.[331]

4. IMPLICATIONS FOR LAW AND POLICY

The psychological findings above have significant implications for law and policy regarding particular groups. To the extent that individuals perceive a group as threatening due to ostensible risks associated with it, we know that substantial errors in risk assessment occur in particular circumstances. Individuals are generally likely to overestimate the probability of an event's occurrence if it is especially familiar or salient. The potentially catastrophic nature of the threat can further exacerbate the tendency to overestimate the likelihood of an event. Social influences often reinforce this skewed risk assessment through the phenomena of informational and reputational cascades,

---

their favored course of action'") (quoting DEBORAH A. STONE, POLICY PARADOX AND POLITICAL REASON 106 (1988)).

328. *See, e.g.*, Neal R. Feigenson & Daniel S. Bailis, *Air Bag Safety: Media Coverage, Popular Conceptions, and Public Policy*, 7 PSYCHOL. PUB. POL'Y & L. 444, 447 (2001) (discussing research on media "melodramatiz[ation]" of accident reporting); Jennifer K. Robbennolt & Christina A. Studebaker, *News Media Reporting on Civil Litigation and Its Influence on Civil Justice Decision Making*, 27 LAW & HUM. BEHAV. 5, 9–10 (2003) (discussing research on media bias for reporting news that "capture[s] news consumers' attention").

329. Kuran & Sunstein, *supra* note 274, at 735–36.

330. *Id.* at 730 (emphasis omitted).

331. *See* Dale T. Miller & Deborah A. Prentice, *Collective Errors and Errors About the Collective*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 541, 541, 547 (1994).

which can cause widespread, though erroneous, beliefs regarding the likelihood of an event.

As people come to be excessively "fearful of statistically small risks," they demand that the government act to prevent that risk regardless of the costs of regulation and potential harm caused by regulating the risk.[332] Government regulators are likely to respond positively to these demands. "Public officials, no less than ordinary people, are prone to use the availability heuristic," and thus skewed risk assessment.[333] Furthermore, reputational pressures often operate on government officials, especially elected ones, who tend to respond to small probability risks with legislative and regulatory measures.[334] Finally, to the extent that judges and juries engage in risk assessment during their deliberations, they too may overestimate the probability of threatened harms.[335] Much research shows that juries use heuristics that may result in biased risk assessments.[336] Judges, too, are subject to these same biases.[337] Thus, at all stages of regulation, actors may overreact to certain risks, allowing significant, but potentially unwarranted, regulation of them. When the alleged risk arises from the exercise of one's expressive rights, excessive regulation can, quite obviously, lead to unreasonable suppression of speech.

While hostile and prejudicial attitudes toward a group can also cascade through society, whether those beliefs *necessarily* translate into discriminatory laws and policy is unclear.[338] However, research shows that, when societies or groups of people historically have engaged in discriminatory behavior, "a relationship with prejudice appears to have emerged fairly consistently."[339] Because this Article is an historical study of established behavior toward the CPUSA, it assumes a link between beliefs about that group and behavior toward them.

Research by political scientists and political psychologists, especially in the area of civil liberties, supports this assumption. Studies show that "[t]he majority tends to react strongly against abhorrent

---

332. *See* MARGOLIS, *supra* note 274, at 174–75; Slovic et al., *supra* note 273, at 152; Sunstein, *supra* note 320, at 1127.

333. Sunstein, *supra* note 320, at 1127; *see also* Kuran & Sunstein, *supra* note 274, at 691–703.

334. *See* Sunstein, *supra* note 320, at 1127.

335. *See id.*

336. *See* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 780–81 & nn.12–16 (2001) (citing individual studies). *See generally* Robert J. MacCoun, *Experimental Research on Jury Decision-Making*, 244 SCIENCE 1046 (1989); Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103 (2002); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998).

337. *See, e.g.*, Guthrie et al., *supra* note 336, at 781–82.

338. *See* DUCKITT, *supra* note 289, at 30–39 (surveying various studies).

339. *Id.* at 31.

outgroups whenever they challenge the fundamental consensus of the American pluralist system."[340] Much of the way this reaction occurs is consistent with notions of prejudice discussed above. Specifically, people tend to respond negatively to groups they perceive as threatening and noxious because they have violated cultural norms.[341] As the majority comes to fear such groups, their tolerance of them decreases.[342] Even political elites, such as legislators, executive officials, and judges, show increased intolerance when they perceive a group to "pose[] a serious threat to democracy itself."[343] Further, the more a person intensely dislikes a noxious group, the more likely they are to take action against them.[344] Such actions can include, and historically have included, derogation of their civil rights.[345]

B. Grounding History in Psychology

Available evidence suggests that Americans' intolerance of the CPUSA may have resulted from the psychological phenomena described above. It is unclear which phenomenon led to such intolerance. In fact, both could have operated simultaneously, possibly reinforcing one another. For example, an individual's dislike of a group may "condition the probabilities that they place on a possible consequence: 'I dislike communists; therefore, there is a strong likelihood that their actions will lead to something undesirable.'"[346] Although a relationship between the two phenomena is quite likely, for ease of reference, this Part discusses each one separately.

1. THREAT PERCEPTION AND RISK ASSESSMENT

Americans' belief that the CPUSA posed a real and substantial threat to national security could have resulted from the operation of the

340. MARCUS ET AL., *supra* note 257, at 7.
341. *Id.* at 60.
342. *Id.*
343. *Id.* at 122.
344. *Id.* at 199.
345. *See id.* at 8; *see also* Donald R. Kinder & David O. Sears, *Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life*, 40 J. PERSONALITY & SOC. PSYCHOL. 414, 429 (1981) (discussing a study of racial attitudes, which found "that the white public's political response to racial issues [was] based on moral and symbolic challenges to the racial status quo in society generally").
346. Kuklinski et al., *supra* note 254, at 5. As noted above, the CPUSA's potential threat to American values, which the social identity and terror management theories posit as leading to prejudicial attitudes, could have also functioned as a "dreaded" threat in Professor Paul Slovic's risk taxonomy, leading Americans to overestimate the likelihood that CPUSA members engaged in illegal activities. *See supra* notes 305–16 and accompanying text.

heuristics and biases discussed above. During the relevant period, the popular image of the CPUSA was highly available. Thanks to the actions of availability entrepreneurs such as Dies, Hoover, and later, McCarthy, there was widespread, negative publicity regarding the organization's hostile intent and threatening nature.[347] Such men painted lurid images of potential traitors, the vivid nature of which must have stayed with the public, especially given the media coverage of various congressional hearings and government officials' speeches.[348]

Media coverage of the *Dennis* trial similarly reinforced this negative image, as evidenced by President Truman's widely publicized description of the defendants as traitors.[349] Combined with publicity about other contemporaneous events, such as espionage allegations regarding communists within the United States and Canada and reports of communist aggression and violence, the popular image of the CPUSA would have been particularly potent.[350] Attempts to personalize the threat by characterizing one's neighbors or friends as potential spies and saboteurs—the "they are everywhere" mentality—would have further increased the popular image's salience.[351] Accordingly, the availability heuristic could have resulted in overestimation of the likelihood that the CPUSA was planning to overthrow the government.

The popular image of the CPUSA also supports the conclusion that Americans saw the organization as an agent of a potentially calamitous event—that is, a dreaded and unknown risk under Slovic's taxonomy. Specifically, by the time of the *Dennis* trial, Americans viewed the CPUSA as conspiring with Russia to overthrow the U.S. government and create a "'Soviet of the United States.'"[352] Americans thus perceived themselves to be fighting for the very existence of their country and maintenanee of their way of life. One government official expressed this sentiment, noting that communism is "'a far greater threat to our existence than any other threat,'" and "if the United States 'does not successfully cope with the Communist threat, then it need not worry about any other threat to the internal security of this nation, because it is not impossible that there will be no nation.'"[353] Another claimed that

347. *See supra* notes 42, 57, and 97–106 and accompanying text.

348. *See supra* notes 57, 98, and 104 and accompanying text.

349. Petition for Writ of Certiorari, *supra* note 183, at 14, *reprinted in* 47 LANDMARK BRIEFS, *supra* note 66, at 21. Clark made similar statements in an August 1949 article published in *Look* magazine. *Id.*

350. *See supra* notes 77–78 and accompanying text.

351. *See supra* notes 96–99 and accompanying text.

352. SCHRECKER, *supra* note 22, at 114 (quoting from an excerpt of Hoover's March 26, 1947 testimony before HUAC).

353. SCHRECKER, *supra* note 26, at 48 (quoting a former FBI official).

each domestic communist "'carrie[d] in himself the germ of death for our society.'"[354]

Such a threat ranks high on Slovic's scale of "dreaded" threats, which include those that are catastrophic, involuntary, and outside of an individual's control.[355] Americans would have perceived loss of their way of life as catastrophic given that it involves curtailed freedom and enforced cultural regimes antithetical to most Americans. Such a threat is also involuntary and beyond individual control. During this period, Americans perceived themselves to be defending against Soviet and ergo CPUSA aggression.[356] That fact alone suggests that the threat was involuntary—people rarely defend themselves against voluntary threats.[357] Furthermore, the perception that CPUSA members were the secretive agents of a foreign country emphasized Americans' lack of control over the threat. Legislation, such as the Smith Act and Internal Security Act, which claimed that the "world Communist movement" had "devised clever and ruthless espionage and sabotage tactics" that evaded existing law and necessitated new legislation, reinforced that perception.[358]

Loss of America's democratic way of life similarly qualifies as an "unknown" risk—that is, one that is new, unobservable, not having immediate effects, and not easily understood.[359] The perceived threat posed by the CPUSA was somewhat new: following a period of increased toleration of domestic communists during the United States' World War II alliance with the Soviet Union,[360] Americans' hostility toward them again increased. One can also characterize the perceived threat posed by domestic communists as latent and unobservable. The characterization of the CPUSA as consisting of secretive agents of a foreign country fits well within the classification of an unobservable threat. Furthermore, because they were allegedly to act when the time was appropriate, the threat was latent and liable to occur unexpectedly. Finally, Americans would have had difficulty understanding the threat posed by domestic groups because they were, by definition, "un-American."[361] That few people ever knew "an admitted Communist"

---

354. *Id.* at 144 (quoting U.S. Attorney General James McGrath).

355. *See supra* note 274 and accompanying text.

356. SCHRECKER, *supra* note 26, at 155.

357. *See supra* note 274 and accompanying text.

358. § 2, 64 Stat. at 987–89; *see also* 54 Stat. 670.

359. *See supra* note 275 and accompanying text.

360. *See* Wiecek, *supra* note 20, at 403.

361. For example, the committee primarily responsible for investigating communism was known as the House Un-American Activities Committee. Frank Donner noted that terms like "un-American" were a product of Americans' "early search for positive communal values and self-definition with which to confront Bolshevism." FRANK J. DONNER, THE AGE OF SURVEILLANCE: THE AIMS AND METHODS

also emphasized their mysteriousness.[362] In light of the perceived magnitude of the threat according to Slovic's threat taxonomy, Americans' demands for action against domestic groups is unsurprising.

The egocentric and confirmation trap biases may have also exacerbated Americans' already skewed risk assessment. Those individuals and organizations acting as availability entrepreneurs often had little concrete evidence to support their claims. Even the *Dennis* proceedings, which were based on "the most complete summary of the activities and aims of American communism ever assembled,"[363] revealed little evidence of concrete, illegal activities. Nevertheless, anticommunists "understood" that such activities were afoot.[364] The willingness to act on such hunches is consistent with the overconfidence bias. Furthermore, anticommunists often turned evidence potentially contradicting their claims to their advantage, suggesting that the confirmation trap bias might have operated.[365] Hoover, for example, faced with the fact that the ranks of domestic communists were rapidly dwindling, claimed that their size was misleading, as there existed many more "secret" Communist Party members.[366] Even as late as 1958, when the CPUSA was decimated, the chairman of HUAC claimed that it was "'a greater menace than ever before. It has long since divested itself of unreliable elements. Those who remain are the hard-core disciplined agents of the Kremlin on American soil.'"[367]

2. THREAT PERCEPTION, INTERGROUP CONFLICT, AND PREJUDICE

There is also evidence to support the conclusion that prejudice resulting from intergroup conflict produced widespread intolerance of

---

OF AMERICA'S POLITICAL INTELLIGENCE SYSTEM 15 n.† (Vintage Books 1981) (1980). Thus, the CPUSA was by definition "un-American" and incapable of being understood by Americans.

362. In his seminal survey on communism, Samuel Stouffer found that only 3% of those surveyed knew an "admitted communist." STOUFFER, *supra* note 122, at 175. He concluded that this lack of familiarity created a sense of "mystery about the secret ways of Communists which . . . sharpen[ed] the audience interest in news or tales about them and also . . . free[d] the imagination to see dangers without limit." *Id.*

363. *See supra* note 166–68 and accompanying text.

364. *See supra* note 135 and accompanying text.

365. The confirmation trap and overconfidence biases are closely related in that "overconfidence derives in part from the tendency to neglect contradicting evidence." Asher Koriat et al., *Reasons for Confidence*, 6 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 107, 113 (1980). It is thus no surprise that anticommunists such as Hoover, a man totally convinced that his view was correct, neglected contradictory evidence.

366. SCHRECKER, *supra* note 22, at 114–20 (quoting from an excerpt of Hoover's March 26, 1947 testimony before HUAC).

367. SCHRECKER, *supra* note 26, at 144 (quoting HUAC chairman Francis Walters).

domestic communists. Certainly, the prerequisite of categorization existed. The fact that communists adhered to a political philosophy quite different from that of most Americans probably sufficed to facilitate such categorization. The anticommunist campaign further solidified an "us versus them" mentality, as evidenced by its use of the "un-American" label to describe communism and its adherents. Communists were not just different, they were the opposite of normal Americans.

With that categorization in place, one can surmise that cognitive mechanisms facilitated negative stereotypes about the CPUSA. The vision of communists as un-American suggests enhancement of group differences consistent with the formation of stereotypes. Indeed, some portrayals of domestic communists created an even wider gulf, suggesting that they were more than simply different; rather, they were inhuman.[368] Thus, some people referred to communism as a disease that could potentially kill American society,[369] while others deseribed communists as "almost a separate species of mankind."[370] In an effort to push communists further from "normal humans," many also tried to link communism to homosexuality.[371]

The widely held belief that communists were loyal automatons serving the Soviet Union is further consistent with individuals' tendencies to see out-group niembers as especially homogeneous. Robots, which are not inibued with the freedom of thought bestowed upon humans, are all alike. The perception of mindless loyalty also suggests that Americans ranked communists as more extreme on various psychological characteristics than themselves. While Americans viewed their own loyalty to the United States as patriotic, they perceived communists' loyalty to the Soviet Union as verging on the psychotic. McCarthy, for example, spoke for many when he claimed that "'practically every active Communist is twisted mentally or physically in some way.'"[372] Polls taken during the 1940s further show that the majority of respondents believed that the CPUSA was composed of "[ni]ostly bad or misguided people."[373] People also apparently attributed negative behaviors of CPUSA niembers to dispositional rather

368. *See* Wiecek, *supra* note 20, at 428–29.

369. SCHRECKER, *supra* note 26, at 144.

370. Hubert Kay, *The Career of Gerhart Eisler as a Comintern Agent*, LIFE, Feb. 17, 1947, at 99, 99.

371. SABIN, *supra* note 16, at 58.

372. DAVID M. OSHINSKY, A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY 113 (1983) (quoting McCarthy).

373. PUBLIC OPINION 1935–1946, *supra* note 118, at 130; *see also* NAT'L OPINION RESEARCH CTR., *supra* note 122 (showing that 38% of those responding to a poll believed that people were communists because they were frustrated, dissatisfied, or unhappy).

than situational factors. For example, they attributed the CPUSA's secretive actions to the group's conspiratorial nature rather than to the operation of government repression.[374]

It is unsurprising, then, that Americans would readily have been able to retrieve and rely upon a wholly negative image of the CPUSA despite the positive works of the party.[375] The perceived threat to society's values posed by the CPUSA could easily have turned this negative stereotype into hostility and prejudice. Americans could have perceived the CPUSA as a threat to their social identity, resulting from communists' disparagement of America's status and accomplishments. After all, far from taking pride in American capitalism and ingenuity, many aspects of communism derided them. Similarly, domestic communists' who admitted loyalty to the Soviet Union could have been seen as an affront to national pride, especially in light of the hostility between the two countries during much of the relevant period.

Americans also apparently viewed the CPUSA as posing a symbolic threat—that is, a threat to Americans' basic values and beliefs. The fact that many saw communists as "un-American" suggests that people were hostile because of differences in the groups' cultural and political values. Contemporary surveys support this conclusion. Some polls reflect a widespread belief that communists wanted to destroy valuable American institutions, like the Christian religion.[376] Others reveal that Americans tended to suspect others of communism because they violated social norms. Thus, they attributed their suspicion to such things as:

> "[He] [w]ould not attend church and talked against God. . . ."
>
> . . . .
>
> "[He] [d]idn't believe in the Bible and talked about war."
>
> . . . .
>
> ". . . He was not like us."
>
> . . . .
>
> "He brought a lot of foreign-looking people into his home."
>
> "He's against almost everything done in the United States. . . ."

---

374. *See supra* notes 149–50 and accompanying text.

375. In addition to their fight against fascism, see *supra* note 24, domestic communists were active in civil rights movements, SCHRECKER, *supra* note 26, at 389–90.

376. SCHRECKER, *supra* note 26, at 75 (noting that the CPUSA's "materialism and hostility to organized religion antagonized God-fearing citizens of every faith"); *The Quarter's Polls*, *supra* note 123, at 643 (showing results of a poll indicating that 72% of the respondents believed that communists wanted to eradicate Christianity); *see also Fourth 1949 Quarter's Polls*, *supra* note 125, at 712 (showing that 77% of respondents believed that an individual could not simultaneously be a good Christian and a good CPUSA member).

> . . . .
> ". . . [He] [w]anted to be a leader but not interested in money."
> . . . .
> ". . . He was always playing Russian music," or "He used to have the lights burning at two o'clock in the morning."[377]

Such bases for suspicions of communism suggest that the perceived threat posed by domestic communists stemmed, at least in part, from their different cultural characteristics and political beliefs.

Given the clash between American culture and communist values, Americans easily could have come to believe that domestic communists did not simply differ from them but that they *intended* to interfere with the American way of life, thus magnifying the threat beyond anything supported by evidence. Such a belief would have provided the foundation for many Americans' support of repression against the organization.

3. SOCIAL INFLUENCES AND ANTICOMMUNISM

While many Americans perceived domestic communists to be a threat, most had little concrete interaction with them,[378] suggesting that Americans came to hold their beliefs as a result of indirect influences—that is, via social cascades. Powerful availability entrepreneurs plied an anticommunist message during this period, which some scholars credit with triggering intolerance toward communists:

> [M]uch of what happened during the McCarthy era was the result of a concerted campaign by a loosely structured, but surprisingly self-conscious, network of political activists who had been working for years to drive Communism out of American life. With the onset of the Cold War, these professional anti-Communists were able to sell their program to the nation's governing elites, who then put it into practice. Though most ordinary people supported what was going on, McCarthyism was primarily a top-down phenomenon.[379]

---

377. STOUFFER, *supra* note 122, at 176–78, 185 (quoting various members of the general public who believed that they "knew somebody who acted suspiciously enough to make them think he might be" a communist).

378. *See supra* note 362 and accompanying text.

379. SCHRECKER, *supra* note 26, at xiii; *see also* James L. Gibson, *Political Intolerance and Political Repression During the McCarthy Red Scare*, 82 AM. POL. SCI. REV. 511, 519 (1988) (noting that political elites were "the driving force in the repression of Communists").

As a result of these anticommunist activities, availability entrepreneurs triggered both informational and reputational cascades.

One can see many aspects of an informational cascade in the events leading up to the *Dennis* trial. The anticommunist educational campaign and widespread media coverage of world events surely made salient the negative images of the CPUSA, thus priming an informational cascade. Not only would such images have been vivid and easily retrieved, the source of information—highly placed, seemingly reliable government officials, such as the U.S. President, U.S. Attorney General, the director of the FBI, or well-known legislators—would have made these negative images difficult to ignore. Leading anticommunist Hoover aptly illustrates this fact. During the anticommunist crusade, the public held him in extremely high esteem, to the extent of seeking his advice on a variety of topics from child rearing to clothing styles.[380] Pronouncements from a man with such a reputation were well received. The negative images issuing from HUAC and other legislative sources also likely influenced public opinion as such sources were generally viewed favorably.[381]

Reputational cascades were also important during this period. The legislative hearings, loyalty boards, and public lists of subversive organizations that were part of the "exposure" of the evils of communism created an intense pressure for national conformity during the Cold War. The slightest perception that an individual sympathized with domestic communists could result in loss of employment and societal shunning,[382] causing people to remain silent even if they disagreed with the popular image of the CPUSA bandied about by others.

Research conducted on university professors and federal employees in the early 1950s, for example, found that many took specific "precautions," including dropping membership subscriptions in organizations listed as subversive, censoring themselves in conversations on political topics, and refusing to sign petitions on political issues, in order to avoid any activity "that might conceivably arouse anyone's

380. DONNER, *supra* note 361, at 80–81. Similarly, during the *Dennis* proceedings, another important availability entrepreneur, McCarthy, was exceedingly popular. Wells, *supra* note 78, at 16 n.76.

381. 2 GALLUP, *supra* note 59, at 787 (showing the results of a January 1949 poll showing that 41% of those that knew of HUAC thought that the committee should continue its activities); *id.* at 924 (showing the results of a July 1950 poll showing that 41% of respondents agreed or qualifiedly agreed with McCarthy's claims that communists were in the U.S. State Department).

382. *See supra* notes 100–13 and accompanying text.

suspicion and thus lead to charges and an investigation."[383] Employers sometimes advised employees to avoid questionable activities. Thus, a U.S. Navy document counseled:

> A number of our citizens unwittingly expose themselves to unfavorable or suspicious appraisal which they can and should avoid. This may take the form of an indiscreet remark; an unwise selection of friends or associates; membership in an organization whose true objectives are concealed behind a popular and innocuous title; attendance at and participation in the meetings and functions of such organizations even though not an official member; or numerous other clever means designed to attract support under false colors or serving to impress an individual with his own importance.
>
> It is advisable to study and seek wise and mature counsel prior to association with persons or organizations of any political or civic nature, no matter what their apparent motives may be, in order to determine the true motives and purposes of the organization. . . .
>
> . . . [We should] so conduct ourselves [so] that there cannot be the least concern on the part of our associates as to our adherence to the principles of this government, or as to our reliability . . . This counsel is prompted by the Commanding Officer's sincere interest in the continued well-being of all employees of the activity.[384]

Given the breadth of the loyalty programs and other tools of exposure, this pressure to conform due to reputational concerns cascaded through society, ultimately resulting in what Justice Douglas called a "[b]lack [s]ilence of [f]ear," driving individuals "in all walks of life either to silence or to the folds of the orthodox."[385] Such reputational pressures apparently fueled a self-reinforcing cascade that drowned out dissenting voices and reinforced the popular image.

---

383. Marie Jahoda & Stuart W. Cook, *Security Measures and Freedom of Thought: An Explanatory Study of the Impact of Loyalty and Security Programs*, 61 YALE L.J. 295, 307–08, 318 (1952).

384. BROWN, *supra* note 109, at 191 n.8 (first and third omissions in original) (quoting the U.S. Navy's "Suggested Counsel to Employees").

385. William O. Douglas, *The Black Silence of Fear*, N.Y. TIMES MAG., Jan. 13, 1952, at 7, 38.

IV. THREAT PERCEPTION IN THE *DENNIS* COURTS

Given the popular image of domestic communists and its effect on Americans' threat perception, one could logically assume that it similarly biased the legal proceedings. Jurors, after all, represent a cross-section of society. Furthermore, despite the paradigm of judges as neutral arbiters unaffected by outside influences, most people agree that judges are not immune to social, political, reputational, or other forces.[386] Judicial proceedings, however, have a life of their own, with evidentiary and other rules that can render the jury's and judge's perceptions substantially different from the public's perception. Although the popular image's pervasiveness is clearly relevant to *Dennis*, one needs more than the simple assumption that it affected the *Dennis* legal proceedings. This Part examines those proceedings and concludes that they were affected by skewed threat perception.

A. The Trial Court

The *Dennis* jurors were initially responsible for the defendants' convictions. Because jury deliberations are secret, there is little direct evidence regarding their reasoning in reaching those conclusions. There are, however, other, more indirect, indicators of such reasoning. First, the evidence and arguments presented at trial (especially the prosecution's) reveal the picture presented to the jury. That picture was consistent with the popular image of domestic communists and likely affected the jury. Second, Judge Medina's response to the defendants, as evidenced by his conduct of the trial and later remarks about it, suggest that he too was affected by the popular image of domestic

386. Jerome Frank noted decades ago that judicial decisions were subject to many influences other than legal theory and doctrine. Jerome Frank, *Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption that Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17, 40 (1931). More recently, scholars have posited that judges are affected by such things as religion, political party affiliation, ideology, or various psychological phenomena. For a sampling of this voluminous literature, see generally LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS (1996); LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? (1999); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1492 (2001); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003); George, *supra* note 4; Guthrie et al., *supra* note 336; Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998).

communists. His decisions, while no substitute for those of the jurors', likely affected them. His comments and evidentiary rulings contributed to the jurors' view of the defendants, and would have been especially influential coming from a person of such authority. In effect, Judge Medina's ability to control the trial made him an availability entrepreneur.

1. RISK ASSESSMENT

The most obvious evidence of skewed risk assessment at the trial level begins with Judge Medina's characterization of the defendants' alleged illegal conduct. Although the defendants were charged with conspiracy to advocate overthrow of the government, Judge Medina's jury charge transformed the indictment into a conspiracy to overthrow the government, instructing the jurors that they could find the defendants guilty if it was their "intent . . . to achieve . . . the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit it to be achieved."[387] Judge Medina's characterization of the harm as a conspiracy to overthrow rather than a conspiracy to advocate overthrow raised the stakes enormously, essentially casting it as a "dreaded" threat similar to the popular image of domestic communists.

Consistent with Slovic's research, Judge Medina's portrayal of the CPUSA as a dreaded threat apparently led to a willingness to ignore or overestimate the likelihood of such an event. There was no proof that the CPUSA was planning to overthrow the government, which should have posed a problem under the existing clear and present danger doctrine. By reading the doctrine as requiring only a showing that the defendants intended to carry out their plan "as speedily as circumstances would permit it to be achieved,"[388] however, Judge Medina's instruction gutted the probability aspect of the clear and present danger test, allowing the magnitude of the potential harm to be the deciding factor and easing the path to conviction.

As the primary legal guidepost, Judge Medina's jury instruction would have had an enormous influence on the jurors. His admonition that their fact-finding role required them to apply the law as *he* characterized it would have solidified that influence[389] as would have his instruction to the jurors that, as a matter of law, the defendants posed a "sufficient danger of a substantive evil" to counter a First Amendment

387. *Foster*, 9 F.R.D. at 390–91.

388. *Id.* at 391.

389. *See id.* at 374 ("On these legal matters you must take the law as I give it to you; you are not at liberty to do otherwise.").

defense if the jurors found that the defendants violated the Smith Act.[390] By defining the alleged harm prohibited by the Smith Act as potentially catastrophic (per se catastrophic assuming the Smith Act was violated) and emphasizing that no other interpretation of the statute was appropriate, Judge Medina's instructions alone could have facilitated the jurors' willingness to find the defendants guilty.

The evidence adduced at trial also would have facilitated the jurors' desire to take action against the CPUSA. Although there was no evidence that the CPUSA advocated or planned to overthrow the government, the prosecution ensured that the popular image of the CPUSA was a constant factor during the trial. Thus, the government introduced evidence of Soviet worldwide aggression, argued that the reconstitution of the CPUSA evidenced Soviet control of the CPUSA, claimed the party's secretiveness and alleged use of Aesopian language proved its conspiratorial nature, and argued that domestic communists' presence in labor organizations showed they planned to use disruptive political strikes to facilitate its goals.[391] Although none of this evidence showed an intent or plan to overthrow the government, it emphasized an image of communists as loyal, devious disciples of a hostile, aggressive enemy. Prosecutors effectively ensured that the popular image of the domestic communists remained highly available to jurors, possibly skewing their perception of the alleged threat of overthrow.

Other aspects of the trial also would have made the popular image of domestic communists easily retrievable. On cross-examination, the prosecution demanded that the defendants' witnesses, most of them fellow communists, reveal the names of other alleged communists,[392] much as HUAC and other committees did at the time. Knowing that the witnesses would refuse to participate in such an inquisition, the prosecution's tactics reinforced the image of communists as secretive and devious—that is, part of a larger conspiracy.[393] Although this evidence was irrelevant to the prosecutor's case, Judge Medina allowed most of the prosecution's questions.[394]

Judge Medina was not as generous with the defendants. Many of his evidentiary rulings prevented the defendants from putting on evidence opposing the prosecution's case, which allowed the prosecution's portrayal of the defendants to dominate the trial.[395] Such one-sidedness would have affected jurors prone to overconfidence of confirmation trap biases, solidifying in their mind the correctness of the

390. *See id.* at 392.
391. *See supra* Part II.A.
392. BELKNAP, *supra* note 11, at 101.
393. *Id.* at 101–02.
394. *Id.*
395. *See supra* notes 183, 197.

prosecution's version. Furthermore, Judge Medina made no secret of his belief that the defendants' actions were little more than propaganda techniques rather than legitimate defense efforts. Although true in many cases, his public and often combative comments regarding the defendants' disruptive tactics contrasted sharply with his willingness to tolerate similar disruptive tactics (for example, demands for names of other communists) by the prosecution.[396] It would have required Herculean efforts to ignore the judge's actions.

Judge Medina's characterization of the party's claims in his jury instruction may have also facilitated the jurors' reliance on the popular image. In summarizing the prosecution's case, he noted:

> The prosecution claims that the defendants conspired together and with others to organize as the [CPUSA, a group] of persons who teach and advocate the overthrow or destruction of the Government of the United States by force and violence and to teach and advocate the duty and necessity of overthrowing or destroying the Government of the United States by force and violence; that defendants as part and parcel of the conspiracy sought to mask their purposes by pretending that they were fighting always and solely for democracy and the interests and welfare of the workers and to bring about salutary reforms and even socialism as a goal to be reached in the nebulous future, all by straightforward, peaceful and strictly lawful means, whereas in truth and in fact they resorted to many clandestine and fraudulent devices in teaching those subject to their influence secretly to prepare for the coming of some crisis, such as a deep depression or a war with the Soviet Union, to spring into action when the word of command was given, to paralyze power houses, the transportation system and the vast industrial machine at the heart of our economic system and in the resultant chaos and confusion to bring about, by violent and unlawful means, the overthrow or destruction of the Government and the establishment of the dictatorship of the proletariat.[397]

The prosecution simply could not have asked for a more vivid, compelling portrayal of its case. To be sure, Judge Medina also

---

396. *See* BELKNAP, *supra* note 11, at 86, 94, 101. Judge Hand noted that Judge Medina's comments regarding the defendants included language "short of requisite judicial gravity," but he ruled that Judge Medina's comments did not deprive the defendants of an adequate opportunity to prepare their case. *Dennis*, 183 F.2d at 225.

397. *Foster*, 9 F.R.D. at 381-82.

summarized the defendants' case at great length.[398] But, this summary involved more mundane pictures because it focused on the defendants' attempts to counter claims about Marxist-Leninist theory and characterizations of their political activity.[399] Such a summary, no matter how well-intentioned, could not compete with the compelling description of the prosecution's case. Similarly, Judge Medina's instruction that the jurors consider "testimony concerning secret schools, false names, devious ways, general falsification and so on" in order to determine whether the CPUSA was a conspiracy[400] practically invited the jurors to adopt the popular image of the CPUSA. The instruction would have been especially influential as the judge had refused to allow the defendants to present evidence providing a different explanation of their secretive practices.[401]

2. PREJUDICE

Evidence also exists to suggest that prejudice may have propelled the verdict against the *Dennis* defendants. As with the general public, there apparently existed an "us versus them" mentality throughout the trial. The indictment itself could have created the requisite categorization. Charging the defendants with conspiring to advocate the overthrow of the government would have divided the defendants and the judge-jurors into different camps—loyal versus allegedly disloyal Americans. The prosecution's reliance on the popular image throughout the trial could have strengthened perception of those differences and facilitated negative stereotypes much as it did in the general populace, eventually resulting in prejudice and a desire to take action against the CPUSA.

The defendants' behavior likely also contributed to such prejudice. Throughout the trial, the defendants' attorneys engaged in obstructive tactics designed to delay the trial and pressure the judge to dismiss the indictment. These factors included foot-dragging on juror selection, numerous objections to the prosecution's evidence and legal arguments, caustic pronouncements that the defendants were the victims of a political witch hunt, and attempts to spout the Communist Party line during trial.[402] Such tactics involved them in "bitter battles" with the

398. *Id.* at 383–86.
399. *See id.*
400. *Id.* at 391.
401. *See supra* note 197.
402. BELKNAP, *supra* note 11, at 69–73, 78; *see also* SCHRECKER, *supra* note 26, at 196.

judge that not only alienated many of their allies,[403] but likely the jurors as well. As one historian noted:

> Unable to free themselves from the party's sectarian vocabulary, [the defendants] came across as wooden, doctrinaire ideologues instead of as the victims of government repression that they also were. Worse yet, the decision to use the courtroom as a bully pulpit for preaching Marxism to the American people played into the prosecution's hands. The defendants inadvertently collaborated with the [DOJ's] strategy of making the case a test of the legitimacy of the [CPUSA's] policies . . . .[404]

Not only would the defendants' image as "wooden doctrinaire ideologues" have facilitated negative stereotypes by making them seem inhuman, all alike, and verging on the mentally ill, their preaching of communist theory would have generated hostility because it reminded the jurors of the vast differences between themselves and the defendants.

Given these facts and the conspiracy charge, one can easily imagine how the jurors might have viewed the defendants as a threat to their values and way of life. Certainly, neutral observers of the trial came to such conclusions. Many newspapers interpreted the trial proceedings as establishing that the CPUSA was a threat to American democracy. The *Los Angeles Times*, for example, described the verdict as finding "that the Communist Party is a criminal conspiracy against the United States, run from Moscow."[405] The *Washington Post* described the CPUSA as "a tightly organized and conspiratorial agency, drawing its inspiration and a large measure of its strength from the Soviet Union."[406] The *New York Times* described the defendants as "secretly teaching and advocating, on secret orders from Moscow, overthrow of the United States Government and destruction of American democracy by force and violence."[407] *Reader's Digest* printed an article proclaiming that the "'unchangeable intention'" of the CPUSA "'is to destroy, by force and violence, everything we hold dear. Let every American remember this.'"[408]

Judge Medina's actions exacerbated any tendency to view the defendants with hostility. His frequent clashes with the defense

403. *See* BELKNAP, *supra* note 11, at 67, 69.

404. SCHRECKER, *supra* note 26, at 197.

405. *Communism Is a Conspiracy*, L.A. TIMES, Oct. 15, 1949, at 4.

406. *Guilty of Conspiracy*, WASH. POST, Oct. 16, 1949, at 4B.

407. Russell Porter, *11 Communists Convicted of Plot; Medina to Sentence Them Friday; 6 of Counsel Jailed in Contempt*, N.Y. TIMES, Oct. 15, 1949, at 1.

408. SABIN, *supra* note 16, at 53 (quoting the August 1950 edition of *Reader's Digest*).

attorneys sorely tried his patience, resulting in numerous remarks that indicated his growing hostility toward them. As one observer noted, Judge Medina accused the defendants' attorneys of making "false and unreliable" statements and "repeatedly declared that [the defendants' attorneys] were acting in concerted agreement in an attempt to create confusion, provoke incidents and break down his health."[409] For example, in one encounter in the middle of the trial, Judge Medina remarked on one defense attorney's actions: "There was an instance when you deliberately lied to me when they were passing these press releases. You said that they were not and you were caught red-handed."[410] When the attorney denied he had lied to the court, Judge Medina responded: "You did it. . . . I can see from your belligerent manner if you thought you could, you might physically come up to the bench and physically attack me. I know your manner, and it doesn't frighten me in the slightest degree."[411] Comments such as this, coming from an individual of generally high esteem, must have affected the jurors' view of the defendants.

---

409. Sacher v. United States, 343 U.S. 1, 15 (1952) (Black, J., dissenting). *Sacher* involved the *Dennis* attorneys' appeal from summary contempt convictions and sanctions imposed by Judge Medina immediately after the verdict. *See id.* at 3–5. Judge Medina's contempt certificate confirms Justice Hugo L. Black's summary of his views:

> Before the trial had progressed very far . . . I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants, deliberately entered into in a cold and calculating manner, to do and say these things for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial; and (3) impairing my health so that the trial could not continue.

United States v. Sacher, 182 F.2d 416 app. at 430 (2d Cir. 1950) (appendix to majority opinion) (reprinting Judge Medina's contempt certificate).

The Supreme Court upheld the convictions in a five to three decision that reflected the justices' deep division regarding their propriety in light of Judge Medina's personal involvement in the case. *Sacher*, 343 U.S. at 11–14. An appendix to Justice Felix Frankfurter's dissenting opinion sets forth portions of the record reflecting exchanges between the trial judge and defense attorneys. *See id.* app. at 42–89 (appendix to opinion of Frankfurter, J., dissenting).

410. *Sacher*, 343 U.S. app. at 80 (appendix to opinion of Frankfurter, J., dissenting). The incident referred to involved the prosecution's accusation that an individual involved with the defense was passing out leaflets to press representatives in the courtroom. *See id.* (appendix to opinion of Frankfurter, J., dissenting); *Sacher*, 182 F.2d at 438–39. The attorney, Harry Sacher, denied this accusation, but Judge Medina believed he was lying about his knowledge of this incident. *Sacher*, 343 U.S. app. at 80–81 (appendix to opinion of Frankfurter, J., dissenting). The Second Circuit reversed Sacher's contempt conviction on these grounds because it found there was no evidence Sacher "attempt[ed] to mislead the court." *Sacher*, 182 F.2d at 424–25.

411. *Sacher*, 343 U.S. app. at 81 (appendix to opinion of Frankfurter, J., dissenting).

Judge Medina's own recollections of the trial confirm that he increasingly viewed the defense attorneys and their supporters as adversaries trying to break his will. Recounting his interaction with supporters of the defendants, he noted:

> [T]he first thing that put me wise to what was coming was one day I got down [to the courthouse] . . . and there was a delegation waiting to see me. A delegation of workers from some place in Ohio. And there was another delegation right behind the first one. . . .
>
> . . . .
>
> I said, "Now, look here, you just can't do this. This is America. What would you think if I let some rich man or some political leader come in and tell me what to do with a case?" . . . Well, my goodness, you could hardly get them out. Each one blah, blah, blahed, each one putting in his two cents worth, and as soon as I got them out there was another delegation. I tell you, these delegations of workers, delegations of veterans, delegations of purple-hearted veterans, delegations of housewives—they came . . . from everywhere—and they were on my neck there for three or four days. . . . I thought I was there representing America, and I didn't want Americans to be doing this sort of thing. . . . Then for the first time I realized the blue chips were down; that here was a force much greater than anything I had suspected; and that they were trying to knock me out and break up that trial.[412]

As the trial progressed, Judge Medina began to view the defendants, their attorneys, and other supporters in an even more sinister light, believing they willed him to commit suicide:

> I guess the first thing they tried on me—remember how Forrestal jumped out of that window in the hospital? Well, about a month after that the pickets down in that little park in front of the courthouse began carrying some new signs, and they read: "Medina will fall like Forrestal." Well, that sounds funny. But they followed it up: telephone messages, "Jump. Jump. You've got to jump," letters, postal cards. Well, do you know, it was the only thing that really worked on me. . . .

412. JUDGE HAROLD R. MEDINA, THE ANATOMY OF FREEDOM 4–5 (C. Waller Barrett ed., 1959).

> I tell you, it was years before I got over what they did to me during that period of about a month or six weeks on that particular "jumping out the window." . . . I tell you the men who thought this up were demons. They were positively demons. And if you remember how many times in Russian history people have jumped out windows—you remember Masaryk in Czechoslovakia? . . . I used to think they pushed the people out the window. But they don't need to do that. When they get working on you the way they know how to do, you jump out by yourself—you don't need to be pushed.[413]

Judge Medina's reaction to the defendants and those related to them is consistent with the formation of prejudiced attitudes. He clearly saw himself opposed to them—both as an American pursuing justice and personally, with respect to his health and well-being. His comments further suggest that he saw the defendants and those associated with them as a nearly super human force aimed at impeding the trial and destroying his life. This conception is consistent with the formation of negative stereotypes (for example, exacerbation of differences and tendency to see out-group members as homogenous and extreme) and out-group hostility (for example, threat to American values and attribution of hostile intent). These beliefs, often reflected in his comments at trial, must have affected the jurors who, like many Americans, were likely predisposed to such psychological phenomena.

B. Judge Hand and the Second Circuit Opinion

One might expect Judge Hand to have been less swayed by the popular image of the CPUSA than Judge Medina or the *Dennis* jurors. In contrast to the trial judge and jurors, Judge Hand had a position on the court of appeals that distanced him from personal interactions with the CPUSA that might have colored his perceptions of them.[414]

---

413. *Id.* at 11–12. In another conversation, Judge Medina "explained that whenever he looked at the spectators during the trial, he consciously forced himself to keep his eyes moving so that he would not let himself be placed in a trance by the hypnotists that the party might have placed in the courtroom." SCHRECKER, *supra* note 26, at 198 n.*.

414. As in other federal appeals, three judges heard the case. This discussion focuses on Judge Hand because he authored the majority opinion. The other judges' vision of the CPUSA is, however, consistent with the psychological phenomena discussed here. Judge Thomas Swan, for example, "considered the CPUSA [to be] an obvious 'danger to our form of government.'" BELKNAP, *supra* note 11, at 126 (quoted source omitted). Judge Chase also apparently had "no doubts at all about the propriety of the necessary rulings." *Id.*

Furthermore, he was an avowed critic of McCarthyism, believing it to be an "[i]nquisition, detecting heresy wherever non-conformity appears."[415] Nevertheless, the popular image appears to have captured his thinking, eventually coloring his perception of the defendants and their conduct.

This is most obviously true with respect to skewed risk assessment. Like Judge Medina, the *Dennis* jurors, and much of the rest of the country, Hand apparently embraced the view of the CPUSA as a "dreaded" threat. Accepting the prosecution's version of the evidence,[416] Judge Hand characterized the CPUSA as

> a highly articulated, well contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. . . . The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of success by lawful means.[417]

World events involving communist aggression, of which Judge Hand was obviously aware because he took judicial notice of them,[418] further magnified the threat and cemented the notion that the CPUSA was a threat to the existence of the United States.

Judge Hand's version and application of the clear and present danger test also reflects biased risk assessment. Judge Hand's version of that test is consistent with an individual's tendency to overestimate the likelihood of dreaded threats or to demand action regardless of the low likelihood of an event. By reading the imminence requirement out of the test, and requiring only that the threatened event be probable at some point in time,[419] Judge Hand's version of the test made it easier to convict the defendants. Accordingly, one can consider alteration of that test as evidence that he succumbed to skewed risk assessment.

Judge Hand's apparent belief in the likelihood of attempted overthrow bolsters that conclusion. While Judge Hand recognized that "discussion and publicity" may weaken the effect of speech over time, rendering it ineffective "when the moment may come" for action,[420] that

---

415. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 578–79 (1994) (internal quotations omitted).

416. Judge Hand rejected the defendants' objections to Judge Medina's decisions to admit and exclude certain testimony, to Judge Medina's alleged misconduct and bias, and to the jury selection process. *Dennis*, 183 F.2d at 224–34.

417. *Id.* at 212.

418. *See id.* at 213.

419. *See id.*

420. *Id.*

fact was true only "in ordinary times and for less redoubtable combinations," than the CPUSA.[421] "[W]e shall be silly dupes," Judge Hand noted, "if we forget that again and again in the past thirty years, [preparations like those allegedly undertaken by the CPUSA] in other countries have aided to supplant existing governments, when the time was ripe."[422] Given that the CPUSA was a beast of a different sort, he concluded that "one could [not] ask for a more probable danger, unless [one] must wait till the actual eve of hostilities."[423]

There is less evidence that prejudice swayed Judge Hand's decision. This is not surprising in light of Judge Hand's reputation as a sophisticated jurist in the liberal tradition who disliked McCarthyism's effect on civil liberties.[424] Such a person likely would not consciously adhere or give vent to prejudiced attitudes. Furthermore, Judge Hand's version of the clear and present danger test (that is, "whether the gravity of the 'evil,' discounted by its improbability, justifie[d] [an] invasion of free speech" rights[425]) would have restrained his inquiry, forcing him to couch his analysis in risk assessment terms due to the test's formula-like nature.

Psychologists have found, however, that prejudice need not be an overt expression of antagonism but rather can indirectly manifest itself. For example, researchers who study race relations in the United States have found that traditional, aversive racism, which involves overtly hostile attitudes toward another racial group, has "become unacceptable in the mainstream of American society" and "has been replaced by symbolic racism, which does not express racist sentiments in an overtly obvious and recognizable manner."[426] Symbolic racism tends to emerge as

> a blend of antiblack affect and the kind of traditional American moral values embodied in the Protestant Ethic. Symbolic racism represents a form of resistance to change in the racial status quo based on moral feelings that blacks violate such traditional American values as individualism and self-reliance, the work ethic, obedience, and discipline.[427]

---

421. *Id.*
422. *Id.*
423. *Id.*
424. *See* GUNTHER, *supra* note 415, at 579–80.
425. *Dennis*, 183 F.2d at 212.
426. DUCKITT, *supra* note 289, at 19.
427. Kinder & Sears, *supra* note 345, at 416 (citations omitted).

Such indirect expression of prejudice could operate in other contexts as well, including among liberals forced to deal with anticommunist sentiment in the late 1940s and early 1950s.[428]

In light of Judge Hand's apparent dedication to civil liberties, and his thoughtful and humble nature, he would likely not have held or expressed an overtly prejudiced attitude toward a group whose appeal was before him. His liberal nature, however, could have produced a more indirect prejudice reflected in the notion that the CPUSA violated traditional American values.[429] There is some support for this conclusion in Judge Hand's *Dennis* opinion and other sources. For example, Gerald Gunther's biography of Judge Hand notes that he believed the Stalin regime to be a significant threat to the United States.[430] Judge Hand's passage taking judicial notice of the Soviet Union's world aggression reflected this sentiment:

> By far the most powerful of all the European nations had been a convert to Communism for over thirty years; its leaders were the most devoted and potent proponents of the faith . . . . Moreover in most of West Europe there were important political Communist factions, always agitating to increase their power; and the defendants were acting in close concert with the movement. . . . Any border fray, any diplomatic incident, any difference in construction of the *modus vivendi*—such as the Berlin blockade . . . might prove a spark in the tinder-box, and lead to war.[431]

---

428. Liberals who previously supported communist causes and denounced persecution of domestic communists largely deserted them as anticommunist sentiment mounted. *See* SCHRECKER, *supra* note 26, at 81–84. Many such groups rationalized their behavior as based upon a realization that the CPUSA supported antidemocratic regimes. In 1939, for example, the American Civil Liberties Union (ACLU) "reaffirmed its traditional commitment to defending the rights of all unpopular groups." *Id.* at 83. Within a year, the organization abandoned this statement and adopted a platform that "declared it 'inappropriate' for officers of the ACLU to belong to 'any political organization which supports totalitarian dictatorship in any country.'" *Id.* at 84. Changes of position such as this could simply reflect liberals' attempts to protect themselves from the anticommunists' tendency to identify as "fellow travelers" any organization sympathetic to the CPUSA's plight. With its focus on the CPUSA's violation of traditional American democratic values, it is also consistent with indirect prejudices similar to symbolic racism.

429. *Cf.* DUCKITT, *supra* note 289, at 39–40 (recounting studies linking the tendency of college students to gravitate toward symbolic racism over overt racism and the "liberal atmosphere of most American campuses would have created significant pressures for students to try and avoid creating the impression of being racist").

430. *See* GUNTHER, *supra* note 415, at 577.

431. *Dennis*, 183 F.2d at 213.

Judge Hand further outlined European communists' denigration of the United States:

> We [have] become the object of invective upon invective; we [are] continuously charged with aggressive designs against other nations; our efforts to re-establish their economic stability [are] repeatedly set down as a scheme to enslave them; we [have] been singled out as the chief enemy of the faith; we [are] the eventually doomed, but the still formidable, protagonist of that decadent system which [communism] was to supplant.[432]

Judge Hand's perception of the worldwide communist movement as hostile and threatening was bound to have affected his views of the CPUSA, especially given his linkage of the two throughout the *Dennis* opinion.

Judge Hand's view of Marxism-Leninism as a cloying ideology requiring unthinking adherence would have further emphasized the difference between communist tenets and his own beliefs, which tended toward skepticism.[433] In fact, Judge Hand called Marxism a "'Satanic and false'" faith,[434] suggesting just how much communism conflicted with his beliefs. Judge Hand's opposition to McCarthyism's inquisitorial tactics does not detract from this conclusion. Belief that the government's tactics overreached and injured innocent victims is entirely consistent with a belief that the CPUSA and its alliance with the Soviet Union were dangerous. In fact, the plight of the anticommunist campaign's innocent victims could have reinforced the difference between them and the real evildoers, thus actually facilitating prejudice.

Judge Hand later attributed his *Dennis* opinion to the need to adhere to Supreme Court precedent and his philosophy of judicial restraint: "'[W]e had no alternative. Many is the time that I have declared valid a law I should never have voted to pass.'"[435] While Judge Hand had long believed that lower courts were bound by precedents, even those they disliked,[436] adherence to precedent and the need for judicial restraint do not explain the passion with which Judge Hand's opinion described the CPUSA and its alleged conspiracy with the Soviet Union. He could have written a much drier opinion upholding the convictions. His

---

432. *Id.*

433. *See* GUNTHER, *supra* note 415, at 581–82.

434. *Id.* at 581 (quoting a letter from Judge Hand to Bernard Berenson).

435. *Id.* at 605 (quoting an April 3, 1953 letter from Judge Hand to Irving Dilliard). Judge Hand was especially aware of *Douds*, which the Supreme Court decided just before the Second Circuit heard the *Dennis* appeal.

436. *See id.* at 603–05.

reliance on vivid depictions of the CPUSA and world events, however, suggests a man who actually believed the picture he portrayed.[437]

Assuming that Judge Hand did not believe his portrayal of the CPUSA, the popular image of that group may nevertheless have affected his opinion. The anticommunist campaign brought powerful pressure to bear on anyone who publicly dissented from that image. Judge Hand's "fearful nature"[438] and "brooding lack of self-esteem,"[439] potentially made him easy prey to reputational influences that facilitate faulty threat perception throughout society. His willingness to denounce Stalinism while remaining silent about McCarthyism until much later[440] suggests, at the very least, that Judge Hand was well aware of the pressures of the anticommunist campaign. Consequently, reputational concerns might have been as much or more of a factor in Judge Hand's *Dennis* opinion as his judicial philosophy.[441] Whether Judge Hand actually believed his portrayal of the CPUSA or simply put forth such an image due to societal pressure, his opinion surely assisted the anticommunist campaign.

C. The Supreme Court Opinions

The psychological phenomena affecting the lower court judges appear to have affected the Supreme Court justices voting to uphold the *Dennis* convictions. Chief Justice Vinson's adoption of Judge Hand's version of the clear and present danger test suggests the operation of skewed risk assessment because it is consistent with research showing that the "dreaded" nature of the harm often infects assessments of its likelihood. Furthermore, Chief Justice Vinson's opinion is replete with references suggesting that he viewed the CPUSA as a "dreaded" threat. He described the CPUSA as a "highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language" that was "rigidly controlled" by a program that was

---

437. *See* Wiecek, *supra* note 20, at 432 (noting that Judge Hand's description of the CPUSA used "language, more appropriate to HUAC or Hoover, [which] suggest[ed] how deeply committed American judges were to the ideological construct of Communism").

438. GUNTHER, *supra* note 415, at 586.

439. *Id.* at 575.

440. *See id.* at 585–86.

441. As Professor Morton Horwitz has noted,

> The real question . . . is whether Hand's increased doubts about judicial activism provide a satisfactory explanation independent of the subject matter of those increased doubts. . . .
>
> . . . [W]hy are we not entitled to call what Gunther terms Hand's "extreme" version of judicial restraint nothing other than judicial self-abnegation in the face of McCarthyism?

Horwitz, *supra* note 16, at 720–21 (footnote omitted).

"slavishly followed by the members of the Party."[442] Having adopted the popular image of the CPUSA, Chief Justice Vinson also believed it posed a very real harm, characterizing it as posing an impending threat of an "armed internal attack."[443]

Chief Justice Vinson's reliance on the "inflammable nature of world conditions"[444] to justify his conclusions also supports a conclusion that skewed risk assessment affected his decision. Those conditions were salient to Chief Justice Vinson. On the morning of the *Dennis* oral arguments, newspapers carried dramatic stories of Chinese communists' advances in the Korean War.[445] Not only did government attorneys repeatedly refer to such events in their briefs and arguments, Chief Justice Vinson "had been reading the newspapers, and reports of 'world crisis after crisis' alarmed him."[446] Similarly, Chief Justice Vinson's personal brush with Soviet espionage while serving as U.S. Secretary of the Treasury could have increased the popular image's salience.[447]

As with Judges Hand and Medina before him, Chief Justice Vinson's beliefs were likely based less on evidence regarding the CPUSA than on the vividness of the popular image and its association with Soviet aggression. There was no more evidence against the CPUSA during the Supreme Court deliberations than there had been in the lower proceedings. In other words, there was *no evidence* that the CPUSA conspired to advocate overthrow of the government, much less that the defendants conspired to overthrow it. Nevertheless, Chief Justice Vinson's view regarding the nature of the threat was so firm that he believed there was no need for discussion. At the justices' conference regarding *Dennis*, Justice Douglas's notes indicate that there was "[p]ractically no discussion."[448] Other justices joining the plurality also took Chief Justice Vinson's view. As Justice Douglas noted: "The amazing thing about this conference . . . was the brief nature of the discussion. Those wanting to affirm had their minds closed to argument

442. *Dennis*, 341 U.S. at 498; *see also id.* at 510–11 (describing the CPUSA as "a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action").

443. *See id.* at 509.

444. *Id.* at 511.

445. PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 380 (1999).

446. *Id.* at 380–81.

447. *See* JAMES E. ST. CLAIR & LINDA C. GUGIN, CHIEF JUSTICE FRED M. VINSON OF KENTUCKY: A POLITICAL BIOGRAPHY 233 (2002). While he was the U.S. Secretary of the Treasury, Chief Justice Vinson received a report authored by Hoover arguing that "Harry Dexter White, then assistant secretary of the Treasury, was passing 'materials' . . . to . . . suspected Soviet agents." *Id.*

448. THE SUPREME COURT IN CONFERENCE (1940–1985), at 278 (Del Dickson ed., 2001) [hereinafter THE SUPREME COURT IN CONFERENCE].

or persuasion. The conference discussion was largely pro forma."[449] Such behavior is consistent with the operation of the confirmation trap and overconfidence biases that often accompany skewed risk assessment.

While Chief Justice Vinson's plurality opinion is couched in risk assessment terms, it is also consistent with the operation of stereotypes and prejudice. For example, there is evidence that Chief Justice Vinson viewed the CPUSA as threatening more because of its nature as a group than because it posed a real threat of overthrow. To illustrate, Chief Justice Vinson emphatically rejected the argument that convictions for conspiracy to advocate overthrow of the government violated the First Amendment, noting that "[i]t is the existence of the conspiracy which creates the danger."[450] In other words, the CPUSA's advocacy of Marxist-Leninist doctrine was dangerous in and of itself although admittedly there was no evidence that the defendants had taken concrete steps to overthrow the government or that such an attempt was imminent. Hostility toward a group because of its beliefs is consistent with psychological theories positing that prejudice results from perceived threats to one's values.[451]

There is other, indirect evidence lending support to this argument. "A government man at heart," Chief Justice Vinson apparently never fully disassociated his interests from his former employer.[452] He remained a close advisor of President Truman's even after his appointment to the Supreme Court.[453] A man so aligned with government interests, especially with a president who called the *Dennis* defendants "traitors" on the eve of trial,[454] likely would have seen the CPUSA's adherence to communist tenets as threatening. Chief Justice Vinson's belief that order must be secured above all else[455] could have exacerbated this perception as it would have emphasized an "us versus

449. *Id.* at 279. Justices Sherman Minton and Stanley Reed voted to confirm without discussion while Justice Harold Burton noted that "[w]e can take judicial knowledge of the danger." *Id.* at 278–79. There is also independent evidence that Justice Minton believed that the CPUSA was a "serious national threat." SABIN, *supra* note 16, at 81.

450. *See Dennis*, 341 U.S. at 511.

451. Justice Black apparently thought that Chief Justice Vinson's characterizations were overblown and based upon superstition and prejudice. His margin comments regarding Chief Justice Vinson's draft opinions were caustic and vicious. He wrote things such as "Bad men! To jail with them!"; "Good semantic emotionalism and ghost conjuring!"; and "The goblin'll get you" in response to Chief Justice Vinson's characterizations of the CPUSA. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 403 (1994) (internal quotations omitted).

452. *See* THE SUPREME COURT IN CONFERENCE, *supra* note 448, at 101.

453. *See* ST. CLAIR & GUGIN, *supra* note 447, at 190–91.

454. *See supra* note 349 and accompanying text.

455. ST. CLAIR & GUGIN, *supra* note 447, at 232 (describing as one of Chief Justice Vinson's "most cherished beliefs" the notion "that order must be secured for freedom to exist").

them" mentality. In this case, "us" was a government trying to preserve American values and beliefs while "them" was a group openly critical of the American form of government and capitalism. With such group opposition established, it would hardly be surprising for Chief Justice Vinson to uphold the convictions of the CPUSA, even absent evidence of wrongdoing.

Justice Jackson's concurrence similarly evidences the operation of biased threat perception in his assessment of the CPUSA's convictions. Like other judges, Justice Jackson succumbed to the popular image of the CPUSA, describing it in perhaps the most vivid terms of all the *Dennis* opinions. He described domestic communists as "selected, dedicated, indoctrinated, and rigidly disciplined members. . . . [They] are, or may be, secreted in strategic posts in transportation, communications, industry, government, and especially in labor unions" and have "no scruples against sabotage, terrorism, assassination, or mob disorder."[456] Such a group was made more sinister because it wanted to gain power not by outright violence but by fooling Americans regarding its legitimacy as a political party.[457] Referring to the 1948 coup in Czechoslovakia, Justice Jackson noted that communists "[p]retending to be but another political party, [were] eventually . . . conceded participation in government, where [they] entrenched reliable members chiefly in control of police and information services," which ultimately allowed them to take over the Czech government in a "bloodless" coup.[458] Although Justice Jackson acknowledged that "[t]he United States, fortunately, has experienced Communism only in its preparatory stages," the communist threat in general was sufficient to render the CPUSA a "nation-wide conspiracy" willing to engage in the tactics Justice Jackson had described.[459]

Justice Jackson's opinion could have resulted from either skewed risk assessment or prejudice. His vision of communism comports with the concept of a "dreaded" threat, one that was obviously salient, especially given his focus on the communist coup in Czechoslovakia. Justice Jackson's rejection of the clear and present danger test in *Dennis* further supports this thesis. Justice Jackson argued that, in the case of furtive preparations, the test would allow the government to act only when "it would . . . be too late."[460] He thus believed that the CPUSA's status as a conspiracy was sufficient to uphold the defendants' convictions.[461] In fact, Justice Jackson apparently viewed the CPUSA's

456. *Dennis*, 341 U.S. at 564 (Jackson, J., concurring).
457. *See id.* at 565–66 (Jackson, J., concurring).
458. *Id.* (Jackson, J., concurring).
459. *Id.* at 568–69 (Jackson, J., concurring).
460. *Id.* at 570 (Jackson, J., concurring).
461. *See id.* at 572 (Jackson, J., concurring).

activities as "inherently dangerous."[462] Such reasoning suggests that the perceived magnitude of the threat posed by the CPUSA, although unsupported by direct evidence, dominated Justice Jackson's assessment regarding the need for action.

Justice Jackson's previous experience at the Nuremburg trials, which caused him to "look[] on potential dictatorial groups with far less tolerance than he had [previously] displayed,"[463] suggests that Justice Jackson's vision of the CPUSA may have also resulted from prejudice. As a result of those experiences, Justice Jackson could have looked upon the CPUSA as a group posing a threat to American values. Ironically, Justice Jackson expressed concern that the *Dennis* defendants would be unable to obtain a fair trial because they were "'the current phobia in Washington.'"[464] Nevertheless, his focus on the CPUSA as a group led him to "set[] aside his feelings" and affirm the defendants' convictions.[465] Such a focus on group dangerousness is consistent with the operation of prejudice.

Justice Frankfurter, like Judge Hand, couched his concurrence in terms of judicial restraint, a philosophy with which he was long associated.[466] "Free-speech cases," he wrote, "are not an exception to the principle that we are not legislators . . . . How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment."[467] Because the legislature had concluded "after due deliberation" that the Smith Act was necessary, Justice Frankfurter concluded the Court should defer to its decision.[468]

Although couched in terms of judicial restraint, Justice Frankfurter's opinion nevertheless invoked the popular image of the CPUSA. Unlike Chief Justice Vinson, Justice Frankfurter acknowledged that the trial had not "established [as] fact that the Communist Party in this country is of significant size, well-organized,

---

462. *See* THE SUPREME COURT IN CONFERENCE, *supra* note 448, at 279.

463. MELVIN I. UROFSKY, DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941–1953, at 172 (1997).

464. *See* HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 192 (1996) (quoting a draft of Justice Jackson's concurring opinion in *Dennis*). Justice Jackson believed that this fear "'cast a shadow on the jury box, [with] everybody looking over their shoulder to see who [was] watching.'" *Id.* (alterations in original) (quoting Justice Jackson's notes).

465. *Id.* at 193.

466. *See* MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES 168 (1982) ("The correct judicial posture . . . ought to be one of deference to the legislature's judgment, unless that choice 'passes the bounds of reason and assumes the character of a merely arbitrary fiat.'") (quoting Justice Frankfurter).

467. *Dennis*, 341 U.S. at 539–40 (Frankfurter, J., concurring in affirmance of the judgment).

468. *Id.* at 550–51 (Frankfurter, J., concurring in affirmance of the judgment).

well-disciplined, [and] conditioned [enough] to embark on unlawful activity when given the command."[469] He argued, however, that "in determining whether application of the statute to the defendants is within the constitutional powers of Congress, we are not limited to the facts found by the jury."[470] After referencing Soviet aggression in Europe, the size of the CPUSA, its organization, recent espionage events in the United States and Canada, communists in political and labor organizations, and Hoover's HUAC testimony, he concluded that "Congress was not barred by the Constitution from believing that indifference to such experience would be an exercise not of freedom but of irresponsibility."[471] As with the other judges involved in the case, Justice Frankfurter's reference to recent but unrelated events is consistent with the psychological phenomena that skew threat perception.

One can plausibly argue that Justice Frankfurter's discussion simply reflects the kinds of incidents Congress and the government considered when passing the Smith Act and undertaking prosecution, rather than reflect his personal views. There is evidence, however, that Justice Frankfurter believed that CPUSA leaders posed a danger to the United States. For example, in a note to Justice Frank Murphy during the Court's deliberations in *Schneiderman*,[472] he wrote:

> "[T]he Soviet Government, after the last war, expected a Bolshevist Revolution throughout the world. . . . [A]fter a little while, the Soviet Government fashioned the Comintern—the Third International—as the instrument of the political export business of the Soviet and the Communist Party. In each country there was a branch office of this international export business of the Soviet Government. And those who were running the branch business in the various countries were, in fact, political instruments of the Soviet regime. Of course, many, many people who became Communists in the United States were perfectly devoted and loyal Americans, but found in Communism a practical expression of their hopes for a better society. But the active managers of the Communist Party . . . were knowing and eager instruments of their foreign masters, the Comintern, and the Comintern was, as I have said, the instrument of the Soviet Government."[473]

---

469. *Id.* at 547 (Frankfurter, J., concurring in affirmance of the judgment).
470. *Id.* (Frankfurter, J., concurring in affirmance of the judgment).
471. *Id.* at 547–48 (Frankfurter, J., concurring in affirmance of the judgment).
472. 320 U.S. 118.
473. Wiecek, *supra* note 20, at 430 (first omission in original) (quoting Justice Frankfurter's note to Justice Frank Murphy).

Based upon this characterization, Justice Frankfurter disagreed with the *Schneiderman* majority, which found that membership in the CPUSA was an insufficient basis for denaturalization.[474] Furthermore, Justice Frankfurter joined (and presumably agreed with) Chief Justice Harlan Fiske Stone's *Schneiderman* dissent, which described the CPUSA in a manner consistent with the popular image.[475]

Similarly, in response to the *Dennis* defendants' request to delay oral argument, reportedly to allow a new lawyer to participate, Justice Frankfurter warned his colleagues that they "were dealing with 'extremely sophisticated tacticians' who were concerned not merely with legal issues but were 'engaged in propaganda for extraneous ends.'"[476] Such behavior supports the argument that Justice Frankfurter embraced the popular image of the CPUSA projected by the anticommunist campaign even though he was very much opposed to that campaign's tactics. Some historians looking back on his opinion have concluded that "Frankfurter's opinion in *Dennis*, read in the light of history, smacks more of judicial abdication of responsibility than measured deference and restraint."[477]

Although the Vinson, Jackson, and Frankfurter opinions are consistent with biased threat perception, one can argue that the justices voting to uphold the *Dennis* convictions did so primarily for strategic reasons. That is, faced with such overwhelmingly negative sentiment regarding the defendants, the justices may have decided to uphold their convictions to preserve their political capital with the president, Congress, and the public. Judge Richard Posner, for example, has argued that the fear of domestic communists, though exaggerated, "was

474. 320 U.S. at 157–59.

475. *See id.* at 170–97 (Stone, C.J., dissenting).

476. ST. CLAIR & GUGIN, *supra* note 447, at 238 (quoting a Justice Frankfurter memorandum circulated to other Court members). Justice Frankfurter was apparently referencing incidents in which the CPUSA attempted to gain "public sympathy by 'educating the masses' about the potential threat to constitutional freedom posed by the government's prosecutions." *Id.* (quoting a Justice Frankfurter memorandum circulated to other Court members).

477. *E.g.*, UROFSKY, *supra* note 463, at 172; *see also* HOWARD BALL & PHILLIP J. COOPER, OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA'S CONSTITUTIONAL REVOLUTION 146 (1992) (arguing that Justice Frankfurter's judicial deference "meant, as it had during the earlier Red Scare, that the Court neglected to pose substantive questions or acquiesced in" intrusive government actions against communists). *But see* IRONS, *supra* note 445, at 382 (maintaining that Justice Frankfurter had doubts about the appropriateness of the defendants' convictions).

a brute fact that judges who wanted to preserve their power had to consider."[478]

That judges engage in strategic reasoning is beyond question, and it is reasonable to assume that such reasoning may have occurred in *Dennis*. But, that assumption does not detract from the thesis of this Article. Many factors influence judicial decision-making. Both the desire to preserve political capital and skewed threat perception could have affected the *Dennis* justices. To the extent that existing fear of communists was "a brute fact" of which the justices had to take note, for example, the popular image of the CPUSA at least influenced the justices' otherwise political decision, suggesting that the justices were subject to reputational influences causing them to conform to dominant opinion even if they disagreed with it. The vivid nature of the justices' opinions, however, suggests more than simple conformity and supports a conclusion that they may have held beliefs in line with much of society.

V. LEGAL TESTS AND THE *DENNIS* PHENOMENA

A. Clear and Present Danger and the Facilitation of Psychological Biases

History has not been kind to *Dennis*. Most scholars agree that the *Dennis* courts got it wrong—that is, they allowed the government to punish the defendants because of their ideas rather than the danger they actually posed to the nation's security. This Article's review of history and psychology further suggests, however, that the *Dennis* courts not only reached the wrong decision, but also that they may never have had a fighting chance of reaching the right one. In light of the social and psychological forces operating at the time, the clear and present danger test was an ill-suited vehicle for determining the defendants' guilt. Indeed, that test may have facilitated the very biases and prejudices that skewed the courts' vision of the defendants' dangerousness.

The amorphous balancing required in the clear and present danger test made it particularly susceptible to the skewing effects of psychological phenomena such as the availability heuristic, confirmation trap bias, overconfidence bias, and the dreaded nature of the predicted event. Even in its most protective form, the test does little more than restate a generalized definition of risk analysis requiring courts to assess the likelihood that speech will cause a particular event. Such a test is no guard against overestimation of an event's probability, especially one

478. Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 741 (2002); *see also* KALVEN, JR., *supra* note 10, at 190–91 (claiming that "political exigencies" motivated the *Dennis* Court).

that supposedly involved violent overthrow of the government, an evil that "was as great as could be imagined."[479] In fact, given what psychologists know about human nature, one could have predicted that some of the *Dennis* judges would overreact to the alleged dangerousness of the CPUSA when applying the clear and present danger test.[480]

Other aspects of that test ensured that its application doomed the *Dennis* defendants. The test's lack of specific intent, causation, and evidentiary requirements, for example, allowed the *Dennis* courts to focus on the wrong harm and magnify the CPUSA's potential threat beyond reason. While the defendants were charged with conspiring to *advocate* overthrow of the government, at the proceedings' conclusion, almost everyone viewed their alleged conspiracy as involving *actual attempted* overthrow of the government. What the judges and juries should have viewed as a relatively minimal harm—all of the courts concluded that advocacy of ideas did not present a punishable harm under the clear and present danger test—had mutated into a catastrophic one.

This mutation resulted from the courts' reading of the government's evidence—Marxist-Leninist literature, the bulk of which alone could not have presented a clear and present danger of advocacy of overthrow, much less actual overthrow, of the government. The trial court's allowance of testimony interpreting that literature and CPUSA practices in a more sinister light, however, shifted focus away from the conspiracy to advocate charge and placed it squarely on the popular image's view of the CPUSA as a part of a worldwide conspiracy of Soviet aggression. The *Dennis* judges and jurors thus inferred a worldwide conspiracy to overthrow the government from the government's literary evidence and descriptions of the CPUSA. Nothing in the clear and present danger test could guard against this occurrence. The simple requirement that the danger be "clear" or "extremely serious" does not focus the inquiry regarding the nature of the harm or the defendant's intent to cause it. Nor does it compel judges to require evidence of a particular type or weight. If anything, these vague terms encourage prosecutors to characterize harm in a way likely to galvanize fear and trigger operation of various psychological biases.

---

479. Douglas Laycock, *The Clear and Present Danger Test*, 25 J. SUP. CT. HIST. 161, 177 (2000).

480. *See* GUNTHER, *supra* note 415, at 602 (noting that the clear and present danger test's reliance on "prophecy of the future" invited the courts' reliance on judicial notice and made the test "vulnerable to . . . wide-ranging inquiries"); Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 41 (2003) (noting that the *Dennis* Court "failed to understand that . . . its fears . . . would be *predictably* overstated").

The test's checkered past also may have facilitated biases. Although courts had applied the test strictly, requiring an extremely high degree of imminence and a serious harm in the years preceding *Dennis*, the test had an inconsistent history, which included a far more lenient version in its early years and its abandonment altogether at other times.[481] That meandering path led Judge Hand to view the test not as a rigid rule, but as "a way to describe a penumbra of occasions, even the outskirts of which are indefinable, but within which, as is so often the case, the courts must find their way as they can."[482] The *Dennis* judges thus felt free to redefine or abandon the strict version of the test in order to uphold the defendants' convictions.

These same aspects of the clear and present danger test may have also facilitated the operation of prejudice and stereotypes in *Dennis*. The test's nebulous reference to "serious" harm could have allowed the *Dennis* jury and judges to convict the defendants and uphold their convictions based upon their perceptions of the CPUSA's threatening nature rather than the act with which defendants were charged—conspiracy to advocate overthrow. In the case of domestic communists, such threat perception could have resulted from a conflict of beliefs or clash of cultural values. This was especially true in light of the literary evidence, testimony interpreting it in a sinister light, and judges' willingness to take notice of world events, all of which cast the defendants as puppets of an aggressive and hostile foreign nation. The clear and present danger test lacked the causation and evidentiary requirements necessary to prevent the kinds of inferences that an individual subject to stereotypes and prejudice might draw to convince themselves that the defendants' beliefs posed a threat deserving of punishment.

The test's historically inconsistent application also could have facilitated the operation of prejudice. The judges' ability to manipulate the clear and present danger test without actually having to say that they were deviating from it provided them with comfort that the *Dennis* defendants received a fair trial as opposed to a political one.[483] This manipulation allowed the judges to avoid asking hard questions about their motivations in upholding convictions based on a remote and speculative harm. Furthermore, the self-congratulatory notion that the American justice system had worked "better" than a totalitarian communist regime emphasized the differences between Americans (with

481. *See supra* note 218 and accompanying text.

482. *Dennis*, 183 F.2d at 212.

483. *See* KALVEN, JR., *supra* note 10, at 195 (commenting that allegations that *Dennis* was a political trial may have prompted the Court to engage in "at least the ceremony of painstakingly reconciling the Government's anti-Communist strategy with the traditions of free speech and political tolerance").

whom the judges surely identified) and communists, which could have contributed to the operation of prejudiced attitudes.[484]

Perhaps intuitively understanding these flaws, the Supreme Court eventually moved away from the clear and present danger test, adopting approaches that more effectively guarded against the psychological phenomena discussed above. The Court began this process during the waning years of the Cold War in another conspiracy case, *Yates v. United States*.[485] *Yates*, like *Dennis*, involved convictions of fourteen additional leaders of the CPUSA for conspiracy to advocate.[486] The government's case in *Yates* proceeded along much the same lines as *Dennis*, including its reliance on the same literary evidence and testimony.[487] Indeed, the charges and evidence in both cases were so similar that Justice Thomas Clark characterized the *Yates* defendants as "engaged in [the same] conspiracy with the defendants in *Dennis*" and as having "served in the same army."[488]

Unlike *Dennis*, however, the *Yates* Court reversed the defendants' convictions.[489] Justice John M. Harlan, writing for the majority, interpreted the Smith Act as prohibiting only incitement of violence and not "advocacy and teaching of forcible overthrow as an abstract principle," and concluded that the lower court's jury instructions did not adequately make that distinction.[490] Turning to the evidence supporting the charges against the defendants, he also found it insufficient to sustain the convictions:

> Instances of speech that could be considered to amount to "advocacy of action" are so few and far between as to be almost completely overshadowed by the hundreds of instances in the record in which overthrow, if mentioned at all, occurs in the course of doctrinal disputation so remote from action as to be almost wholly lacking in probative value. Vague references to "revolutionary" or "militant" action of an unspecified character, which are found in the evidence, might in addition

---

484. That Americans indulged in such self-congratulation is evident from the many letters Judge Medina received lauding him for his fair conduct of the trial. *See* JUDGE MEDINA SPEAKS 299–303 (Maxine Boord Virtue ed., 1954) (describing these letters); *see also* SABIN, *supra* note 16, at 53–54 (discussing public sentiment about the fairness of the *Dennis* trial).

485. 354 U.S. 298 (1957), *overruled in part by* Burks v. United States, 437 U.S. 1 (1978).

486. *Id.* at 300–02.

487. *Id.* at 329–33.

488. *Id.* at 344–45 (Clark, J., dissenting).

489. *Id.* at 327.

490. *Id.* at 318, 324–27.

> be given too great weight by the jury in the absence of more precise instructions. . . .
>
> . . . .
>
> . . . [W]hen it comes to Party advocacy or teaching in the sense of a call to forcible action at some future time we cannot but regard this record as strikingly deficient. At best this voluminous record shows but a half dozen or so scattered incidents which, even under the loosest standards, could be deemed to show such advocacy. Most of these were not connected with any of the petitioners, or occurred many years before the period covered by the indictment.[491]

As a consequence of Justice Harlan's interpretations, his opinion, though not overruling *Dennis*, substantially limited its viability, doing so without ever mentioning the clear and present danger test.[492]

In stark contrast to *Dennis*, Justice Harlan's approach reflects analysis free of the skewing effects associated with the psychological phenomena discussed above. By narrowly defining the punishable harm as "incitement to action,"[493] Justice Harlan firmly placed the focus on a particular, identified harm, rather than on a generalized "extremely serious" harm. Such focus is more likely to prevent the conflation of harm that occurred in *Dennis*—that is, the merger of conspiracy to advocate overthrow with conspiracy to overthrow. Furthermore, Justice Harlan's attention to the nature of the evidence, his critical examination of causal links between that evidence and the incitement charge, and his refusal to take judicial notice of the evils of communism[494] further curbs the ability to draw unreasonable and unsupported inferences from generalized evidence regarding a group's "threatening" nature. Finally, his concern that vague references to amorphous harms such as "militant" and "revolutionary" action might skew the jury's decision-making shows a clear understanding of human frailty and the need for an aggressively critical approach to the government's evidence.

While Justice Harlan's actions deprived *Dennis* of its vitality, *Yates* did not completely undo the harm wrought by *Dennis*. By dealing with

---

491. *Id.* at 327, 329–30.

492. *See* KALVEN, JR., *supra* note 10, at 214; Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 753 (1975).

493. *See Yates*, 354 U.S. at 303.

494. *Id.* at 330 ("[I]t is upon the evidence in the record that the petitioners must be judged in this case."). Justice Douglas's dissent in *Dennis* also evidences freedom from skewing effects, especially in his discussion of the absence of evidence supporting the defendants' convictions. *See supra* notes 244–49 and accompanying text.

Dennis indirectly, Justice Harlan left *Dennis* and its version of the clear and present danger test available for later application. In *Brandenburg v. Ohio*,[495] however, the Court formally adopted a standard providing many of the same protections as Justice Harlan's approach. In *Brandenburg*, the Court made clear that the government could not punish mere abstract teaching of the moral necessity of illegal action; rather, the First Amendment permits punishment of speech only when it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[496] By narrowly defining the harm as incitement of "imminent lawless action," *Brandenburg*, like *Yates*, carefully limits the threat that can be considered, requiring that it be both imminent and the result of an incitement. Accordingly, it makes the harm inquiry more objective and less likely to be subject to skewing effects.[497] The requirement that the defendants' speech be "directed" and "likely" to cause "imminent" harm imposes strict intent and causation requirements, forces judges and jurors to assess the evidence carefully, is more likely to prevent unwarranted inferences, and makes it less likely that judges and jurors will overestimate the likelihood of harm.[498]

Ultimately, *Brandenburg*'s concrete definition of harm and imposition of causation requirements makes evasion more difficult and forces jurists to take a sober second look at their thought processes before coming to a conclusion.[499] None of this, of course, guarantees that courts will refrain from manipulating the *Brandenburg* standard in the same way that they manipulated the more malleable clear and

---

495. 395 U.S 444 (1969).

496. *Id.* at 447.

497. *See* Horwitz, *supra* note 480, at 45 ("It is simply more difficult to conduct a distorted analysis of risk when, by demanding imminence, the test will generally require a jury to balance its passionate assessment of risk with the actual outcome . . . ."); Frederick M. Lawrence, *The Collision of Rights in Violence-Conducive Speech*, 19 CARDOZO L. REV. 1333, 1347 (1998) ("The evaluation of harm is made more objective when it looks to specific instances of imminent harm rather than to those that are general instances of potential long-range harm.").

498. *See* Vincent Blasi, *Reading Holmes Through the Lens of Schauer: The* Abrams *Dissent*, 72 NOTRE DAME L. REV. 1343, 1358–59 (1997) (describing *Brandenburg* as imposing strict causation requirements designed to gnard against the punishment of ideas); Laycock, *supra* note 479, at 180–81 (locating *Brandenburg*'s principal strength in its use of the term "imminent" to modify both the danger and the incitement element); Bernard Schwarz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 240 (noting that *Brandenburg*'s requirement of express advocacy of imminent law violation which must be likely to occur makes it "more difficult to show the required nexus between given expression and imminent lawless action").

499. Horwitz, *supra* note 480, at 47 (noting that *Brandenburg*'s "testness" makes it more "difficult to evade"); Laycock, *supra* note 479, at 181 (stating that "[t]he genius of *Brandenburg* is [its] belts and suspenders" approach to protecting speech).

present danger test. As Professor David Rabban has noted, "substantial doubts can be raised as to whether any constitutional standard, however protective its language, can protect free speech in times of crisis."[500] But *Brandenburg*'s specific criteria are difficult to evade and thus have "enormous potential."[501] That is all that we can ask of jurisprudential tools, at least in the context of battling unconscious skewing effects.

B. The Supreme Court's Modern Approach: Tiers of Scrutiny

In light of *Brandenburg*, it may be tempting to dismiss *Dennis* as an historical artifact. After all, *Brandenburg* has successfully limited many governmental attempts to regulate speech short of incitement, and the clear and present danger test in its earlier iterations is positively moribund. For all of *Brandenburg*'s positive contributions, however, there is reason to be concerned regarding future cases involving skewing effects similar to those found in *Dennis*.

Brandenburg's analytical approach applies only in situations involving incitement to illegal action, a narrow category of speech cases representing a small portion of the Court's jurisprudence. More commonly, the modern Court resolves cases involving regulations of political speech by applying its multitiered system of review. Thus, the Court applies variations of "means-end" scrutiny depending on the kind of regulation at issue. It reserves the most stringent review, strict scrutiny, for content-based regulations (that is, those that regulate because of what is said), asking whether the regulation is necessary to meet a compelling state interest.[502] It applies intermediate scrutiny to content-neutral regulations (that is, those that regulate without regard to the expression's message), asking whether they are "'narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.'"[503] There exist serious questions as to whether these balancing tests can protect against skewing effects in times of crisis.[504] Much about them suggests that they cannot.

---

500. David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1352 (1983).

501. *Id.* at 1353.

502. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992). For a general discussion of the Court's content discrimination jurisprudence, see Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 173–74 (1997).

503. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

504. Many scholars describe the Court's use of tiers of scrutiny as a balancing approach. Professor Daniel Solove, for example, has noted:

We know, for example, that strict scrutiny is intended to be extremely protective—"'strict' in theory [but] fatal in fact."[505] Indeed, this scrutiny is so protective of speech that the Supreme Court deems content-based regulations as "presumptively invalid."[506] But, what is it about the strict scrutiny test that compels that result? While we know that the government's interest in promoting a content-based regulation must be "compelling," nothing in the test defines the parameters of that term. We assume that it must be a more important interest than "significant," the term used to describe governmental interests in the more forgiving intermediate scrutiny test, but that relative comparison does little to elucidate the ultimate criteria used to judge whether an interest is "compelling." Furthermore, the Court's jurisprudence has assiduously avoided a rigorous analysis of the relative and ultimate strengths of government ends,[507] instead contenting itself to strike down most content-based laws because the means used were unnecessary to promote the government's interests.[508]

Despite the Court's reliance on the tailoring portions of strict scrutiny, this aspect of the test does not *compel* the Court to apply

---

> The most common form of balancing occurs through levels of judicial scrutiny. Each level of judicial scrutiny shares the same basic structure. First, the government interest must meet a threshold of importance . . . . Second, the means of the law must be connected or tailored in some way to the governmental interest (the law's purpose or "end") . . . . The importance of the governmental interest and the tailoring of the means are the predicate to the government's exercise of power.

Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 954 (1999) (footnote omitted); *see also* Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 711–12 (1994) (characterizing the Court's constitutional tests as balancing approaches).

505. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

506. *R.A.V.*, 505 U.S. at 382.

507. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 977 (1987); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 308 (1997); Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 932–37 (1988); Hans A. Linde, *Who Must Know What, When, and How: The Systemic Incoherence of "Interest" Scrutiny*, *in* PUBLIC VALUES IN CONSTITUTIONAL LAW 219, 220–22 (Stephen E. Gottlieb ed., 1993).

508. *See, e.g.*, *R.A.V.*, 505 U.S. at 395–96; Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 121–23 (1991); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 100 (1972). *But see* Widmar v. Vincent, 454 U.S. 263, 277 (1981) (noting that a university's interest in excluding a student group from school facilities was not sufficiently compelling to support a content-based restriction on speech). For an illuminating discussion of the Court's tendency in constitutional review to focus on the tailoring aspects of strict scrutiny rather than governmental interests, see Bhagwat, *supra* note 507, at 308 & n.32, 321.

stringent review. While the notion that a law must be "necessary" to effectuate the government's interest ostensibly limits unreasonably broad and draconian government action by forcing judges to review carefully other regulatory options, the term is subject to interpretation. Does the Court mean "necessary" in the dictionary sense of "indispensable"[509] or in an alternative sense, such as a law is necessary when available alternatives would significantly impair the government's interests?[510] Furthermore, although the Court's tiers of scrutiny are closely entwined with empirical assessments regarding the government's proof of harm and necessity of action,[511] nothing in the strict scrutiny test indicates the nature or amount of evidence required to satisfy a court that the law is "necessary" in any sense of the term. Absent something more to guide the Court, means scrutiny can be quite "manipulable."[512]

Consequently, although we know that the application of strict scrutiny means that the Court likely will strike down a restriction on speech, we arrive at that conclusion not because of the test's careful formulation, but because of background understandings regarding its application.[513] Such background understandings may work well in normal times, but their unspoken nature may lead courts to abandon or manipulate them in times of crisis.[514] After all, prior to *Dennis*, the

---

509. *See* 10 THE OXFORD ENGLISH DICTIONARY 275–76 (2d ed. 1989), *available at* http://dictionary.oed.com/.

510. *See, e.g.*, AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 398–400 (1999) (Souter, J., concurring in part and dissenting in part) (discussing the "weak" and "strong" senses of the term "necessary").

511. *See* Solove, *supra* note 504, at 943, 953–55; Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115 (2003).

512. Bhagwat, *supra* note 507, at 322; Gunther, *supra* note 505, at 33–36; *see also* Zick, *supra* note 511, at 207–08 (discussing the Court's inconsistent application of evidentiary assessments within and among various levels of scrutiny).

513. In addition to our understanding that strict scrutiny is essentially "fatal," Professor Kathleen Sullivan has noted that much of the work of strict scrutiny is done in the initial decision to categorize a regulation of speech—that is, the decision that a rule is content-based triggers strict scrutiny and the presumption that the government loses. Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 60 (1992). Thus the categorization, rather than the application of the test itself, is determinative. *Id.* Eugene Volokh has also noted that the strict scrutiny test itself is not the source of our understanding regarding its rigidly protective nature. *See* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2447 (1996). Rather, history and principles developed outside of that context inform the Court's application. *Id.*

514. It is not entirely clear whether our background understanding of the rigidity of strict scrutiny continues to be true. Several scholars have noted that the line between rigid categorization and application of levels of scrutiny is blurring as the Court adds levels of scrutiny and moves toward a more flexible balancing approach. *See, e.g.*, Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30

clear and present danger test was subject to a similar background understanding, which did not prevent the Court from manipulating the test.[515]

Furthermore, absent such understandings, the actual terms of the strict scrutiny test do little more than state a generalized form of risk analysis. The notion that an interest must be "compelling," for example, essentially collapses traditional definitions of risk assessment into a single word—that is, an interest is "compelling" if it is serious and likely to occur. In fact, the term "compelling" is potentially less helpful than the phrase "clear and present danger" because its risk assessment aspects are unspoken. As a consequence, not only does strict scrutiny lack *Brandenburg*'s concrete standards guarding against the possible operation of psychological biases, it lacks even the minimal explicit statement of risk assessment in the clear and present danger test. To allow all of the heavy lifting of risk assessment to be done below the surface, based upon a series of unarticulated assumptions, is dangerous. The possibility that the specter of a national security crisis will skew a judge's application of strict scrutiny is substantial.

Korematsu v. United States,[516] in which the Court upheld the internment of Japanese Americans during World War II after applying strict scrutiny, stands as a lasting testament to the judiciary's ability to manipulate that test in times of crisis. While few people would disagree with the conclusion that the government's interest in preventing espionage and sabotage was compelling, there was little, if any, evidence in *Korematsu* that Japanese Americans engaged in such activities.[517] Despite this reasonably obvious fact, the Court barely scrutinized the government's evidence, instead holding that "'we cannot reject as unfounded the judgment of the military authorities and of Congress'" that the exclusion order was necessary.[518] In *Korematsu*,

---

CONN. L. REV. 961, 964–65 (1998); Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L.J. 481, 514–15 (2002); Wilson R. Huhn, *Assessing the Constitutionality of Laws that Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 853 (2004); Toni M. Massaro, *Constitutional Law as "Normal Science"*, 21 CONST. COMMENT. 101 (forthcoming 2005) (manuscript on file with author). Some of the justices, most prominently Justice Stephen Breyer, have explicitly argued for application of a more flexible balancing test in free speech cases. *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 217 (2003) (Breyer, J., concurring in judgment); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 741 (1996).

515. *See supra* note 201 and accompanying text.

516. 323 U.S. 214 (1944).

517. *See* Wells, *supra* note 3, at 912–13 (discussing evidence pertaining to Japanese American disloyalty in *Korematsu*).

518. *Korematsu*, 323 U.S. at 218 (quoting Hirabayashi v. United States, 320 U.S. 81, 99 (1943)).

then, strict scrutiny was barely scrutiny at all, much less the "fatal in fact" version that we have come to know.[519]

If strict scrutiny may be susceptible to skewing effects or manipulation in times of crisis, intermediate scrutiny is likely to be even more so. As with strict scrutiny, the terms used in intermediate scrutiny to describe the nature of the government's ends ("significant") and means ("narrowly tailored"), and the requirement of "ample alternatives for communication" are not self-defining.[520] Furthermore, strict scrutiny at least comes with a background understanding that it is difficult to satisfy. As a true balancing test, intermediate scrutiny leaves judges to gauge interests and means with no guideposts at all.[521] Not surprisingly, the courts' applications of that test have been "remarkably inconsistent," even in normal times.[522] One can easily envision problems with its application during times of crisis.

In fact, recent cases involving protestors suggest that intermediate scrutiny provides insufficient guidance for courts attempting to assess free speech concerns in light of national security interests. In *Coalition to Protest the Democratic National Convention v. City of Boston*,[523] a federal district court refused to issue a preliminary injunction barring the government's use of a demonstration zone near the 2004 Democratic National Convention,[524] a decision upheld by the U.S. Court of Appeals for the First Circuit.[525] The zone was more than an area simply cordoned off from public traffic. Rather, located under an abandoned elevated railway track that was itself wrapped in razor wire, the zone was surrounded by two rows of concrete barriers topped by eight-foot chain link fences with two layers of mesh roofing to prevent thrown objects and liquids.[526] In effect, individuals and groups wanting to protest at or near the convention were to be shunted to a location that the district court labeled a "grim, mean, and oppressive space" reminiscent

519. *See* Solove, *supra* note 504, at 998–1000 (associating *Korematsu* with judicial deference despite the application of strict scrutiny). For criticism of the Court's decision in *Korematsu*, see Grossman, *supra* note 7; and Rostow, *supra* note 7.

520. Scholars have noted, for example, that the Court's refusal to examine closely the government's interest occurs with intermediate as well as strict scrutiny. *See, e.g.*, Bhagwat, *supra* note 507, at 307–08; Solove, *supra* note 504, at 960–66.

521. *See* Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141, 166–70 (1995); Sullivan, *supra* note 513, at 60–61; Christina E. Wells, *Beyond Campaign Finance: The First Amendment Implications of* Nixon v. Shrink Missouri Government PAC, 66 MO. L. REV. 141, 162–64 (2001).

522. Wells, *supra* note 521, at 162–64.

523. 327 F. Supp. 2d 61 (D. Mass. 2004), *aff'd sub. nom* Bl(a)ck Tca Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004).

524. *Id.* at 64, 76–78.

525. *Bl(a)ck Tea Soc'y*, 378 F.3d at 15.

526. *Coalition to Protest*, 327 F. Supp. 2d at 67.

of "an internment camp," the design of which was "an offense to the spirit of the First Amendment."[527] Nevertheless, the judge concluded that the government satisfied the requirements of intermediate scrutiny.[528]

The government raised security concerns generally, and national security concerns particularly, with regard to the need for such a zone.[529] It further argued that modifications to the zone, such as allowing literature to be passed through chutes in the fabric mesh—would unreasonably endanger convention delegates.[530] At first glance, of course, the government's interests satisfy the requirement of a "significant" government interest.[531] But, the government's evidence regarding the possible threat to security essentially consisted of evidence of "past experience at comparable events" rather than specific proof regarding potential problems at the 2004 convention.[532] One ought to be concerned regarding the creation of such a draconian space for free expression—one likely to detract from the protestors' attempts to communicate with the convention delegates—based upon remote and speculative evidence unrelated to the event at hand. Nevertheless, the district court concluded that such evidence "adequately support[ed] each of the security precautions . . . as reasonable."[533] The appellate court agreed, finding that "[o]n this hastily assembled record, the quantum of 'threat' evidence was sufficient to allow the trier to weigh it in the balance" and that the "security measures undertaken by the City, though extreme, were nonetheless narrowly tailored."[534] In other words, the magnitude of the possible threat in this case justified a more deferential approach to the government's tailoring of the free speech zone.

To their credit, the opinions evidence unease regarding the zone and its potential effect on free expression. Nevertheless, there is reason

---

527. *Id.* at 67, 74, 76.

528. *See id.* at 76.

529. *See id.* at 70–71, 77.

530. *See id.* at 75–76.

531. *Bl(a)ck Tea Soc'y*, 378 F.3d at 12 ("[T]here can be no doubting the substantial government interest in the maintenance of security at political conventions.").

532. *Coalition to Protest*, 327 F. Supp. 2d at 75. The district court judge requested "specific intelligence concerning security threats during the DNC." *Id.* at 75 n.2. The government indicated that such intelligence existed but refused to disclose it to the plaintiffs' counsel. *Id.* The judge reviewed the evidence ex parte, but in light of the plaintiffs' objections, did not consider it when assessing the appropriateness of the demonstration zones. *Id.* Whether the judge could adequately disregard such evidence once presented is a legitimate question raising significant due process concerns. Nevertheless, this Article assumes, as the reviewing court assumed, *see Bl(a)ck Tea Soc'y*, 378 F.2d at 13–14, that the only evidence relevant to the district court's assessment of the security threat involved past events.

533. *Coalition to Protest*, 327 F. Supp. 2d at 75.

534. *Bl(a)ck Tea Soc'y*, 378 F.3d at 14.

to be concerned that, despite the courts' thoughtfulness, the intermediate scrutiny test unreasonably weighted the balance against free speech concerns. The specter of national security and the September 11th attacks loomed throughout the opinions and apparently affected both courts' willingness to question the government's actions. The district court noted that the convention was the first to occur since the September 11th attacks.[535] The First Circuit hinted that the outcome might have been different had the case been decided in "less tumultuous times."[536] Similarly, Judge Kermit Lipez, concurring in the First Circuit's decision, noted:

> Inevitably, the events of 9/11 and the constant reminders in the popular media of security alerts color perceptions of the risks around us, including the perceptions of judges. The risks of violence and the dire consequences of that violence seem more probable and more substantial than they were before 9/11. When judges are asked to assess these risks in the First Amendment balance, we must candidly acknowledge that they may weigh more than they once did.[537]

If ever there was evidence that a salient and catastrophic threat might affect judicial application of the Court's modern tests, this is surely it.

The courts' unwillingness to interfere with the zone despite the truncated nature of the proceedings further suggests that intermediate scrutiny is not up to the task of adequately balancing the policy concerns at stake during a time of crisis. Both the district and appellate courts admitted that their decisions were hurried and based upon an incomplete record, thus hampering their analysis of the issue.[538] Such factors typically weigh *more heavily* in favor of protecting speech rights, as "[t]here is a significant danger that courts under time pressure and forced to speculate regarding potential harm based upon inadequate evidence will allow 'groundless fears to figure in the rationale for suppression,' thus distorting the decision-making process."[539] Yet, the courts essentially used the truncated nature of the proceeding to justify

---

535. *Coalition to Protest*, 327 F. Supp. 2d at 64.

536. *See Bl(a)ck Tea Soc'y*, 378 F.3d at 15 n.5.

537. *Id.* at 19 (Lipez, J., concurring).

538. *See id.* at 16; *Coalition to Protest*, 327 F. Supp. 2d at 75.

539. Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 CASE W. RES. L. REV. 1, 65 (2000) (quoting Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 49 (1981)); *see also* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984).

the opposite presumption—that is, the hurried nature and the security issues at stake made them hesitate to overrule the government's concerns and apply a deferential form of intermediate scrutiny.

None of this is to say that the opinions obviously reached the wrong result or that the individual judges necessarily responded to fear. The amorphous balancing and unspoken empirical assumptions associated with intermediate scrutiny, however, could not provide the judges with an adequate tool to analyze the problems about which they were concerned. Rather, the opinions are reminiscent of *Dennis* in their balancing and tailoring of interests. With other protest decisions sure to involve national security interests[540] and a government apparently willing to exploit that interest to get what it wants, [541] it is unreasonable to leave such decisions to the good will of concerned judges.

C. Some Thoughts on Possible Solutions

What can be done about the flaws in the Court's modern jurisprudence, which so closely parallel those of the clear and present danger test? One could conclude from the apparent, continuing failure of the Court's jurisprudence in guarding against fear and prejudice that *nothing* can guard against such effects, because judges who do not want to jeopardize the nation will find a way to rule in favor of the government. Given this sad fact, the Court's jurisprudence cannot, and perhaps should not, attempt to craft standards designed to prevent judges from deferring to government assessments of potential threat. Chief Justice William Rehnquist has suggested as much in his book, *All the Laws but One*, which involved a lengthy review of prominent cases involving civil liberties' infringements during wartime.[542] Judge Posner

---

540. *See, e.g.*, United for Peace & Justice v. City of New York, 323 F.3d 175 (2d Cir. 2003); Nat'l Council of Arab Ams. v. City of New York, 331 F. Supp. 2d 258 (S.D.N.Y. 2004); Stauber v. City of New York, Nos. 03 Civ. 9162–9164 (RWS), 2004 WL 1593870 (S.D.N.Y. July 16, 2004); United for Peace & Justice v. City of New York, 243 F. Supp. 2d 19 (S.D.N.Y. 2003).

541. During the 2004 Republican National Convention in New York City, for example, government officials justified surveillance activities and strict regulation of protest activity with reference to certain protestors, who were described as "particularly troublesome, even dangerous anarchists who infiltrate other groups of demonstrators and then try to provoke violence." *Nightline Vote 2004* (ABC television broadcast, Aug. 31, 2004), *available at* 2004 WL 63018012. For the most part, such violence did not materialize. *Id.* Such characterizations are eerily reminiscent of the anticommunist campaign's characterization of domestic communists.

542. *See* REHNQUIST, *supra* note 6, at 221 (concluding that courts are "reluctan[t] . . . to decide a case against the government on an issue of national security during a war"). Chief Justice William Rehnquist characterized his conclusion as descriptive rather than normative. That is, he claimed simply to describe what courts have and likely will do during wartime. *See id.* at 224. Nevertheless, he apparently also accepted this phenomenon as the best course of action as evidenced by his rather

similarly argues that "[t]he greater the threat that some activity poses to the nation's safety, the stronger will seem—and will be—the grounds for seeking to repress that activity at some cost to liberty."[543]

In contrast, Professor Vincent Blasi, also recognizing human frailty in the face of fear, takes the opposite tack. Rather than arguing for deference, Blasi views our tendency to exaggerate threats in times of crisis as a reason to craft rigidly protective constitutional standards.[544] Thus, he argues that courts should develop standards during normal times "that are relatively immune from the pressure of urgency by virtue of their formality, rigidity, built-in delays, or strong internal dynamics."[545] We should avoid balancing tests like the clear and present danger test, as they cannot withstand the pathologies that occur in times of stress.[546]

While each of the above approaches rightly recognizes the influence of human nature in adjudication, both suffer from flaws suggesting that they are inappropriate jurisprudential tools. An approach deferring to executive action, such as that of Chief Justice Rehnquist and Judge Posner, ignores that "government [officials] can confound 'reason' in remarkably extensive ways."[547] History suggests that government officials who are not required to account for or justify their decisions[548] can make remarkably bad ones.[549] As I have argued elsewhere, rigorous judicial review may be a necessary aspect of holding such officials accountable and improving their decision-making.[550] Consequently, a jurisprudential approach that completely insulates government decision-making will often facilitate arbitrary and ill-advised government

---

lengthy defense of the *Korematsu* Court's deference. *See id.* at 203–11; *see also* Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395, 1405–09 (1999) (reviewing REHNQUIST, *supra* note 6) (discussing Chief Justice Rehnquist's view of the desirability of judicial deference in times of crisis).

543. POSNER, *supra* note 6, at 296.

544. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 468 (1985).

545. *Id.*

546. *Id.* at 473, 483.

547. Massaro, *supra* note 514 (manuscript at 126).

548. For a general discussion of the psychological research on the relationship between accountability and decision-making, see Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255 (1999).

549. *See* IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 9, 144, 176–77, 242–59 (2d ed. 1982); Wells, *supra* note 3, at 908–21, 929–35.

550. Wells, *supra* note 3, at 935–49. For a comparison of the relative merits of congressional versus judicial oversight as methods of accountability pertaining to executive decision-making, see Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486 (2002) [hereinafter Seidenfeld, *Cognitive Loafing*]; and Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059 (2001).

decisions resulting from the biases discussed earlier. Leaving such unfettered discretion to executive officials is further antithetical to fundamental First Amendment principles, which historically have viewed such discretion as closely intertwined with censorship.[551]

Blasi's proposal, on the other hand, although prompted by a desire to protect First Amendment values, may actually fail to do so. While resorting to a rigidly protective, nonbalancing resolution of free speech issues is superficially attractive, especially in light of the failures of previous balancing approaches,[552] methodologies that eschew balancing may backfire. As Professor Martin Redish has noted:

> Issues of first amendment protection often entail difficult and controversial comparative value analyses and rough predictions as to future events. As a result, by denying the existence of complex interest-balancing, the court does not avoid use of a balancing process; rather, it merely transforms the process into an unstated, and therefore likely unthinking and less refined balancing.[553]

As this Article has noted, the likely result of such hidden balancing is less protection of speech rather than more. Furthermore, to the extent that Blasi's proposal is designed to protect judicial capital, it may also fail as the Court's "unwillingness to consider the imminence and severity of the harm to which that speech might lead" could "undermine [its] legitimacy."[554]

---

551. *See, e.g.*, City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988); Kunz v. New York, 340 U.S. 290 (1951); Lovell v. City of Griffin, 303 U.S. 444 (1938); *see also* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 459–63 (1996) (discussing the Court's antipathy toward unbounded government discretion).

552. Professor Vincent Blasi is by no means the only person to eschew balancing as workable methodology in free speech cases. *See, e.g.*, John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

553. Martin H. Redish, *The Role of Pathology in First Amendment Theory: A Skeptical Examination*, 38 CASE W. RES. L. REV. 618, 629 (1988).

554. *Id.* at 630. As Professor George Christie has also noted:

> The litigants in any given case are entitled to feel that their case is being taken seriously by a court that will decide the case on the basis of proofs and arguments put forward by the parties and not on the basis of some preconceived idea of what is good for the country, or the world, or the universe, or on the basis of some prudential strategy of judicial decisionmaking.

George C. Christie, *Why the First Amendment Should Not Be Interpreted from the Pathological Perspective: A Response to Professor Blasi*, 1986 DUKE L.J. 683, 694.

Although Rehnquist, Posner, and Blasi propose different solutions, their proposals do share a commonality—their distrust of judges' ability or willingness to apply existing jurisprudential tools leads them to take all-or-nothing approaches that eschew any form of balancing. None of them seems willing to consider, however, that balancing, if appropriately guided, could avoid some of the problems with past and existing doctrine.[555] The real problem with the Court's tests is not necessarily that they balance. Rather, it is that they attempt to balance and make predictions based upon unspoken assumptions and ill-formed empirical assessments. Consequently, psychological biases can skew that balancing, resulting in poorly reasoned and ill-formed decisions.

Thus, the simplest remedy to the Court's past mistakes may not be to avoid balancing, but simply to make the Court's balancing better. What follows are some preliminary thoughts regarding how this can be done. Those thoughts take the form of a list of questions that a court should explicitly incorporate into its jurisprudence when determining whether the government's regulation of speech can be justified in light of the government's stated interest. Specifically, these questions are designed to elucidate the nature and quality of the evidence that the government presents in support of its actions. In effect, they make explicit the empirical assessments that are often implicit—or if acknowledged, are generally unguided—in the Court's opinions.

Before listing these questions, a caveat as to what these questions are *not* is appropriate. They do not represent a complete and overarching framework of free speech jurisprudence. They do not address, for example, issues pertaining to content-neutrality (or lack thereof),[556] the government's purpose,[557] the nature of the person or institution subject to the government's action,[558] or the capacity in which the government acts.[559] Nor does this list suggest how the Court should change its existing standards—that is, whether it should abandon strict scrutiny or merely supplement it. Whether and how such issues should

---

555. *See* Rabban, *supra* note 500, at 1353 (noting that "[t]he Supreme Court's failure to protect free speech during prior periods of crisis [is attributable] to the weaknesses of inherited legal standards" and that stricter and more refined tests such as the one used in *Brandenburg* may avoid such problems).

556. *See, e.g.*, Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49 (2000); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

557. *See, e.g.*, Bhagwat, *supra* note 507; Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001).

558. *See, e.g.*, Frederick Schauer, *The Supreme Court, 1997 Term—Comment: Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998).

559. *See, e.g.*, ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995).

affect free speech jurisprudence are undoubtedly important, but they are beyond the scope of this Article.

Instead, this Article proffers this list of questions based upon the assumption that the Court's current trend toward balancing and empirical assessments is an integral aspect of its approach in free speech cases—one that is likely to remain part of its jurisprudence for some time.[560] If true, we would do well to refine that balancing by using questions that actually get at what it is we care about in the balancing process—that is, an identification of interests involved and an assessment of the government's evidence regarding the need to regulate. Even here, however, this list of questions is preliminary. It assumes a situation similar to one that arose in *Dennis* (that is, where the government regulates speech because of its communicative effect during a national security crisis) and I acknowledge that the list would need further refinement to account for situations involving other reasons for regulating (such as protest situations in noncrisis times).

With that final caveat in mind, however, examples of the kinds of questions that the Court should explicitly incorporate into its jurisprudence when trying to determine whether the government has satisfactorily shown a need to restrict speech might include:

- What is the *specific harm* allegedly resulting from the speech or what is the specific government interest in restricting speech (including a careful look at the criminal charge, if applicable)?[561]
- Does the government have *direct evidence of a causal link* between the speech at issue and the government's interest in regulating or is it indirect evidence (for example, evidence relying on general past occurrences unrelated to the speakers before the court)?
- What is the *imminence* of the stated harm or alleged result of the speech?
- What is the speaker's *intent* to cause the harm or result alleged?
- Does the government have *direct evidence of the speaker's intent* (that is, words or written material directly stating the

560. *See generally* Zick, *supra* note 511.

561. I acknowledge that the Court may also need to identify a hierarchy of government interests or purposes as part of its assessment of the restriction's constitutionality as such purposes may affect the Court's approach, especially if they are considered to be illegitimate. For a discussion regarding government purposes in the free speech context, see Wells, *supra* note 539, at 44–52. I do not discuss that issue here because most agree that national security concerns—those most often raised in times of crisis—are legitimate and of the highest order.

speaker's intent) or indirect (that is, intent inferred from the speaker's other words, associations, or actions)?

- To the extent that groups or multiple entities are involved, how much of the *evidence is directly related to the specific speakers before the court* as opposed to others? How much of the evidence regarding those speakers before the court involves all or most of them rather than a small portion of them?
- Does the evidence before the court *logically support a conclusion other than the one for which it is proffered* by the government?
- Are there *reasons, other than those stated,* for which the government could desire to restrict the speech at issue—for example, is the group or speaker before the court socially or politically unpopular? Has it historically been so?

As should be reasonably obvious from this list, these questions bear a striking resemblance to the *Brandenburg* Court's adaptation of the clear and present danger test. They thus focus courts' attention on identifying the actual interest at stake and the relationship between its impairment and the speaker's expression. The questions are more global, however, to account for the fact that incitement, the specific issue in *Brandenburg*, is not the only government interest about which a court might be concerned. Further, the questions inspire the Court to inquire more specifically regarding the evidence presented than in *Brandenburg*.[562] Thus, they inquire as to the directness of the evidence as it relates to causation by or attribution to the speaker and require the Court to seek alternative arguments and explanations regarding the government's evidence.

In order to ensure that judges and jurors do not unduly suppress speech, courts should further require certain answers to these questions prior to upholding restrictions on expression. Thus, speech should be restricted only when it is clear that it will cause serious and imminent harm, the speaker intends this result, and there is no other plausible explanation for the speaker's behavior. By requiring all such factors to

562. Despite the *Brandenburg* test's advantages over previous tests, some commentators have noted that it nevertheless raises questions as to some of its requirements. *See, e.g.*, MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 184-86 (1984) (noting ambiguity in the "imminence" and "incitement" requirements); Marc Rohr, *Grand Illusion? The* Brandenburg *Test and Speech that Encourages or Facilitates Criminal Acts*, 38 WILLAMETTE L. REV. 1, 15 (2002) (arguing that the decision is unclear as to whether the speaker must have a subjective intent to incite imminent lawless action and whether the words spoken must explicitly urge an unlawful act). These questions, in addition to focusing courts on empirical issues, more specifically identify issues regarding intent, advocacy, and the like.

be present, this approach is far more objective and the questions far more difficult to evade than the Court's current tiers of scrutiny approach. Furthermore, when combined with specific questions regarding the nature and weight of the evidence as it relates to groups and individuals, the Court's inquiry becomes even more focused on actual wrongdoing rather than stereotypes or vivid images of possible negative outcomes resulting from a group's behavior.

Psychological evidence suggests that these kinds of questions are more likely to result in reasoned judicial decision-making than the Court's current approach. Specifically, such questions—when explicitly dealt with in opinions—force courts to account for their decisions, which should improve their decision-making. On a general level, this phenomenon of "accountability" simply refers to the need for one person to answer to another.[563] From a psychological perspective, accountability involves "the implicit or explicit expectation that one may be called on to justify one's beliefs, feelings, and actions to others" and "also usually implies that people who do not provide a satisfactory justification for their [own] actions will suffer negative consequences . . . [while] people who do provide compelling justifications will experience positive consequences."[564]

Psychologists know that accountability can improve judgment and decision-making.[565] Although accountability does not alleviate all decision-making errors or biases,[566] it can attenuate many of the errors

---

563. *See* Wells, *supra* note 3, at 936 n.183.

564. Lerner & Tetlock, *supra* note 548, at 255. By serving as a constraint on behavior, "[a]ccountability is a critical norm-enforcement mechanism—the social psychological link between individual decision makers on the one hand and social systems on the other." Philip E. Tetlock, *Intuitive Politicians, Theologians, and Prosecutors: Exploring the Empirical Implications of Deviant Functionalist Metaphors*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 582, 583 (Thomas Gilovich et al. eds., 2002).

565. This improvement comes about because people who are held accountable want to avoid embarrassment in front of their audience. *See* Lerner & Tetlock, *supra* note 548, at 263; Itamar Simonson & Peter Nye, *The Effect of Accountability on Susceptibility to Decision Errors*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 416, 441 (1992). To avoid this embarrassment people are motivated to

> prepare themselves by engaging in an effortful and self-critical search for reasons to justify their actions. This search leads participants to (a) survey a wider range of conceivably relevant cues; (b) pay greater attention to the cues they use; (c) anticipate counter arguments, weigh their merits relatively impartially, and factor those that pass some threshold of plausibility into their overall opinion or assessment of the situation; and (d) gain greater awareness of their cognitive processes by regularly monitoring the cues that are allowed to influence judgment and choice.

Lerner & Tetlock, *supra* note 548, at 263 (citations omitted).

566. Research shows that accountability can improve some aspects of decision-making, have no effect on others, and exacerbate some biases. For a general discussion, see Tetlock, *supra* note 564, at 590–92.

and biases apparently involved in the *Dennis* decisions. Thus, research shows that accountability can cause decision-makers to be more self-critical, more willing to consider alternative points of view, more willing to anticipate possible objections to proposed courses of action, and more willing to consider the possibility that they are wrong.[567] Accountability can also attenuate biases related to the availability heuristic[568] and the overconfidence bias.[569] Finally, while accountability can exacerbate individuals' tendency to seek out confirmatory evidence to the exclusion of disconfirmatory evidence, explicit instructions to consider alternatives urge individuals to correct for this bias.[570]

How can the questions above improve judicial decision-making with regard to accountability? Explicit incorporation of such questions requires courts resolving free speech disputes to put their reasoning process on the record in a much more detailed manner than with current standards, such as strict and intermediate scrutiny, which purport to bring mathematical precision and openness to the decision-making process, but which actually leave courts with great discretion to manipulate outcomes.[571] With that reasoning on the record, judges know that they must deal with potential criticism—from judges who review their decisions, from peers who may also partake in those decisions if at an appellate level, and from public and scholarly audiences who will review and critique the decisions.[572] Consequently, they should be

---

567. Philip E. Tetlock, *Accountability and Complexity of Thought*, 45 J. PERSONALITY & SOC. PSYCHOL. 74, 81 (1983); Tetlock, *supra* note 564, at 590; Philip E. Tetlock et al., *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. PERSONALITY & SOC. PSYCHOL. 632, 639–40 (1989).

568. *See* Diederik A. Stapel et al., *The Impact of Accuracy Motivation on Interpretation, Comparison, and Correction Processes: Accuracy X Knowledge Accessibility Effects*, 74 J. PERSONALITY & SOC. PSYCHOL. 878, 891–92 (1998); Erik P. Thompson et al., *Accuracy Motivation Attenuates Covert Priming: The Systematic Reprocessing of Social Information*, 66 J. PERSONALITY & SOC. PSYCHOL. 474, 484 (1994).

569. *See* Philip E. Tetlock & Jae Il Kim, *Accountability and Judgment Processes in a Personality Prediction Task*, 52 J. PERSONALITY & SOC. PSYCHOL. 700, 706–07 (1987).

570. *See* David M. Sanbonmatsu et al., *Overestimating Causality: Attributional Effects of Confirmatory Processing*, 65 J. PERSONALITY & SOC. PSYCHOL. 892, 894–99 (1993).

571. *See* Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 202–03 (1985) ("Despite their superficial precision, neither the content nor the shape of modern formulae communicates clarity and constraint. . . . In combination with the mechanical tone of formulaic opinions, the palpable range of choice inherent in the formulae communicates, not objectivity, but power without responsibility.") (footnote omitted).

572. To improve decision-making, accountability must satisfy certain prerequisites. A thorough discussion of these prerequisites in the context of holding judges accountable likely needs greater exploration and is beyond the scope of this

spurred to reason thoroughly through their opinions and carefully justify their ultimate outcomes. Furthermore, many of the questions above—for example, those requiring courts to seek out alternative explanations of the government's case—are designed to spur courts into critical self-evaluation of their decisions. Research shows that, independent of accountability effects, such questions can usefully counter some of the biases that might have caused the skewed decision-making that occurred in *Dennis*.[573]

Reliance on these questions is no guarantee that courts ruling on civil liberties issues involving national security will reach outcomes more favorable to those liberties than did the *Dennis* courts. Judges may still fall prey to fear and prejudice or they may simply make the strategic determination that they do not wish to involve themselves in these matters. However, if courts reach those decisions after having explicitly considered the questions listed above, they will have been forced to take a sober second look at their reasoning processes and to justify specifically their reasons for the infringement. Such a process is far more intellectually honest than an approach that pretends to acknowledge the courts' role in protecting liberties, but that actually defers to the government's claims of necessity. Such candor allows us better to debate the wisdom of the Court's decisions, whether they are a result of the balancing described above or a strategic decision such as invocation of the political question doctrine to avoid judicial resolution of civil liberties questions during wartime.[574]

VI. CONCLUSION

Dennis is an extreme example of judicial capitulation to fear and prejudice, but it hardly stands alone in history.[575] The frequency with which courts have faced national security threats and the current post-

---

Article. For discussions that begin that exploration in other contexts involving judicial review, see Seidenfeld, *Cognitive Loafing*, *supra* note 550; and Wells, *supra* note 3, at 940–46.

573. *See, e.g.*, PLOUS, *supra* note 280, at 227–29 (discussing studies showing that "various judgment biases can be reduced by considering the possibility of alternative outcomes or answers"); Koriat et al., *supra* note 365, at 116–17 (noting that requiring decision-makers to generate reasons opposing their course of action decreases overconfidence).

574. *See, e.g.*, Robert J. Pushaw, Jr., *Defending Deference: A Response to Professors Epstein and Wells*, 69 MO. L. REV. 959, 970 (2004) (arguing that in some instances the courts should invoke the political question doctrine in cases involving conflicts between civil liberties and war powers).

575. *See, e.g.*, Lee Epstein et al., *The Effect of War on the Supreme Court*, 80 N.Y.U. L. REV. (forthcoming 2005) (manuscript on file with author) (discussing an empirical study of civil liberties cases from 1941 to the present, which found that justices frequently defer to government claims of necessity during crisis periods).

September 11th atmosphere suggests that courts may again find themselves in the difficult position of balancing free speech and national security.[576] Given their existing tools, judges may not be up to that task. We need not abandon those tools in order to improve judges' performance in this area. Rather, simple refinement of the manner in which courts approach the balancing tests and empirical assessments that are such a foundational aspect of their jurisprudence may improve their decision-making, especially during times of crisis. This Article takes a first step toward such refinement although much more admittedly remains to be done. This first step, however, is an important one as it begins to unpack what is unspoken in the Supreme Court's tests and allows us to begin a discussion regarding those aspects of the Court's decision-making that hover beneath the surface of its jurisprudence.

576. *See, e.g.*, Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 695–702 (2004) (discussing recent court decisions in which the courts deferred to executive claims of national security).

* * *