A TALE OF TWO HANDS: One Clapping; One Not

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My thanks to the editors of the *Arizona State Law Journal* for organizing this symposium celebrating the 100th anniversary of Judge Learned Hand's brilliant and courageous, if unsuccessful, effort in *Masses Publishing Co. v. Patten*[1] to slow down the repressive train that was running amok over Americans who vigorously spoke out against America's entry into World War I. While many have chronicled the major Supreme Court cases from *Schenck* to *Gitlow* failing to protect free speech during and after World War I,[2] they usually don't go beneath the surface of the Supreme Court to plumb the massive wave of repression that swept the nation in the summer and fall of 1917, fanned by jingoism, fear of immigrants, war fever, fear of communism, and President Woodrow Wilson's streak of fanaticism.[3] Convinced that he was doing God's work in committing the nation to a war to make the world safe for democracy, Wilson, a baffling figure who was an appalling racist, an economic reformer, an idealistic internationalist, and the first President to appoint a Jew to the Supreme Court,[4] had no qualms about

* Norman Dorsen Professor in Civil Liberties, New York University School of Law. I'm sorry that we lost my longtime friend and colleague, Norman Dorsen, who died on July 1, 2017, before he had a chance to join in the festivities. Much of what I say in this essay emerged from almost fifty years of conversations with Norman. We would have enjoyed writing this one together.

1. 244 F. 535 (S.D.N.Y.), *stay issued by* Second Circuit, *stay pending appeal continued*, 245 F. 102 (2d Cir.), *rev'd*, 246 F. 24 (2d Cir. 1917). Judge Henry Ward issued a concurring opinion. 246 F. at 39. The third member of the Second Circuit panel was Hand's colleague on the S.D.N.Y. bench, Julius Marshuetz Mayer, sitting by designation, fresh from presiding over the July 9 conviction of Emma Goldman and Alexander Berkman under the Espionage Act of 1917 for praising draft resisters and vigorously criticizing America's entry into the war. *See* Laura M. Weinrib, *Freedom of Conscience in War Time: World War I and The Limits of Civil Liberties*, 65 EMORY L.J. 1051, 1111 (2016); *infra* note 37 and accompanying text.

2. *Schenck v. United States*, 249 U.S. 47 (1919); *Gitlow v. New York*, 268 U.S. 652 (1925); *see, e.g.*, HARRY KALVEN, JR., A WORTHY TRADITION (Jamie Kalven ed., 1988); ANTHONY LEWIS, FREEDOM FOR THE THOUGHT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT (2007).

3. *See* James Weinstein, *The Story of Masses Publishing Co. v. Patten: Judge Learned Hand, First Amendment Prophet*, *in* FIRST AMENDMENT STORIES 64–66 (Richard Garnett & Andrew Koppelman eds., Foundation Press 2012).

4. For excellent recent efforts to solve the enigma of Woodrow Wilson, see A. SCOTT BERG, WILSON 9 (2013); PATRICIA O'TOOLE, THE MORALIST 260 (2018).

ruthlessly stifling criticism of America's entry into World War I. Wilson's personal hostility to World War I dissenters was intense. For example, after the Supreme Court had affirmed the conviction and ten-year prison sentence imposed on Eugene Debs for delivering a mild speech in which he expressed admiration for draft resisters, Wilson rejected pleas for clemency and/or early release as Debs's health failed in prison.[5] It took a change of administration and a recommendation from the new Attorney General A. Mitchell Palmer (yes, Virginia, that Palmer of "the Palmer raids") to President Warren G. Harding to secure Debs's release in 1921.[6] His health broken and stripped of his political rights, Debs visited Harding in the White House to say thank you for his release and returned home to a hero's welcome in Terre Haute, Indiana, where he died quietly in 1926.[7]

Eugene Debs was but one of an avalanche of victims. David Rabban and Geof Stone have powerfully chronicled the breadth and savagery of the repression that was occurring under Learned Hand's nose in July 1917.[8] We owe them both a debt of thanks. More importantly for the purposes of this symposium, we owe Learned Hand's memory a debt of gratitude and respect for trying his best to do something about it.[9] I wish that I could say the same thing about Hand's judicial response to McCarthyism.

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5. Debs v. United States, 249 U.S. 211 (1919); EUGENE FREEBERG, DEMOCRACY'S PRISONER: EUGENE V. DEBS, THE GREAT WAR, AND THE RIGHT TO DISSENT 134–35, 179 (2017).

6. FREEBERG, *supra* note 5, at 292–94.

7. The story of Debs's imprisonment and eventual release on Christmas Day, 1921 is told in FREEBERG, *supra* note 5, at 299, 301, 317 (2017). President Harding commuted Debs's sentence but declined to pardon him. *Id.* at 292–94.

8. *See* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME – FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004).

9. I owe special thanks, as well, to Jim Weinstein both for urging us to recognize the 100th birthday of Judge Hand's decision in the *Masses*, and for his useful re-telling of the story behind the case and the long-term influence of Hand's reasoning. *See generally* Weinstein, *supra* note 3. Anyone writing about the *Masses* also owes significant debts to Gerald Gunther for his masterful biography of Learned Hand GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 127–136 (2d ed., Oxford University Press 2011) [hereinafter GUNTHER, THE MAN AND THE JUDGE], and his more extensive discussion of the case in Gerald Gunther, *Learned Hand and the Origins of First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975) [hereinafter Gunther, *Origins of First Amendment*], as well as to Geof Stone for his excavation of the lost legislative history of the Espionage Act of 1917. Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335 (2003). As always, I benefitted from re-reading Vince Blasi's work. Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment:* Masses Publishing Co. v. Patten, 61 U. COLO. L. REV. 1 (1990).

THIS HAND IS FOR CLAPPING

I come both to praise and, metaphorically, to bury Learned Hand. I want to explore a riddle that has long perplexed me—how could the same intellectually-gifted judge—Billings Learned Hand—have written the remarkable and courageous 1917 District Court opinion in the *Masses*, enjoining the Postmaster General from banning an irreverent, radical, fervently anti-war Socialist journal from the mails at the height of World War I—an opinion that paved the intellectual path to the modern First Amendment's understanding of the intimate relationship between democracy and vigorous judicial protection of free speech;[10] and, thirty-three years later, have authored the chillingly depressing 1950 Second Circuit opinion in *United States v. Dennis*[11] affirming the Smith Act convictions and imprisonment of the leadership of the American Communist Party for the crime of being the leadership of the American Communist Party[12]—an opinion that opened the gates for a relentless Cold War assault on dissent under McCarthyism.

Frankly, I find it difficult to believe that the two opinions were written by the same man. The *Masses* is the courageous, intellectually adventurous opinion of an idealist willing to take risks in defense of deeply cherished free

10. Jim Weinstein, among others, persuasively traces the link. *See* Weinstein, *supra* note 3, at 62, 66–67.

11. 183 F.2d 201 (2d Cir. 1950), *aff'd* Dennis v. United States, 341 U.S. 494 (1951). Hand was joined by Judges Thomas Walter Swan and Harrie B. Chase. Judge Chase filed an even more repressive concurrence. *Dennis*, 183 F.2d at 234. Chief Justice Fred Vinson wrote for four members of the Supreme Court, largely adopting Hand's reasoning. *Dennis*, 341 U.S. at 495–517. Justices Felix Frankfurter and Robert H. Jackson issued separate concurrences. *Id.* at 517, 561. Justices Hugo Black and William O. Douglas dissented in separate opinions. *Id.* at 579, 581. The district court opinion of Judge George M. Hulbert denying the motion to dismiss the indictment is reported at United States v. Foster, 80 F. Supp. 479 (S.D.N.Y. 1948). Judge Harold Medina was selected to preside over the bitterly contested trial which, as of 1949, was the longest in the history of the federal courts. GERALD HORNE, BLACK LIBERATION/RED SCARE: BEN DAVIS AND THE COMMUNIST PARTY 210, 215 (1994). After the defendants' conviction, Judge Medina found the six defense lawyers in contempt of court and sentenced them to jail. United States v. Sacher, 182 F.2d 426, 428 (2d Cir. 1950). The contempt citations were affirmed by the Supreme Court by a 5–3 vote. Sacher v. United States, 343 U.S. 1 (1952). The dissenters, especially Justice Frankfurter, roundly criticized Judge Medina for favoring the prosecution. *Id*. at 23–89.

12. The Smith Act defendants were not charged with saying or doing anything illegal. Their crime was to lead an organization—the American Communist Party—deemed by the government to be a criminal conspiracy allegedly aimed at overthrowing the government of the United States by force and violence at some indefinite point in the future as soon as it became practicable to do so. In fact, in denying the motion to dismiss the indictments, Judge Hulbert held that no overt acts were necessary. *Foster*, 80 F. Supp. at 481–85.

speech values. *Dennis* is the opinion of an exceedingly able, but world-weary cynic, unwilling to step out of a deeply rutted road leading to the destruction of values he claims to revere but will not defend.[13]

The dispiriting saga of the McCarthy years has been told many times.[14] What has not been told is the extent of Learned Hand's responsibility for the judicial collapse that made McCarthyism possible. Unlike his junior status in 1917, when no one much cared what Learned Hand said, by 1950, Hand had become the unchallenged voice of the American rule of law. If Hand had done in *Dennis* what he tried to do in the *Masses*, his powerful judicial voice might well have made a difference. It's not as though there was nothing to be done. In addition to the procedural issues in the *Dennis* trial that I will discuss *infra*, Justice John Marshall Harlan, Jr.'s opinions in *Yates v. United States*,[15] *Scales v. United States*,[16] and *Noto v. United States*[17] demonstrated that it was possible to put a lid on McCarthyism, while remaining true to a cautious judicial ethos.

Before turning to a close reading of the two opinions, though, let me address two arguments that claim to find principled explanations for both decisions. I'll call one the "deference" explanation; and the other the "doctrinal" explanation.

The deference explanation is based on Hand's lifelong rejection of judicial decisions like *Lochner v. New York*[18]—highly aggressive exercises of judicial power invalidating, on constitutional grounds, legislative efforts to regulate the market, usually in favor of the weak.[19] Recall, that the youthful Hand was an avid supporter of President Theodore Roosevelt's attack on undue judicial activism.[20] After being appointed to the bench by William Howard Taft in 1909, Hand broke with the Republican Party to support Roosevelt's 1912 third-party run for President, and, while sitting as a federal district judge, unsuccessfully ran in 1913 for Chief Judge of the New York Court of Appeals

13. I take on faith Gerald Gunther's persuasive assertion that Hand loathed McCarthyism. Hand's public statements beginning in 1952 condemned the climate of fear and repression gripping the country. *See* GUNTHER, THE MAN AND THE JUDGE, *supra* note 9, at 508–09.

14. *See generally* ELLEN SCHRECKER & PHILLIP DEERY, THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS (3d ed. 2017).

15. 354 U.S. 298, 318 (1957).

16. 367 U.S. 203, 228–29 (1961).

17. 367 U.S. 290, 299–300 (1961).

18. 198 U.S. 45 (1905).

19. *See* GUNTHER, THE MAN AND THE JUDGE, *supra* note 9, at 99.

20. See Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 508–09 (1908), written the year before Hand's 1909 appointment to the District Court bench by William Howard Taft.

on the Bull Moose ticket.[21] It's fair to say, therefore, that, as a young man, a basic tenet of Hand's judicial philosophy, which he shared with Justices Oliver Wendell Holmes, Louis Brandeis, and Felix Frankfurter, was deference to legislative judgment as a matter of commitment to democracy.

Unlike Brandeis, however, Hand never accepted the compromise ultimately set forth in footnote four of *United States v. Carolene Products Company* restricting deferential judicial review to economic regulation cases, while deploying more assertive judicial power in cases involving enumerated rights and "discrete and insular minorities."[22] As did Frankfurter, Hand believed in judicial deference across the board, even in free speech cases.[23] Viewed as an exercise in democratic deference to Congress about when free speech should be curtailed, perhaps Hand's *Dennis* opinion is just a Second Circuit version of Felix Frankfurter's concurring opinion in the Supreme Court.[24] Read that way, perhaps Hand's *Dennis* opinion can be defended as a principled exercise in judicial self-denial; a refusal to misuse judicial power to advance personal values like free speech at the expense of respect for democratic norms.

Much as I would like to, I don't find the judicial deference explanation persuasive. First, there is not a hint of deference in the *Masses*. As we'll see in a moment, it's an audacious, aggressive exercise of judicial power bordering being on excessively aggressive. That's the problem. How could the same judge have been so audacious in the defense of free speech in the *Masses*, and so passive and deferential in *Dennis*?

Second, it's not clear that Learned Hand, a Second Circuit Judge, was empowered to reject Stone's *Carolene Products* formulation once it had been embraced by a majority of the Supreme Court, including Justice Brandeis. Maybe Felix Frankfurter, as a Supreme Court Justice, was entitled to continue to adhere to a dissenting approach requiring deference in everything; but not Hand sitting as an inferior court judge—and I'm sure he knew it. Maybe that explains Hand's world-weary summary of Supreme Court First Amendment doctrine demonstrating its incoherence[25]—he needed to make space for his own passive approach by making it clear that heightened review led nowhere.

Most importantly, the judicial deference theory doesn't explain Hand's contradictory approaches to non-constitutional issues like statutory

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21. See GUNTHER, THE MAN AND THE JUDGE, *supra* note 9, at 94–96 for a description of Hand's political activities.

22. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

23. *See* LEARNED HAND, THE BILL OF RIGHTS 69–74 (1958).

24. Dennis v. United States, 341 U.S. 494, 551 (1951) (Frankfurter, J., concurring).

25. United States v. Dennis, 183 F.2d 201, 207–13 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

construction and procedural fairness raised in both cases; settings where democratic deference has no role. As we'll see, in the *Masses*, Hand pushed his non-constitutional powers to the edge, and maybe beyond, in defense of free speech. In *Dennis*, he simply tanked on the numerous non-constitutional paths open to him to protect free speech.

The "doctrinal" explanation argues that *Dennis* is consistent with the *Masses* because conspiring to advocate the wisdom, necessity, and/or propriety of overthrowing bourgeoisie government by force and violence, the speech allegedly at issue in *Dennis*, is precisely the type of verbal incitement that was, in Hand's view, absent from the July 1917 issue of *The Masses*. But, if one compares the speech and cartoons at issue in the *Masses*[26] with the abstract tenets of Marxism embraced by the American Communist Party and made the centerpiece of the government's case in *Dennis*, the speech in the *Masses* appears more likely to generate an imminent interference with important government security interests than the rantings of Marxist theoreticians about the need for world revolution at some indefinite point in the future. But Hand rejects the significance of temporal consideration. His celebrated re-formulation of Holmes's "clear and present danger" test in *Schenck v. United States*[27] as measuring "the gravity of the 'evil,' discounted by its improbability"[28] gives the First Amendment game away by allowing an extremely grave evil, like overthrow of the government by force and violence, to support massive censorship even when there is no plausible risk that the feared evil will come to pass in the foreseeable future. Under Hand's test, ultimately adopted by Chief Justice Vinson,[29] the gravity of the feared evil trumps the improbability of its occurrence every time. In fact, in the next sentence, Hand dismantles his purposeful incitement model in the *Masses* by swapping out the idea of a "remote" harm that cannot justify prosecution, for a potential harm, however improbable, completely eliminating any notion of imminence, probability, or reasonable foreseeability as long as the feared evil is sufficiently grave.[30]

Maybe Hand thought he was merely following Supreme Court orders in *Dennis*, although his reading of Supreme Court First Amendment precedent

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26. The eight items—four cartoons and four essays—on which the government made its case in the *Masses* are annexed to the Hand opinion as an appendix.

27. 249 U.S. 47, 52 (1919).

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

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

30. 183 F.2d at 212.

seems awfully crabbed and grudging to me.[31] We'll see later how his obvious disagreement with *Schneiderman v. United States*[32] led him to ignore its significance, going so far as to decline to be completely bound by a five Justice majority in *Schneiderman* because the members of the majority wrote reciprocally supporting each other's opinion.[33] What Learned Hand's judicial philosophy might have been, there is no way to put *The Masses* and *Dennis* in the same philosophical universe. The two cases point in different directions. One is a road map for protecting speech; the other a blueprint for suppressing it.

In any event, even if doctrinal coherence existed, there is simply no explanation for Hand's cavalier treatment of the serious procedural errors in *Dennis*.[34] Much as I would like to, therefore, I can't find a doctrinal coherence between the two opinions that would afford a principled defense of Hand's behavior.

But enough carping. It's time for some well-deserved praise.

The *Masses* is one of the most courageous, intellectually adventurous, morally compelling lower court judicial decisions that I have ever read. Not because of its fidelity to accepted judicial principles—it was not particularly faithful—but because Hand, faced with a dangerous breakdown of fundamental norms of decency surrounding the nation's commitment to toleration and dissent, courageously used every trick in his judicial bag—and a few tricks that he put into the bag himself—to try to slow down the runaway democratic train. Hand knew that he would probably be reversed.[35] He knew that his opinion would damage his career. But he literally threw himself at the runaway train—and paved the way to the future. In a dark time, let's hope there are other federal judges worthy of Learned Hand's willingness to stretch the limits of their judicial power to the point of jeopardizing their careers to defend the nation's commitment to decency and fairness.

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31. *See* 183 F.2d at 207–11.

32. 320 U.S. 118 (1943).

33. *See Dennis*, 183 F.2d at 210.

34. Hand discusses the procedural issues at 183 F. 2d at 216–34. I discuss aspects of Hand's procedural rulings involving discriminatory jury selection, judicial misconduct, Confrontation Clause violations, refusal to admit exculpatory testimony and evidence, refusal to allow one of the defendants to sum up to the jury, failure to apply the appropriate burden of proof, and failure to direct a verdict of innocence *infra* pp. 850–53. Since the Supreme Court confined its grant of certiorari to questions of First Amendment and unconstitutional vagueness, Hand had the last word on the procedural issues.

35. *See* GUNTHER, THE MAN AND THE JUDGE, *supra* note 9, at 128. The Gunther biography of Hand and Jim Weinstein's telling of the story of the *Masses* each describe Hand's mental state and set out the surrounding facts. I have drawn heavily on each.

Hand appears to have been one of only three federal judges to have sought to slow the train in 1917. The other two were district court judges in Montana and North Dakota who dismissed Espionage Act indictments.[36] When Hand decided to act in July 1917, repression of World War I dissenters wasn't confined to the hinterlands. It had reached a white-hot pitch in his own courthouse. His colleague, Judge Julius Mayer (who was to sit by designation on the Second Circuit panel overruling Hand), had just presided over a farce of a trial convicting Emma Goldman and Alexander Berkman of violating the Espionage Act of 1917 by publishing criticism of the draft and organizing the "No Conscription League."[37]

The defendants had been arrested on June 15 and held on the enormous sum of $25,000 (nearly $500,000 in today's dollars) bail each.[38] Emma Goldman was released on bail on July 1. Alexander Berkman was released on July 6. The trial began on July 7, after Judge Mayer denied the defendants, who were representing themselves, a short continuance to prepare for trial and to summon witnesses on their behalf.[39] The Goldman/Berkman trial lasted two days.[40] Judge Mayer charged the jury that the only issue in the case was whether defendants had conspired to counsel persons of draft age to refuse to register.[41] The evidence consisted of copies of *Mother Earth* and *The Blast*, magazines published by the defendants containing passionate denunciations of the draft, as well as a manifesto and working papers of the "No Conscription League" opposing the draft but offering no advice on

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36. *See* Weinstein, *supra* note 3, at 74–75. Iconic Justices Oliver Wendell Holmes and Louis Brandeis did nothing until 1919. *See* Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Justices Holmes and Brandeis dissenting from affirmance of conviction).

37. *See* Kathleen Kennedy, *Manhood and Subversion During World War I: The Cases of Eugene Debs and Alexander Berkman*, 82 N.C. L. REV. 1661, 1676–77 (2004).

38. To add insult to injury, after the defendants had been convicted and imprisoned, the clerk of the court kept 1% of the $50,000 in bail funds as an administrative expense. The Supreme Court upheld the practice, with Justices Holmes and Brandeis dissenting. Berkman v. United States, 250 U.S. 114 (1919).

39. *See Berkman & Goldman: Opening Session*, INFOPLEASE.COM, https://www.infoplease.com/us/speeches-primary-documents/trial-and-speeches-alexander-berkman-and-emma-goldman-10 (last visited Oct. 2, 2018).

40. For excerpts from trial, see *Berkman & Goldman: Trial and Speeches of Alexander Berkman and Emma Goldman*, INFOPLEASE.COM, https://www.infoplease.com/us/speeches-primary-documents/trial-and-speeches-alexander-berkman-and-emma-goldman-16 (last visited Oct. 2, 2018).

41. *See Berkman & Goldman: The Court's Charge*, INFOPLEASE.COM, https://www.infoplease.com/us/speeches-primary-documents/trial-and-speeches-alexander-berkman-and-emma-goldman-2 (last visited Oct. 2, 2018).

whether to register.[42] None of the items contained language urging draft resistance.[43] The jury was out for all of forty minutes before returning a verdict of guilty.[44] Judge Mayer immediately sentenced both Goldman and Berkman to the maximum two-year term, coupled with the threat of deportation, refusing to grant the defendants two days to put their affairs in order before imprisonment.[45]

So, on July 17, when Learned Hand was asked by Gilbert Roe, Max Eastman's experienced pro bono Manhattan lawyer,[46] to sign an order to show cause why the Postmaster General should not be enjoined from barring the July issue of *The Masses* from the mails, Hand was fully aware that he was living in the midst of the most severe attacks on free speech in America since the Alien and Sedition Acts in the 1790s.[47] Hand met the challenge head-on by abandoning judicial restraint and exceeding orthodox limits on judicial power in at least four ways.

First, another judge might not, quite possibly should not, have agreed to preside over *The Masses* request for an injunction. It doesn't take a mind reader to realize that Max Eastman, the editor and publisher of *The Masses*,[48] was judge-shopping when he had Gilbert Roe, a veteran defender of free speech and a close associate of Progressive Senator Robert LaFollette,[49]

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42. *See* Kennedy, *supra* note 37, at 1676, 1682.

43. *Id.* at 1675.

44. *Berkman & Goldman: The Verdict*, INFOPLEASE.COM, https://www.infoplease.com/us/speeches-primary-documents/trial-and-speeches-alexander-berkman-and-emma-goldman-3 (last visited Oct. 2, 2018).

45. *See id.* The defendants' principal argument on direct appeal to the Supreme Court was the unconstitutionality of the Selective Service Act. No First Amendment issues were raised. The convictions were affirmed unanimously. Goldman v. United States, 245 U.S. 474 (1918).

46. Gilbert Roe is an unsung figure in American First Amendment lore. Before there was an ACLU, Roe's Free Speech League was the nation's principal—perhaps sole—defender of First Amendment principles. Roe had been a law partner of Senator Robert LaFollette before setting up a successful practice in New York City. His client list included Emma Goldman, Lincoln Steffens, Margaret Sanger, Max Eastman, Upton Sinclair, John Reed, Eugene Debs, and the New York City Teachers Union. *See generally* ERIC B. EASTON, DEFENDING THE MASSES: A PROGRESSIVE LAWYER'S BATTLES FOR FREE SPEECH (2018).

47. *Id.* at 132–33.

48. Max Eastman was the editor and principal writer for *The Masses*. A brilliant but mercurial intellectual, Eastman swung from radical left-wing politics in his youth to right-wing anti-communism at the end of his career. CHRISTOPH IRMSCHER, MAX EASTMAN: A LIFE 1 (2017). He is, perhaps, the only person to have written for *The Masses* and William F. Buckley's *The National Review*. *See id.* at 5, 325.

49. Roe, an associate of progressive Senator Robert LaFollette, had testified against the Espionage Act of 1917. *See* Brief of Gilbert E. Roe as *Amicus Curiae*, *in* 19 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 697,

submit the order to show cause to Learned Hand, rather than one of the other three Southern District trial judges.[50] As we've just seen, one of Hand's colleagues, Judge Julius Marshuetz Mayer, had just finished mopping the floor with Emma Goldman. Eastman and Roe surely knew that Mayer would have made short work of *The Masses* request for equitable relief.[51] The junior district judge, Martin T. Manton, was a garrulous Democratic politician, an intellectual lightweight who went on to an undistinguished career on the Second Circuit that ended in disgrace in 1939 when he was convicted of and imprisoned for accepting bribes.[52] Eastman would surely have known that Manton would never bite the Presidential hand that could promote him.[53] That left Hand's cousin, Augustus Hand, junior to Learned, but still a well-respected judge.[54]

Extrapolating from my own litigation experience, Augustus Hand would have seemed a plausible stand-in for Learned Hand. But I never would have selected him.[55] The difference was that Eastman had an "in" with Learned Hand. In 1915, at Hand's wife's request, Hand had made a speech at the

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704–51 (Philip B. Kurland & Gerhard Casper eds., 1975) (discussing the unconstitutionality of the 1917 Espionage Act).

50. I confess here to be drawing on my own experience as a civil liberties lawyer over the years. Whenever the local rules allowed—and sometimes when they did not—I used an *ex parte* order to show cause to place a case before a favored trial judge in the hope that once the judge signed papers bringing on the hearing, the supporting papers would have intrigued him sufficiently to hold onto the hearing on whether to grant the injunction. I confess blissful ignorance about whether the Southern District had formal rules dealing with the practice in 1917. I'm pretty sure that Learned Hand, as senior district judge, had the power de jure or de facto—to hold onto the *Masses* case once the order to show cause was submitted to him on July 16. That's just what he did.

51. In the end, of course, Judge Mayer, sitting by designation in the Second Circuit, signed on to Judge Henry Wade Rogers's decision overturning Hand's opinion. *See* Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917).

52. *See generally* Allan D. Vestal, *A Study in Perfidy*, 35 IND. L.J. 17 (1959) (chronicling Manton's systematic corruption while sitting on the Second Circuit).

53. Ironically, in 1918, Manton received the promotion to the Second Circuit that had seemed slated to go to Learned Hand before Hand rocked the boat with his *Masses* opinion. GUNTHER, THE MAN AND THE JUDGE, *supra* note 9, at 221–22.

54. Augustus Hand was appointed to the Southern District in 1914, five years after Learned Hand's appointment. He was promoted to the Second Circuit in 1927, three years after his cousin. Charles E. Wyzanski, Jr., *Augustus Noble Hand*, 61 HARV. L. REV. 573, 576–77, 581 (1948).

55. I've practiced civil liberties law for more than fifty years, serving as National Legal Director of the ACLU during the Reagan Presidency and as Founding Legal Director of the Brennan Center for Justice at NYU from 1995–2007. One of my favorite judge shopping techniques was to present an order to show cause why preliminary injunctive relief should not be granted to a desired judge and then let nature take its course. Many times, the judge took the bait and kept the case.

Colony Club introducing Max Eastman, then a well-known advocate of women's suffrage who had been invited to address the members of the exclusive women's club on the issue of votes for women.[56] It must have been a gracious introduction and one helluva speech because, a year later, Eastman persuaded Learned Hand, then a sitting federal judge, to write a glowing letter to the New York State legislature endorsing *The Masses* as fit for distribution in the NYC subways.[57]

The obvious problem was that Learned Hand's prior relationship with Eastman, and his efforts to assist *The Masses* before the New York State Legislature, may well have rendered it inappropriate for Learned Hand to have kept the case, especially when his cousin, Augustus, was available as a competent substitute. Learned Hand was ordinarily such a stickler for judicial propriety that his decision to keep the case despite the prior relationship with both Eastman and *The Masses* speaks volumes about his willingness in 1917 to defy convention to protect free speech.[58]

Second, Hand, a brilliant technical judge, must have known that the Supreme Court had repeatedly held, most recently in *Ex parte Rapier*, that exclusion from the mails was not the equivalent of censorship as long as alternative methods of distribution were available.[59] In order to execute an end-run around *Rapier*, Hand decided to treat the *Masses* case as though Eastman had been indicted for violating the Espionage Act of 1917, rather than merely threatened with loss of mailing privileges.[60] It's still not clear to me after repeated readings of the *Masses* why, in 1917, Hand was justified in

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56. GUNTHER, THE MAN AND THE JUDGE, *supra* note 9, at 129–30.

57. The legislative hearings grew out of a decision by a private company hired to run the news kiosks in the NYC transit system to boycott *The Masses* because of its "blasphemous" content. Hand assured the legislators that the magazine was a respectable journal. The legislators were not impressed. *The Masses* remained frozen out of the subways until the end. The incident is described in GUNTHER, THE MAN AND THE JUDGE, *supra* note 9, at 130; Weinstein, *supra* note 3, at 69.

58. The Model Canon of Judicial Ethics can be read to require Hand's recusal. *See* MODEL CODE OF JUDICIAL CONDUCT r. 2.11 (AM. BAR ASS'N 2015).

59. *Ex parte* Rapier, 143 U.S. 110, 133 (1892).

60. *See* 244 F. 535, 538 (S.D.N.Y. 1917). Hand's treatment of the case as potentially criminal was prescient. The editorial staff of *The Masses* was, indeed, indicted under the Espionage Act of 1917. Madeleine Baran, *A Brief History of* The Masses, BROOKLYN RAIL (Apr. 1, 2003), https://brooklynrail.org/2003/04/express/a-brief-history-of-the-masses. Augustus Hand presided over the trials. Two juries hung, and the prosecution was dropped. *Id.* It would be interesting to recover Augustus Hand's charge to the jury. It's how the *Dennis* trial should have ended if it had been presided over by someone like Augustus Hand, and not Harold Medina. As we'll see, the central role of the jury was the crucial procedural issue in *Dennis* that Learned Hand ran away from.

treating the case as though it were a criminal prosecution instead of a civil action challenging a non-criminal penalty. Hand was right, of course; but only because *Rapier* was dead wrong. Barring something from the mails should, for First Amendment purposes, be treated as the equivalent of banning it.[61] In 1917, though, Hand, as a district judge, was bound by *Rapier*. His only way around it was to insist that the statute should be viewed on its face as capable of being used criminally.[62] Even if cases like *United States v. Reese* permitted such an approach, Hand still had to exercise his discretion to expand his review power to facial from as applied.[63] In my experience, most judges would not have done it.

Third, Hand invoked the canon, novel in 1917, that ambiguous or overbroad statutes should be construed to avoid interference with basic free speech principles, even in settings where Congress has the constitutional power to prohibit the speech in question.[64] In effect, Hand invoked a nascent "doctrine of clear statement" requiring Congress to act in unmistakable terms if it wished to engage in censorship of speech merely because it feared the speech would diminish enthusiasm for the war effort. Today, employing such a canon would be routine, but only when serious doubts existed about Congress's constitutional power to invoke the broad version of the statute. When, as Hand conceded, no doubts existed about Congress's power, Hand's invocation of a clear statement rule would be highly controversial today. In 1917, it was downright revolutionary.

Hand, then, applied the canon to unlimber three desirable, but highly debatable, narrow readings of the Espionage Act of 1917 that he insisted Congress must have intended. While Geof Stone has labored mightily to excavate legislative history supporting Hand's narrow readings,[65] at least two of them remain, at a minimum, audacious. First, he construed the prohibition on "willfully" making "false statements" with the "intent to interfere with

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61. Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965).

62. Facial review based on a statute's potentially broadest reach was invoked in *United States v. Reese*, 92 U.S. 214 (1875) to invalidate Reconstruction efforts to protect recently freed slaves. Hand did just the opposite in *Dennis* in relying heavily on *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950), a civil proceeding, in construing a criminal statute. United States v. Dennis, 183 F.2d 201, 211 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

63. Both Judge Hough, passing on an unsuccessful application to vacate the stay of Hand's opinion issued by the Second Circuit the day the opinion was released, and Judge Rogers, writing for the Second Circuit panel that reversed Hand's opinion, relied on the reasoning and holding in *Ex parte Rapier* to reject any First Amendment issue but did not cite to the decision. *See* Masses Publ'g Co. v. Patten, 246 F. 24, 28 (2d Cir. 1917).

64. Masses Publ'g Co. v. Patten, 244 F. 535, 542–43 (S.D.N.Y. 1917).

65. *Id.*; Stone, *supra* note 9, 335–58.

the . . . success of the military . . . forces of the United States."[66] Hand sensibly reasoned that the presence of words like "willful" and "intent" indicated that Congress was seeking to reach only false statements that the speaker knew to be false. Score one for Hand. It's the standard we use today in libel cases.[67]

Second, Hand construed the prohibition on "causing or attempting to cause" "insubordination, disloyalty, mutiny, or refusal of duty."[68] Seizing on the use of the word "cause," Hand read into the statute a requirement of direct incitement or assertion of a duty to disobey the law.[69] It was a brilliant effort at limiting Congress's excess and advancing free speech theory, but it persuaded no one in 1917. Whether or not Geof Stone's research has retroactively rehabilitated Hand's narrow reading,[70] it's clear that Hand, in 1917, was willing to go very far out on a limb to protect free speech principle. He gets an A for effort, even if it didn't work.

Finally, Hand took on the government's strongest point—that the eight items in the magazine violated the prohibition on "willfully" "obstructing the recruiting or enlistment service of the United States."[71] Hand conceded that the powerful criticism of conscription present in the cartoon and texts *could* induce a reader to resist the draft, but narrowly construed the prohibition to require proof that the speaker actually counseled a reader that there was a duty or other self-interested reason to violate the law.[72] Once again, that may have been the law that Congress should have passed, but it's doubtful that it's what Congress intended. Once again, though, I'm less interested in whether Hand was right than in the fact that he used every single bit of his power as a judge in the *Masses* to try to stop the runaway train. Bless him for it.

There is an extraordinary fourth explosion of judicial activism in the *Masses*. Hand released his opinion on July 24, but did not issue his injunction until July 26, allowing Gilbert Roe, Eastman's lawyer, to ask the Postmaster for the return of the 12,000 copies of the July issue that had been deposited in the post office awaiting mailing. Roe told the Postmaster that *The Masses* had found an alternative method of distributing the July issue. I've been around the track enough times to suspect strongly that Roe, with Hand's

66. *Masses Publ'g Co.*, 244 F. at 539.
67. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).
68. *Masses Publ'g Co.*, 244 F. at 539.
69. *Id.* at 540–43.
70. *See, e.g.*, Stone, *supra* note 9, at 136–170.
71. *Masses Publ'g Co.*, 244 F. at 541.
72. *Id.* at 541–42.

cooperation, was seeking to insulate Hand's opinion from appellate review by mooting the controversy. Why else would Hand have delayed his injunction for two days? Judge Charles Merrill Hough's August 6 decision to continue the Second Circuit stay pending plenary appeal gives the game away by explaining that the continued stay is needed to prevent the appeal from becoming moot.[73] If, as I strongly suspect, Hand was complicit in delaying his injunction for two days, it's yet another indication of the lengths Learned Hand was willing to go in 1917 to resist the repressive mania that was overtaking his country.

The reaction to Hand's attack of conscience wasn't pretty. His cousin, Augustus, was not pleased.[74] The Second Circuit issued an immediate stay, continued it to prevent mootness,[75] and unanimously reversed Hand, with Judge Mayer, sitting by designation, passing judgment on his colleague.[76] *The Masses*, barred from the mails, collapsed financially and ceased to publish.[77] Max Eastman and his fellow editors were indicted and tried twice before hung juries for violating the broad version of the Espionage Act of 1917.[78] Learned Hand lost his coveted promotion to the Second Circuit. A corrupt hack,

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73. Masses Publ'g Co. v. Patten, 245 F. 102, 104–06 (2d Cir. 1917).

74. Hand's letters describe "Gus's" disapproval and the virtually unanimous rejection of his approach. *See* GUNTHER, THE MAN AND THE JUDGE, *supra* note 9, at 135 (quoting Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Charles C. Burlingham (Oct. 6, 1917)).

75. *Masses Publ'g Co.*, 245 F. at 104–06.

76. Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917). The Second Circuit opinion was written by Judge Henry Wade Rogers, a founder of the University of Michigan Law School, and President of Northwestern University until 1900, when his support for admitting women forced him out. Rogers immediately joined the Yale Law School faculty in 1900 and served as Dean from 1903–1916, when Woodrow Wilson appointed him to the Second Circuit. *Henry Wade Rogers*, NW. UNIV. ARCHIVES (Sept. 9, 2009), http://exhibits.library.northwestern.edu/archives/exhibits/presidents/rogers.html. Rogers's opinion, a workmanlike survey of conventional "bad tendency" jurisprudence, recognizes the binding effect of *Ex parte Rapier*, *Masses Publ'g Co.*, 246 F. at 29, and adopts verbatim Judge Hough's observation in his opinion continuing the Second Circuit, *Masses Publ'g Co.*, 245 F. at 106, stay that expressing intense admiration for someone's behavior is an implied encouragement to emulate it. *Masses Publ'g Co.*, 246 F. at 38. Judge Ward concurred in an ineffectual opinion rejecting Hand's approach but warning that not all criticism would fall within the government's regulatory power. *Id.* at 39. Unlike Judges Rogers and Mayer, who were Wilson appointees, Ward was nominated and confirmed in 1907 by Theodore Roosevelt.

77. Adam Gopnik tells the sad story in his biography of Max Eastman at Adam Gopnik, *A Valentine for Max Eastman*, NEW YORKER (Feb. 14, 2018), https://www.newyorker.com/news/daily-comment/a-valentine-for-max-eastman.

78. IRMSCHER, *supra* note 48, at 130–33.

Martin Manton, was appointed in his stead.[79] Hand was not forgiven until 1924, when Calvin Coolidge finally elevated him to the Second Circuit, where he became a legend, serving until 1961.[80] It's hard to know for sure, but the six-year delay (1918–24) and the notoriety probably cost Learned Hand a seat on the Supreme Court. It didn't hurt that the Republican Establishment still hadn't fully forgiven Hand for abandoning William Howard Taft in 1912.[81] Imagine if the *Masses* version of Learned Hand had been on the Supreme Court when *Gitlow*[82] and *Whitney*[83] were decided.

That's enough praise. Now back to the carping.

ONE HAND DEFINITELY NOT CLAPPING

If the *Masses* opinion is a hymn to judicial courage, Learned Hand's opinion in *Dennis* is a dirge to lost idealism.[84] I'll pass on whether Hand's First Amendment reasoning was right or wrong. I think his abandonment of his own effort in the *Masses* to forge effective free speech protection and his gleeful/spiteful demonstration that Holmes's competing "clear and present danger" test in *Schenck*, as haltingly developed by the Supreme Court and restated by Hand himself, provides little real protection in times of hysteria, was utterly unnecessary. Not necessarily wrong. Just not compelled.

I believe that Hand, if he wished, could have re-worked the same raw material, as Justice Douglas did in his *Dennis* dissent,[85] and Justice Harlan would do several years later in *Yates, Scales,* and *Noto* to slow down the runaway McCarthy Express. Unlike his younger self, the 1950 version of Learned Hand simply chose not to. Maybe Hand really did believe himself bound by inadequate Supreme Court precedent. Maybe he really did feel a

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79. *See* Vestal, *supra* note 52, at 18.

80. GUNTHER, THE MAN AND THE JUDGE, *supra* note 9, at 235–36.

81. The Gunther biography describes young Hand's political activities on behalf of Roosevelt's Bull Moose Party. The Republican establishment blamed the election of Woodrow Wilson in 1912 on Roosevelt's third-party run that split the traditional Republican vote. *See id.* at 192–97. Think Ralph Nader in 2000.

82. *Gitlow v. New York*, 268 U.S. 652 (1925).

83. *Whitney v. California*, 274 U.S. 357 (1927).

84. Hand's opinion is reported at 183 F.2d 201, 201–34 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). The Smith Act, enacted in 1940, made it a crime to advocate the violent overthrow of the government, or to organize or be a member of any group or society devoted to such advocacy. 18 U.S.C. § 2385 (2018). It was based, in large part, on state statutes banning "criminal anarchy" upheld in *Gitlow v. New York* over the dissents of Holmes and Brandeis. 268 U.S. 652, 654 (1925); 268 U.S. 672–73 (1925) (Holmes, J., dissenting) (Brandeis, J., joining).

85. 341 U.S. 494, 581–82 (1951) (Douglas, J., dissenting).

profound duty to defer to Congress. But it's impossible to square Hand's adventurous spirit in the *Masses* with his defeatist approach in *Dennis.*

Consider but one example. In the *Masses*, Hand was confronted with a Supreme Court precedent that, arguably, stopped the case dead in its tracks. Applying a version of the right/privilege dichotomy, the Supreme Court had explicitly—if wrongly—refused to treat denial of mailing privileges as an abridgment of free speech.[86] But Hand's entire opinion in the *Masses*, especially his adoption of a narrowing canon of construction, was predicated on the assumption that, under a broad reading of the statute, *The Masses* would suffer a grievous injury to the free speech principle. Hand simply ignores *Ex parte Rapier.* As we've seen, Hand solved his *Rapier* problem by electing to review the statute on its face, not as applied; allowing him to pretend that he was presiding over a hypothetical criminal prosecution requiring him to construe the statute narrowly.[87] A modern court seeking to protect free speech might well use the same overbreadth technique;[88] but in 1917, as it is today, facial, as opposed to "as applied" review was a highly controversial, judicially aggressive technique. Hand elected to adopt it to avoid a speech-restrictive Supreme Court precedent. Good for him. But such an aggressive approach certainly was not required. In fact, it was rejected by all four judges who reviewed Hand's opinion, and, apparently, not even endorsed by cousin Augustus.

Contrast how the 1950 version of Holmes handled a potentially determinative speech-protective Supreme Court opinion, *Schneiderman v. United States*, where the United States sought to cancel a naturalization certificate issued in 1927 to a member of a predecessor of the Communist Party, who went on to serve as a leader of the American Communist Party.[89] The United States argued that Marxist principles, as adopted by the party's intellectual core and adhered to by its members, called for the overthrow of the government by force and violence as soon as practicable and made it impossible for a committed member to swear truthful attachment to the principles of the Constitution, a pre-requisite for naturalization.[90]

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86. *Ex parte* Rapier, 143 U.S. 110, 133–34 (1892).

87. Masses Publ'g Co. v. Patten, 244 F. 535, 541 (S.D.N.Y. 1917).

88. I explore the technique in Burt Neuborne, *Where's the Fire?*, 25 J.L. & POL'Y 131 (2016).

89. *Schneiderman v. United States*, 320 U.S. 118, 119 (1943).

90. *Id.* at 121–22. The unhappy legal rules surrounding political denaturalization in effect in 1950 were set out in *United States v. Schwimmer*, involving the denaturalization and deportation of a pacifist who had announced that she would refuse to serve in the armed forces.

Schneiderman, represented pro bono by Wendell Wilkie, Republican candidate for President in 1940, argued that nineteenth century Marxist principles called for violent overthrow only because no lawful path to power existed. In the twentieth century United States, Schneiderman argued that access to the ballot and protection of free speech offered a peaceful, lawful path to communism. Violence would be needed, he testified, only if, as was likely, the bourgeoisie refused to recognize the communist's legal right to rule.[91]

The lower courts ruled in *Schneiderman* that the fundamental documents of Marxism provided an adequate justification for a finding that Schneiderman was not sincerely attached to the principles of the Constitution when he took the oath of naturalization in 1927, despite his protestation to the contrary.[92] The Supreme Court reversed, 5–3.[93] Justice Frank Murphy, writing for the Court and sounding for all the world like Learned Hand in 1917, ruled that the denaturalization statute must be construed narrowly because a broad construction was incompatible with the nation's commitment to intellectual freedom.[94] Read narrowly, Murphy ruled that the statute required proof by clear and convincing evidence that the naturalization oath was false.[95] Specifically, Justice Murphy ruled the tenets of Marxism, ossified in the Communist Party's founding documents and rhetoric, could be compatible with loyalty to the Constitution, as long as the commitment to violence was understood to mean violence aimed at defending lawful political gains by communists at the ballot box.[96] The Supreme Court vacated the judgments below because, as a matter of law, the raw documents, standing alone, could not provide clear and convincing evidence of a commitment to overthrowing the lawful government by force and violence when contradicted by Schneiderman's sworn protestation to the contrary.[97]

Chief Justice Harlan F. Stone, joined by Justices Owen Roberts and Frankfurter, dissented at length, arguing that service as a leader of the

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Justices Holmes, Brandeis and Sanford dissented. 279 U.S. 644, 653 (1929) (Holmes, J., dissenting) (Brandeis, J., joining); 279 U.S. at 655 (Sanford, J., dissenting).

91. *See Schneiderman*, 320 U.S. at 127–28.

92. Schneiderman v. United States, 119 F.2d 500, 504 (9th Cir. 1941); United States v. Schneiderman, 33 F. Supp. 510, 513 (N.D. Cal. 1940).

93. *Schneiderman*, 320 U.S. at 161, 207.

94. *Id.* at 119–20.

95. *Id.*

96. *See id.* at 136–39.

97. *Id.* at 147–57. Justices Douglas and Rutledge joined the majority opinion and wrote separate concurrences. *Id.* at 161 (Douglas, J., concurring); *id.* at 165 (Rutledge, J., concurring).

Communist Party was sufficient to justify a judicial finding that Schneiderman had taken the oath falsely in 1927 because, down deep, he was wedded to violent overthrow of the government as soon as practicable.[98]

The 1917 version of Learned Hand would—and should—have used *Schneiderman* to end the Smith Act prosecutions. The defendants in *Dennis* made the same effort to explain that, as Americans, their commitment to revolutionary violence was confined to violence that was needed to defend an elected communist government from overthrow by the bourgeoisie.[99] As in *Schneiderman*, the prosecution called them liars, pointing to the Communist Party's endorsement of nineteenth century Marxist tracts, and twentieth century Leninist bombast, without acknowledging that the texts were written in eras when access to the ballot and free speech were not available to communists.[100]

Hand conceded that, under his slightly narrowing reading of the Smith Act, requiring "advocacy" (if not his 1917 insistence on "incitement,"), the central issue in *Dennis* was whether American communist leaders, like the defendants, were committed to teaching and advocating the propriety of violent overthrow of the government at the earliest practicable moment, or to the use of revolutionary violence only to defend lawful political gains at the ballot box.[101] As a great trial judge, Hand also knew that, since defendants' beliefs were an—indeed "the"—element of the crime, it was the prosecution's burden to prove beyond a reasonable doubt that defendants were lying when they disclaimed belief in violent overthrow unconnected to the defense of lawful gains.[102] As a great appellate judge, Hand knew that that the Supreme Court had already ruled in *Schneiderman* that the evidence before the *Dennis* trial court—all 16,000 pages of it[103]—when coupled with the defendants'

98. *See id.* at 170, 181 (Stone, C.J., dissenting).

99. Hand's opinion accurately describes defendants' explanation of the limited role of revolutionary violence as a technique to defend gains at the ballot box. United States v. Dennis, 183 F.2d 201, 206 (2d Cir. 1950).

100. Hand's opinion also accurately summarizes the prosecution's reading of the basic Marxist texts as requiring overthrow of bourgeoisie governments as soon as practicable. *See id.* at 206; *see also* Martin H. Redish, *Unlawful Advocacy and Free Speech Theory: Rethinking the Lessons of the McCarthy Era*, 73 U. CIN. L. REV. 9, 39 (2004).

101. *See Dennis*, 183 F.2d at 206–07; *see also* Redish, *supra* note 100, at 46.

102. *Dennis*, 183 F.2d at 230–31. Although the Court did not impose the reasonable doubt standard on the states until *In re Winship*, 397 U.S. 358 (1970), it had been the rule in the federal courts at least since *Coffin v. United States*, 156 U.S. 432 (1895). In 1950, Hand had undoubtedly applied it multiple times.

103. Dennis v. United States, 341 U.S. 494, 497 (1951). Justice Douglas's dissent in *Dennis* makes clear that the prosecution's case in *Dennis* rested on four basic Marxist-Leninist texts, and

sworn denials, did not constitute clear and convincing evidence that the defendants were committed to violent overthrow, much less the required proof beyond a reasonable doubt. As in *Schneiderman*, the *Dennis* record is devoid of any proof that any defendant did anything but lead the Communist Party in perfectly lawful activities, like running for office and bitterly criticizing the government.[104]

In the absence of particularized proof going beyond Marxism's founding documents and tons of revolutionary rhetoric, and in the presence of sworn denials by the defendants of any commitment to revolutionary violence not linked to defending lawful gains, I'm confident that the 1917 version of Hand would have seized on *Schneiderman* to order a directed verdict of innocence, ending one of the ugliest and most repressive chapters in our history. Sadly the 1950 version of Hand brushed *Schneiderman* aside, ruling that the Marxist tomes and revolutionary speeches offered by the prosecution constituted adequate evidence that defendants were lying, and left the decision of what to believe up to the jury.[105]

I assume that the only explanation for Hand's refusal to be governed by *Schneiderman* is that he agreed with the Stone, Roberts, Frankfurter dissent in *Schneiderman*—hardly the province of a Second Circuit judge. It gets worse. If Hand was right that the hotly disputed issue of precisely what the defendants truly believed they were advocating and advancing was a jury issue—something Hand had expressed reservations about back in the day[106]—and he if was right that the abstract tomes and leaflets offered by the government constituted adequate proof to support a finding of guilt beyond a reasonable doubt, then the jury took the stage front and center as the most crucial institution in the case.[107] The 1917 version of Hand would have moved

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not on anything that the defendants had done personally, other than assuming leadership positions in a Marxist-Leninist political party founded on those texts. *Dennis*, 341 U.S. at 582–83 (Douglas, J., dissenting).

104. *See id.* at 572–79.

105. *Dennis*, 183 F.2d at 206–10.

106. In his correspondence with Holmes, Hand had expressed concern about a jury's ability to withstand social pressure to make the needed inferences. *See* GUNTHER, THE MAN AND THE JUDGE, *supra* note 9, at 132; *see also* Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 242.

107. The jury should have been even more crucial. I believe that Hand was almost surely wrong in refusing to permit the *Dennis* jury to pass on whether the "clear and present" danger test, as re-formulated by Hand, was satisfied on the *Dennis* record. 183 F.2d at 215–16. While a judge should make the first pass at determining, as a matter of law, whether the speech in question poses a sufficient threat to warrant suppression, in a criminal case, the jury must be given an opportunity to disagree, especially when the judge merely defers to the legislature's

heaven and earth to assure a fair jury. Hand's cavalier treatment of the serious issues of jury unfairness in *Dennis* is impossible to square with his lifelong commitment to fair process.

Tellingly, the Supreme Court granted certiorari in *Dennis* on only two issues—the substantive validity of the Smith Act convictions under the First Amendment; and the Smith Act's alleged unconstitutional vagueness.[108] By limiting its cert. grant, the Supreme Court allowed Learned Hand to deliver the final word on the very serious non-constitutional and procedural objections raised by the defense, including the failure to have ordered a directed verdict of not guilty under *Schneiderman*. I see no way to harmonize Judge Hand's intense search for justice in the *Masses* with Judge Hand's flight from procedural justice in *Dennis*.

Let's start with Judge Medina's behavior. It can't have been easy to preside over the *Dennis* trial. Unlike earlier Communist Party cases like *Bridges v. California*,[109] and *United States v. Schneiderman*,[110] where party members were brilliantly represented by Osmond Fraenkel, an ACLU stalwart,[111] and Wendell Wilkie, Republican candidate for President in 1940,[112] and with contemporary Hand Cold War cases like *United States v. Coplon*[113] and *United States v. Remington*,[114] involving non-party members represented by excellent apolitical lawyers, by 1950 the party leadership had taken firm control of efforts to prosecute party members.[115] Whether from ideological blindness, misplaced strategy, or plain stupidity, Communist Party leaders insisted that defense lawyers shoulder three incompatible burdens—present an effective legal defense; demonstrate the weakness of

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determination. Otherwise, the judge is unconstitutionally directing a verdict of guilty on an essential element of the crime. Hand's clearly unjustified use of judicial notice, and his labeling the issue as one of law, instead of a mixed question of law and fact, doesn't begin to justify that aspect of his decision. *See* William Wirt Blume, *Origin and Development of the Directed Verdict*, 48 MICH. L. REV. 555, 560 (1950).

108. Dennis v. United States, 340 U.S. 863, 863 (1950).

109. 314 U.S. 252 (1941).

110. 320 U.S. 118 (1943).

111. Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297, 305–06.

112. Paul Boudreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ. L. REV. 195, 209 n.104 (2004).

113. 185 F.2d 629 (2d Cir. 1950).

114. 208 F.2d 567, 571 (2d Cir. 1953) (Hand, J., dissenting).

115. *See* Burt Neuborne, Harisiades v. Shaughnessy*: A Case Study in the Vulnerability of Resident Aliens*, *in* IMMIGRATION STORIES 87, 96–100 (David A. Martin & Peter H. Schuck eds., 2005).

bourgeoisie justice; and appeal over the heads of the judges to a political audience.[116]

It took a special judge to sit through transparent efforts to politicize the *Dennis* trial. Harold Medina was not a special judge. He was a self-important, egotistical martinet who, as chronicled in Justice Frankfurter's elaborate dissent from the contempt citations Medina imposed on the defense lawyers after the trial was over, constantly picked fights with the lawyers, repeatedly lost his temper in front of the jury, and behaved in the presence of the jury with outrageous pro-prosecution bias.[117]

Learned Hand, the exemplar of judicial fairness and the last word on whether Medina's behavior had compromised defendants' rights to a fair jury trial, simply took a pass, blaming the lawyers for having provoked the judge.[118] Provoked Judge Medina might have been. But one might have expected Learned Hand, of all the judges we know, to have refused to permit Medina to take his pique out on the defendants' right to a fair jury trial on the essential element of the crime.

Now, let's move to the jury. Hand conceded that thirty-eight percent of the grand jurors were culled from lists compiled by the clerk of the court from outside sources like *Who's Who in New York*, the *New York Social Register*, and the alumni records of the elite schools of the Ivy League.[119] In 1942, the use of such "Blue Ribbon" lists was condemned by the Supreme Court in *Glasser v. United States*.[120] In response to *Glasser*, the clerk had ceased using such lists, but had failed to purge the *venire* of the thousands of names derived from the lists, allowing so-called Blue Ribbon Grand Jurors to be phased out over time, so that when the grand jury was formed in *Dennis*, more than 3,000 of the "best people," remained in the pool.[121] Not only that, the clerks admitted disqualifying wage earners from the pool because extended service in a grand jury was a hardship that often induced judges to excuse them.[122]

Hand breezily dismissed the defendants' challenge to the grand jury pool by observing that no defendant is entitled to grand jury made up of a cross

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116. I have written about the disastrous results of the Communist Party's decision to take over the defense of civil liberties cases involving communists. Neuborne, *supra* note 115, at 87–112; Burt Neuborne, *Of Pragmatism and Principle*: *A Second Look at the Expulsion of Elizabeth Gurley Flynn from the ACLU's Board of Directors*, 41 TULSA L. REV. 799 (2006).

117. Sacher v. United States, 343 U.S. 1, 23–42 (1952) (Frankfurter, J., dissenting).

118. United States v. Dennis, 183 F.2d 201, 225–26 (2d Cir. 1950).

119. *Id.* at 217–18.

120. 315 U.S. 60, 86–88 (1942).

121. 183 F.2d at 217.

122. *Id.* at 219.

section of the community.[123] The irony of having the leaders of the Communist Party indicted by the members of the *New York Social Register* seemed lost on the 1950 version of Learned Hand.[124] Maybe you can sympathize Hand's response to the grand jury challenge by treating it as hyper-technical lawyer-talk. After all, grand juries always indict. Who cares how they are formed? But you can't say that about the petit jury.

Hand already knew how important a fairly drawn petit jury could be. Back in the day, the editorial staff of *The Masses* had been spared conviction under the Espionage Act of 1917 by two hung juries in trials presided over by Augustus Hand.[125] Hand himself made the petit jury in *Dennis* the crucial institution of justice by failing to direct a verdict of innocence under *Scneiderman*, thus vesting the jury with power to decide, under the proper burden of proof, whether the defendants were advocating violent overthrow of the government as soon as practicable, or merely espousing revolutionary violence as a way to defend an elected communist government from bourgeoisie overthrow. You'd have thought that Learned Hand, of all people, would be concerned to assure that a jury required to make such a decision be fairly representative, not a jury from which wage earners and poor people had been minimized or excluded. You'd be wrong.

Hand acknowledged that, in forming the jury pool, the clerks had drawn disproportionately from the wealthiest areas of New York and Westchester and had knowingly underrepresented jurors from areas where wage earners and the poor lived.[126] Hand's response was that the clerks were merely responding to the likelihood that wage owners and poor people would find it a hardship to sit as jurors for an extended trial.[127] The irony of having the leaders of the Communist Party tried by a wealthy jury from which laborers were excluded or minimized seemed lost on Hand.

But the *piece de resistance* is race. Defendants proved that every card identifying a qualified black juror was marked with a letter "C."[128] Not surprisingly, Blacks were radically underrepresented in the jury pool, and on the jury itself. In response, Hand angrily denied that clerks in his courthouse would do anything as dastardly as discriminate in jury selection on the basis

123. *Id.* at 220.

124. *Id.* at 217–23.

125. IRMSCHER, *supra* note 48, at 130–33; *see* Gopnik, *supra* note 77.

126. *Dennis*, 183 F.2d at 216–17.

127. The same rationale operated to exclude women as jurors until *Taylor v. Louisiana*, 419 U.S. 522, 533–34 (1975).

128. *Dennis*, 183 F.2d at 223.

of race.[129] It might, he mused, be useful to know that a prospective juror was black in order to be able to offer him (they were all him in those days) an excuse from service if it would prove an economic hardship.[130] Monty Python couldn't think that one up.

There's more. Hand misused judicial notice to fill in the huge gaps in the prosecution's evidence of communists' widespread use of violence to overthrow governments in Europe. He refused to permit the jury to pass on whether a sufficient clear and present danger of violent revolution existed to warrant criminalizing the Communist Party, declined to condemn Judge Medina's refusal to recall a sitting juror who had made speeches about being "at war" with communism, but had failed to reveal his passionate anti-communist activity during what passed for *voir dire* in Judge Medina's courtroom, upheld Judge Medina refusal to permit defendants' lawyers to question the jury pool about prejudice, upheld Judge Medina's refusal to allow one of the defendants to sum up before the jury, allowed hearsay evidence about the party's true revolutionary beliefs about violence that probably violated the Confrontation Clause, and refused to permit defendants to offer exculpatory evidence of their having failed to counsel violence.[131] Judge Hand wearily waived each objection away as too weak to warrant a new trial.[132]

What happened to Learned Hand, icon of procedural fairness?

Let me speculate a bit. Partly, I think that Hand was recoiling from the Communist Party's foolish effort to turn the Smith Act trials into communist propaganda shows. If Wendell Wilkie had been defending the communist defendants, as he had successfully *Schneiderman*, I'll bet that Learned Hand would have ruled in his favor on many, perhaps most, of the procedural issues.

Partly, Hand was just plain frightened by the prospect of a violent communist tomorrow. Standing on the ruins of communism today, it's hard to recall how confident post-World War II communists were that tomorrow belonged to them, and how frightened many thoughtful conservatives were that they were right. When Hand threw his judicial body in front of a speeding train in 1917 in defense of free speech for *The Masses*, the October Revolution had not occurred. Stalin had not built a powerful police state committed to worldwide revolution. Communists had not seized power unlawfully throughout Eastern Europe. China was not a communist country. Hitler had not overwhelmed the Weimar Republic. The world had not

129. *Id.*
130. *Id.* at 223–25.
131. *Id.* at 224–34.
132. *Id.*

endured yet another round of apocalyptic war. There was no such thing as a nuclear weapon. My sense is that, in 1950, Hand was seventy-eight years old, and just plain fearful when he declined to play Sir Galahad a second time.

But mostly, I think Hand was a class-bound snob. In 1917, while NYC LaFollette Progressives, like Gilbert Roe; and Bull Moose types, like Learned Hand, didn't mix much with Max Eastman and the *The Masses* crowd, they all belonged to the same elite New York social class. Max Eastman could speak at the exclusive Colony Club at the invitation of Learned Hand's wife, and Hand could feel perfectly comfortable in introducing him. But try imagining Learned Hand socializing with the distinctly *declassé* leaders of the American Communist Party, or the poor wage earners and black folks whose rights to serve on the *Dennis* jury Hand so completely undervalued.

When Hand was dealing with social equals, he was a model judge. Witness his trailblazing defense of Judith Coplon's privacy rights,[133] and his heroic but unavailing efforts to save William Remington from prison,[134] where he was ultimately beaten to death.[135] Sadly, in *Dennis*, the riff-raff below the stairs didn't fare as well.

133. United States v. Coplon, 185 F.2d 629, 639–40 (2d Cir. 1950).

134. United States v. Remington, 208 F.2d 567, 571–75 (2d Cir. 1953) (Hand, J., dissenting).

135. *Remington Dies in Prison; 2 Inmates Named as Killers; Remington Is Dead After Jail Attack*, N.Y. TIMES, Nov. 25, 1954, at 1.