BRANDENBURG V. OHIO AND ITS RELATIONSHIP TO *MASSES PUBLISHING CO. V. PATTEN*

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My role in this symposium, and my paper, are less academic than others'. I clerked for Justice Abe Fortas during the 1968–69 Term and worked with him on *Brandenburg v. Ohio*.[1] I will describe the process by which *Brandenburg* was created, its per curiam status, and its meaning as seen from the perspective of its author. I also will address the theme of this conference, especially the claim that *Brandenburg* incorporated Learned Hand's view of the First Amendment.

I have not previously publicly discussed Fortas's role in *Brandenburg*. The Term in which I clerked was the last Term of the Warren Court. Chief Justice Earl Warren was insistent that we not talk about what we did or how our opinions were crafted, and we observed that rule, or most of us did, for many years. The practice seems to have changed for subsequent Supreme Court clerks,[2] but I, and others, took it seriously.

So, this is the first time that I've come out of the closet, so to speak, about *Brandenburg*. For some years I even denied knowledge of why it was a per curiam opinion. By now it is well known that we were on a rushed schedule. The opinion went to the conference on a Friday, shortly after it had been assigned to Justice Fortas. The next day, Fortas bowed to President Richard Nixon's pressure and resigned from the Supreme Court.[3] When I worked on the opinion, I didn't know that the resignation was imminent, but I did know that Justice Fortas needed to have the opinion right away.

As to the content of *Brandenburg*, Justice Fortas was a facts man. I worked on several First Amendment opinions during my year with him at the Court,

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1. *See* Biography of Martha A. Field, HARV. L. SCH., https://hls.harvard.edu/faculty/directory/10263/Field/ (last visited Sept. 14, 2018); *see generally* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

2. *See* Comment, *The Law Clerk's Duty of Confidentiality*, 129 U. PA. L. REV. 1230, 1230 (1981).

3. *A History of Conflict in High Court Appointments*, NPR (July 6, 2005, 12:00 AM), https://www.npr.org/templates/story/story.php?storyId=4732341.

and he often focused on the particular facts of the case.[4] Moreover, if there was a film to be viewed or a microfilm to peruse, he wanted to start with that.[5] Much of the *Brandenburg* opinion is simply a recitation of all the facts that could be gleaned from a very poorly filmed newscast of a Klan gathering in a remote field in Ohio.[6] That's what *Brandenburg* involved.

The facts could have spoken for themselves. There really was no danger of violence at all, only hateful rhetoric,[7] but in deciding the case Fortas also wanted to send a clear message and to lay out a new and defensible approach in this confusing area of law. We came from the perspective that the Holmes-Brandeis clear and present danger test sounded very protective of speech, but that it had been consistently misapplied, at least by Court majorities, and certainly by Justice Oliver Wendell Holmes, Jr. in *Schenck v. United States*, where he first had announced the formulation.[8] Fortas wanted to say that a clear substantial imminent danger is what is required to interfere with speech.

Justice Fortas viewed *Brandenburg* as a resuscitation and clarification of the clear and present danger test, a directive as to how that test should be applied in future cases. He was trying to capture the best of what Holmes and Justice Louis Brandeis had said, largely in dissents, and to repudiate past misapplications that had unnecessarily punished speech.[9] Frankly, we did not have *Masses*[10] or Learned Hand in mind at all. I was quite surprised, actually, at Professor Gerald Gunther's view that *Brandenburg* was derived from *Masses*.[11]

Of course, this does not necessarily mean that *Masses* lacked any influence at all. As Professors Thomas Healy and James Weinstein have shown, it may, for example, have had some influence on Holmes and Brandeis's formulations.[12] And of course, I admire Hand greatly for standing up for free

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4. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504–05, 508–10 (1969); Epperson v. Arkansas, 393 U.S. 97, 99–100 (1968).
5. *See Brandenburg*, 395 U.S. at 445–47.
6. *Id.*
7. *See id.*
8. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).
9. *See, e.g.*, Pierce v. United States, 252 U.S. 239, 272–73 (1920) (Brandeis, J., dissenting); Schaefer v. United States, 251 U.S. 466, 493–95 (1920) (Brandeis, J., dissenting); Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).
10. Masses Publ'g Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917).
11. Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754–55 (1975).
12. *See* James Weinstein, *The Story of* Masses Publishing Co. v. Patten*: Judge Learned Hand, First Amendment Prophet*, *in* FIRST AMENDMENT STORIES, 61, 86–91 (Richard W. Garnett & Andrew Koppelman eds., 2012); Thomas Healy, *The Justice Who Changed His Mind: Oliver*

speech, including the right to criticize the war effort in vehement and impolite terms, when that position was highly unpopular.[13] (Unfortunately, he retreated from his courageous position later in his career.[14])

I do disagree with both Professor Gunther and Professor Weinstein that the Hand test improved upon the clear and present danger test, or that it was more speech-protective.[15] I will elaborate upon the differences between the Hand test and the *Brandenburg* test, which was designed to be in the Holmes-Brandeis tradition.

HAND'S TEST: APPEAL TO DUTY AND SELF INTEREST

Hand does say that unless a speaker states that it is one's duty to disobey a law, or that it is one's interest to do so, his or her speech will be protected.[16] That could be a very speech-protective standard, certainly for those who do not use those words, even if they advocate very strongly. But it has always struck me as mere coincidence whether a speaker uses those particular words or not. Do we want to punish people because of the accident of how they express themselves? To me, Hand's brightline objective rule, as he called it, makes little sense, even though it would help some to escape punishment.

In other ways, I find Hand's test extremely vague and malleable. Hand forbids "advocating illegal action," as opposed to "political agitation."[17] *Brandenburg* (and Holmes) are more speech-protective here, holding that one can advocate illegal action, unless there is a clear and imminent danger.[18] Hand also draws a line between "direct" and "indirect" advocacy, or directly and indirectly saying that illegality is "one's duty" or is "in one's interest."[19] These standards are hardly clear. Moreover, they are highly manipulable.

Yet more impenetrable is Hand's distinction between causing "esteem" for war protesters and conscientious objectors, which cannot be prohibited, and causing "emulation" of them, that is, causing others to follow their

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Wendell Holmes, Jr., and the Story Behind Abrams v. United States, 39 J. SUP. CT. HIST. 35, 60 (2014).

13. *See, e.g.*, United States v. Nearing, 252 F. 223, 227–28 (S.D.N.Y. 1918); *Masses*, 244 F. at 540–41.

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

15. *See* Weinstein, *supra* note 12, at 83; Gunther, *supra* note 11, at 724–26.

16. *Masses*, 244 F. at 540.

17. *Id.*

18. *See* Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969); Schenck v. United States, 249 U.S. 47, 52 (1919).

19. *Masses*, 244 F. 540–42.

example, which is punishable.[20] He says that praising heroic resisters to government tyranny, paying tribute to them, and expressing admiration for them are all protected.[21] So is raising money for their legal expenses.[22] But why does this not encourage emulation? In addition to its murkiness, the distinction between bestowing esteem and causing emulation seems inconsistent with Hand's later criticism of Holmes's test for focusing on future consequences rather than objective words.[23]

But Hand's central point is that protection is not lost unless one appeals to duty or self-interest, directly or indirectly.[24] Hand thus has created an objective test, based on the particular words used. But his test is a very formal one, and one that does not sensibly separate what should be punishable from what should not. Moreover, the direct-indirect element is not objective in any sense.

MENS REA: FROM NEGLIGENCE TO SPECIFIC INTENT

Hand's admirers criticize *Brandenburg* also for its requirement of specific intent—a requirement, for example, that a person cannot be convicted of hampering the war effort unless he wanted his actions to achieve that result.[25] Hand similarly criticized Holmes's test for requiring specific intent, saying that the concept is too manipulable and that juries cannot be counted on to apply it honestly.[26] Hand did not trust judges on this subject either: Judges might be affected by their personal sentiments about the war.[27] Accordingly,

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20. *Id.* at 542.
21. *Id.* at 541–42.
22. *Id.* at 541.
23. *See* Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist of N.Y., to Zechariah Chafee, Jr., Professor, Harvard Law Sch. (Jan. 8, 1920) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:48408568$8i; *see also* Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Zechariah Chafee, Jr., Professor, Harvard Law. Sch. (Jan. 2, 1921) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:48408568$12i.
24. *Masses*, 244 F. at 540.
25. *See* Brandenburg v. Ohio, 395 U.S. 444, 453–54 (1969) (Douglas, J., concurring).
26. *See* Weinstein, *supra* note 12, at 84–85; *see also* Letter from Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921), *supra* note 23; Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S. (Apr. 1, 1919) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:43005322$17i.
27. Weinstein, *supra* note 12, at 84–85.

Hand wanted to avoid any mens rea requirement greater than negligence for conviction under the sedition acts.[28]

Professor Weinstein seems to support that approach of abandoning any strict mens rea requirement.[29] He quotes Chief Justice John Roberts in a recent case, referring to an intent requirement as creating a chilling effect on speech.[30] Referring to the factor of intent as creating a chilling effect on speech, Justice Roberts said:

> [T]his Court in *Buckley* had already rejected an intent-and-effect test for distinguishing between discussions of issues and candidates. After noting the difficulty of distinguishing between discussion of issues on the one hand and advocacy of election or defeat of candidates on the other, the *Buckley* Court explained that analyzing the question in terms "'of intent and of effect'" would afford "'no security for free discussion.'" It therefore rejected such an approach . . . .
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> For the reasons regarded as sufficient in *Buckley*, we decline to adopt a test for as-applied challenges turning on the speaker's intent . . . . The test to distinguish constitutionally protected political speech . . . should provide a safe harbor for those who wish to exercise First Amendment rights. The test should also "reflec[t] our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" A test turning on the intent of the speaker does not remotely fit the bill.
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> Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial [in every case] . . . . No reasonable speaker would choose to run an ad covered by BCRA if its only defense to a criminal prosecution would be that its motives were pure. An intent-based standard "blankets with uncertainty whatever may be said," and "offers no security for free discussion." The FEC does not disagree. In its brief filed in the first appeal in this litigation, it argued that a "constitutional standard that turned on the subjective sincerity of a speaker's message would likely be incapable of workable application; at a minimum, it would invite costly, fact-dependent litigation."

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28. *See* Letter from Learned Hand to Oliver Wendell Holmes, Jr., *supra* note 26 (asserting that "it is very questionable whether the test of motive is not a dangerous test").

29. Weinstein, *supra* note 12, at 65.

30. *Id.* at 85 n.115.

> . . . . "First Amendment freedoms need breathing space to survive." An intent test provides none.[31]

Justice Roberts, however, was objecting to an intent requirement that made speech illegal, rather than one that protected speech.[32] Moreover, he was talking in the context of a First Amendment challenge to congressional provisions concerning campaign financing and ads, not in a criminal case.[33]

But there is precedent for rejecting a strict mens rea requirement. That was the approach followed in the early Espionage Act cases.[34] Persons were presumed to have intended what the factfinders thought were the natural consequences of their speech, whether or not those consequences were desired by the speaker, and whether or not those consequences came to pass.[35] At most, the standard is one of negligence, measuring the defendant's conduct according to the imagined standards of the "reasonable person."[36] Of course, *Masses* was suppression of a publication, not a criminal prosecution of an individual,[37] but there were thousands of prosecutions of individuals under the Espionage Act for criticizing the war effort, and more than a thousand convictions and imprisonments.[38]

By today's standards, such convictions do not represent just applications of the criminal law. Our tradition is to require some strict mens rea for a criminal conviction.[39] It is a bedrock principle that we do not seek to punish as criminals people who did not intend harm.[40] Although originally, in *Schenck* in 1919, Holmes held actors and speakers responsible for the "natural tendency" of their conduct or speech,[41] shortly afterward, dissenting in *Abrams v. United States*, he championed a specific intent requirement for these speech-based prosecutions.[42] After demonstrating that the statute at issue required intent to interfere with the United States war effort,[43] Holmes

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31. Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 467–69 (2007) (footnote omitted) (citations omitted) (referencing Buckley v. Valeo, 424 U.S. 1 (1976)).

32. *Id.* at 468.

33. *Id.*

34. *Clear and Present Danger Re-Examined*, 51 COLUM. L. REV. 98, 102 (1951).

35. *See* Schenck v. United States, 249 U.S. 47, 51 (1919).

36. *See, e.g.*, *Schenck*, 249 U.S. at 51; Debs v. United States, 249 U.S. 211, 216 (1919); Frohwerk v. United States, 249 U.S. 204, 207 (1919).

37. *See Schenck*, 249 U.S. at 47.

38. Masses Publ'g Co. v. Patten, 246 F. 24, 26 (2d Cir. 1917).

39. *See generally* 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).

40. *See generally* Elonis v. United States, 135 S. Ct. 2001, 2009–10 (2015) (demonstrating that strict liability is restricted to narrowly limited and unusual contexts).

41. *See Debs*, 249 U.S. at 216; *Schenck*, 249 U.S. at 52.

42. Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

43. *Id.* at 626.

explained why specific intent, rather than negligence or even recklessness, was required for violation:

> I am aware of course that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.
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> It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime.[44]

THE GRAVITY OF DANGER FROM THE SPEECH

Hand also disagreed with Holmes's and Brandeis's emphasis on the dangerousness of speech.[45] Hand feared this aspect of the clear and present danger test and wanted to make the assessment of risk a secondary, consideration.[46] He feared that looking to the future effects of speech was too speculative and could lead to manipulation and misapplication of the test.[47] (Later, in *Dennis*, Hand backed off this approach when he put forth "the gravity of the 'evil,' discounted by its improbability" as the proper

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44. *Id.* at 626–27.

45. Gunther, *supra* note 11, at 721.

46. *Id.* at 725 (discussing Hand's preference for an objective test over an inquiry into probable unlawful conduct).

47. *Id.* (noting Hand's reluctance to focus on the future effects of speech and mistrust of juries to protect dissent in wartime).

formulation.[48] But at the times of *Masses*, Hand was critical of predicting future danger as part of the test for whether speech is protected.)

Contrary to that view, I've often thought since *Brandenburg* that we should have focused more in *Brandenburg* on both the type and the gravity of the danger. The danger, if there was any in *Brandenburg*, was grave: an assault on American values, an appeal to white supremacy and anti-Semitism. But there was no violence or dispute among the Klansmen. And any danger was wholly unlike ones that previous cases had involved: Until *Brandenburg*, the clear and present cases focused on either overthrow of the government or interference with a U.S. war.[49]

Moreover, the speech in *Brandenburg* was not even aimed against government. It did criticize government policies and predicted situations in which there "might have to be some revengeance taken,"[50] but racism and anti-Semitism were the main themes. It took place in a lonely field that had only Klansmen, dressed in white robes and pointed hats and carrying torches, surrounding a bonfire burning a cross.[51] They were by themselves, having a ceremony celebrating their hatred. The kind of speech they engaged in was more like speech that today we might consider under a hate speech framework,[52] as well as, or instead of, clear and present danger. Though, of course, with only supporters listening and no victims there to hear the speech, it couldn't have qualified as hate speech anyway.[53]

Using the clear and present danger test in a setting such as *Brandenburg* may suggest that it's a proper test for crimes in general. Holmes also pointed out the closeness of his test to the law of attempt, in criminal law,[54] which also requires specific intent and some degree of imminence.[55] (Gravity of harm is not however part of the crime of attempt.)

It is true that over the years, especially in the 1940s, the "clear and present danger" formulation was sometimes invoked in combination even with very minor crimes. For example, courts spoke sometimes of the clear and present danger of breach of the peace, when they were trying to punish unruliness, or

48. United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

49. Brandenburg v. Ohio, 395 U.S. 444, 450–53 (1969) (Douglas, J., concurring) (summarizing the prominent cases involving the clear and present danger test).

50. *Id.* at 446 (majority opinion).

51. *Id.* at 445–46.

52. R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992) (holding that a content-based restriction on hate speech does not survive strict scrutiny).

53. *Id.*

54. Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

55. *Id.*; *see* Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 10 (1989).

even a clear and present danger of littering.[56] As I've looked back at *Brandenburg* over the years, I wish we had said more concerning the gravity of evil that must be predicted as a consequence of speech, before any attempt at suppression of the speech could be made. Should the clear and present danger test be limited to speech against the government, for example? It certainly should be limited to substantial dangers, not minor ones, and in general, its application has been so limited.

Nonetheless, from the very beginning of the clear and present danger test, the meaning of "danger" has been utterly ambiguous. What evil is necessary in order to comprise a clear and present danger in a particular case? In *Schenck*, Holmes discusses the gravity of evil flowing from distributing pamphlets critical of conscription,[57] but what is the evil to which he is looking? It's unclear whether the feared result is of one soldier refusing to be enlisted, or whether instead the clear danger involves the whole war effort collapsing. Or, indeed, is it somewhere in-between? The results differ drastically depending on which approach is followed, yet *Schenck* offers no guidance about which is intended. The latter approach involves a much graver evil, but that evil is much more remote.

THE *DENNIS* FOOTNOTE

Many ask why Justice Fortas put in the footnote citing *Dennis v. United States* in the opinion.[58] To some that seemed inconsistent with *Brandenburg*'s strict position concerning when speech could be punished; it appeared to cut back on the *Brandenburg* message. Some believe that the Black and Douglas disagreements in their respective concurrences in *Brandenburg* were caused were caused by that footnote.

The point Fortas sought to make from *Dennis* is that past majority interpretations of the clear and present danger test had already been

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56. *See* Niemotko v. Maryland, 340 U.S. 268, 277 (1951) (citing Lovell v. Griffin, 303 U.S. 444, 451 (1938)).

57. Schenck v. United States, 249 U.S. 47, 51–52 (1919).

58. Brandenburg v. Ohio, 395 U.S. 444, 447 n.2 (1969) ("It was on the theory that the Smith Act embodied such a principle [forbidding punishment of mere advocacy] and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. That this was the basis for *Dennis* was emphasized in *Yates v. United States*, in which the Court overturned convictions for advocacy of the forcible overthrow of the Government under the Smith Act, because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.") (alteration in original) (citations omitted) (citing 54 Stat. 670, 18 U.S.C. § 35; Yates v. United States 354 U.S. 298, 354 U.S. 320-24 (1957); Dennis v. United States 341 U.S. 494 (1951)).

repudiated. True, in *Dennis* the Court deferred to congressional judgment and upheld the conviction without itself passing upon the degree of danger or its imminence,[59] but the Court said in the opinion, "Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale."[60] Earlier in the opinion Justice Fortas had said "*Whitney* [and its punishment of mere advocacy] has been thoroughly discredited by later decisions," citing *Dennis v. United States*.[61]

Justice Fortas was intent on adding this footnote, possibly because he knew that the opinion would be per curiam and it would be unseemly for a per curiam opinion to usher in a whole new approach. But the seeming emulation of *Dennis*, whose holding was not supportive of free speech, caused some ambiguity and confusion.

THE ULTIMATE MEANING

Is the strict *Brandenburg* formulation realistic in requiring imminent danger and a specific intent to cause substantial harm before advocating illegality can be punished? Would courts actually follow this test in times of war or national peril? The *Brandenburg* formulation may be extreme, but that may be useful: In perilous settings, there is a tendency to overact, often at the expense of civil liberties. It may be most important to have a strict test to steer decisionmakers in the direction of restraint in circumstances where there is the greatest temptation to ignore limitations.

Brandenburg states a policy, also seen elsewhere in Justice Fortas's writings,[62] that the First Amendment requires protection of speech whenever possible, whenever the facts allow. The *Brandenburg* formulation has a hortatory aspect as well as a regulatory one, serving as a reminder that government should not act to suppress expression of opinion and should not suppress any speech that does not pose a real and immediate danger.[63]

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59. *Dennis*, 341 U.S. at 499, 516–17.

60. *Id.* at 507. The court cites for its proposition *Craig v. Harney*, 331 U.S. 367, 376 (1947) (conviction for contempt of court reversed): "The fires which [the language] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."

61. *See Dennis*, 341 U.S. at 507.

62. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513–14 (1969); Brown v. Louisiana, 383 U.S. 131, 141–42 (1966).

63. *Brandenburg*, 395 U.S. at 447–48.

FORTAS OR BRENNAN?

A final issue. As I said, the Supreme Court in conference voted to adopt the opinion the day before Justice Fortas resigned. It obviously was a per curiam, because by the time it came out, Justice Fortas was no longer on the Court. The opinion wasn't actually handed down, in fact, until some weeks later.

Years later I learned that one of Justice William Brennan's clerks claimed that *Brandenburg* came from Brennan's chambers.[64] Of course, I was flattered that someone else claimed the opinion, and I perused the opinion to see if it was true. Not finding any obvious changes, I compared Fortas's and the published version of *Brandenburg* (which came from Brennan's chambers) in the Library of Congress. What Brennan's office altered were two things: First of all, they cut back one sentence on the facts. I'm sure that was no loss. More important, they removed the words "clear and present danger" from the opinion, so that those words do not appear in the per curiam of the Court. They do appear in Black's and Douglas's concurrences, objecting to resuscitation of clear and present danger because of its historical applications.[65] Those concurrences were written when clear and present danger was still in the opinion.

I don't know how much impact this late change in Fortas's *Brandenburg* opinion has had. Many readers don't even notice the absence of that formulation and refer to *Brandenburg*, as I have, as developing the clear and present danger test. Justice Fortas and I were just as happy to keep the words, as long as they were limited in the way that *Brandenburg* did. Maybe Justice Brennan's efforts would have been better spent by excising the *Dennis* footnote.

In sum, *Masses* was a great opinion, especially in the courageousness of its message and its linking of free speech and democracy. It was prescient in many ways, although I do not admire its so-called objective test. Hand's linkage between free speech and the demands of democracy is masterful, and it is as relevant today as it was in 1917. But *Masses* was not the inspiration for *Brandenburg*, and many of *Masses*' greatest contributions to First Amendment jurisprudence are irrelevant in *Brandenburg*'s context.

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64. *See* Stephen Wermiel, *SCOTUS for Law Students: Lessons from History for Rulings After Justice Scalia's Death*, SCOTUSBLOG (Mar. 15, 2016, 5:09 PM), http://www.scotusblog.com/2016/03/scotus-for-law-students-lessons-from-history-for-rulings-after-justice-scalias-death/.

65. *See Brandenburg*, 395 U.S. at 449–50 (Black, J., concurring); *id.* at 450 (Douglas, J., concurring).