

ON THE WATERFRONT: CHEESE-EATING, HUAC, AND THE FIRST AMENDMENT

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The early 1950s were a bleak time for freedom of speech and association in the United States. Witch hunts, black lists, and loyalty oaths were the order of the day. The Supreme Court, in a relatively docile state of mind, went meekly along, acquiescing to congressional subpoenas, investigations, compelled testimony, and laws making it a crime to belong to the Communist Party. Out of these tools of repression an astounding work of art was spawned—a movie entitled *On the Waterfront*.

Winner of eight Academy Awards, including best motion picture of 1954, *On the Waterfront* is one of the greatest movies ever made. In the prestigious, though controversial, survey conducted by the American Film Institute in 1998 to select the 100 best American movies of the first 100 years of movie-making, *Waterfront* was ranked number eight. Even at that lofty status—top ten on the all-time list, certainly, is nothing to sneeze at—*On the Waterfront* may have been denied its fair share of acclaim. Lingering resentment of its director, Elia Kazan, for his Great Betrayal in 1952, may have cost the movie who knows how many votes among the Hollywood insiders chosen by AFI to cast ballots. Indeed, just a year before the survey, AFI had refused to honor Kazan with a lifetime achievement award, despite his superlative record as a film director.¹ In Hollywood, it seems, old

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1. Elia Kazan directed the following films: *A Tree Grows in Brooklyn* (1945), *The Sea of Grass* (1947), *Boomerang!* (1947); *Gentleman's Agreement* (1947); *Pinky* (1949); *Panic in the Streets* (1950); *A Streetcar Named Desire* (1951), *Viva Zapata!* (1952), *Man on a Tightrope* (1953), *On the Waterfront* (1954), *East of Eden* (1955), *Baby Doll* (1956), *A Face in the Crowd* (1957), *Wild River* (1960), *Splendor in the Grass* (1961), *America, America* (1963), *The Arrangement* (1969), *The Visitors* (1972), and *The Last Tycoon* (1976). He won two Academy Awards as best director, one for *Gentleman's Agreement* and another for *On the Waterfront*, both of which won Academy Awards for best picture. On the stage, he directed the original productions of five dramas that won the Pulitzer Prize: *The Skin of Our Teeth* (1943), *A Streetcar Named Desire* (1948), *Death of A Salesman* (1949), *Cat on A Hot Tin Roof* (1955), and *J.B.* (1959). In addition, he was a co-

grudges die hard. Who is to say, then, that *Waterfront* didn't lose a vote here and there as yet another way of getting back at one of Hollywood's most talented but least favorite directors. But more of that later. At this point, suffice it to say that *On the Waterfront* has it all: great acting, great direction, a great story replete with drama, action, romance, and smoldering sex. It is a tremendously powerful movie, an example of Hollywood realism at its best.² It even has a message, for those wont for such things in a motion picture. I certainly am. Oh, you don't have to remind me what the old movie moguls used to say: "If you wanna send a message, call Western Union."³ Yes, they were expressing the conventional wisdom of the old time Hollywood money men that message movies don't sell at the box office. But they were wrong—dead wrong. Look at *Citizen Kane*. Or *To Kill A Mockingbird*. Or *The Graduate*. Or, for that matter, look at *Waterfront* itself. Each and everyone of them a message movie that did extremely well, thank you, at the box office. And besides, a message is essential to a true work of art. Messages give us something to think about, to contemplate, to discuss, to argue about. No doubt about it, they make a movie better, much better; they make it a work of art. The moguls never understood that. Notwithstanding MGM's proud but ultimately hypocritical boast of *Ars Gratia Artis*, the moguls always were more interested in making money than art.

As a work of art, *On the Waterfront* has a vibrant dramatic force. It is a modern day morality tale, set on New York's grimy docks and environs, pitting good against evil in a tense struggle of survival. The film's core message is that those who remain silent in the face of evil are complicit in that evil; the failure to take a stand against wrongdoing is itself immoral. This message is expressed through the conflict raging within the film's protagonist Terry Malloy, played by the incomparable Marlon Brando in an incredible performance which quite deservedly won an Academy Award. Brando's performance alone, full of

founder of and teacher at the Actors Studio, whose original members included Marlon Brando, Montgomery Clift, Julie Harris, Anne Jackson, Karl Malden, Eli Wallach, and Shelly Winters. Before becoming a director, he acted in both movies and stage plays.

2. "*On the Waterfront* came as a public shock in 1954 because Hollywood films have stayed away from the real America . . ." PAULINE KAEL, *I LOST IT AT THE MOVIES* 54 (1965).

3. One collection of quotations claims that this adage could be the single most repeated cliché in the history of movie making and that it has been variously attributed to moguls Samuel Goldwyn, Harry Warner, and Harry Cohn, as well as to several actors and writers. See RALPH KEYES, "NICE GUYS FINISH SEVENTH"—FALSE PHRASES, SPURIOUS SAYINGS, AND FAMILIAR MISQUOTATIONS 130 (1992).

anguish and pain, yet so tender, is well worth the price of admission. Kazan himself was awed by Brando's performance. Remembering one scene between Brando and Eva Marie Saint, Kazan said, "the depth of guilt as well as tenderness on Brando's face is overwhelming."⁴ And the famous scene of Brando and Rod Steiger (who also gave a wonderful performance), as they confront their demons in the back seat of a taxicab, truly is one of the memorable moments of movie history. Kazan again sums it up well:

What other actor, when his brother draws a pistol to force him to do something shameful, would put his hand on the gun and push it away with the gentleness of a caress? Who else could read "Oh Charlie!" in a tone of reproach that is so loving and so melancholy and suggests that terrific depth of pain?⁵

Full of pain and anguish, *Waterfront* also reflects the sensibilities of its time, the 1950's. Like the plays of Arthur Miller, *Waterfront* was meant to prove that great drama didn't have to be about kings and queens or the upper classes. The common people, it seems, can be just as interesting as royalty. As Miller showed, even traveling salesmen could suffer from the same sort of tragic flaws that beset Shakespearean kings and queens, and this made for great theater.⁶ Turning that lesson on its head, *Waterfront* demonstrated that the common man or woman could possess a nobility of spirit thought to be reserved for kings and queens, and that, too, made for exciting drama. Even "a figure out of the American lower depths,"⁷ a washed-up ex-pug like Terry Malloy, could achieve heroic status through an act of moral and physical bravery.

Some of the other notions of the day reflected in *Waterfront* are not so sublime. In the 1950's when the movie was made, a renegade parish priest like the one in this film played by Karl Malden showed his mettle and his solidarity with the dock workers by smoking cigarettes and taking a drink now and then. By today's standards, that seems a bit quaint, not to mention politically incorrect. And by today's standards, the language of the film occasionally becomes offensive, as when one of the dock workers explains that "One thing you gotta understand, Father, on the dock we've always been D and D . . . deaf and dumb. No

4. ELIA KAZAN, *ELIA KAZAN: A LIFE* 526 (1988).

5. *Id.* at 525.

6. See ARTHUR MILLER, *DEATH OF A SALESMAN* (1949).

7. KAEL, *supra* note 2, at 48.

matter how much we hate the torpedoes, we don't rat." The alliterative phrase "deaf and dumb," though perhaps unobjectionable in the fifties, certainly has a jarring, demeaning ring today.⁸

Still, there is no denying the dramatic power of *Waterfront*, played out in the raw clash between good and evil. In *Waterfront*, evil is represented by the ironically named Johnny Friendly⁹ (played by Lee J. Cobb), the crude, vicious, brutal, cigar-chewing, corrupt mob boss of the docks who feeds like a vulture on the meager salaries of poor working people and orders the murder of anyone who challenges his iron reign over the docks. Despite his criminal behavior, Friendly is able to evade the law because no one, not even the good working people he abuses, will testify against him. On the docks, there is nothing worse than being a "stoolie," or a "rat." Nobody wants to have anything to do with a crummy "cheese eater," so the workers steer clear of the Waterfront Crime Commission which is investigating corruption on the docks.

Father Barry, the parish priest with a streak of community activist to him, wants to take on the mob. He tries to convince the dock workers that cheese-eating ain't so bad, in fact, may be the honorable thing to do. He puts it this way:

How can we call ourselves Christians and protect these murderers with our silence? . . . Anybody who sits around and lets it happen, keeps silent about something he knows has happened, shares the guilt of it just as much as the Roman soldier who pierced the flesh of our Lord. . . .

Eventually, Father Barry is able to convince Terry Malloy that testifying against Johnny Friendly to the Waterfront Crime Commission is the right thing to do. For Terry, testifying is an act of redemption that absolves him of his sins. Though he is vilified for being a rat by his fellow dock workers, by the neighborhood kids who previously idolized him, and even by the cops, Terry remains defiant. He shows up at the dock, demanding his right to work, and proclaiming that he is happy he testified. "I'm glad what I done—you hear me?—glad what I done!" he screams at Johnny Friendly while all the dock workers gaze in

8. As late as 1969, Peter Townshend used the phrase in his lyrics for "Pin Ball Wizard" in the rock opera *Tommy*:

That deaf dumb and blind kid
Sure plays a mean pin ball!

9. Near the end of the movie, it is revealed that the name Johnny Friendly is a pseudonym. The character's real name, it turns out, is Michael J. Skelly.

silence at the spectacle of good rising up against evil. And finally good does triumph over evil, but not until Friendly's goons viciously beat Terry while the workers stand by and watch. But then the workers have a change of heart, and rally around Terry. They won't work unless he does, they say. Battered and bloody, Terry pulls himself up and walks—by himself—into the hold of a ship, ready for work.

In the context of the movie, there is no denying that it is an act of heroism when Terry Malloy finally decides to testify against Johnny Friendly to the Waterfront Crime Commission. After all, Friendly not only was a crooked union boss cheating good working people out of a living wage, he also was a vicious murderer. Johnny Friendly had ordered the murder of at least three people, including Terry's brother, Charlie the Gent. To make matters worse, it was at Johnny Friendly's behest that Terry was tricked into luring his pal Joey Doyle up to the tenement roof, where, unbeknownst to Terry, Friendly's goons were waiting to throw Joey to his death. If that weren't enough, Terry has fallen in love with Joey's sister, who has returned to the neighborhood after being away at parochial school, only to find her brother dead at the hands of the local mobsters. Racked with guilt over his unwitting participation in Joey's death, is it any wonder that Terry would finally see the rightness of ratting on Johnny Friendly?

But the morality of cheese-eating gets a bit more complicated when considered beyond the context of the film itself, especially when considered in light of the personal history of the film's director, Elia Kazan. Oh, you don't have to remind me what the New Critics used to say, a work of art is coherent on its own and should be allowed to stand on its own. To the New Critics, the artist's background and the circumstances surrounding the creation of a work of art are of no moment. By now, though, the New Critics are decidedly Old Hat. And wrong. Yep, as wrong as the movie moguls were about sending messages. While it is true that a work of art can stand on its own, if it has to, it also can be enhanced immeasurably by considering the artist's background and the circumstances surrounding the creation of the work. A work can be made infinitely more interesting by examining matters external to the work itself. There is no question, for example, that *The Great Gatsby* is a wonderful novel that stands beautifully on its own; yet it is even more fascinating when considered in light of the parallels between the lives of the

novel's protagonist, Jay Gatsby, and its author, F. Scott Fitzgerald.

Similarly, there is a fascinating subtext to *On the Waterfront*. To understand that subtext, one has to go back to the 1940's, a few years after World War II, when McCarthyism was beginning to run rampant throughout the land and the House Committee on Un-American Activities was investigating the perils of Communism with no less than a missionary zeal.¹⁰ The House Committee on Un-American Activities—also known simply as the Committee¹¹ or, most infamously, by the disparaging acronym, HUAC. Oddly enough, the letters of the acronym HUAC are sequentially incorrect, but no less able for it to evoke fear and loathing in many a heart.

HUAC came to Hollywood in 1947.¹² At the time, the chairman of the Committee was J. Parnell Thomas, a Congressman from Illinois.¹³ According to Walter Goodman, the author of a comprehensive study of HUAC,¹⁴ Thomas was a right-wing extremist whose animus would find fertile soil with the Committee.¹⁵ He was mean-spirited and had little brook for the constitutional rights of witnesses called before the Committee.¹⁶ As far as Thomas was concerned, witnesses who claimed a constitutional right to refuse to answer questions were all part of “a concerted effort on the part of the Communists, their fellow travelers, their dupes, and paid apologists to create a lot of fog about constitutional rights, the First Amendment, and so forth.”¹⁷

In Hollywood, the HUAC hearings got off to an ominous start when the first witnesses to be subpoenaed, the so-called “Hollywood Ten,” were charged with contempt of Congress for refusing to give a yes or no answer to the question: Are you now

10. In 1938 the House of Representatives established the House Special Committee on Un-American Activities to investigate “subversive and un-American propaganda.” H.R. Res. 282, 75th Cong. (1938). In 1945, it was made a standing committee of the House—the House Committee on Un-American Activities. H.R. Res. 5, 79th Cong. (1945). In 1969 the Committee's name was changed to the House Committee on Internal Security. H.R. Res. 89, 91st Cong. (1969).

11. In fact, a definitive work on the Committee by Walter Goodman is titled *THE COMMITTEE* (1968).

12. VICTOR S. NAVASKY, *NAMING NAMES* viii (1980).

13. GOODMAN, *supra* note 11, at 24.

14. *Id.*

15. *Id.* at 24.

16. See WILLIAM K. KLINGAMAN, *ENCYCLOPEDIA OF THE MCCARTHY ERA* 185-86 (1996).

17. *Id.* at 186.

or have you ever been a member of the Communist Party?¹⁸ In all probability the Ten could have refused to answer that question by invoking the Fifth Amendment privilege against self-incrimination, although it would be a few years until the Supreme Court got around to ruling for the first time that an individual's membership in the Communist Party was, in fact, within the protection of the Fifth Amendment.¹⁹ For whatever reasons, the Hollywood Ten decided to base their refusals to answer the question not on the Fifth Amendment, but on the First Amendment, which protected freedom of speech and association.²⁰ The Ten claimed that HUAC had no right to probe into their political beliefs and associations, which were protected by the First Amendment. The Committee, though, was unmoved by any constitutional claims, and at the Committee's behest Congress voted to cite the Ten for contempt. The hearings in Hollywood were suspended while the Ten appealed their convictions. Meanwhile, to support the Ten, a group of big-name movie stars founded the Committee for the First Amendment, but it didn't last very long, "fold(ing) almost as fast as it formed."²¹ In 1951, after all appeals had been exhausted to no avail and the Ten were imprisoned for terms of up to one year (not to mention being blacklisted from future employment), the hearings in Hollywood began once again, and this time with an even greater vengeance.²² The Committee knew that they had the Congress and the Courts behind them, and witnesses knew full well that if they failed to cooperate the consequences could be dire: the blacklist and imprisonment.

Supposedly, the purpose of the Committee was to investigate and weed out Communism in the movie industry. In actuality, however, the Committee seemed much less interested in obtaining information about Communist "infiltration" of the motion picture industry than it was in demeaning the individuals who were called upon to testify. Perhaps the most egregious example of this occurred when the actor Larry Parks was brought

18. *Id.*

19. *Blau v. United States*, 340 U.S. 159 (1950).

20. *NAVASKY*, *supra* note 12, at 82-83, 399-400. There is a powerful symbolic value in relying upon the First Amendment rather than the Fifth. Claiming protection under the First Amendment conveys a positive message that the activity in question was a legal form of expression or association that may not be criminalized, whereas "pleading the Fifth" conveys a negative message that a criminal act may have been committed but its perpetrator may not be compelled to testify about it. *See NAACP v. Button*, 371 U.S. 415, 428-31 (1963).

21. *NAVASKY*, *supra* note 12, at 83.

22. *Id.* at viii-x, 82-84.

before the Committee. While Parks freely admitted that he had once been a member of the Communist Party and was fully willing to describe party activities, he asked the Committee not to force him to name other names.²³ Indeed, he begged the Committee not to make him “crawl through the mud to be an informer.”²⁴ His plea, though, was unavailing; the Committee compelled him to name names, despite the fact that it knew full well that Parks had nothing new to tell that the Committee didn’t already know. This sort of degrading ritual was conducted repeatedly throughout the HUAC hearings.²⁵ The Committee subpoenaed one witness after another and forced each of them to name names that the Committee knew were already on its list.

Elia Kazan was called to testify before the Committee in 1952.²⁶ At first he answered all of the Committee’s questions except those about other persons.²⁷ But a few months later when he was called back to testify a second time, he gave the Committee the names of eight colleagues from the Group Theater with whom he had been in a Communist “cell” seventeen years before.²⁸ Kazan was hardly the only witness to cooperate with HUAC, and it is unfair to focus solely on him. Moreover, the real villains of this story are the congressional members of HUAC and the studio bosses who possessed the power to challenge the Committee, but were too frightened or greedy or narrow-minded (or, most likely, all three) to do anything but toe the line. On the other hand, the individuals who were forced into becoming informants were themselves victims, made to degrade themselves in a public ceremony designed to break their will.

Kazan, though, insists that he did not regret his testimony, and he set out in *On the Waterfront* to make that clear. He began work on the film about a year after testifying before HUAC. As many people suspected when *Waterfront* was released²⁹ and as Kazan admitted in his 1988 autobiography,³⁰ the movie was, at least in part, an attempt to justify his naming names before the Committee. Looking back on it all, Kazan wrote:

When Brando, at the end, yells at Lee Cobb, the mob boss, “I’m

23. *Id.* at viii.

24. *Id.* at ix.

25. *Id.* at 314-29.

26. *Id.* at 202.

27. *Id.*

28. *Id.*

29. David Denby, *On the Outside Looking In*, PREMIERE, Aug. 1988, at 28.

30. KAZAN, *supra* note 4, at 500.

glad what I done—you hear me?—glad what I done!” that was me saying, with identical heat, that I was glad I’d testified as I had . . . So when critics say that I put my story and my feelings on the screen, to justify my informing, they are right. That transference of emotion from my own experience to the screen is the merit of those scenes.³¹

But ratting on a cruel killer like Johnny Friendly is one thing; ratting on your friends and colleagues for being fellow travelers years ago is quite another. For all the revisionist attempts to rewrite history to show that Communism posed a real threat to American society, there certainly was no real threat from the poor souls whom Kazan named to the Committee or, for that matter, from any other Hollywood fellow travelers named by other witnesses who cooperated with the Committee. There simply is no parallel between informing on an unquestionably evil monster like Johnny Friendly and informing on former colleagues who at worst were misguided in their political views. Informing on a Johnny Friendly clearly is the right thing to do, but in less absolute circumstances, the morality of informing is decidedly more ambivalent. In some situations, informing may be an act of dishonor. No doubt Lillian Hellman had it exactly right when, in explaining her refusal to name names to the Committee, she said:

I am not willing, now or in the future, to bring bad trouble to people who, in my past association with them, were completely innocent of any talk or any action that was disloyal or subversive . . . (T)o hurt innocent people whom I knew many years ago in order to save myself is, to me, inhuman and indecent and dishonorable. I cannot and will not cut my conscience to fit this year’s fashions. . . .³²

To those who still insist that naming names was justifiable because of the threat posed by Communism, there is always the pointed question of why, if they really believed that there was a true danger from Communism, they didn’t name names *before* HUAC began to put pressure on them to inform.³³ That question has led at least one victim of the blacklist, the writer-director Abe Polonsky, to assert that the witnesses who cooperated with HUAC did so to save their careers, and not for any high-minded

31. *Id.*

32. LILLIAN HELLMAN, *SCOUNDREL TIME* 93 (1976).

33. NAVASKY, *supra* note 12, at 279.

ethical or political considerations.³⁴ Whereas Terry Malloy risked his life and his job when he testified before the Waterfront Crime Commission, the witnesses who cooperated with HUAC were saving their skins. While Terry's act was one of moral conscience, testifying before HUAC was an act of moral cowardice.³⁵

Yet some of the witnesses friendly to HUAC claimed that they named names out a sense of conscience. One of those friendly witnesses was Budd Schulberg, who wrote the screenplay for *Waterfront*. A few days after he was named to the Committee as a former member of the Communist Party, Schulberg sent a telegram to HUAC stating, "I will cooperate with you in any way I can."³⁶ When he appeared before the Committee, Schulberg described how he was made to suffer the heavy hand of thought control when other party members tried to make him rewrite a novel-in-progress to conform to the party line, and called him on the carpet when he refused to do so.³⁷ In his testimony, Schulberg named fifteen former party members.³⁸ Not long after that he began work on the *Waterfront* screenplay. In later years, Schulberg tried to justify his testimony by arguing that the Communist Party was totalitarian and repressive.³⁹ "I testified," he defiantly declared, "because I felt guilty for having contributed unwittingly to intellectual and artistic as well as racial oppression."⁴⁰ This hardly explains, however, why Schulberg named names. After all, testifying about the Communist party is one thing; informing on individuals quite another.

Moreover, cooperating with HUAC was getting into bed with the devil. HUAC, with its inquisitional methods, was hell-bent on a witch hunt that degraded individuals and ruined their lives for no other reason than that they dared to question the pieties of American life. HUAC, of course, had no appreciation of freedom of speech, freedom of thought, or freedom of association. It had no understanding of the First Amendment, of the value of dissent, or of the right of individuals to think for themselves. HUAC abused its power, subverted the Constitution, and trampled on civil liberties. The very existence of HUAC was an

34. *Id.* at 279-80.

35. See PETER ROFFMAN & JIM PURDY, *THE HOLLYWOOD SOCIAL PROBLEM* FILM 293-94 (1981).

36. NAVASKY, *supra* note 12, at 239.

37. *Id.* at 239-40. The novel was *WHAT MAKES SAMMY RUN?*

38. *Id.* at 241.

39. *Id.* at 242.

40. *Id.*

affront to the dignity of the individual and to freedom of thought. If anything was un-American, it was HUAC itself. HUAC was an abomination, and to cooperate with it by naming names was detestable.

Still, Kazan's suggestion that he was able to transfer the emotion of his experience of informing to the screen in *Waterfront* raises the interesting possibility that reprehensible behavior can be cleansed to some degree by using it as a source to enhance art. And so, the critic David Denby is willing to forgive Kazan, partially, because the director was able to turn his sin into great art:

I will never agree with Kazan's political behavior, but if his act of self-liberation (blabbing to the committee) allowed him to take his lifelong emotions, objectify them, and turn them into scenes as reverberant as any in American movies, then perhaps he did the right thing. Not right as a man, but right as an artist.⁴¹

Many artists, as well as other persons in Hollywood and elsewhere, were not strong enough to withstand the threat of being blacklisted. It is not difficult to understand why. Careers were ruined, friendships and even families were split apart, all by the blacklist. The blacklist was the very antithesis of freedom of speech. Operating through suspicion and innuendo, it punished people for holding unpopular beliefs, for criticizing the government, for aspiring to a better life. It embodied guilt by association; nothing more than membership in the Communist Party was enough to taint an individual, perhaps for life.

As McCarthyism swept across the country creating a climate of fear and repression, the Supreme Court did little to protect freedom of speech or association. Talk about complicity! Where were the Justices of the Supreme Court, with their life tenure and judicial independence, when we needed them to put some brakes on this anti-Communist tyranny by the majority? In fact, the Court itself seemed swept along with the tide of anti-Communist hysteria, content to turn its back on First Amendment freedoms, when they were most in need of support. In 1949, the Court declined to review the convictions of the Hollywood Ten, paving the way for their imprisonment.⁴² Two years later, the Court announced its decision in *Dennis v. United States*,⁴³ upholding the convictions of eleven persons for violating

41. Denby, *supra* note 29, at 28.

42. NAVASKY, *supra* note 12, at 84.

43. 341 U.S. 494 (1951).

the Smith Act, a federal statute that made it a crime to advocate, abet, advise, or teach the desirability or propriety of overthrowing the government by force or violence. The defendants in *Dennis*, convicted of conspiring to organize the Communist Party, were sentenced to long terms in prison. The Court's decision in *Dennis* represents the low point for freedom of speech and association in the United States. It allows mere membership in the Communist Party, or simply the expression of an opinion in support of Communism, to be made a crime. The defendants in *Dennis*, after all, had done little more than teach about Marxist-Leninist doctrine,⁴⁴ yet in the eyes of six learned Justices of the august Supreme Court of the United States, neither the convictions nor the Smith Act itself violated the First Amendment.

The plurality opinion in *Dennis*,⁴⁵ written by Chief Justice Vinson, is a bold example of legal sophistry. It acknowledges the value of freedom of speech and purports to follow the philosophy of Justices Holmes and Brandeis, proponents of a strong First Amendment, who advocated that speech may only be restricted when there is a "clear and present danger" that it will cause a substantive public evil.⁴⁶ But the opinion then quickly turns aside the thoughts of Holmes and Brandeis. "[N]either Justice Holmes nor Justice Brandeis," the opinion declaims, "ever envisioned that a shorthand phrase (clear and present danger) should be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case."⁴⁷ After all, "[s]peech is not an absolute," beyond control of the legislature when it believes that "certain kinds of speech are so undesirable as to warrant criminal sanction."⁴⁸

The plurality opinion then puts the finishing touches on the Holmes-Brandeis philosophy by replacing the clear and present danger test with a test announced by Judge Learned Hand in the opinion below.⁴⁹ "In each case," Hand said, "[courts] must ask

44. So far as the present record is concerned, what petitioners did was to organize people to teach and themselves teach the Marxist-Leninist doctrine contained chiefly in four books: *Foundations of Leninism* by Stalin (1924); *The Communist Manifesto* by Marx and Engels (1848); *State and Revolution* by Lenin (1917); *History of the Communist Party of the Soviet Union (B.)* (1939).

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

45. Justice Clark did not participate in the case. Justices Reed, Burton, and Minton joined the opinion of Chief Justice Vinson. Justices Frankfurter and Jackson concurred in the judgement and Justices Black and Douglas dissented.

46. *Dennis*, 341 U.S. at 507-08.

47. *Id.* at 508.

48. *Id.*

49. *Id.* at 508-10.

whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."⁵⁰ This approach provides considerably less protection for freedom of speech than the clear and present danger test. Under Hand's test, if the potential danger or evil that may be caused by speech is sufficiently grave, it need be neither clear nor present. Thus, in *Dennis* itself, where the feared evil (violent overthrow of the government) was admittedly grave, the lack of evidence showing its probability or imminence did not deter the Supreme Court from upholding the convictions in the case.

There was a sad irony to the Court's adoption of Judge Hand's test in *Dennis*, because decades before, in a previous era of repression, Hand had been an early champion of free speech. In 1917, as a federal district court judge, he ruled that *The Masses*, a radical journal of the day that assailed the United States' entry into World War I, could not be excluded from the mails.⁵¹ Hand's decision was an act of considerable courage at a time when the Red Scare was about to sweep through the land. Hand maintained that some words were "keys of persuasion," while other words were "triggers of action."⁵² The former were a legitimate part of the public discourse; the latter were not. Accordingly, Hand drew a line between speech that was mere "persuasion" and speech that amounted to direct "incitement."⁵³ In correspondence with Justice Holmes, Judge Hand tried to convince Holmes to be more appreciative of the value of free speech and to adopt the Hand formula distinguishing persuasion from incitement.⁵⁴ While Hand's exhortations no doubt played a role in convincing Holmes of the value of free speech, Holmes never accepted the incitement standard, preferring instead to use the clear and present danger test as a means of providing protection for freedom of speech.⁵⁵ Indeed, Holmes dismissed the Hand formulation with the riposte that "Every idea is an incitement."⁵⁶

Conversely, Hand did not think well of the clear and present danger test. In his view, it was too slippery to provide ade-

50. *Id.* at 510 (referring to *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950)).

51. *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

52. *Id.* at 540.

53. GERALD GUNTHER, *LEARNED HAND—THE MAN AND THE JUDGE* 157-58 (1994).

54. *Id.* at 161-67.

55. *Id.*

56. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

quate protection for free speech.⁵⁷ Even Supreme Court justices, he observed, were not immune from the “herd instinct” of seeing a clear and present danger lurking around the corner when one did not really exist⁵⁸—an observation that would prove all too prescient. Hand preferred a more objective standard, a hard and fast rule that was not so manipulable. To his way of thinking, speech should be protected by the First Amendment unless it directly advocated or incited illegal activity.

Hand’s formulation, however, was not without its own flaws. Like other hard and fast rules, it did not provide a very good scale for assessing competing values or interests. In many instances, Hand’s standard did not draw the line at the right place and therefore was prone to protecting both too much and too little speech. It gave no constitutional shelter to trivial speech that directly advocated illegal action but posed no real threat of fruition. Antithetically, it provided constitutional shelter for consequential speech that did not directly advocate illegal action but posed a real threat of causing it. Hand’s formula, then, was far from ideal.

In any event, by the time of his *Dennis* opinion in 1950, Hand had given up on his direct incitement formulation, believing it to be a failure that had found little favor.⁵⁹ As a lower federal court judge, Hand “took seriously his obligation to follow Supreme Court precedents.”⁶⁰ This, however, hardly explains his opinion in *Dennis* opting for an approach debilitating the clear and present danger test and providing diminished protection for freedom of speech.⁶¹ Hand himself, it seemed, had succumbed to the “herd instinct” and took along with him a plurality of the Supreme Court.

In addition to the plurality, two other Justices—Frankfurter and Jackson—concurd in the judgment to uphold the defendants’ convictions. Both of these Justices rejected use of the clear and present danger test. Justice Jackson rejected the test because he believed that in a case such as *Dennis* it required the Court to appraise “imponderables” that would baffle the best-informed minds.⁶² Similarly, Justice Frankfurter thought that the

57. Gunther, *supra* note 53, at 163-70.

58. *Id.* at 169.

59. *Id.* at 600.

60. *Id.*

61. For a valiant, though ultimately unconvincing, effort to explain Hand’s opinion in *Dennis*, see *id.* at 599-605.

62. *Dennis*, 341 U.S. at 570 (Jackson, J., concurring).

test required courts to read “events still in the womb of time” and make determinations beyond their competence.⁶³ To Frankfurter’s way of thinking, primary responsibility for adjusting the competing interests presented by the case belonged to Congress.⁶⁴ The Supreme Court, he asserted, should exercise “self-restraint” and defer to the judgment of Congress, setting it aside only if there was no reasonable basis for it.⁶⁵ Frankfurter’s position, Justice Black noted in a dissenting opinion, “waters down the First Amendment so that it amounts to little more than an admonition to Congress.”⁶⁶

There were two dissenters on the high Court in *Dennis*—Justices Black and Douglas. As Black saw it, the plurality had repudiated the clear and present danger in a way that greatly deflated the protection afforded by the First Amendment.⁶⁷ The defendants, he noted, were not charged with overt acts of any kind designed to overthrow the government; the charge was nothing more than that they agreed to assemble to discuss their plans at a later date.⁶⁸ The indictment, then, amounted to “a virulent form of prior censorship” forbidden by the First Amendment.⁶⁹

Justice Douglas stressed that the Communist Party posed little threat to the nation and there simply was no clear and present danger to justify the convictions in the case.⁷⁰ A clear and present danger must be based on something more than fear or speculation; rather, there must be some immediate harm that is likely to occur if the speech is allowed.⁷¹ In Douglas’ view, that standard clearly was not met. The protestations of Justices Douglas and Black, however, were unavailing to their colleagues on the Supreme Court.

In *Dennis*, a majority of the Court was unwilling to rein in misuse of congressional authority. This carried over to a pronounced reluctance to curb the investigative authority of HUAC, even when the Committee seemed to be abusing its power. Traditionally, the Court has granted great deference to congressional committee investigations, allowing a committee

63. *Id.* at 551 (Frankfurter, J., concurring).

64. *Id.* 525.

65. *Id.* at 525-26.

66. *Id.* at 580 (Black, J., dissenting).

67. *Id.*

68. *Id.* at 579.

69. *Id.*

70. *Id.* at 588-90 (Douglas, J., dissenting).

71. *Id.* at 585.

pretty much *carte blanche* to probe wherever it chooses, so long as it stays within the scope of congressional authorization.⁷² In *Barenblatt v. United States*, the Court upheld the authority of HUAC to question a college professor about his membership in the Communist Party, and confirmed his conviction of contempt for refusing to answer the Committee's questions.⁷³ Ruling that a congressional delegation of authority to one of its committees to conduct an investigation should be construed broadly, the Court concluded that HUAC's probe did not violate the First Amendment.

Even when Justices were manifestly disconcerted by the tactics of HUAC, they were not willing to step into the fray to restrain the Committee. Thus, in one case Justice Jackson admitted that:

I should not want to be understood as approving the use that the Committee on Un-American Activities has frequently made of its power. But I think it would be an unwarranted act of judicial usurpation to strip Congress of its investigative power, or to assume for the courts the function of supervising congressional committees. I should affirm the (contempt conviction) below and leave the responsibility for the behavior of its committees squarely on the shoulders of Congress.⁷⁴

During this period of time, as a result of the New Deal Court crisis, the Supreme Court had adopted a stance of deference toward Congress, allowing it extremely wide latitude to exercise its legislative authority.⁷⁵ This may have been an appropriate strategy for dealing with legislation that concerned economic matters. But it proved to be disastrous for dealing with legislation that impinged upon civil liberties. The Court's timidity during the time of McCarthyism allowed Congress to run roughshod over freedom of speech and association.

As the Warren Court began to take shape, there were some dissenters from the Court's disregard for First Amendment rights. In *Barenblatt*, for example, Justice Black wrote a dissenting opinion accusing the majority of:

(Ignoring) the interest of the people as a whole in being able to join

72. See, e.g., *Watkins v. United States*, 354 U.S. 178 (1957). See generally ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW—PRINCIPLES AND POLICY* 302-04 (2d ed. 2002).

73. 360 U.S. 109 (1959).

74. *Eisler v. United States*, 338 U.S. 189, 196 (1949) (Jackson, J., dissenting).

75. See JEFFREY M. SHAMAN, *CONSTITUTIONAL INTERPRETATION—ILLUSION AND REALITY* 76-79 (2001).

organizations, advocate causes and make political "mistakes" without later being subjected to governmental penalties for having dared to think for themselves. It is this right, the right to err politically, which keeps us strong as a Nation.⁷⁶

Justice Black's eloquent statement squarely captures the heart of the First Amendment: the right to think for oneself. As Justice Black says, this is a source of strength, not weakness, for our nation. Years later, the Court would come to recognize that toleration of criticism, even to the extent of tolerating the burning of an American flag, is "a sign and source of our strength."⁷⁷

When McCarthyism began to wane, the Court belatedly rewrote the book on freedom of speech and association, ruling in a series of cases that membership in a supposedly subversive organization may not be made a crime unless the government can show that an individual actively joined the organization knowing of its illegal objectives and with the specific intent of furthering those objectives.⁷⁸ In the Court's reconstructed view, the right of association finally was recognized as a "cherished freedom"⁷⁹ specifically protected by the First Amendment,⁸⁰ and guilt by association was denounced as a doctrine "which has no place here."⁸¹ The Court also became less deferential in reviewing legislative authority to conduct investigations and began to place First Amendment limits on legislative inquiries.⁸² In 1958, the Court ruled that the government may not compel disclosure of an individual's membership in an organization unless the government can demonstrate a genuinely compelling need for the disclosure.⁸³ "Inviolability of privacy in group associations [the Court stated] may in many circumstances be indispensable to the preservation of freedom of association, particularly where a group espouses dissident beliefs."⁸⁴ Finally, in 1967, the Court struck down a federal statute that was the equivalent of the blacklist in that it denied employment to persons who were

76. *Barenblatt*, 360 U.S. at 144 (Black, J., dissenting).

77. *Texas v. Johnson*, 491 U.S. 397, 419 (1989).

78. *See Yates v. United States* 354 U.S. 298 (1957); *Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 290 (1961).

79. *Elfbrandt v. Russell*, 384 U.S. 11, 17 (1966).

80. *United States v. Robel*, 389 U.S. 258, 263, n.7 (1967).

81. *Elfbrandt*, 384 U.S. at 19.

82. *See Gibson v. Florida Legis. Comm.*, 372 U.S. 539 (1963); *DeGregory v. New Hampshire Att'y Gen.*, 383 U.S. 825 (1966).

83. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

84. *Id.* at 462.

members of Communist organizations.⁸⁵ Since then the Court has adhered to an expansive view of the First Amendment, granting wide protection to freedom of expression and association.

In 1969, in the case of *Brandenburg v. Ohio*,⁸⁶ the Supreme Court came full circle and then some by returning to the Holmes-Brandeis philosophy of freedom of speech and combining the clear and present danger test with the direct incitement formulation of Learned Hand. In *Brandenburg* the Court squarely ruled that speech may not be restricted unless it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁸⁷ By requiring both incitement and imminent lawless action that is likely to occur, the *Brandenburg* test "combin[es] the best of Hand's views with the best of Holmes' and Brandeis'."⁸⁸ This, however, did not satisfy Justices Black and Douglas, the two dissenters in *Dennis*. Sometime after *Dennis* they gave up on the clear and present danger test, believing (as Learned Hand did years before) that it was too slippery to provide adequate protection for free speech. By the time *Brandenburg* was decided both Black and Douglas had moved to a more absolutist view of the First Amendment and had come to the conclusion that the clear and present danger "should have no place in the interpretation of the First Amendment."⁸⁹ A majority of the Court, though, was content with the newly reinforced clear and present danger test, and has adhered to it pretty well ever since.

So how did justice turn out in all of this? Well, Johnny Friendly, I suppose, got his just deserts, at least dramatically. At the end of the movie, his hold over the waterfront broken, the men no longer fearful of him, Friendly is unceremoniously dumped into the polluted waters of the harbor by none other than Pop Doyle (Joey's father). And more in the way of retribution may be in store for Friendly. Given Terry Malloy's testimony to the Waterfront Commission about Friendly's criminal activities, the mobster's next place of residence may well be prison. Perhaps, then, the law will be fulfilled. Not completely, though, as Johnny Friendly, unfortunately, may be just the tip of

85. *United States v. Robel*, 389 U.S. 258.

86. 395 U.S. 444 (1969).

87. *Id.* at 447.

88. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 848 (2d ed. 1988).

89. *Brandenburg*, 395 U.S. at 449-50 (Black, J., concurring); *id.* at 454 (Douglas, J., concurring).

a criminal iceberg. In the film, there are hints that Friendly has connections in the police force and to someone referred to as "Mr. Upstairs." During the waterfront hearings, there is a shot of an unidentified man watching the hearings on television and telling his secretary that he will no longer see Johnny Friendly. So, while Johnny Friendly got his comeuppance, others—the big bosses and the police—may not get theirs.

Terry Malloy attained justice by redeeming himself through an act of bravery and virtue, which enabled him to triumph over evil, not only the evil of Johnny Friendly, but also the evil within himself. Through his heroic act, he finally won the right to work, the respect of the dock workers and—most importantly—his own self-respect.

As for justice for the real-life participants to the drama that surrounded *On the Waterfront*, the record is decidedly mixed. Some of the individuals who were blacklisted eventually were able to reclaim their careers, but many were not. Careers and, indeed, lives, were ruined by the blacklist. While there was no justice for the Hollywood Ten who went to prison for their political beliefs, they could perhaps enjoy a kind of vicarious poetic justice when J. Parnell Thomas, the mean-spirited chairman of HUAC, was convicted of taking kickbacks from his staff and was imprisoned in a federal correctional institution, where his fellow inmates included two of the Hollywood Ten.⁹⁰ Politics and corruption, it seems, make for strange cellmates.

In 1999, after being denied recognition for his work for years, Elia Kazan was finally honored with an Academy Award for his lifetime achievement. The award for Kazan, which was a long time in coming, was proposed by Karl Malden, who by then was a respected elder statesman of the Hollywood community and a former president of the Motion Picture Academy of Arts and Sciences. The 39-member board of the Academy voted unanimously, although in some cases grudgingly, for the honorary Oscar to Kazan.⁹¹ Outside the auditorium where the Academy Awards were being given, a small group of individuals picketed in protest of the decision to give Kazan an award. Inside the auditorium, when the Oscar was finally presented to Kazan, most members of the audience rose from their chairs to give him a standing ovation. A few, however, refused to stand or to applaud. Certainly, if one considers only Kazan's body of work, he

90. NAVASKY, *supra* note 12, at 84.

91. See Patricia Bosworth, *Kazan's Choice*, VANITY FAIR, Sept., 1999, at 326.

richly deserved the Oscar. In that respect, justice, although long delayed, was accomplished. On the basis of his work, Kazan clearly deserved the Oscar; on the basis of his HUAC testimony, though, perhaps he did not deserve a standing ovation. Still, after the passing of so many years some measure of forgiveness was in order.

I think, though, that despite his protestations to the contrary, Kazan regretted his testimony for the rest of his life, and that he spent a good portion of the rest of his life trying unsuccessfully to convince himself that he did the right thing. While Terry Malloy was able to redeem himself in his own mind, Elia Kazan, perhaps, never was able to do that.

In real life, some degree of justice also came to the waterfront itself. The Waterfront Commission of New York Harbor, established in 1953, was able to rid the docks of the daily "shape-up," depicted so vividly in the movie, which gave hiring bosses like Johnny Friendly the sole power to decide who would work, often in return for kickbacks or favors (like pushing somebody off a roof).⁹² In addition, hydraulic lifts have replaced the hook, cable, and nets with which stevedores like Terry Malloy formerly toiled.⁹³

As for HUAC, the House of Representatives finally saw fit to abolish its ignominious Committee in 1975. That, too, was an act of justice long delayed.

92. Douglas Century, *Still A Contender on the Waterfront*, N.Y. TIMES, March 12, 1999, at E37.

93. *Id.*