

## REVIEWS

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HERESY, YES—CONSPIRACY, NO. By Sidney Hook. New York: The John Day Company, 1953. Pp. 283. \$3.75.

IN recent years publicists, political scientists, and lawyers have been compelled by tragic circumstances to re-examine and re-define principles of freedom which, if not firmly settled by tradition and judicial decision, by 1940 had assumed something like a definite shape. The issue of paramount importance, perhaps, has been that concerning the extent to which the leaders and members of the Communist Party are entitled to demand that the formulas of liberty be applied to them as they had been applied to other radical dissenters. It is probably fair to say that the consensus of liberal opinion has more and more tended to acknowledge that it is neither safe nor wise to apply, in favor of active members of the Communist Party, the constitutional doctrine designed to secure freedom of expression. This acknowledgment has stimulated search for a principle which will justify an exception to the general rule of constitutional protection. There is no need to inspect the varying fruits of that search: some have urged that the Communist Party, being an agent of a foreign power, is unlike other dissenting groups within the nation; others have contended that freedom of speech secures traditional protection only when the speaker fully and frankly reveals the nature of his faith and his affiliation; others have accepted the plausible thesis that those who would destroy freedom if they achieved power are not entitled to enjoy its usual benefits in their effort to destroy it.

Since the Supreme Court rendered its decision on the *Dennis* case,<sup>1</sup> a new formula to justify the exception has been suggested with increasing frequency. Mr. Hook has chosen that formula for the title of his latest book, and in the first section of the volume has endeavored to defend it. He has done so, it should be added, without making the formula itself an all-sufficient justification, for he manifestly believes that the agents of a foreign and hostile power are not entitled to the usual benefits of constitutional doctrine and that those who do not trade in ideas in the open but on a black market infected with fraud, deception, and secrecy have surrendered the claim to equality of constitutional treatment. Yet Mr. Hook's essential purpose is to persuade his reader that the Constitution permits the making of a distinction between the speech of the isolated heretic, which must be defended, and the advocacy of the conspirator, which must be condemned. To assert, as this reader must, that Mr. Hook has failed in his effort is not to say that there is no justification for treating the leaders of the Communist Party exceptionally; it is

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1. *Dennis v. United States*, 341 U.S. 494 (1951).

merely to suggest that the new justifying formula, at least as Mr. Hook explains it, is deceptive and inadequate. Those who believe that tranquility is to be found in a neat phrase and that an all-sufficient answer to basic problems of liberty is to be discovered in a facile formula may find Mr. Hook's thesis comforting. All that one may fruitfully ask of such readers is that they do not assume with him that to abandon old ritual for new is to become realistic.

The lawyer's law which Mr. Hook endeavors to translate into political principle is found, for the most part, in the concurring opinion of Mr. Justice Jackson in the *Dennis* case. There, it will be remembered, the Justice gave forthright emphasis to the fact that the defendants were not charged with the crime of advocating the overthrow of government but with the different offense of conspiracy. Mr. Hook, like others before him, finds satisfaction in this dichotomy and suggests that those who are still troubled are suffering from the lingering ailment of ritualistic liberalism, a disease which blurs in its victim's mind the clear distinction between the isolated advocate of unlawful purposes and the associated heretic who joins with others in a plan to advocate unlawful ends.

To put Mr. Hook's thesis in these terms is to invite protest from his supporters, for they will urge that their spokesman was writing not of associated heretics but of the Communist Party, a group essentially different from other organized dissenters. Undoubtedly that is true, but Mr. Hook in the effort to find a telling phrase in which his thesis may be summarized has chosen to use the language of the law. That language carries with it legal doctrine which Mr. Hook conveniently ignores. He uses the word "conspiracy" with a meaning not only quite different from that which the law has given it, but with a meaning so unrelated to common usage as to be totally bewildering. His definition of the term concludes with the surprising statement that "whoever subverts the rules of a democratic organization and seeks to win by chicanery what cannot be fairly won in the process of free discussion is a conspirator."<sup>2</sup> By this proposition the element of combination, contrary to general understanding, is eliminated from conspiracy. Mr. Hook thus undermines his own title. If the author's text at this point is to be taken seriously the volume should have been called *Heresy, Yes—Chicanery, No*. A volume written to support such a formula might be most important. It would in any case have to deal with problems which Mr. Hook has eliminated from his present concern. It would, presumably, tell us whether or not deception and chicanery are instruments which the isolated heretic will never use and whether or not one who combines with others, quite openly and without chicane, to achieve unlawful purposes by lawful means should be held guilty of criminal conduct. It would be easy to disregard the amazing suggestion that deception is conspiracy by writing it off as a careless phrase were it not for the fact that Mr. Hook in a chapter on "Reflections on the Smith

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2. P. 22.

Act" specifically states of the statute that "[t]he main question . . . is not Section Three . . . , which forbids conspiracy to do what is proscribed in Section Two, but Section Two itself, which forbids the advocacy of the overthrow of government by force or violence. If it is wrong to advocate the use of force and violence, it is wrong to conspire to do so."<sup>3</sup> Conspiracy in its ordinary sense thus ceases to play a significant part in Mr. Hook's doctrine, and the speech of the isolated but deceitful heretic is apparently subjected to the same limits as those which bound the freedom of the conspirator.

To the lawyer the most striking aspect of Mr. Hook's dogmatic glibness is his apparent indifference to the fact that combinations very different from that of the Communist leaders are punishable as conspiracies by Anglo-American law. The ritualistic liberal is troubled by the opinion of Mr. Justice Jackson, not necessarily because he regrets the criminal conviction of the Party leaders, but because to discover justification for their conviction in the law of conspiracy is to create a significant danger that other groups falling within the expansive grasp of that law may also be its victims. The lawyer's recollection of legal doctrine tells him that any combination may be treated as a criminal conspiracy if it seeks either to achieve its legitimate purposes by unlawful means or to achieve unlawful ends by proper means. The lawyer might rest comfortably on the formula which distinguishes between heresy and conspiracy if he felt as free as does Mr. Hook to use the word "conspiracy" with a meaning quite different from that which the law has given it. Mr. Hook, when he recognizes combination as an element in conspiracy, furnishes his own definition. A conspiracy, he tells us, is "a secret or underground movement which seeks to attain its end not by normal or political or educational process but by playing outside the rules of the game. . . . The signs of a conspiracy are secrecy, anonymity, the use of false names and labels, and the calculated lie."<sup>4</sup> This may well be a fair description of the Communist Party and its operations, and may emphasize those elements in the Communist program which justified the conviction of the Party leaders, but the Smith Act,<sup>5</sup> which nowhere mentions Communism, is written in the language of the law rather than the language of Mr. Hook. Is there any reasonable assurance that American judges in their enforcement of the statute will read its provisions as would a philosophical publicist? Are they not likelier to read the statute as lawyers, and to say that the conspiracies with which it is concerned are those that the common and statutory law of the United States has dealt with on innumerable occasions?

When one puts these questions one approaches a problem towards the solution of which Mr. Hook might have made an important contribution had he not been satisfied to rest his case on verbalism. In its broadest terms that problem is this: Have the policies which lie behind the clear and present

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3. P. 99.

4. P. 22.

5. 54 STAT. 670 (1940), as amended, 18 U.S.C. § 2385 (Supp. 1952).

danger test become a constitutional standard by which the Court will measure the scope not only of the right of speech but of the right of political association? To answer that inquiry in the affirmative is, perhaps, to discover a concealed merit in Mr. Hook's thesis. It is to say explicitly that the Constitution permits the punishment of conspiracies as Mr. Hook has defined them, and to imply that other conspiracies possessing less dangerous qualities must be secured by constitutional interpretation from repressive governmental action. The misleading feature of Mr. Hook's formula still persists, however, for what it distinguishes is heresy from conspiracy. What is needed, if the suggested analysis be accepted, is a standard which will tell us which activities of which conspirators possess some constitutional security and which do not. The standards, unfortunately, are not clearly defined in the *Dennis* case. The Chief Justice developed his opinion more in terms of speech than in terms of conspiracy, and believed, apparently, that the clear and present danger test of Holmes and Brandeis was both applicable and satisfied in the case before the Court. Mr. Justice Jackson, at the other extreme, seemed to believe that because the charge against the defendants was of conspiracy and not of advocacy the somewhat naive test of Holmes and Brandeis was irrelevant. Passages in his opinion would suggest that two timid heretics combining without chicanery to advocate now the violent overthrow of government on New Year's eve in 1999 might constitutionally be convicted under Section 3 of the Smith Act. Since the charge would be conspiracy, not advocacy, the test of clear and present danger, the Justice suggests, would not be applicable.<sup>6</sup> Most liberals, ritualistic and realistic alike, find that proposition hard to accept. It is uncertain, however, whether they would balk because they consider that the imagined conspiracy offers no clear and present danger to our society or because they consider that the speech presents no such danger. The opinion of Justice Jackson, it must be acknowledged, gives such emphasis to the character of the Communist Party that one carries away the conviction that by some means—possibly through application of the repudiated test itself—the Justice would give to the speech of other political conspirators a degree of constitutional protection. Certainly all of the Justices who wrote opinions concurring in the decision of the majority were less concerned to show that the advocacy, as such, presented a clear and present danger to the nation than they were to reveal the danger inherent in the Party's foreign affiliation and domestic mechanism. It is the emphasis on the character of danger inherent in such an organization as the Communist Party which leads one to believe that perhaps the next constitutional battles on this terrain will determine whether or not the legislative power to punish con-

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6. "But it is not forbidden to put down force or violence, it is not forbidden to punish its teaching or advocacy, and the end being punishable, there is no doubt of the power to punish conspiracy for the purpose. . . . In conspiracy cases the Court not only has dispensed with proof of clear and present danger but even of power to create a danger." *Dennis v. United States*, 341 U.S. 494, 575-6 (1951) (concurring opinion).

spirators, like the legislative power to punish speech, is subject to the test of clear and present danger. There is unfortunately little in Mr. Hook's volume which bears directly on this issue.

If Mr. Hook's contrast between defensible heresy and punishable conspiracy has merit and if his account of the character of the Communist Party is accurate, would it not mean that the proceedings against the Party leaders should have been brought under Section 2384 of Title 18<sup>7</sup> rather than under Section 3 of the Smith Act? That conclusion was certainly implicit in the dissent of Mr. Justice Douglas. By selecting the Smith Act as the basis of prosecution the Government ran head-on into problems of free speech which might have been more readily evaded had Section 2384 been chosen. It is all well enough to speak of the unlawfulness of the conspirators' objective—overthrowing the Government by force and violence—if the Court is considering the guilt of the defendants under Section 2384. It is far less legitimate to label the objective unlawful when they are charged with conspiring to advocate that overthrow. For constitutional tradition, as developed before the *Dennis* case, told us that advocacy of overthrow, even by conspirators, is not unlawful unless a clear and present danger of an attempt at overthrow is the consequence of such advocacy.<sup>8</sup> Perhaps that tradition has survived the *Dennis* case; the final point of that decision may merely be that the seriousness of danger to be anticipated from speech depends considerably on the character of the speaker and the political mechanism which he controls. The vice in Mr. Hook's formula, as in certain aspects of Mr. Justice Jackson's opinion, lies in its suggestion that to charge and prove a conspiracy is to eliminate the issues of free speech from the controversy. The ugly implications in the word conspiracy are surely misused if they are taken to justify the conviction of any heretics who either associate themselves, however ineffectively, in the advocacy of revolutionary enterprises, or, acting in concert, use chicanery to achieve their objectives. "[A] juristic principle cannot rest on a mere appeal to the vocabulary of vituperation."<sup>9</sup> Perhaps Mr. Hook was tempted into verbalism by certain passages in the opinion of Mr. Justice Jackson. Certainly the Justice oversimplified the issues before him when he suggested that the sole relevance of speech and advocacy in the *Dennis* case was as proof of the fact that the defendants had conspired to overthrow the government by force and violence. Paraphrasing Jackson, Mr. Hook says that "[t]he legal rule concerning conspiracy in interstate commerce . . . and

7. "If two or more persons in any State or Territory . . . conspire to overthrow . . . by force the Government of the United States . . . they shall each be fined not more than \$5000 or imprisoned not more than six years, or both." 62 STAT. 808 (1948), 18 U.S.C. § 2384 (Supp. 1952).

8. Mr. Hook conveniently overlooks the fact that free speech cases have characteristically been prosecutions for conspiracy. See, e.g., *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919). Cf., *Whitney v. California*, 274 U.S. 357 (1927).

9. McCardie, J., in *Pratt v. British Medical Ass'n*, [1919] 1 K.B. 244, 255.

the admissibility of evidence chiefly of a verbal kind in establishing the existence of such conspiracy, has never been challenged by the opponents of the Smith Act."<sup>10</sup> That challenge has not been made because Section 3 of the Statute does not condemn conspiracies to overthrow the government but conspiracies to advocate such overthrow. When Congress amends the antitrust laws to condemn conspiracies to advocate monopoly, the ritualistic liberals will be compelled, perhaps, to face the issue which Mr. Hook presents, but for the present they will feel justified in reminding him that orthodox doctrine as it existed before *Dennis* would have told us that although conspiracies to promote unlawful advocacy may be made criminal by the legislature, advocacy may be made unlawful only when it presents an immediate danger to society.

Doubtless these criticisms of Mr. Hook's thesis will seem to some excessively legalistic. It may be urged that to reveal the inadequacy of his understanding of the law of conspiracy is not to undermine his fundamental point that the methods and affiliations of the Party leaders take them beyond the protective reach of conventional doctrine. Public opinion, however, will be gravely misled if it accepts Mr. Hook's comforting formula as sufficient. There is real danger that law and public opinion will follow divergent paths into constitutional confusion if the lawyer uses the word "conspiracy" in one sense and the public gives it a very different meaning. Experience has taught us that constitutional law is rendered ineffective when judges misconceive the convictions of the society which they serve. The publicist does corresponding harm when he misconceives the substance of legal doctrine. When he condenses misconception in a phrase he compounds that harm.

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THE TIDELANDS OIL CONTROVERSY. By Ernest R. Bartley. Austin: University of Texas Press, 1953. Pp. x, 312. \$5.00.

POLITICAL scientist Bartley undertakes to show via history that the Supreme Court's disposition of the "tidelands" cases was "incorrect as a matter of law."<sup>11</sup> His argument is that, by virtue of the law of nations, England in 1776 held sovereignty over a strip of the sea around its possessions; this sovereign interest carried with it ownership of the sea bed; when our thirteen colonies left the Empire they acquired *pro tanto* these sovereign and proprietary interests; as later states joined our union they joined on equal footing with the original states and so acquired, and still hold, corresponding interests in a three-mile belt along their own shores.

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10. P. 99.

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1. P. 278.