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THE RED MENACE REVISITED

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The Red Menace, Revisited

David E. Bernstein*

Introduction

Professor Martin Redish, a distinguished scholar of freedom of expression (among other things), wades into the debate over the legacy of the anti-Communism of the late 1940s and 1950s in *The Logic of Persecution: Free Expression and the McCarthy Era*.¹ Redish's unique contribution is to approach this controversy from the perspective of First Amendment theory.

First, we shall review the history of the debate over Communism and anti-Communism in American history. Through the mid-1960s, most historians concluded that the American Communist Party (CPUSA) was controlled by and beholden to the Soviet Union, and its hard-core membership, at least, was disloyal to the United States. As one prominent historian summed it up, the CPUSA was "the American appendage of a Russian revolutionary power."²

Over time, "revisionist" historians associated with the New Left painted a very different picture of the CPUSA. According to these historians, the Party was a generally benign, idealistic, homegrown progressive movement interested in economic justice and civil rights.³ Its

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¹ MARTIN H. REDISH, *THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA* (2005).

² THEODORE DRAPER, *THE ROOTS OF AMERICAN COMMUNISM* 395 (1957).

³ For a recent recapitulation, see Victor Navasky, *Cold War Ghosts*, *NATION*, July 16, 2001, at 40. Navasky writes of,

the experience of 99.9 percent of the million comrades who passed through the CPUSA during the 1930s and early '40s—stay-at-homes who contented themselves with reading (and sometimes shouting at) the *Daily Worker*, demonstrators who sang along with Peter Seeger and social activists who organized trade unions and rent strikes in the North and fought lynching and the poll tax in the South.

Id.

members were “liberals in a hurry”⁴ who understandably lost patience with the slow pace of liberal reform. The Party had close ideological and psychological ties to the USSR,⁵ and most of its members sympathized with that nation, but the CPUSA was independent, charges of disloyalty were at best greatly exaggerated,⁶ and hostility to the Party was motivated primarily by mindless anticommunism.

These conflicting views of the CPUSA also informed historians’ understanding of the so-called McCarthy period, covering the late 1940s and much of the 1950s. At this time, Anti-Communism was a dominant theme in American political life, and both the government and private parties acted to suppress the Party and punish its members. Traditionalist historians, though considered “conservative” by left-wing revisionists, generally had mainstream liberal views. Like their “Cold War liberal” forebears, who dominated anti-Communist intellectual circles during the McCarthy period, the traditionalists often reviled McCarthy himself as an irresponsible demagogue,⁷ but believed that the era’s anti-Communism was largely justified by the Communists’ fealty to a hostile totalitarian power. To the extent that there was a certain amount of overreaction⁸ to a perceived domestic threat, it was an understandable (if regrettable) response to revelations that American Communist spies for the Soviet Union such as Alger Hiss

⁴ See ARTHUR M. SCHLESINGER, JR., *THE VITAL CENTER* xiv (Transaction Press 1997) (1949) (describing the younger generation of historians who declined to criticize Stalinism and believed Communists to be “liberals in a hurry”).

⁵ See, e.g., PETER L. STEINBERG, *THE GREAT “RED MENACE”* 291 (1984) (discussing the CPUSA’s “psychological” ties to the Soviet Union, and stating that the Party could have, but did not, develop “its own thoughtful independent policies”).

⁶ See, e.g., DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* 54 (1977) (claiming that there is no evidence that the CPUSA was directly connected with espionage).

⁷ Indeed, at the height of McCarthy’s influence, liberal anti-Communists opposed him and his tactics, while still supporting a crackdown on the Communist Party. See Nicholas Wiseman, *Falsely Accused: Cold War Liberalism Reassessed*, 66 *HISTORIAN* 320 (2004).

⁸ HARVEY KLEHR ET AL., *THE SECRET WORLD OF AMERICAN COMMUNISM* 327 (1995) (“[M]any innocent people were harassed.”). However, Redish concludes that “for the most part, it seems that the blacklists were accurate.”

and Julius Rosenberg had seriously jeopardized American national security.

Revisionist historians, by contrast, believed that the government and allied private power created anti-Communist “hysteria” in an attempt to suppress sincere radical, progressive movements that threatened the conservative status quo. By making an example of the Communists, the forces of reaction sent a warning to all left-wing radicals that their political activities put them at risk.⁹ The result was a political culture of conformity that dominated the United States in the 1950s. Revisionist historians were skeptical of reports of Communist spying on behalf of the USSR, and many revisionists consistently maintained the innocence of Hiss, Rosenberg, and other alleged Soviet spies.

For many years, revisionists had the upper hand in the debate,¹⁰ as New Left historians came to dominate the study of American Communism by the mid-1970s.¹¹ These historians admired the Communists’ radicalism and lauded their early support for racial equality. However, revisionists have been put on the defensive by documents from both Soviet and American archives that undermine their interpretation of American Communism.

These documents arrived in two waves. First, after the collapse of the Soviet Union, the Russian government briefly allowed certain American historians access to secret “Comintern” documents, discussing Soviet relations with Communist parties worldwide.¹² Next, in 1995 the United States government declassified the “Venona” documents, secret communications between Soviet government officials and agents in the Soviet Union and United States, among other

REDISH, *supra* note 1, at 15.

⁹ See, e.g., STEINBERG, *supra* note 5, at 289.

¹⁰ REDISH, *supra* note 1, at 63 (finding that revisionist views “heavily dominated historical scholarship” by 1980).

¹¹ JOHN EARL HAYNES & HARVEY KLEHR, *IN DENIAL: HISTORIANS, COMMUNISM & ESPIONAGE* 33 (2003).

¹² REDISH, *supra* note 1, at 3.

places.¹³

The Comintern and Venona documents seem to vindicate the traditionalist historians' perspective on the CPUSA—except that perhaps the traditionalists were not critical enough. We now know that, just as alleged by leading anti-Communists during the McCarthy era, the CPUSA was directly subsidized and controlled by the Soviet Union. The political positions it took were either directly dictated by the Soviet Union, or were the Party leadership's best guess as to what Soviet authorities would support.¹⁴ As historians Klehr and Haynes put it, “[w]ithin the limits of their knowledge, American Communists always strove to do what Moscow wanted, no more, no less.”¹⁵

Furthermore, the CPUSA was heavily implicated in espionage for the Soviet Union. Party leaders recruited its members from the Party's “secret apparatus” to serve as spies for the Soviet Union.¹⁶ While most members of the CPUSA did not engage in espionage, at least through the late 1940s the vast majority of Americans who spied for the Soviet Union were members of the Party, recruited through the Party.¹⁷

¹³ United States intelligence began decrypting these communications starting in 1943. *Id.* at 4.

¹⁴ *Id.* at 3 (noting that the CPUSA had never functioned as an independent political organization).

¹⁵ HARVEY KLEHR & JOHN EARL HAYNES, *THE AMERICAN COMMUNIST MOVEMENT: STORMING HEAVEN ITSELF* 179 (1992).

¹⁶ REDISH, *supra* note 1, at 4 (“[S]ince 1942, the nation had been targeted by an intense and widespread Soviet espionage program that had utilized numerous professional Soviet agents and hundreds of Americans, often taken from the ranks of the CPUSA’s so-called secret apparatus—cadres of specially recruited American communists who were fiercely loyal to the party and its goals.”); *see also* HERBERT ROMERSTEIN & ERIC BREINDEL, *THE VENONA SECRETS: EXPOSING SOVIET ESPIONAGE AND AMERICA’S TRAITORS* xii (2000) (“[T]he party served as a natural recruiting ground -- and its leadership, a vetting agency -- for prospective US- based Soviet spies.”); Ellen Schrecker, *McCarthyism: Political Repression and the Fear of Communism*, 71 SOC. RESEARCH 1041, 1051 (2004) (“[D]ozens, perhaps hundreds, of Communists spied for the Soviet Union during the 1930s and 1940s, and . . . the American Communist Party, at the highest levels, was deeply involved in their recruitment.”).

¹⁷ Most Americans who joined the Communist Party did so for relatively benign reasons, did not participate in espionage, and left after a short time. “But the people who passed through the CPUSA did not define its character or mission: that was done by its hard core of permanent cadre who devoted their lives to the movement.” KLEHR ET AL., *supra* note 8, at 323-24.

Moreover, Party members were expected, on pain of expulsion, to subordinate any other values they had to serving the Party and its ideology. For example, Hollywood scriptwriters were expected to use their positions to promote Communist doctrine and the Party's agenda, or, if that was not possible, at least to work to exclude anti-Soviet sentiment.¹⁸ Ellen Schrecker, a prominent historian of American Communism who is rather sympathetic to the Communists, admits:

In their political work (and for many activists in their daily lives as well) Communists were expected to comply with party directives. Even during its more reformist phases ... the American Communist Party never abandoned its demand for conformity. It was—in theory and in ways that shaped the behavior of its members—a tightly organized, highly disciplined, international revolutionary socialist organization.¹⁹

By now, most revisionists have acknowledged that their understanding of the CPUSA was wrong.²⁰ The battle lines among historians have therefore shifted from the nature of American Communism to the actions of anti-Communists. Revisionists claim that whatever the nature of the Communist Party, the “crimes” of McCarthyism were not justified. By contrast, leading traditionalists Haynes and Klehr argue that “the new evidence about the CPUSA bears directly on the perspicacity, tactics and rationale of their anti-Communist opponents.”²¹

Just about everyone still agrees that Joseph McCarthy was an irresponsible demagogue who indulged in exaggeration and outright lies.²² But the anti-Communism of the late 1940s and

¹⁸ REDISH, *supra* note 1, at 158-59.

¹⁹ ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* 5-6 (1998).

²⁰ *But see* ATHAN THEOHARIS, *CHASING SPIES: HOW THE FBI FAILED IN COUNTERINTELLIGENCE BUT PROMOTED THE POLITICS OF MCCARTHYISM IN THE COLD WAR YEARS* (2002) (doubting, for example, that Alger Hiss was a Soviet spy); Navasky, *supra* note 3, at 38-39 (same). For the most recent account of Hiss's career as a spy and his subsequent attempt to rehabilitate himself, see G. EDWARD WHITE, *ALGER HISS'S LOOKING-GLASS WARS* (2004).

²¹ John Earl Haynes & Harvey Klehr, *The Historiography of American Communism: An Unsettled Field*, 68 *LABOUR HIST. REV.* 61, 74 (2003).

²² For example, leading traditionalist historians Haynes and Klehr accuse McCarthy of “wild and irresponsible

1950s both pre- and post-dated McCarthy's time in the limelight, and a fierce debate continues to rage about whether actions taken by both government and private actors against American Communists constituted a repressive authoritarian witch hunt motivated by hysteria,²³ or a (mostly) proportionate reaction to a true menace.²⁴

Schrecker, for example, argues that the persecution of Communists in the late 1940s and 1950s was not justified because most of the suspected Soviet agents had been excluded from the government by 1947, and the KGB's Washington networks were out of business soon thereafter²⁵; the espionage that Communists engaged in mostly took place during World War II, when the United States and USSR were allies; and, finally, because Communists spied for the Soviet Union out of pure-hearted motives.²⁶

By contrast, Haynes and Klehr argue that "[t]he peculiar and particular edge to American anti-communism" was justified by "the CPUSA's allegiance to the Soviet Union." It was "the belief that American Communists were disloyal is what made the Communist issue so powerful

charges against the Truman and Roosevelt administrations." HAYNES & KLEHR, *supra* note 11, at 81. Elsewhere, Haynes and Klehr state that "[i]t is difficult to regard Senator Joseph McCarthy's assault on political civility as much more than the vicious partisanship of a political bully." KLEHR ET AL., *supra* note 8, at 325. Even conservative polemicist Ann Coulter, who wrote a bestselling book that defends McCarthy, acknowledges many of his weaknesses. ANN COULTER, *TREASON: LIBERAL TREACHERY FROM THE COLD WAR TO THE WAR ON TERRORISM* (2003). It seems fair to conclude that McCarthy's blundering and bluster has obscured the fact that his views regarding Soviet espionage in the United States were closer to the truth than were those of many of his harshest critics. *See generally* ARTHUR HERMAN, *JOSEPH MCCARTHY: REEXAMINING THE LIFE AND LEGACY OF AMERICA'S MOST HATED SENATOR* (2001).

²³ *See* ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 961 (2d ed. 2002) ("hysteria"); Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/> (Sept. 14, 2005, 13:13 EST) (quoting University of Chicago professor Geoffrey Stone as referring to "the anti-Communist witch hunt" and the "hysteria" of the 1940s and 1950s).

²⁴ [W]e must avoid the Reverse Mussolini Fallacy. That Mussolini made the trains run on time (if he did) isn't reason to like Mussolini; but that you dislike Mussolini isn't reason to dislike trains running on time. That McCarthy condemned Communism (which he often did through wrongful means) doesn't mean that there's McCarthyism — or even a violation of civil libertarian principles — whenever a group condemns Communists

Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/> (Sept. 6, 2005, 18:50 EST).

²⁵ Schrecker, *supra* note 16, at 1041.

and at times poisonous.” Since the American Communist movement indeed demanded that its adherents place loyalty to the Soviet Union above loyalty to the United States,²⁷ Haynes and Kehr argue that it was perfectly appropriate that American Communists were not considered legitimate participants in the democratic polity; that private organizations “blacklisted” Communists; and that, given Soviet espionage through the Party, the United States government exposed the Party’s activities, and “jailed some of its leaders, and removed [Communists] from federal jobs.”²⁸ If the USSR ceased to use the CPUSA for espionage purposes in the late 1940s, that was only as a result of the government’s increased vigilance regarding domestic security, and “because of the determined campaign by anticommunists of every political hue,”²⁹ involving the very policies that historians like Schrecker decry.

The relevant issues in the debate over the anti-Communism of the late 1940s and 1950s—blacklists, congressional hearings on Communist activities, criminal prosecutions of Communist Party leaders—all involve claims of freedom of expression by the Communists and their supporters, and yet until *The Logic of Persecution* no scholar has subjected the period to a sustained First Amendment analysis.

Part I of this Review discusses the Smith Act prosecutions, in which CPUSA leaders were prosecuted for promoting violent revolution against the government. Redish argues that these prosecutions were blatantly unconstitutional, because the defendants were accused only of advocacy of certain ideas, and not of engaging in illegal acts. Redish therefore concludes that

²⁶ REDISH, *supra* note 1, at 4.

²⁷ KLEHR ET AL., *supra* note 8, at 326 (“[T]he belief that the American Communist movement assisted Soviet intelligence and placed loyalty to the Soviet Union ahead of loyalty to the United States was well founded.”).

²⁸ *Id.* at 25.

²⁹ HAYNES & KLEHR, *supra* note 11, at 224.

the revisionist historians are correct in condemning these prosecutions.

This Reviewer agrees with Redish's constitutional analysis, but contends that contrary to his perspective, historians' judgment about the Smith Act prosecutions is not, and should not, necessarily be based solely on whether the prosecutions violated the First Amendment. Rather, historians may reasonably consider the moral status of the defendants; whether freedom of expression suffered any lasting harm; and whether the goal of destroying the CPUSA's usefulness to the USSR was, in context, a particularly important one. Recent revelations about the CPUSA, and the government's knowledge of the CPUSA at the time of the Smith Act prosecutions, are highly relevant to the first and last of these considerations.

Part II of this Review evaluates the infamous "blacklist" by Hollywood movie studios of members of the CPUSA, often considered "exhibit A" of McCarthyistic oppression. Redish questions whether Congress had the constitutional authority to haul the "Hollywood 10" and other known or suspected Communists before the House UnAmerican Activities Committee. Regardless, Redish concludes, and this Reviewer agrees, it was entirely appropriate—under the First Amendment, and also morally—for businesses and individuals to boycott members of the Stalinist CPUSA.

Finally, Part III of this Review discusses whether state and local governments acted within their constitutional authority in refusing to hire CPUSA members as teachers. Redish concludes that school authorities did not violate the First Amendment when they excluded devoted Communists from teaching classes in subject areas that required teachers to pass along a liberal democratic perspective to their students. Communists could hardly be expected to do that well, and the government acting as employer has the right to hire the best employees. Part III

reviews some objections to Redish's conclusion, and suggests that monitoring compliance with the assigned curriculum would have been an alternative means of accomplishing the government's agenda.

I. The Smith Act Prosecutions

Congress passed the Smith Act³⁰ in 1940 in anticipation of a potential war with Nazi Germany. The Act made it a criminal offense for anyone to "knowingly or willfully advocate[], abet[], advise[], or teach[] the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State . . . by force or violence" or for anyone to "organize[] . . . any society, group, or assembly of persons who teach, advocate, or encourage" such an overthrow, or for anyone be a member of or to affiliate with any such association.³¹

In 1941, the government prosecuted eighteen leaders of the Trotskyist Socialist Workers Party under the Smith Act. The CPUSA not only applauded this action, Party leaders assisted in the prosecution.³² The government also indicted twenty-eight right-wing extremists under the Smith Act, charging that that the defendants' speeches and writings constituted a conspiracy to encourage insubordination in the Armed Forces. However, the twenty-eight individuals were such a disparate, motley group that the government first modified the conspiracy charges, and later, after a mistrial resulting from the presiding judge's death, withdrew the indictment.³³

The Smith Act then lay dormant until it was used to prosecute eleven CPUSA leaders in

³⁰ 18 U.S.C. § 2385 (2000).

³¹ *Id.*

³² JOHN EARL HAYNES, RED SCARE OR RED MENACE?: AMERICAN COMMUNISM AND ANTICOMMUNISM IN THE COLD WAR ERA 30 (1996).

³³ *Id.* at 30-31.

1949. The indictment charged them with conspiring “to organize as the Communist Party” with the purpose of “overthrow[ing] and destroy[ing] the Government of the United States by force and violence” at some unspecified future time.³⁴ Among the overt acts alleged was teaching the principles of Marxism-Leninism.³⁵ By 1957, the government had indicted dozens of leaders of the CPUSA for Smith Act violations.³⁶

To some extent, the Smith Act prosecutions were motivated by political considerations, as the Truman Administration sought to fend off Republican accusations that it had neglected domestic security. In particular, Republicans argued that revelations of Soviet spying in the United States by the likes of Alger Hiss showed that the Democrats had been grossly inattentive to the threat of subversion by American Communists.

However, the prosecutions were also motivated by a sincere belief that the Communist Party posed a threat to national security, given ongoing hostilities between the Stalinist USSR and the United States. Top government officials such as FBI director J. Edgar Hoover “tended to see the CPUSA as principally a covert-warfare agency that was engaged in espionage and prepared to act as an internal sabotage and disruptive force to aid the Soviet Union in time of war.”³⁷

While revisionist historians (following the lead of cultural critics such as Arthur Miller³⁸) portrayed views such as Hoover’s as the product of “witch hunt” hysteria,³⁹ these views were not

³⁴ *Text of Indictment of Twelve Communists*, N.Y. TIMES, Jan. 17, 1949, at 9.

³⁵ *Id.*

³⁶ ARTHUR J. SABIN, IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY 11 (1999).

³⁷ HAYNES, *supra* note 32, at 179.

³⁸ See ARTHUR MILLER, THE CRUCIBLE (1952).

³⁹ REDISH, *supra* note 1, at 63. For a relatively recent example, see Sabin, *supra* note 36, at xi (attributing the “Red Scare” of the post-World War II period to “national hysteria”).

unreasonable given that top government officials had recently learned from the Venona cables that the Soviet Union used American Communists to engage in wide scale espionage against the United States.⁴⁰ Moreover, Party leaders were in fact prepared to aid the Soviet Union as a domestic fifth column in the event of a military confrontation with the United States, and “entertained fantasies” that “they would participate in an imminent revolution against the American government.”⁴¹ As Klehr et al., conclude, “the Communist Party of the United States of America was ... a conspiracy financed by a hostile foreign power that recruited members for clandestine work, developed an elaborate underground apparatus, and used that apparatus to collaborate with espionage services of that power.”⁴²

The government would therefore have been fully justified in prosecuting many members of the Communist Party for espionage or conspiracy to engage in espionage, and for other offenses involving clear criminal acts. The Smith Act prosecutions are nevertheless extremely troubling from a First Amendment perspective, as Redish explains:

Although the Venona documents in particular indisputably establish that a certain percentage of American Communists engaged in espionage, to rely on those revelations in order to justify many of the prosecutions of American Communists during the Cold War amounts to a constitutional non sequitur. Anticommunist historians completely ignore the simple fact that, with relatively limited exception, . . . the government prosecutions . . . had absolutely nothing to do with the clearly illegal espionage revealed by the Venona documents. Rather, they were premised on communists’ organizational activities allegedly designed to facilitate advocacy of the attempted overthrow of the American government. From the perspective of the theory of free expression, there is all the difference in the world between the two forms of activity. . . . That many American communists *could* properly have been prosecuted for unprotected acts of espionage does not logically imply that their wholly unrelated protected

⁴⁰REDISH, *supra* note 1, at 6, 63.

⁴¹ KLEHR ET AL., *supra* note 8, at 325.

⁴² *Id.* at 326.

expressive activity could also be constitutionally punished.⁴³

Therefore, according to Redish, even though traditionalists are right that the Communist Party presented a real threat to national security, the revisionists are also correct that “the American government was responsible for wholly unjustified political repression of an unpopular ideology, in a manner ominously reminiscent of a totalitarian regime.”⁴⁴

While Redish provides a thorough and valuable discussion of the First Amendment problems with the Smith Act prosecutions, he leaves several important questions unanswered. First, what if, instead of harassing the CPUSA through the Smith Act prosecutions, the federal government had simply outlawed it? Redish implies that such an action would have been unconstitutional, noting that “many organizations operating within the United States possessed substantial allegiances to foreign governments or to political forces operate within other nations.”⁴⁵ Members of such organizations, he writes, should not be automatically deprived of their First Amendment rights.⁴⁶ As Redish notes, “[i]f CPUSA members took positions ordained in Moscow it was presumably still their voluntary choice to do so.”⁴⁷

But unlike, say, members of “American ethnic groups who choose blindly to support the positions of their native land,”⁴⁸ who have a First Amendment right to associate to promote those positions, American Communists belonged to an organization secretly controlled and financed by a foreign power, the Soviet Union. This raises the question of whether expressive associations funded by foreign governments should be protected by the First Amendment, or

⁴³REDISH, *supra* note 1, at 64.

⁴⁴ *Id.* at 65.

⁴⁵ *Id.* at 10.

⁴⁶ *Id.* at 10-11.

⁴⁷ *Id.* at 74.

whether such expression would be more of an interference with the American marketplace of ideas than a contribution to it.⁴⁹

Even if one concludes that expression funded by foreign governments should generally receive First Amendment protection, in the late 1940s and early 1950s the Soviet Union was not just any foreign country, but an enemy nuclear power that was engaged in military hostilities, both directly (through the blockade of the American-occupied zone in Berlin) and through intermediaries (e.g., the Korean War), with the United States. The CPUSA recruited spies for the Soviet Union, and was prepared to engage in violence on behalf of the Soviet Union.⁵⁰ A close contemporary analogy would be a Fundamentalist Muslim party funded by Al Qaeda, whose policies are dictated by Al Qaeda, and whose leaders and some members have aided Al Qaeda via espionage activities.⁵¹ It is hardly clear that the First Amendment requires the government to tolerate the existence of this party, and that the government could not close it

⁴⁸ *Id.*

⁴⁹ For an explanation of how the “marketplace of ideas” metaphor relates to an appropriate understanding of the First Amendment, see DAVID E. BERNSTEIN, *YOU CAN’T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS* 11-22 (2003). In short, the First Amendment is intended to prevent the government and its “power elite” from entrenching itself by suppressing criticism. Speech that emanates from *foreign governments* may be seen as a potentially meddlesome and illegitimate statist interference in the American marketplace of ideas, which the United States government may choose to tolerate, but which does not deserve First Amendment protection.

⁵⁰ MICHAL R. BELKNAP, *COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES* 201 (1977) (relating that during Smith Act prosecutions, “[c]ommunists, remaining committed to a socialist revolution, continued to believe that violence would probably accompany it”); KLEHR & HAYNES, *supra* note 15, at 165 (noting that Robert Thompson, one of the defendants convicted in the 1949 Smith Act cases, fled “underground” in case he was needed to lead a guerrilla war against the United States).

⁵¹ The analogy isn’t exact, because Al Qaeda is a more immediate threat to the American public, in the sense that it currently seeks to attack civilian targets on U.S. soil, than the Soviet Union was, but the Soviet Union had far more destructive capacity than Al Qaeda because it possessed nuclear weapons and had a state apparatus supporting its long-term military struggle with the U.S. While Redish analyzes related issues under the “Clear and Present Danger” test, as the Court did in the Smith Act cases, query whether the federal government has the inherent right to shut down a party acting as an agent for a hostile foreign power or terrorist group under its War Powers, without concern for First Amendment niceties.

down as a criminal conspiracy against the United States.⁵²

Another question raised by Redish's analysis is how much weight a historian should give to the fact that the Smith Act prosecutions violated the First Amendment. Redish suggests that the fact that the Smith Act prosecutions were unconstitutional strongly favors the historical perspective of revisionists who argue that those prosecutions were a terrible injustice, and undermines the views of traditional historians who have used the Comintern and Venona revelations about the CPUSA to view the Smith Act cases with some sympathy.⁵³

Yet a historian could reasonably conclude that the Smith Act prosecutions, though unconstitutional, were, from a historical perspective, a net positive. First, the individuals prosecuted were not innocents caught up in youthful idealism that led to a brief flirtation with Communism, but were leaders of the CPUSA who were willing pawns of one of the great mass murderers in history.⁵⁴ They remained enthusiastic Communists despite (or perhaps because of!) the artificial Ukrainian famine of 1932-33, the Stalinist terror of the late 1930s, the gulag, the Hitler-Stalin pact, brutal Soviet repression of Eastern Europe after World War II, and the anti-Semitic show trials and executions of the late 1940s and early 1950s. These Smith Act defendants, in short, were morally culpable for apologizing for, promoting, and cooperating with Stalin's Soviet Union, at the expense of their own liberal, democratic nation.

Many of those prosecuted had engaged in illegal activities. And, though they used freedom of expression as a defense, as loyal Communists they didn't believe in it, and indeed

⁵² One is tempted to suggest that if it is constitutionally permissible for the government to regulate and restrict the financing of American political campaigns by Americans, *see* *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), surely it would be permissible at least to ban the funding of American parties by hostile foreign powers.

⁵³ REDISH, *supra* note 1, at 6.

⁵⁴ HAYNES & KLEHR, *supra* note 11, at 23 (attributing between five and ten million deaths to Soviet Communism, most of which occurred during Stalin's time).

opposed freedom of expression for their ideological enemies.⁵⁵ No sympathy is due such individuals; there is at least some poetic justice in such individuals getting hoisted by their petards, and it would be hard to call their prison sentences “unjust” in any cosmic sense, even if they were unconstitutional under the positive law. Respect for the law, including constitutional law, is an important value, but it’s not the only value that historians can or should hold.

Redish is correct that the issue of whether “the individual communist defendants were morally worthy of our concern”⁵⁶ is not relevant to the resolution of First Amendment objections to the Smith Act prosecutions. But it may be highly relevant to how we perceive the prosecutions in retrospect. For example, the biographies of the individual Nuremberg defendants surely play a significant role in how those trials, which had little basis in preexisting law, are now viewed.

Indeed, many of the greatest critics of the Smith Act trials among historians implicitly concede the relevance of moral judgments regarding individuals prosecuted by the government in violation of the First Amendment. They do so by generally ignoring the fact that almost all the tactics used by the government against Communists in the McCarthy era—including unconstitutional Smith Act prosecutions—were initially used by federal authorities in the late 1930s and early 1940s against American Nazis, fascists, and their sympathizers.⁵⁷ Academics

⁵⁵ Indeed, many of them were also the same individuals who had applauded and encouraged the Smith Act prosecution against the Trotskyists in 1941.

CPUSA leader Earl Browder, among others, had also called for government persecution of “American fascists,” which, ultimately, would include everyone who opposed Communism, exclaiming: “[W]e demand the suppression of American fascists! We fight for the complete, merciless, and systematic destruction of fascism in all its aspects, everywhere.” Alexander Meiklejohn & Earl Browder, *Free Speech for Fascists?*, NEW MASSES, December 7, 1943, at 12.

⁵⁶ REDISH, *supra* note 1, at 130.

⁵⁷ See HAYNES *supra* note 32; see also Leo P. Ribuffo, United States v. McWilliams: *The Roosevelt Administration and the Far Right*, in AMERICAN POLITICAL TRIALS 179 (Michael R. Belknap ed., 1994).

(and cultural figures) who lionize the McCarthy-era Communist “martyrs” generally have little if anything to say about the equally unconstitutional prosecution of the leader of the German American Bund and other Nazi sympathizers, not because the Nazis were more dangerous—quite the opposite, they did not succeed in infiltrating high levels of government, as did the Communists, and they had much weaker ties to Nazi Germany than the Communists did to the Soviet Union—but because they have made an implicit moral judgment that the Communists are more worthy of their moral concern than are the Nazis.⁵⁸ One can reasonably assume that if those who have documented the McCarthy era felt the same way about Stalinists as they do about Nazis, and the same way about anti-Communists as they do about anti-fascists, the “persecution” of Communists would be treated with historical nonchalance similar to the treatment given to the government’s earlier “persecution” of right-wing extremists.

Second, the Smith Act persecutions caused no long-term damage to the First Amendment, nor, in retrospect, does it appear that there was much danger of such damage at the time. In upholding the convictions of the initial Smith Act defendants, the Supreme Court applied the test that speech advocating violence could only be punished when a “clear and present danger” of such violence existed. The Court interpreted this test broadly, but only because the defendants were members of a Communist conspiracy.⁵⁹ The Court’s plurality wrote:

⁵⁸ KLEHR & HAYNES, *supra* note 15, at 8-58. To Geoffrey Stone’s credit, his recent book discusses the suppression of fascists and Nazis by the Roosevelt Administration, and even notes conservative criticism of those who condemn the government’s anti-Communist activities during the McCarthy period but fail to condemn the Roosevelt Administration. GEOFFREY R. STONE, *PERILOUS TIMES* 244-77, 392 (2004).

⁵⁹ William M. Wiecek, who is highly critical of the Smith Act prosecutions, emphasizes that the Court made a special exception for Communists and did not otherwise tamper with First Amendment doctrine. William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v United States*, 2001 SUP. CT. REV. 375, 377-78.

The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score. And this analysis disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger.⁶⁰

Frankfurter's concurring opinion also made it clear that he thought the CPUSA was a unique case. By 1957, with the CPUSA no longer a perceived serious danger to American security, the Supreme Court reversed itself, and held that revolutionary advocacy by itself could no longer justify a conviction.⁶¹ In the end, the First Amendment was stretched for only a short period of time to take care of a specific nettlesome problem, and, in the long term, came out of its ordeal stronger than ever. Admittedly, this was not a certain outcome at the time, and one can surely criticize the Court from a legal theory perspective in creating a potential dangerous slippery slope. But one can also forgive historians for viewing history through what actually happened, not what might have happened.

Finally, the Smith Act prosecutions were effective in disrupting the CPUSA's efforts at subversion. Redish argues that the government's prosecutions under the Smith Act had nothing

⁶⁰ *Dennis v. United States*, 341 U.S. 494, 510-11 (1951).

⁶¹ *Yates v. United States*, 354 U.S. 298 (1957). One can dispute whether the outcome of *Yates* resulted from changed historical circumstances, or simply from a change in Supreme Court personnel. The author of this Review tends to lean toward the school of thought that suggests that Supreme Court decisionmaking is less purely "legal" and more influenced by external political and historical events than legal scholars typically acknowledge. *See, e.g.*, MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004) (making such an argument in the context of Supreme Court civil rights decisions in the twentieth century).

to do with espionage, but “were premised on communists’ organizational activities allegedly designed to facilitate advocacy of the attempted overthrow of the American government.”⁶² But this is like saying that Al Capone’s conviction for tax evasion had nothing to do with his activities as a mobster.⁶³ The government wanted to put an end to Soviet espionage and subversion through the CPUSA, so they (successfully) used the available prosecutorial tools.⁶⁴

It would have undoubtedly been preferable if the government had charged the defendants with crimes involving overtly illegal acts. But, as Ellen Schrecker explains, given that the American Communist movement was a highly disciplined conspiracy, unless a Communist was caught in the act of espionage, “[i]t was almost impossible to find usable evidence of their

⁶²REDISH, *supra* note 1, at 64.

⁶³ Commenters on this Review have pointed out that Capone’s tax evasion conviction was lawful, unlike the Smith Act prosecutions, which were unconstitutional. That’s true, but it misses the point. The prosecutors’ *motive* for charging Al Capone with tax evasion was that they were unable to build a case against him for his mob activities, and saw the tax issue as a way to put him in jail and disrupt his criminal enterprise. Similarly, the *motive* for the Smith Act prosecutions was not to suppress leftist speech, but that the government, as discussed below, was unable to build a case against the Communists for their criminal activity, and the Smith Act was a way of putting the CPUSA’s leaders in jail and disrupting their criminal enterprise. If Capone had not been a mobster, the government would likely never have investigated him, nor prosecuted him, for tax evasion. If the Communist leadership had not been engaged in espionage and other illegal acts, the government would not have prosecuted them under the Smith Act.]

⁶⁴ KLEHR ET AL., *supra* note 8, at 223-24. The Smith Act prosecutions were “one of the major reasons for the virtual collapse of the CPUSA by 1958.” BELKNAP, *supra* note 50, at 7.

Thus, Redish exaggerates when he writes that “there is no logical connection between the post-1990 historical revelations on the one hand and the prosecution, trial, or appeals of the communist leaders, on the other.”Redish, *supra* note __, at 98.

While the Smith Act prosecutions, unlike Capone’s tax conviction, were constitutionally dubious and presented some danger to the First Amendment, it is not unusual for historians to conclude that the ends justified the means. An extreme example is the atomic bomb attacks on Hiroshima and Nagasaki that killed tens of thousands of innocent people and likely violated international law. International Law on the Bombing of Civilians, <http://www.dannen.com/decision/int-law.html> (last visited Feb. 2, 2006). Although the consequences of these bombings dwarfed the consequences of the Smith Act, there is no shortage of historians willing to argue that Truman’s decision was sound. See, e.g., RICHARD B. FRANK, DOWNFALL: THE END OF THE IMPERIAL JAPANESE EMPIRE (1999); THOMAS B. ALLEN & NORMAN POLMAR, CODE-NAME DOWNFALL: THE SECRET PLAN TO INVADE JAPAN—AND WHY TRUMAN DROPPED THE BOMB (1995); ROBERT JAMES MADDUX, WEAPONS FOR VICTORY: THE HIROSHIMA DECISION (2004). To take a less extreme example, the Roosevelt Administration was aware that many aspects of the first New Deal were blatantly unconstitutional, and some New Deal legislation, such as the National Industrial Recovery Act, endangered American liberty by concentrating enormous power in the hands of the executive. Historians, however, are hardly unanimous in condemning Roosevelt.

misdeeds.”⁶⁵ Using the Venona telegrams would have compromised an extremely important source of intelligence. Other evidence—unauthorized wiretaps, break-ins, and other undercover operations—was not admissible in court. Finally, the statute of limitations for Soviet spies such as Alger Hiss had expired. If the government wanted to cripple the Party’s ability to aid the Soviet Union, it needed to resort to “corollary crimes” such as Smith Act offenses.⁶⁶

Thus, the government was faced with several unattractive options: prosecute Communists for espionage and reveal the Venona decoding, destroying an extremely valuable source of information on the Soviets; spend huge resources monitoring the CPUSA in a potentially fruitless attempt to disrupt its espionage activities; ignore the CPUSA’s espionage, and continue to allow American secrets to leak to the country’s greatest enemy; or stretch the boundaries of the First Amendment and prosecute CPUSA leaders under the Smith Act, as the government had previously done to Nazi and fascist leaders. The government did not obviously choose the worst option.

So, even if one concedes that the Smith Act prosecutions were totally illegitimate from a First Amendment perspective, one still has to reckon with several arguments: the defendants received only a small fraction of their just deserts for their complicity in Stalinism; no lasting harm was done to freedom of expression in the United States; and the prosecutions served an important national security interest. The fact that the government and the courts disregarded the First Amendment may have been unfortunate, even outrageous, from a legal perspective, but this

⁶⁵ Schrecker, *supra* note 16, at 1041.

⁶⁶ *Id.* at 1057-58. Thus, Redish is not quite correct when he writes that the Smith Act prosecutions were not brought for the purpose of punishing criminal activity. REDISH, *supra* note 1, at 130.

The government was quite protective of the Venona secrets. For example, Soviet agents were quietly pushed out of the government rather than prosecuted so that the government would not need to reveal the Venona intercepts. KLEHR ET AL., *supra* note 8, at 237.

does not settle this issue of whether the Smith Act prosecutions should, in historical perspective, be condemned. Relying on the Venona documents to defend the Smith Act prosecutions may, as Redish asserts, be a “constitutional non sequitur,”⁶⁷ but, on the other hand, to limit one’s assessment of the prosecutions to whether they violated the constitution may be a “historical non sequitur.” The constitutionality of the government’s conduct is certainly relevant to historical judgment, but it isn’t necessarily conclusive.

II. The Hollywood Blacklist

Congress established the House Un-American Activities Committee (“HUAC”) in 1938 as a select committee to investigate foreign subversion, especially connections between Nazi Germany and American extremist groups. In 1947, discovery of what appeared to be a Soviet spy network in Hollywood led to concerns that the Soviet Union was attempting to infiltrate the entertainment industry and use it to propagandize the American public.⁶⁸

Congress substantially increased HUAC’s funding, and committee members decided to launch a more thorough investigation of Communism in Hollywood.⁶⁹ After hearing from friendly witnesses who identified Hollywood Communists, the committee subpoenaed ten screenwriters who were believed to be members of the CPUSA. The committee then posed its famous question: “Are you now, or have you ever been a member of the Communist Party of the

⁶⁷REDISH, *supra* note 1, at 64.

⁶⁸*Id.* at 138.

⁶⁹*Id.*

United States?”⁷⁰ Each refused to answer, and each was cited for contempt.

The hearings were a public relations disaster for the movie industry, which depended on a favorable public image for its revenues. Faced with the potential for boycotts supported by a wide swath of the American public, the movie studios issued the “Waldorf Statement,” pledging not to employ Communists.⁷¹ For the next decade, no known member of the CPUSA would be employed by any Hollywood studio. This became known as “the blacklist.”

In both academic histories and the popular imagination (spurred by films such as *Guilty by Suspicion* and *The Front*), the blacklist has become the paradigmatic example of McCarthyistic repression. But this viewpoint seems more dependent on the (at least) covert sympathy with the ideological goals of Communism by those who have documented the McCarthy era than on any generalizable principle.⁷² As Redish proposes, a “helpful device would be to substitute for the term *communist* the words *Nazi*, *racist*, *anti-Semite*, *gay-basher*, or any other political or ideological characteristic that the reader deems offensive.”⁷³ Would the historians who condemn the Hollywood blacklist similarly condemn the boycott of Nazis, racists, anti-Semites, or gay-bashers? As Redish suggests, “I am willing to wager that in that revised political context, the concept of blacklisting does not sound nearly as troublesome or offensive to many as it does when the process is applied to those possessing communist beliefs or

⁷⁰ *Id.* at 139.

⁷¹ *Id.* at 140.

⁷² *Id.* at 14 (noting that leftists’ views of blacklists seem entirely dependent on “substantive agreement or disagreement with the basis for the shunning”); *Id.* at 165 (“If one condemns the Hollywood blacklist on the process-based grounds that one should ‘never [conspire] to deprive a man of work because of his private political convictions,’ then *any* manifestation of private shunning on political grounds, at least in the workplace, must be equally condemned . . .”).

⁷³ *Id.* at 144.

affiliations.”⁷⁴ For that matter, as Redish observes, one rarely hears those who continue to agonize about the blacklist of Communists protest against blacklists of anti-Communists and other politically incorrect individuals, past and present, in industries such as entertainment, journalism, academia, and publishing.⁷⁵

Historically, such blacklists were often established and monitored by the Communists themselves.⁷⁶ To stick with the entertainment industry, discussions of the blacklist almost never acknowledge that during the “Red Decade” of the 1930s, Hollywood *anti*-Communists were blacklisted because of their ideology.⁷⁷ Because the studio bosses didn’t support this blacklist, it wasn’t as effective as the 1950s blacklist, but it seriously harmed careers nevertheless.⁷⁸

Nor is it often acknowledged that the friendly witnesses who appeared before HUAC also faced an informal boycott (though not quite a blacklist) that damaged many careers, which continued into the late 1990s in the case of Elia Kazan.⁷⁹ And leading Hollywood figures apparently refuse to work with Mel Gibson because of controversy over *The Passion of the Christ* and Gibson’s views on the Holocaust,⁸⁰ but Gibson has hardly become a Hollywood martyr on the purported principle that a creative artist should not be penalized for his political or

⁷⁴ *Id.* at 14.

⁷⁵ *Id.* at 165.

⁷⁶ *Id.*

⁷⁷ See DEREK LEEBAERT, *THE FIFTY-YEAR WOUND: THE TRUE PRICE OF AMERICA’S COLD WAR VICTORY* 113 (2002) (discussing the “lists of anti-Communists, in Hollywood and elsewhere, who were denied work when Stalinist influence was at its height”); ROBERT MAYHEW, *AYN RAND AND SONG OF RUSSIA* 76-77 (2003).

⁷⁸ *Id.*

⁷⁹ See Jacob Weisberg, *Blacklist and Backstory: Hollywood’s Unexpected Embrace of Elia Kazan*, SLATE, Jan. 31, 1999, <http://www.slate.com/id/18121/> (noting that both the “American Film Institute and the Los Angeles Film Critics Association [recently] have turned Kazan down for honors that no one disputes are merited by his films”). Kazan’s critics would claim that they boycott him for “naming names,” not for his ideological views or political activities. But is there any serious doubt that the boycotters’ attitudes would be very different if Kazan had discussed with Congress Nazi, as opposed to Communist, infiltration of Hollywood?

⁸⁰ Sharon Waxman, *For Mel Gibson, ‘The Passion’ Seems Mostly a Blessing*, N.Y. TIMES, June 23, 2004, at E1; Sharon Waxman, *New Film May Harm Gibson’s Career*, N.Y. TIMES, Feb. 26, 2004, at E1.

social views.

Of course, the fact that indignation at boycotts and blacklisting, formal or informal, is often selective only means that it's hypocritical, not that it's wrong. From a First Amendment perspective, the blacklist raises two significant issues. First, whether it was appropriate for Congress to launch the investigation of Hollywood Communism that led to the blacklist, and for witnesses to cooperate with the investigation. And second, whether it was wrong, and perhaps a violation of the spirit of the First Amendment, for individuals and companies to boycott the blacklisted because of their Communist ties.

A. The Propriety of the HUAC Investigation

One possible justification for HUAC's investigation of Hollywood, Redish states, is that many Americans were firm anti-Communists, and wanted nothing to do with anyone who supported the CPUSA. Thus, Americans' ability to exercise their right of nonassociation was arguably facilitated by HUAC hearings that revealed that the Hollywood Ten and other entertainment industry employees were CPUSA members or had close ties to the Party.⁸¹

This was precisely the position taken by novelist and former Hollywood screenwriter Ayn Rand, who testified as a friendly witness before HUAC.⁸² She wrote:

Now if the Hollywood 10 claim that a public revelation of their Communist ideas damages them because it will cost them their Hollywood jobs—this means that they are holding these jobs by fraud, that their employers, and coworkers, and the public do not know the nature of their ideas and would not want to deal with them

⁸¹ REDISH, *supra* note 1, at 135.

⁸² *Id.* at 139. Thus, while HUAC's facilitation of nonassociation is rarely if ever raised in historical debates and may indeed "add an entirely new dimension to that debate," REDISH, *supra* note 1, at 136, the point is not quite original.

if such knowledge were made available. If so, then the Communists, in effect are asking that the government protect them in the perpetuation of a fraud. They're demanding protection for their right to practice deceit among others. They're saying, in effect: I'm cheating those with whom I'm dealing. And if you reveal this, you'll cause me to lose my racket—which is interference with my freedom of speech and belief.⁸³

Redish, however, correctly asserts that if government is permitted to expose individuals' private political affiliations, "the risks of chilling or intimidating speakers into silence" outweighs any gains to the exercise of nonassociation rights.⁸⁴ This is especially true because giving the government the power to investigate and publicize citizens' political views and affiliations could so easily be abused. One need only consider the facts of *NAACP v. Alabama ex rel. Patterson*.⁸⁵ The question before the Court in *Patterson* was whether the State of Alabama could compel the state NAACP to reveal to the state Attorney General the names and addresses of its members. The state planned to turn these names over to local "White Citizens' Councils," expecting that the Councils would use the information to help squelch the growing civil rights movement by harassing NAACP members.

But while it is inappropriate for the government, in general, to investigate and publicize citizens' political views and affiliations, connections with the CPUSA presented a distinct circumstance. The Party was controlled, manipulated, and used for espionage by a hostile foreign power. Congress therefore had an appropriate national security rationale for investigating the extent to which the Party infiltrated important segments of American society, and to what extent the Party was using, or planning to use, such infiltration for criminal purposes. As Rand wrote, "[w]hen Congress investigates the Communist Party, it is

⁸³ MAYHEW, *supra* note 77, at 89.

⁸⁴ REDISH, *supra* note 1, at 135.

investigating a factual matter, a criminal conspiracy, and not a matter of ideas.”⁸⁶

Redish, by contrast, sees HUAC as “unconstitutional at its core and from its inception, in everything it did,”⁸⁷ because “the committee appeared to view its function primarily as one of exposure,”⁸⁸ raising grave separation of powers and First Amendment concerns. By this standard, of course, many grandstanding congressional investigations, of, for example, violent video games or indecent music lyrics would be unconstitutional, since the only potential legislative purpose of such hearings would be to pass unconstitutional regulations. The point is not that such hearings would be missed, but that the standard Redish advocates—that Congressional investigations are only constitutional when they have a constitutionally valid legislative purpose—would be a significant change to current practice.

But whatever the constitutional standard that one would generally apply to congressional investigations, surely Congress had the authority to investigate the Communist Party as both a criminal conspiracy and a threat to national security. Congress had at least as much right to investigate a suspected Communist criminal conspiracy as it had to investigate a more typical criminal conspiracy such as the mafia, or, for that matter, a domestic political organization engaged in both legal speech activities and many illegal activities, such as the Ku Klux Klan. And Congress had as much right to ask suspected Hollywood Communists about their ties to the Party as it had to ask Frank Sinatra about his ties to the mob (which it did in 1951).⁸⁹ The

⁸⁵ 357 U.S. 449 (1958).

⁸⁶ See MAYHEW, *supra* note 77, at 86. Mayhew contends that given that the Soviet Union controlled the Communist Party and that the party was involved in espionage, a criminal investigation by HUAC was justified. And under the circumstances, membership in the Party was enough to justify the government asking questions as part of a criminal investigation. *Id.*

⁸⁷ REDISH, *supra* note 1, at 41.

⁸⁸ *Id.* at 38.

⁸⁹ See Anthony Bruno, *A Hoodlum Complex*, COURT TV CRIMINAL LIBRARY,

Supreme Court reached the same conclusion in two cases in the early 1960s holding that national security concerns dictated that the Communist Party could be required to turn over its membership lists to the government.⁹⁰ That's not to say that Congress never abused its investigative power,⁹¹ or that it won't do so in the future. To paraphrase P.J. O'Rourke, giving politicians discretionary power is like giving whiskey and car keys to teenage boys.

B. Was the Blacklist Unconstitutional or Immoral?

The First Amendment only bans the government from punishing individuals for their political affiliations. Not only does the First Amendment not ban the private individuals from discrimination based on political ideology or affiliation, expressive associations have a First Amendment right to engage in such discrimination.⁹²

Redish argues that even business owners and businesses have a constitutional right to refuse to associate with someone whose views they despise. He contends that “a requirement that the *Jewish News* hire a member of the American Nazi Party—even to serve as janitor—or that a Jewish merchant could be prohibited from refusing to hire a Nazi as his assistant” would

http://www.crimelibrary.com/gangsters_outlaws/cops_others/frank_sinatra/1.html (last visited Feb. 2, 2006). It is true that the CPUSA, unlike the mafia, was a political association, and also engaged in legal political activity. But it is also true that the mafia owned lawful legitimate businesses, such as Las Vegas casinos. The fact that a criminal conspiracy also engages in legal, otherwise constitutionally protected activities doesn't prevent the government from investigating its illegal activities. Even the CPUSA's purely political activities had, in part, an underlying illegal purpose. Organizing as a political party, running candidates, etc., allowed the Party to attract recruits, the most enthusiastic and/or influential of whom would be recruited into the Party's secret cadre and asked to engage in espionage and potentially other illegal pro-Soviet activities.

⁹⁰ *Uphaus v. Wyman*, 360 U.S. 72, 77-81 (1959); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 90-104 (1961).

⁹¹ For a discussion of perceived abuses, see GEOFFREY R. STONE, *PERILOUS TIMES* 374-76 (2004).

⁹² *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

sufficiently harm cognitive interests that it would violate the First Amendment.⁹³ Thus, the First Amendment was no legal barrier to the blacklist,⁹⁴ unless one could make a persuasive case that it was a response to a threat, implicit or explicit, by the government.⁹⁵ Redish suggests that such a case would be very difficult to make in the absence of any evidence of direct threats by the government, and given overwhelming, organized, popular hostility to Communism and Communists.⁹⁶

There is, perhaps, a sound social norm that in many contexts people should ignore each

⁹³ REDISH, *supra* note 1, at 155. If he is right, then at least two American jurisdictions have unconstitutional antidiscrimination laws. The District of Columbia bans discrimination based on political affiliation, and Puerto Rico bans discrimination based on political beliefs. *Unlawful Discrimination in Employment Laws*, NAT'L CONFERENCE OF STATE LEGISLATORS, July 2004, <http://www.ncsl.org/programs/employ/empdisc.htm>.

Redish claims that the right he advocates would not give constitutional imprimatur to discrimination based on race. A restaurant owner with strong segregationist sympathies in the 1960s South would not be able to claim a right of nonassociation with blacks because the category of blacks is underinclusive of the category of individuals who supported integration. Redish uses the underinclusive argument in part to “pierce the veil” of non-cognitive discrimination which is connected only to “incidental” cognitive discrimination. Thus, non-cognitive discrimination against blacks is only incidentally cognitive discrimination against those who believe in integration. See REDISH, *supra* note 1, at 151-52.

However, it seems that restaurant owners could have gotten around this difficulty via a simple stratagem. It's likely true that few blacks in the South would have been willing, if asked, to swear that they opposed integration. Thus, under Redish's theory, it seems that a restaurant owner could have maintained segregation simply by asking all customers to sign a pledge that they opposed integration. This might have cost the owner a few white customers, but would have served the purpose of keeping the restaurant all white.

For that matter, if there is a general right not to associate with individuals with whom one disagrees vehemently, a white supremacist could refuse to hire any black for a managerial position, on the grounds that any black who would accept such a position is obviously against white supremacy, and should be boycotted. It's true that this would lead to the white supremacist applying an underinclusive standard, but he might respond that he is simply trying to keep his search costs to a minimum. The exercise of a constitutional right does not generally depend on one's exercising that right to one's maximum ability.

The fact that Redish's non-association theory might benefit segregationists does not mean that it is necessarily wrong. However, the downside of his perspective must be considered along with its upside.

⁹⁴ As Rand wrote, “[t]he damage which the 10 claim to suffer in this case is a private damage, not a legal one, a damage which consists of the refusal of private citizens to deal with a Communist, if they learn that he is a Communist.” MAYHEW, *supra* note 77, at 89.

⁹⁵ Redish acknowledges that “[t]o the extent it could be conclusively established that the blacklist was, in fact, solely or predominantly the result of governmental coercion, my conclusions about the blacklist would of course have to change.” REDISH, *supra* note 1, at 162. Similarly, it is perfectly consistent with the First Amendment for a private business or school to ban “hate speech” on its premises. However, if the origin of the ban lay in fear of liability for permitting an illegal “hostile environment,” then the First Amendment is clearly implicated. See BERNSTEIN, *supra* note 49, at 23-34, 59-72.

other's political beliefs, even when they vehemently disagree with each other. Few Americans would prefer living in a society where individuals routinely refuse to patronize or associate with Republicans or Democrats. Nevertheless, members of a free society are entitled to decide that some political views are so beyond the pale that the holders of those views should be treated as moral pariahs. Not everyone will exercise this power responsibly, but the blacklist of Hollywood Communists was hardly an example of petulance.

When the blacklist was started, Joseph Stalin, one of the great mass murderers in human history, controlled the Soviet Union, a totalitarian, repressive, imperialist nation that was involved in a Cold War with the United States. As we have seen, hardcore CPUSA members were as a rule loyal to this dictatorship and not the United States,⁹⁷ and screenwriters were obligated to try to use their positions to promote Communism.⁹⁸ The studios and the public deserve praise, not blame, for refusing to interact with such individuals. To the (relatively limited)⁹⁹ extent abuses occurred, and non-Communist "progressives" or other innocent parties were caught up in the blacklist for venal or other reasons, that is certainly unfortunate, and those responsible for such abuse deserve condemnation.

But the fact remains that the most of those blacklisted were at least as morally complicit

⁹⁶ Ellen Schrecker, however, suggests that the government was far more involved in anti-Communist blacklists than Redish seems to acknowledge. Schrecker, *supra* note 16.

⁹⁷ Again, this refers to longstanding, committed members of the CPUSA, not individuals who briefly passed through the movement, and could avoid or be taken off the blacklist by expressing their more recent sentiments.

⁹⁸ Even mere dissent from this perspective was punishable. Screenwriter Albert Maltz wrote an article in 1946 attacking the Party's view that art is merely a weapon in the class struggle. Leading figures in the Hollywood Left, including two future members of the Hollywood Ten, as well as major East Coast Party figures denounced him and harassed him until he recanted. See Edward Dmytryk, *Odd Man Out: A Memoir of the Hollywood Ten* 22 (1996).

⁹⁹ Contrary to the impression left by movies like *The Front*, even Schrecker acknowledges that "most of the men and women who lost their jobs or were otherwise victimized were not apolitical folks who had somehow gotten on the wrong mailing lists or signed the wrong petitions. . . . Whether or not they *should* have been victimized, they

in Stalinist crimes¹⁰⁰ as a typical American Nazi of the 1930s and 40s was complicit in Nazi crimes. Communist screenwriters, in particular, “defended the Stalinist regime, accepted the Comintern’s policies and about-faces and criticized enemies and allies alike with infuriating self-righteousness screen artist reds became apologists for crimes of monstrous dimensions. ... film Reds in particular never displayed any independence of mind or organization vis-a-vis the Comintern and the Soviet Union.”¹⁰¹ Nor was the screenwriters’ Communist activism irrelevant to their jobs, as they actively sought to maximize Communist and pro-Soviet sentiment in films, and minimize the opposite. Screenwriter and leading Communist John Howard Lawson urged his comrades to “get five minutes of Party doctrine into every film, and to place such moments in expensive scenes so that they would not be cut by the producer.”¹⁰²

The Hollywood Ten, portrayed so often as innocent victims and martyrs,¹⁰³ were all Stalinist members of the CPUSA. As Ayn Rand wrote: “Should the Hollywood 10 suffer unpopularity or loss of jobs as a result of being Communists? They most certainly should -- so long as the rest of us, who give them jobs or box office support, would not want to aid Communists or be accessories to the spread of communism.”¹⁰⁴

certainly were not misidentified.” SCHRECKER, *supra* note 19, at xii.

¹⁰⁰ According to Ronald Radosh, co-author of *Red Star Over Hollywood: The Film Colony's Long Romance With The Left* (2005), and an expert on American Communism, not only were all of the Hollywood Ten members of the CPUSA at the time they were blacklisted, so were approximately 98 per cent of all of the Hollywood blacklist’s targets. Email from Ronald Radosh to David Bernstein, Feb. 7, 2006.

¹⁰¹ LARRY CEPLAIR & STEVEN ENGLUND, *THE INQUISITION IN HOLLYWOOD* 239, 241 (2003).

¹⁰² REDISH, *supra* note 1, at 158-59.

¹⁰³ See, e.g., Evan Gahr, *New Facility, Old Politics: The DCJCC's Blacklist Dishonorees*, JEWISH WORLD REV., Jan. 14, 1998, <http://www.jewishworldreview.com/010198/blacklist1.html> (reporting the DCJCC’s “celebration” of the Hollywood Ten). The reviewer uses this particular example because he recalls receiving promotional literature for this exhibit and being appalled by it. See generally PAUL BUHLE & DAVE WAGNER, *HIDE IN PLAIN SIGHT: THE HOLLYWOOD BLACKLISTEES IN FILM AND TELEVISION, 1950-2002* (2003) (treating the blacklistees as heroes).

¹⁰⁴ MAYHEW, *supra* note 77, at 89. Ann Coulter recently put it more colorfully: “To be sure, the Hollywood blacklisting was truly heart-wrenching. While people were being forced to eat their shoes in the Ukraine, only a heart of stone could fail to be moved by the stories of [Communist] Hollywood screenwriters who couldn’t sell a

III. Employment of Public School Teachers

During the McCarthy era, Communists were excluded from teaching positions in many public school systems by the requirement that all employees sign “loyalty oaths” swearing allegiance to the United States.¹⁰⁵ Liberal scholars have “universally condemned the use of loyalty oaths” as a violation of freedom of conscience.¹⁰⁶

Redish, however, argues that a more thorough understanding of First Amendment theory shows that excluding Communists from some teaching positions is defensible, perhaps even desirable. An important background assumption is that the very existence of public schools means that the government will to some degree be inculcating values into minor students. Simply by choosing curriculum, textbooks, and engaging in other functions inherent in the education process, the government will inevitably be making value-laden choices that will dictate what students learn about various social, moral, and political issues.

Some scholars, Redish points out, would try to avoid such choices by limiting the government’s role in morals education to “values clarification.”¹⁰⁷ Redish suggests that this would be a value-neutral but undesirable state of affairs. However, a value-free public school education would not really be “neutral” in any meaningful way, as it is actually impossible not to make at least an implicit choice among values. First, failing to make a choice among values to be taught during the school day is a value judgment in itself. This value judgment may, for

Twilight Zone episode for up to three years.” COULTER, *supra* note 22, at 76.

¹⁰⁵ REDISH, *supra* note 1, at 173-74.

¹⁰⁶ *Id.* at 176.

example, reflect a belief in the value of skepticism and critical thinking, or a belief that having schoolchildren spend their days in a ‘values vacuum’ will not substantially affect their moral development.

Second, and related, the very existence of public education crowds out private schools to which the vast majority of parents would otherwise send their children. Many of these parents would prefer that their children receive values-laden education, and, given an educational free market, would send their children to schools (including religious schools) that explicitly promoted certain values. The absence of values education in public school thus reduces the amount of values inculcated in students via primary education relative to a non-statist system.

Given the inevitability of some level of values education in public schools, Redish concludes that the appropriate model is one that allows the government to inculcate values as part of the inherent educational function of establishing curricula for schools. However, the government should be forbidden from more directly and overtly engaging in values inculcation through “school-sponsored assemblies, bulletin boards, distribution of advocacy material, and use of the Pledge of Allegiance.”¹⁰⁸

Redish acknowledges, however, that “at most the anti-indoctrination model could prevent fifteen to twenty percent of the improper values inculcation that occurs within America’s school systems.”¹⁰⁹ He hopes, but provides no evidence, that adoption of a formal constitutional anti-indoctrination model would lead to more citizen engagement to prevent more subtle forms of indoctrination.

¹⁰⁷ *Id.* at 195-96.

¹⁰⁸ *Id.* at 217-18.

¹⁰⁹ *Id.* at 218.

Whatever model public schools choose to follow with regard to values inculcation, the government acting as employer has the right to ensure that its employees will follow the assigned curriculum. Redish therefore concludes that to the extent that public belief, as reflected in public school curricula, during the McCarthy era “included a strong belief in the moral and economic value of capitalism,” it was appropriate for school authorities “to exclude teachers who did not share such values, including communists,” but only if they were teaching relevant courses, such as history, economics, or civics.¹¹⁰ Such reasoning today means that Nazi and Klan members “be excluded from a race relations or social studies classroom.”¹¹¹ On the other hand, given that neither physics nor math changes depending on one’s ideology,¹¹² excluding Communists from teaching such classes in the 1950s was not justified, nor would there be any justification for excluding Nazis or Klansmen from teaching such classes today.¹¹³

It is hard to disagree with Redish’s conclusion that since public schools will inevitably inculcate values, the government has a right to ensure that the teachers it employs are “with the program.”¹¹⁴ But perhaps one lesson of the McCarthy era controversy over employment of Communist public school teachers is that government-run schools create inherent First Amendment problems.

Any solution that leaves the government in charge of dictating curriculum, much less directly teaching values, seems second-best from a First Amendment perspective given that, as

¹¹⁰ *Id.* at 177. However, it is not at all clear that states that excluded Communist teachers did so for the reasons Redish suggests, as opposed to acting on mere viewpoint-based hostility to Communism.

¹¹¹ *Id.*

¹¹² *Id.* at 32.

¹¹³ By contrast, New York authorities “took the view that although membership in the Communist Party was legal, the CPUSA espoused an antidemocratic ideology, thus membership was incompatible with the responsibilities of a[n] teacher in a public institution.” HAYNES, *supra* note 32, at 178.

Redish acknowledges, “the public school educational system is an authoritarian operation.”¹¹⁵ The government’s subsidy of certain points of views by teaching them in public schools serves as the equivalent of an implicit tax on competing perspectives, a method for government to get around the prohibition on directly taxing ideas that the government wishes to discourage. To preserve a fair, non-statist, marketplace of ideas, the government, if it must fund education, should simply provide vouchers and let parents decide which values they wish their children to be exposed to.¹¹⁶ Redish argues that “there is little doubt that a democratic society cannot function effectively absent an effective system of public education,”¹¹⁷ but he does not explain why such a system must be run by, as opposed to simply funded by, the government.

If a voucher system had been in place in the 1950s, the question of Communist teachers would have been decided by parental preferences; some, probably most, schools would have excluded Communist teachers from some or all subject areas; other schools would have permitted Communist teachers; and a small minority of schools, offering a far-left curriculum, would have actually *preferred* Communist teachers. The end result: a system that would have both assured the ability of the majority of parents to have their children taught their values in schools, and also protected the rights of Communists to find employment in schools that welcomed their values.

Of course, courts in the 1950s (and beyond) were not about to rule that the existence of

¹¹⁴ See generally *Wales v. Bd. of Educ.*, 120 F.3d 82 (7th Cir. 1997) (holding that a public school teacher may be fired for opposing a new curriculum).

¹¹⁵ REDISH, *supra* note 1, at 18.

¹¹⁶ Of course, such a system, while providing parents with the opportunity to choose schools that try to inculcate particular values, might severely limit the diversity of views children are exposed to. But in this Reviewer’s opinion, the basic purpose of the First Amendment is to prevent governmental actors from entrenching themselves by restricting or manipulating the speech marketplace in their favor, not to expose everyone to the broadest possible range of opinions. See BERNSTEIN, *supra* note 49, at 11-22.

public schools violated the First Amendment. The question therefore remains as to whether Redish is correct that it did not violate the First Amendment for a school to refuse to employ Communists, when their dedication to Communist ideology *might have* interfered with their ability and willingness to follow a prescribed curriculum praising the American political and economic system.

This debate echoes one that arose during the McCarthy era within the anti-Communist left. Sidney Hook argued that given that CPUSA members were obligated to follow Party dictates and promote Party positions, a teacher had the burden to prove that he did not let his membership in the party interfere with his role in the classroom.¹¹⁸ Arthur Schlesinger, by contrast, believed that the government could not legitimately assume that all Party members would toe the party line at the expense of their job obligations. He argued that classroom performance should be judged independently and should be the only basis for judging one's suitability for employment.¹¹⁹

A hypothetical should help clarify the relevant freedom of expression issues. Assume that it is the 1950s, and a public school has adopted a social studies curriculum that required teachers to teach the students that capitalism, tempered by the social welfare state, creates prosperity and happiness. Red Pinkelwicz, a current fifth-grade social studies teacher and member of the CPUSA, is scheduled to teach the class. The school could reasonably believe that Pinkelwicz's Communist beliefs would make him, in context, a relatively poor teacher of the

¹¹⁷ REDISH, *supra* note 1, at 18.

¹¹⁸ SIDNEY HOOK, HERESY, YES—CONSPIRACY, NO (1953).

¹¹⁹ Ronald Radosh, *The Legacy of the Anti-Communist Liberal Intellectuals*, 67 PARTISAN REV. 550, 560 (2000). Irving Kristol, meanwhile, opposed loyalty oaths on practical grounds. A Communist would lie and sign them, he suggested, while honest civil libertarians might refuse and be punished. *Id.* at 563.

assigned curriculum, and one who, for that matter, might intentionally try to undermine the curriculum.¹²⁰

May the school fire Pinkelwicz, and replace him with someone more likely to effectively convey the assigned material? This is not an easy question, as the government is entitled to hire the best teachers available and the First Amendment does not bar the government from using an individual's beliefs as evidence relevant to non-speech issues such as lack of competence for particular employment.

Schlesinger suggests that the school should be required to retain Pinkelwicz, but may monitor his classroom teaching to ensure that he is "following the program." This seems like sound policy, as the implications of allowing school authorities to choose teachers based on how their personal beliefs may effect their teaching are too troubling: May libertarians be forbidden from teaching history courses, because they *may* be tempted to undermine the statist assumptions so often embedded in public school social studies and history curricula? Can fundamentalist Christians and Jews be prohibited from teaching biology, on the grounds that they *may* try to undermine the teaching of evolution? Can committed Catholics be prohibited from teaching "health" classes on the grounds that the *may* try to avoid discussing contraception and abortion,

¹²⁰ The case of loyalty oaths required of public university professors involves somewhat different considerations. To the extent they were simply meant to punish individuals for their ideological commitments, they were constitutionally illegitimate. Universities, however, did have a sound rationale for refusing to employ CPUSA members, at least in fields where there was an official Communist view on contested matters. Communist professors were prohibited by the Party from acting as free agents in their research and teaching, and were instead obligated to follow and promote the "party line." A university, including a public university, could reasonably conclude that CPUSA membership was inconsistent with the universities' mission of pursuing knowledge and truth, and/or that it did not wish its funds used to spread Communist propaganda. *See* HOOK, *supra* note 116. On the other hand, not everyone who belongs to a particular organization always follows its dictates. For example, many proud Catholics disobey the Church's teachings on all sorts of issues. Thus, one can also argue that before dismissing or refusing to hire a Communist, a state university was obligated to either show that the Communist Party never, or almost never, tolerated academics who failed to follow the Party line, or, failing that, undertake an individualized determination of whether the Communist in question in fact believed that his work must follow the

as required by the curriculum?¹²¹ Can conservative Christians be banned from teaching in general, because their views on the morality of homosexuality *may* lead them to discriminate against gay students?¹²²

The rationale for a presumption of innocence for teachers is not simply a matter of “individual rights.” If public schools could exclude teachers based on their beliefs and affiliations, the end result would likely be that school boards would establish curriculum-related employment criteria that would just-so-happen to require that the boards’ political and ideological allies would be eligible for employment, and their enemies would not. This, to say the least, would not be a desirable state of affairs.

Even if one agrees with the above analysis, the question remains as to whether the “innocent until proven guilty” policy is a constitutional requirement, or simply a much more attractive policy choice than giving the government acting as public school employer wide discretion to hire and fire based on an individual’s political views. Reasonable minds can disagree on this, and Redish makes a plausible case that the government has wide constitutional discretion in its hiring policies.

On the other hand, even if one believes that “innocent until proven guilty” in the context of teacher ideology *is* a constitutional requirement, the government acting as employer does not *always* need to wait until an employee’s affiliations and beliefs affect job performance before it

Party line.

¹²¹ This is not a moot concern. My wife, who was educated in Israel, had a religious Jewish health teacher in public school who simply skipped the sex education part of the curriculum.

¹²² The Canadian teachers’ accreditation authority attempted to refuse accreditation to graduates of Trinity Western University (TWU), a private Christian institution in British Columbia, claiming that they are too bigoted to become teachers because they agree as students to abide by traditional Christian teachings about sex by refraining from “premarital sex, adultery, [and] homosexual behavior.” The Canadian Supreme Court ordered the invalidation of the authority’s policy. *B.C. Coll. of Teachers v. Trinity West. Univ.*, [2001] S.C.R. 772.

can take them into account when making employment decisions. As Redish argues, for example, surely the federal government acted properly in excluding CPUSA members from sensitive government jobs.¹²³ And it's hard to gainsay the decision of a school board to fire a teacher who was a known member of the North American Man Boy Love Association, both because the revelation of his membership prevented him from being an effective teacher, and because of the potential for tort liability if the teacher acted on his pedophilic proclivities.¹²⁴

Consider, too, the case of New York City police officer Joseph Locurto.¹²⁵ He was fired for his off-duty participation in a racist parade float. The ACLU, which represented him, argued that the government cannot punish its employees for expressing their views, however repugnant, on their own time. Redish seems to limit his own analysis of government power to hire based on individuals' ideology to either national security concerns or teachers (or others) who are expected to *express certain views* advocated by the government, and not simply behave a certain way, and he might very well agree with the ACLU's position in this case.

However, the counter-argument is that the government may prohibit the employment of known racists for police employment, not to punish them for their views—which would violate the First Amendment—but because those views simply render them unqualified for the job. Few would argue with the proposition that it is important that African-American victims of crimes and criminal suspects think that police officers treat them fairly. Hiring or retaining police officers publicly known to be racist could undermine minority confidence in their departments,

¹²³ REDISH, *supra* note 1, at 29. Redish adds, however, that the loyalty security program was unconstitutionally overbroad. *Id.* at 34.

¹²⁴ See *Melzer v. Bd. of Educ.*, 196 F. Supp. 2d 229 (E.D.N.Y. 2002).

¹²⁵ For the factual background, see David E. Bernstein, *Firing Racist Police Officers is Justified*, CATO DAILY COMMENT., July 20, 2003, <http://www.cato.org/dailys/07-20-03.html>.

especially given the history of police tension with the African-American community. Publicly expressing one's contempt for minorities, then, arguably renders one unqualified for the job. The same argument would apply to public school teachers who publicly expressed racist beliefs, and would be teaching students of other races.

This perspective creates the obvious difficulty of determining who gets to decide whether an individual's views are sufficiently "racist" to disqualify him from teaching or police work, and how this would be decided without the government violating the First Amendment by establishing a semi-official standard of political correctness.¹²⁶ An additional difficulty presents itself if the employee in question, despite his avowed racist views, had interacted with members of other races for years, without allowing his views to interfere with his job. This was apparently the case with Mr. Locurto, who had worked in a largely black neighborhood for years without complaint, and, indeed, with a sterling record. Such a record would undermine the government's case if its argument was based not on public perception, but rather on the claim that disciplinary action was justified because racist individuals are more likely than their peers to treat minorities unfairly on the job.¹²⁷

¹²⁶ See *B.C. Coll. of Teachers*, [2001] S.C.R. 772 (prohibiting accreditation body from enforcing a teaching ban on graduates of a Christian college who were allegedly predisposed to discriminate against homosexuals).

¹²⁷ Locurto ultimately won his case, in part because the court found that any "perception" claim was merely a pretext for a politically motivated dismissal. Mayor Rudolph Giuliani had sworn to fire *any* City employee who participated in the racist parade float. This was an incredibly constitutionally overbroad declaration, as there is no plausible relationship between racism, and, for example, one's ability to be an effective pothole-filler. In contrast to the analysis set forth above, however, the court added that "[e]ven if plaintiffs' terminations arose out of a genuine concern for potential disruption, the Court finds that defendants' concern was unreasonable and, in any event, insufficient, as a matter of law, to outweigh plaintiffs' constitutionally protected speech rights."

Many cases, moreover, will present ambiguities concerning both whether a government employee's speech can truly be said to affect his job performance, and whether the motives of the government in punishing the speech involve improving public service or are simply an attempt to suppress ideas the government doesn't want expressed. As Judge Frank Easterbrook of the United States Court of Appeals for the Seventh Circuit has written:

Speech has multiple objectives. One statement can address issues of both public and private concern. An employer may respond to either or both of these facets of the speech. *Pickering*

In short, the issue of whether the government should have excluded Communists from teaching certain classes raises a host of troubling issues regarding free speech and the rights of government employees. These issues have often been addressed via the so-called *Pickering* test, but the tensions between the power of government acting as employer to hire the “best” employees and the potential for this power to stifle freedom of expression has not been resolved, and may to a certain extent be unresolvable. Redish advocates giving the government more discretion in these matters than many civil libertarians would likely find comfortable, especially because he apparently thinks it not just constitutional but wise policy to, for example, exclude individuals with racist views from teaching race-related classes. But these are extremely difficult constitutional and practical issues, and Redish does a great service in showing that even the oft-condemned treatment of Communist teachers during the McCarthy era is not nearly as clear-cut as the existing portrayals suggest.

Conclusion

The Logic of Persecution is an extremely important work of First Amendment theory.

expresses optimism that courts can separate one kind of speech (and one kind of response) from the other at low cost, and then permit the public employer to react when speech goes “too far” (or becomes “too disruptive”) while protecting speech that has net public benefits. How this is to be done *Pickering* does not say. When both speaker and employer have (or appear to have) mixed motives, the task is intractable. And the cost can be substantial—by which we mean not the monetary costs litigants bear themselves, or the time the judicial system must divert from serving the needs of other litigants, or the risk of error, but the opportunity costs that will be borne by the public when public servants seek to avoid litigation.

Wales v. Bd. of Educ., 120 F.3d 82, 84-85 (7th Cir. 1997).

Space considerations prevent this Review from discussing all of Redish's insights, but the reader's attention is called, for example, to his elegant demolition in chapter 2 of the theory that the First Amendment should be interpreted narrowly to protect freedom of speech from recurring pathological censorious periods. He shows that there is no evidence, and little reason to believe, that a "weak" First Amendment will hold up better in times of crisis than a "strong" one.

The Logic of Persecution is also a valuable contribution to the historiography of the so-called McCarthy era, adding important insights to the historical debate over that period's Communism and anti-Communism. First Amendment scholar Eugene Volokh has noted three exceedingly common errors in such discussions: "A tendency to overextend constitutional norms from government action to private action; a tendency to overlabel action as McCarthyism or close to it; and a tendency to miss the real threat that Communism posed in its heyday."¹²⁸

Redish, to his great credit, makes none of these errors. He has no illusions about the nature of Communism and its supporters, and takes great care to distinguish potentially unconstitutional government action from private action *protected* by the First Amendment. He provides an extremely well-balanced, comprehensive review of the freedom of expression issues raised in the anti-Communist actions of the 1940s and 1950s. *The Logic of Persecution* will undoubtedly be the starting point for those looking for a scholarly legal perspective on such issues.

The Logic of Persecution will also likely have an impact on the debate over anti-Communism in the 1950s, though perhaps not as great an impact as Redish might hope. Redish's reminder of the grave freedom of expression issues raised by the Smith Act

¹²⁸ Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/> (Sept. 14, 2005, 13:13 EST).

prosecutions may temper what some see as the triumphalism of the traditionalists, and a growing tendency during the “War on Terror” for some elements of the public to perhaps be overly nostalgic for the anti-Communism of the McCarthy era.¹²⁹ As discussed previously,¹³⁰ traditionalist historians are not likely to conclude that the unconstitutionality of the Smith Act prosecutions resolves the question of whether they should now be denounced. Nevertheless, at best, the Smith Act prosecutions, like other legally and ethically dubious government activities during the McCarthy era, were an evil made necessary by Cold War exigency—not something to be celebrated, and certainly, at least in the absence of dire emergency, not something to be emulated.

Meanwhile, revisionist historians, if they give *The Logic of Persecution* the attention it deserves, may retreat somewhat from simple-minded anti-anti-Communism. This reviewer suspects, however, that many revisionist historians will cling to their condemnations of all things anti-Communist, and not because they are unaware of the public-private distinction that Redish so meticulously delineates. Rather, they have a vested ideological (and scholarly) interest in demonizing anti-Communism and whitewashing the Communists. First Amendment theory, no matter how well-done, is not going to persuade the sort of people who argue that the work of traditionalist historians constitutes nothing more than an attempt to make communism in the 1940s and 1950s “an evil caricature of itself,” (as if Stalinism were not in fact evil), and who see attempts to complete and correct the historical record of American Communism as nothing more than a plot to “discredit the left-liberal project today.”¹³¹

¹²⁹ E.g., COULTER, *supra* note 22.

¹³⁰ See *supra* notes 38 to 44 and accompanying text.

¹³¹ Navasky, *supra* note 3, at 36. Similarly, Paul Buhle says of criticism of his work by Haynes and Klehr: “First let

As Haynes and Klehr have shown in excruciating detail, many of the revisionists who have consistently sympathized with the Communists remain “in denial.”¹³² The Comintern and Venona documents have not modified their sympathies, nor tempered their denunciation of anti-Communism. If revelations that the CPUSA was controlled from Moscow; that it facilitated espionage against the United States; that its members unhesitatingly apologized for Stalin and his crimes, and that they followed Party orders in their professional and personal lives, have not been sufficient to fundamentally change these historians’ interpretation of the period, what hope does a book on the First Amendment have?

me note that most of the political attacks from the Right are actually intended, like the repressive atmosphere generally, not to threaten me but to intimidate graduate students and young professors who might speak their minds, or join protest movements.” Dale McCartney, *Labor History: Dale McCartney Interviews Paul Buhle*, ZNET, July 20, 2005, <http://www.zmag.org/content/showarticle.cfm?ItemID=8342>. If that’s not sufficiently over-the-top, Buhle adds: “There’s another element in the attacks upon my writings: not Red Baiting but Goy-Bashing. The notion that a Gentile—even one who works in Yiddish and spends much time with Jewish audiences—could actually understand Jewish culture is annoying if not threatening.” *Id.*

¹³² HAYNES & KLEHR, *supra* note 11.