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Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger

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Since the early days of the twentieth century, theorists of free speech have grappled with the problem of determining how much protection the first amendment gives to speech which advocates unlawful conduct. On the one hand, speech urging criminal conduct appears to be of limited social value and may well lead to significant social harm. On the other hand, regulation of unlawful advocacy has often been employed as a means of suppressing unpopular social ideas and political groups, and attaching criminal penalties to such speech could substantially impair the flow of free and open discourse. In an effort to reconcile these competing concerns, various members of the Supreme Court have at different times suggested a number of constitutional tests. The test that has received the most attention from Justices and scholars is the so-called "clear and present danger" test, originated by Justice Holmes in his opinion for the Court in *Schenck v. United States.*[1] This first incarnation of the test provided that speech may be regulated if "the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[2]

The clear and present danger test has, over the years, had its artic-

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1. 249 U.S. 47 (1919).

2. *Id.* at 52.

ulate advocates.[3] On the whole, however, both judicial[4] and scholarly[5] commentary has been quite negative. Virulent criticism has come from those who believe the test is insufficiently protective of free speech interests, and from others who find that the test unduly limits legislative ability to protect society from the harm that unlawful advocacy may cause.[6]

This Article has two purposes. First, it will reexamine the theoretical issues inherent in the broad debate over whether unlawful advocacy should be afforded any level of constitutional protection. Second, it will scrutinize the viability of the clear and present danger test.[7]

Part I of the Article deals with the fundamental issues surrounding first amendment protection of advocacy of unlawful conduct. It examines and criticizes several of the arguments for extending constitutional protection to potentially harmful speech. Part I then discusses the impact on free speech of a total exclusion of such advocacy from the scope of the first amendment, and concludes that such an exclusion is constitutionally impermissible.

Part II of the Article assumes, as the Supreme Court has consistently done, that there properly exists at least some level of constitutional protection for at least some forms of unlawful advocacy. Part II then examines in detail the history, structure and theory of the clear and present danger test. After resolving most of the ambiguities in the test's structure in favor of a protectionist approach and suggesting a reformulation of the test to reflect this, the Article considers and at-

3. Perhaps the leading academic advocate of the test is Professor Chafee. *See generally* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941).

4. *See* Dennis v. United States, 341 U.S. 494, 517-56 (1951) (Frankfurter, J., concurring); *id.* at 567-70 (Jackson, J., concurring). Judge Learned Hand also expressed criticism of the test. *See* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

5. *See, e.g.*, T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 51-53 (1966); P. FREUND, ON UNDERSTANDING THE SUPREME COURT 27-28 (1951); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Kalven, *Professor Ernst Freund and Debs v. United States*, 40 U. CHI. L. REV. 235, 236 (1973). As Professor Strong wrote, "there are few who would grieve at [the test's] total demise." Strong, *Fifty Years of "Clear and Present Danger": From* Schenck *to* Brandenburg *— and Beyond*, 1969 SUP. CT. REV. 41.

6. *See infra* Part II, Section C, Subsections 2-5.

7. The current status of the doctrine is the subject of debate. In the mid- and late 1960's, commentators suggested that the test was all but dead. *See* Kalven, *"Uninhibited, Robust, and Wide-Open" — A Note on Free Speech and the Warren Court*, 67 MICH. L. REV. 289, 297 (1968); McCloskey, *Reflections on the Warren Court*, 51 VA. L. REV. 1229, 1236 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 213-14. However, Professor Shiffrin has stated that "[i]t is now clear that a variant of the clear and present danger test is solidly entrenched in a portion of the Court's first amendment theory." Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. REV. 915, 916 (1978) (footnote omitted).

tempts to refute the criticisms which have been levelled over the years at clear and present danger. The consideration of the criticisms includes a demonstration of the inferiority of alternative ways of identifying the circumstances under which the free speech clause protects the advocate of unlawful conduct from criminal sanctions.

The Article's ultimate conclusion is that an examination of the test's scope and structure, as well as a comparative investigation of the alternative methods of determining the appropriate degree of protection for unlawful advocacy, reveal that, to analogize to Winston Churchill's famous comment about democracy,[8] the clear and present danger test is the worst method for determining the degree of constitutional protection of unlawful advocacy, except for all the other ways. The point, in other words, is that while the clear and present danger test is unfortunately subject to potential abuse in its application, no other suggested means of resolving the conflict inherent in regulating unlawful advocacy does a better job. Indeed, detailed examination of each of these alternatives establishes that they are either demonstrably inferior to clear and present danger, or represent merely minor variations or modifications of the clear and present danger test itself.

I
THE PROPER EXTENT OF CONSTITUTIONAL PROTECTION FOR ADVOCACY OF UNLAWFUL CONDUCT

It is tempting to argue that advocacy of unlawful conduct—at least in its direct form—is so inherently harmful and so lacking in traditional first amendment values that it is never worthy of constitutional protection. Indeed, respected scholars have so urged.[9] There can be little doubt that such advocacy may lead to the commission of criminal acts. Even if in a particular instance the advocacy does not cause the commission of a punishable offense, why should society take the risk that inheres in allowing advocacy of acts it has deemed undesirable?

Free speech scholars have given several answers to this question. First, one might rely on the traditionally accepted "marketplace of ideas" theory,[10] which posits that even "false" speech should be protected as part of the societal discourse, because it will serve to accentu-

8. "No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time." (Speech to the House of Commous, Nov. 11, 1947) (as quoted in THE OXFORD DICTIONARY OF QUOTATIONS 150 (3d ed. 1979)).

9. *See, e.g.*, Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y.) (L. Hand, J.), *rev'd*, 246 F. 24 (2d Cir. 1917), discussed *infra* notes 120-30 and accompanying text; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 31 (1972).

10. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

ate the superiority of speech that contains truth.[11] There are, however, analytical flaws in this intuitively appealing argument. First, the basic assumption that exposure to the so-called "false" speech will help society to discover and appreciate "true" speech is empirically dubious.[12] There may be inadequate time or opportunity for response, the "false" speech may be more persuasively phrased, or the audience may simply not be sufficiently sophisticated or sufficiently interested to ascertain the difference. Second, there is a logical flaw in relying upon the "marketplace" model, because the assumption of that model is that the listeners will be afforded the opportunity to make their choice in the marketplace. Yet in the case of unlawful advocacy, by hypothesis the listeners are not allowed to make their own choice: if they heed the advice of the speaker and commit the crime, they will of course be subject to prosecution. If unlawful advocacy is to receive constitutional protection, then, it must be for some other reason.

One arguable alternative is the "safety valve" rationale for free speech, which posits that the first amendment helps to achieve a stable society by providing the cathartic opportunity to those who are displeased with society.[13] If people were not allowed to consider or discuss their beliefs that the current laws of society should be disregarded, their dissatisfaction would increase and would be further exacerbated by suppression. Open revolt could be the result of such pressure. This argument, however, is flawed as well.

If avoiding societal instability is the major reason for protecting free speech, it is by no means clear, either empirically or intuitively, that the best method of achieving that goal is protection of free and open discussion, including direct advocacy of unlawful conduct. A society could easily conclude that the immediately visible stability achieved by the suppression of unlawful advocacy is far preferable to whatever speculative future stability might be engendered by its protection. Such a judgment would be difficult to refute, as long as the only value of free speech under consideration is the achievement of societal stability. The argument that stability is a major goal of the free speech clause, then, backfires: if stability is paramount, the first amendment could be construed to give no protection to unlawful advocacy.

A third rationale for protecting the freedom of speech is advanced by theorists who premise their concept of free speech to be exclusively the facilitation of the political process. These theorists could reason that, at least when the crime urged deals with the overthrow of govern-

11. *See* J. MILL, ON LIBERTY 34-35 (1947 ed.).

12. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1130 (1979).

13. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970); Shiffrin, *supra* note 7, at 949.

ment, unlawful advocacy is deserving of protection. Indeed, Alexander Meiklejohn believed such advocacy deserved what he called "absolute" protection, which in reality meant only that the advocacy could never be regulated because of its dangerousness.[14] The argument here is that, although members of society will be punished if they act upon another's exhortation to overthrow the government, those who urge such action will usually have one or more reasons for so urging, and the political process may benefit from learning the nature of their grievances.[15] But such an argument appears strained, for it is difficult to see why aggrieved speakers cannot complain of social ills without directly advocating illegal acts. Denying first amendment protection to the unlawful advocacy need not stifle the expression of grievances.

In light of the foregoing analysis, it is doubtful that a distinction should be drawn in the level of constitutional protection given to so-called "ideological" advocacy and the non-ideological variety, as Professor Greenawalt has suggested.[16] He argues that non-ideological illegal advocacy is "far removed from what the framers had in mind when they prized expression"[17] and that though "the urging to commit the crime may be an outlet of self-expression for A . . . if he may not enjoy the 'outlet' of committing the act himself, no substantial reason exists for assuring his right to enjoy the outlet of deliberately trying to convince someone else to commit the act."[18] But these arguments, even if accepted, cannot be logically limited to excluding protection for non-ideological illegal advocacy. Initially, reliance on the framers' intent is questionable, since no one has a definitive conception of what the framers actually intended,[19] and to the extent it is thought that an understanding of their goals does exist, it appears that it was such a narrow conception that it is unlikely it would have protected ideologically motivated illegal advocacy, either.[20] As to Professor Greenawalt's second point, it would seem that the exact same logic could be applied to ideological advocacy: if an individual does not have a right actually to overthrow the government, why should he have the right to urge others

14. *See* A. MEIKLEJOHN, POLITICAL FREEDOM 26-27 (1965). Meiklejohn's "absolutism" is very different from a common understanding of the term. *See infra* text accompanying notes 138-50.

15. This theory differs from the "marketplace of ideas" model in that the latter sees unlawful advocacy as good only insofar as it invites refutation. The political process idea, on the other hand, sees the unlawful advocacy itself as a necessary part of the democratic process preserved by the Constitution.

16. Greenawalt, *Speech and Crime*, 1980 AM. BAR FOUND. RESEARCH J. 645, 748.

17. *Id.*

18. *Id.* at 749.

19. *See* Bork, *supra* note 9, at 22.

20. *See* L. LEVY, LEGACY OF SUPPRESSION 176-248 (1960).

to do so? Professor Greenawalt's logic, then, proves considerably more than he intended to prove.

The greatest difficulty in drawing this dichotomy is the impossibility of obtaining a consensus definition on the meaning of "ideological." The problem is that one person's "freedom fighter" is another person's criminal. Such a distinction would also invite manufactured ideological motivation to mask simple criminal intent. True, it is difficult to engender a significant degree of enthusiasm for protecting one man's urging another to commit murder for pay. But "non-ideological" crimes may also include such relatively innocuous activities as nudity or the smoking of marijuana. Moreover, it is no more intuitively attractive to protect an urging to "rid" society of Blacks, Jews, or some other group because of their allegedly harmful effect on society, or to protect an urging of the bombing of innocent people at an airport or restaurant to protest governmental oppression. Yet a dichotomy premised on the basis of ideology would logically lead to providing greater protection to such expression.

None of these theories, then, justifies protecting unlawful advocacy. The marketplace rationale, the stability rationale, and the political process rationale are all insufficient to explain such protection, nor does it seem that ideological content should make a difference. It still remains unclear, therefore, exactly why unlawful advocacy should come within the first amendment's protection.

What is left is the value inherent in allowing individuals to think and discuss freely. Such freedom is valuable because it enables individuals to develop their mental faculties to the fullest. To be sure, if in a specific instance such speech presents danger of serious harm we may conclude that the value of such free and open discussion will be forced to give way. But that is not the threshold question. The question, rather, is whether—wholly apart from any degree of actual danger presented by the expression—advocacy of unlawful conduct is ever deserving of constitutional protection. The answer is that, assuming no such danger, it is simply not appropriate for society to censor free and open discourse. For while particular thoughts or suggestions may ultimately be rejected, there is independent value in allowing people to explore all possibilities to think through the comparative advantages and disadvantages of various options. This is not merely because it will aid them in making decisions (for as already noted, when a particular course of action is criminal, society does not allow that choice to be adopted), but because it stimulates intellectual development. Having to edit one's own speech for fear of government interference can always retard one's intellectual development, and unlawful advocacy should

therefore be suppressed only if the government can demonstrate the existence of a real threat of harm.

The propriety of protecting some unlawful advocacy is reinforced by a consideration of the effects of denying constitutional protection to all such speech. A total ban on even the most frivolous forms of unlawful advocacy would have a great impact on daily discourse. Statements such as, "I wouldn't bother paying that parking ticket," or "a little marijuana never hurt anyone," could be grounds for constitutionally permissible prosecutions. Chicago White Sox broadcaster Jimmy Piersall could be jailed for his comment last season that slugger Greg Luzinski "oughta be shot" for not running out a ground ball.[21] Such constraints on normal, harmless statements are unacceptable, even if the statements are "unlawful advocacy." If the first amendment means anything, it represents a value judgment that the interchange of ideas, information and suggestions is to be kept free and open, at least if the interchange presents no real threat of harm to society.[22] The meaning of the first amendment would be severely truncated if people were driven to self-censorship by fears that innocent comments could be construed as unlawful advocacy.

Thus, it is not difficult to accept that a blanket exclusion of unlawful advocacy from the first amendment's scope is improper. But it does not follow that *all* unlawful advocacy is to receive absolute protection. Several commentators have suggested such a result,[23] but it seems unwarranted by either the language[24] or history[25] of the first amendment.

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21. Of course, it might be suggested that Piersall's comment was mere hyperbole, rather than actual unlawful advocacy. *Cf.* Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) (suggestion of shooting the President mere hyperbole). The line between hyperbole and incitement, however, is not easy to draw. Indeed, in an earlier game the umpires complained that Piersall was actually inciting a fan riot at Comiskey Park against the umpires by means of hand gestures from the broadcast booth. The allegation may have been somewhat extreme, but whether a particular comment will ultimately be found to be hyperbole is a risk many would rationally choose not to take.

22. This theory is developed more fully in Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

23. *See* A. MEIKLEJOHN, *supra* note 14; Baker, *Scope of the First Amendment Freedom of Speech*, 25. U.C.L.A. L. REV. 964 (1978). Neither of these commentators is a "pure" absolutist. Professor Meiklejohn believes that certain restrictions may be imposed on the timing and location of speech, as well as on the basis of a type of "Robert's Rules of Order" principle. A. MEIKLEJOHN, *supra* note 14, at 24-26. He also excludes protection for speech unrelated to the governing process, and is somewhat inconsistent on the issue of protection for unlawful advocacy. *See infra* text accompanying notes 146-50. Professor Baker provides no protection to certain categories of expression, such as commercial speech or coercive speech. Baker, *supra*, at 996 & n. 102, 1009. However, neither would allow suppression of speech on the grounds of the speech's danger.

24. While upon first examination it might appear that a literal reading of the amendment's language would lead to absolute protection for anything classified as "speech," the operative language appears to be "the freedom of speech," a phrase that is by no means self-defining.

25. There can be little doubt that whatever the framers intended, it was not absolute protection. Certainly no historical evidence has ever been cited to support such an assertion. In fact, the

If neither of the extremes of total protection or total exclusion is acceptable, it is necessary to delineate a constitutional standard which will provide guidance in individual instances to determine whether unlawful advocacy is to be protected. The clear and present danger test, as one means of resolving this issue, has received by far the greatest attention from courts and commentators. It is therefore to a full analysis of that test that this Article now turns.

II
THE CLEAR AND PRESENT DANGER TEST: HISTORY, THEORY, CRITICISMS AND ALTERNATIVES

A. History[26]

While the language of the clear and present danger test appears to express a judicial attitude that is highly protective of free speech, the test was originally used to justify results highly restrictive of free speech interests. Formulated initially by Justice Holmes in his opinion for the Court in *Schenck v. United States*,[27] the test was used to ratify suppression of speech that could hardly be said to create any actual danger to anyone. The defendants in *Schenck* had printed a circular opposing military conscription and had distributed it to persons accepted for military service. They were convicted for conspiring to violate the 1917 Espionage Act. The Supreme Court affirmed the convictions. Holmes conceded that the circular called for only peaceful measures against conscription, and that the sole unlawful advocacy it contained was a statement that those drafted should assert their rights and that everyone "must maintain, support, and uphold the rights of the people of this country."[28] But even such mild exhortations, the Court held, could be punished, because in the volatile atmosphere of wartime they could have had the effect of disrupting the war effort by convincing soldiers that their conscription was unlawful. No evidence was cited, however, to establish the threat of any actual, specific harm caused by the leaflet. While Holmes unveiled the clear and present danger test as a way of incorporating the circumstances surrounding speech into an evaluation of its claim to first amendment protection, in actuality he employed the test to suppress speech absent any showing that it presented a real

most detailed historical analysis suggests that the framers intended an extremely narrow, technical version of speech protection. *See generally* L. LEVY, *supra* note 20.

26. The history of the clear and present danger test, particularly in its early stages, has been the subject of extensive scholarship. *See, e.g.*, J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 728-40 (1978); S. KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS: A STUDY IN THE INFLUENCE OF IDEAS 169-235 (Collier ed. 1961); T. EMERSON, *supra* note 13, at 62-79, 101-29. The historical discussion in this Article will therefore be limited to the essentials.

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

28. *Id.* at 51.

threat in light of the surrounding circumstances.[29]

The newly devised test seemed to be immediately disregarded by the very Court that had created it. Two cases, *Frohwerk v. United States*[30] and *Debs v. United States*,[31] were decided virtually contemporaneously with *Schenck*, and like it upheld convictions for unlawful advocacy, but did not even mention the clear and present danger test. *Debs* in particular presented a highly questionable approval of governmental suppression of unpopular advocacy. Debs, a popular socialist leader, was convicted under the Espionage Act of 1917[32] of attempting to cause insubordination in the military forces and obstructing recruiting and enlistment into the military. He had given a public speech praising socialism and decrying war and conscription. The speech ended with the exhortation, "[d]on't worry about the charge of treason to your masters; but be concerned about the treason that involves yourselves."[33] At no point did Debs openly advocate illegal activity, nor was any evidence presented that the speech had caused any noticeable insubordination or obstruction of the draft. Nevertheless, Holmes, writing again for the Court, upheld Debs' conviction. He found that while the main theme of the speech, the theory of socialism, was itself protected, the first amendment would not shelter Debs if he intended to encourage obstruction of the draft and if his remarks had the "reasonably probable" effect of doing so.[34] Holmes did not find free speech to be a central issue in *Debs*.[35] Holmes never referred to the week-old clear and present danger formulation, seemingly leading to the conclusion that the test must at that time have been of little importance to its creator.[36]

Commentators[37] sense that Holmes dramatically shifted his em-

29. *Id.* at 52.

30. 249 U.S. 204 (1919).

31. 249 U.S. 211 (1919).

32. Ch. 30, § 3, 40 Stat. 217, 219 (1917) (as amended by the Act of May 16, 1918, ch. 75, § 1, 40 Stat. 553, 553).

33. As quoted in 249 U.S. at 214.

34. *Id.* at 216.

35. *Id.*

36. According to Professor Konefsky, "the author of the clear and present danger doctrine completely ignored his own brain child." S. KONEFSKY, *supra* note 26, at 183. In a letter to Pollack, Holmes wrote:

> I am beginning to get stupid letters of protest against a decision that Debs, a noted agitator, was rightly convicted of obstructing and recruiting service so far as the law was concerned . . . . There was a lot of jaw about free speech, which I dealt with somewhat summarily in an earlier case — *Schenck v. U.S.*

As quoted in *id.* at 182-83. Professor Kalven wrote that *Debs* "was for Holmes a routine criminal appeal." Kalven, *supra* note 5, at 238.

37. *See, e.g.*, A. MEIKLEJOHN, *supra* note 14, at 46; Gunther, *supra* note 4, at 720. *But cf.* Nathanson, *The Communist Trial and the Clear and Present Danger Test*, 63 HARV. L. REV. 1167, 1174 n.17 (1950) (later opinions "only spell[ed] out in greater detail what was implicit in the

phasis with his dissent in *Abrams v. United States*.[38] The *Abrams* facts were similar to those in *Schenck* and *Debs*. Appellants had been convicted of conspiring to violate the amended Espionage Act, which prohibited speech that encouraged resistance to the war effort or reduction of production "with intent . . . to cripple or hinder the United States in the prosecution of the war."[39] They had printed and distributed two circulars, written both in English and Yiddish, that denounced the sending of troops into Russia to oppose the Russian Revolution. While the circulars never explicitly called for law violation, they charged that capitalism is the "enemy of the workers of the world," and stated: "Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia fighting for freedom."[40] Justice Clarke wrote the majority opinion, upholding the convictions on the ground that the defendants' purpose was "to create an attempt to defeat the war plans of the government of the United States by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war."[41] The Court never considered whether there was any real danger that the circulars would have any effect.

In dissent, Justice Holmes suddenly emerged as an eloquent champion of liberty: "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."[42] But while the *Abrams* dissent included some of the most famous words ever

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shorthand of Justice Holmes.") If this were correct, however, it is almost inconceivable that Holmes could have voted to uphold the convictions in *Schenck* and *Debs*.

38. 250 U.S. 616 (1919).

39. Act of May 16, 1918, § 1, 40 Stat. at 553.

40. 250 U.S. at 621.

41. *Id.* at 622. Justice Clarke faced a difficulty in bringing the appellant's conduct within the terms of the statute, since the Act prohibited efforts to undermine the war effort against Germany, while the circular had been directed only against American military activity in Russia. Clarke circumvented the difficulty by reasoning that

> "[e]ven if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons of character such as those whom they regarded themselves as addressing, not to aid government loans and not to work in ammunition factories, where their work would produce . . . munitions of war, the use of which would cause the 'murder' of Germans and Russians."

Id. at 621.

42. *Id.* at 628 (Holmes, J., dissenting). Interestingly, Holmes reasserted his belief in the accuracy of the decisions in both *Frohwerk* and *Debs*. *Id.* at 627. Though he made no attempt to distinguish those cases from *Abrams*, at least *Debs* might be distinguished on the grounds that the defendant there, unlike those in *Abrams*, was far from "an unknown man," and therefore might be thought to have more influence on his listeners.

written about the importance of free speech,[43] it also contained several indications that Holmes' reading of the clear and present danger test was not all that protective of speech. Holmes argued that "nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so."[44] The assertion that "a silly leaflet" would have no "appreciable tendency" to hinder the war effort may imply that had the circulars been less "silly," or had Holmes found some "appreciable tendency," he might have agreed with the majority that upheld the defendants' convictions. Moreover, Holmes noted that "[p]ublishing those opinions for the very purpose of obstructing . . . might indicate a greater danger, and at any rate would have the quality of an attempt."[45] That is, while he did not find present the very specific intent that he thought was required for a violation of the statute,[46] Holmes' statement nevertheless reveals both his willingness to equate the exercise of pure speech with a criminal attempt and his unsupported equation of the presence of an intent to accomplish a harm with an increase in the likelihood of that harm. It would seem, then, that even after Holmes began to take seriously the meaning of the test he had formulated, he was willing to find clear and present danger in situations where the plain language of the test would seem to indicate otherwise. Holmes' *Abrams* dissent indicates a standard which would protect speech more often than the majority's rule, but which might allow widespread suppression on a showing of only the possibility of harm.

Holmes continued to adhere to a view that was more protective of free speech than the majority's. In *Gitlow v. New York*,[47] the majority upheld a conviction for unlawful advocacy without referring to the clear and present danger test. The Court found that the only issue was the constitutionality of a state statute which made it a crime to advocate violent or forceful overthrow of the government.[48] The majority applied a standard that was extremely deferential to legislative judg-

43. [W]hen men have realized that time has upset many fighting faiths, they may have come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. *Id.* at 630.

44. *Id.* at 628.

45. *Id.*

46. *Id.*

47. 268 U.S. 652 (1925).

48. The legislature had outlawed advocacy itself, rather than conduct of which advocacy could merely serve as evidence (as had been the case in the Espionage Acts). The Court found that "[e]very presumption is to be indulged in favor of the validity of the statute." *Id.* at 668.

ment,[49] and held that since it was reasonable that New York should protect itself from insurgency, and since defendants had clearly violated that statute, their conviction was constitutional.

The clear and present danger analysis did not assume a truly protectionist gloss until *Whitney v. California*.[50] The *Whitney* Court upheld defendant's conviction for helping to organize the Communist Labor Party in California. While Justices Brandeis and Holmes concurred in the holding, they did so only because Whitney had not made the argument that her activity was protected because it did not cause any clear and present danger of harm. Justice Brandeis' opinion, which Justice Holmes joined, laid out the protectionist analysis of the constitutionality of convictions for unlawful advocacy. As important as the rights of free speech and assembly are, Brandeis wrote, they are not absolute. "Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral."[51] Citing *Schenck*, he asserted that a restriction cannot be imposed "unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent."[52] Brandeis' replacement of the word "present" by the word "imminent" reveals a clear intention to impose strict requirements concerning both the likelihood and timing of harm that would flow from any particular speech.[53] The Holmes-Brandeis stance was clear: only an emergency could justify repression.[54] Brandeis' incarnation of the test made its practical meaning for the first time consistent with its linguistic formulation.

Majority recognition of the clear and present danger test as a proper way of measuring the protection of free speech was some time in coming. Though by the time *Whitney* was decided the clear and present danger test had been the subject of fairly extensive discussion in Supreme Court opinions, that discussion had been carried on only in the minority opinions written by Justices Holmes and Brandeis. Just once had the test been used in an opinion that spoke for the majority of the Court, and that decision was *Schenck*, which upheld suppression

49. The *Gitlow* test has been referred to as the "bad tendency" approach. T. EMERSON, *supra* note 13, at 104.

50. 274 U.S. 357 (1927).

51. *Id.* at 373 (Brandeis, J., concurring).

52. *Id.*

53. *Id.*

54. The rationale for the "imminence" requirement—consistent with the "marketplace of ideas" concept—was that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Id.* at 377.

without any real showing that the danger was either "clear" or "present." In fact, in *Fiske v. Kansas*,[55] its first decision to reverse a conviction for unlawful advocacy on first amendment grounds, the Court made no reference to the test. During the fifteen years following *Fiske*, however, the Court's acceptance of the clear and present danger test became increasingly clear,[56] although the Court never examined the theory or structure of the test in any detail.

The next stage of the Court's application of the clear and present danger analysis was characterized by a dramatic alteration in the test's scope. The case signalling the change was *Dennis v. United States*.[57] Defendants, leaders of the American Communist Party, had been convicted of violating the conspiracy provision of the Smith Act,[58] which made it a crime "to organize . . . any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence." The Supreme Court upheld the convictions. Though Chief Justice Vinson's plurality opinion purported to adhere to the terms of the clear and present danger test,[59] the opinion so dramatically altered the test's structure that it effectively implemented a new analysis.[60]

Chief Justice Vinson cited the clear and present danger test as the proper one to apply in cases of suppression of unlawful advocacy. But in interpreting the test, he adopted the measure of the constitutionality of such governmental suppression developed in the lower court by Learned Hand.[61] Hand's formula, as quoted in *Dennis*, was this: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such an invasion of free speech as is nec-

55. 274 U.S. 380 (1927).

56. *See, e.g.*, Thomas v. Collins, 323 U.S. 516, 530 (1945); Cantwell v. Connecticut, 310 U.S. 296, 308 (1940); Thornhill v. Alabama, 310 U.S. 88, 105 (1940). The test was also employed in Herndon v. Lowry, 301 U.S. 242 (1937), but, according to one commentator, "[t]he role which it played on this occasion was . . . a minor and quite dispensable one." Corwin, *Bowing Out "Clear and Present Danger,"* 27 NOTRE DAME LAW. 325, 343 (1952).

The test was also relied upon in a series of decisions in the 1940's regulating the authority of a court to utilize its contempt power against commentary regarding the conduct of a trial. Craig v. Harney, 331 U.S. 367, 373 (1947); Pennekamp v. Florida, 328 U.S. 331, 350 (1946); Bridges v. California, 314 U.S. 252, 260-63 (1941).

57. 341 U.S. 494 (1951).

58. Ch. 439, § 2, 54 Stat. 670, 671 (1940) (current version at 18 U.S.C. § 2385 (1976)).

59. 341 U.S. at 508.

60. *Cf.* T. EMERSON, *supra* note 13, at 114 ("On its face the Hand-Vinson formula [in *Dennis*] seems to emasculate the clear and present danger test."); Gunther, *supra* note 4, at 751 ("[t]he Vinson Court in *Dennis* restated clear and present danger in a manner draining it of most of the immediacy emphasis it had attained over the years.").

61. 183 F.2d 201, 212 (2d Cir. 1950). Interestingly, the approach adopted by Hand in *Dennis* is quite different from the test he created in the *Masses* decision many years earlier. *See infra* text accompanying notes 114-122.

essary to avoid the danger."[62] The difference between the two formulations is significant. The clear and present danger test featured two independent conditions: first, the threat that a substantive evil might follow from some speech, and second, the real imminence of that threat. Only the conjunction of the two conditions could justify curtailment of free speech. The Hand test, by contrast, made the variables dependent so that probability and gravity of harm would work in inverse correlation: the graver the evil threatened by the speech, the less probable need be its occurrence before government is justified in suppressing the speech. The clear and present danger test did not allow either condition to mitigate or exacerbate the effect of the other, so that even if a threatened evil were great, a lack of true imminence would invalidate governmental suppression of its advocates. The Hand test, in contrast, derives results by setting up and appraising such interaction: threat of a great evil, even of a non-imminent one, would justify suppression of speech.

Under either test, the court had to identify and quantify both the nature of the threatened evil and the imminence of the perceived danger. The initial question was exactly what harm the defendants' speech might cause. If it was the actual overthrow of the government, the Court would have been justified in perceiving a significant evil. But the Court chose another course. Rather than finding a threat of actual overthrow, it declared that significant harm would result from even an unsuccessful attempt to overthrow the government.[63] The Court made no effort to describe that "significant harm"; it made only a vague allusion to the "physical and political" damage an attempted insurgency would cause.[64]

The next question was the imminence of the threat. The Chief Justice emphasized that the Smith Act, the indictment, and the jury instructions all referred to actual advocacy, not mere academic discussion.[65] He also noted that the jury had been instructed that it could not convict unless it found that the defendants intended to attempt to overthrow "as speedily as circumstances would permit," which the Court took to mean "that the revolutionists would strike when they thought

62. 341 U.S. at 510 (quoting 183 F.2d at 212). The test is similar in structure to Hand's approach to the issue of negligence in tort law. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

63. "Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt." 341 U.S. at 509.

64. *Id.*

65. *Id.* at 501-02.

the time was ripe."[66] Vinson found the "probability of success, or the immediacy of a successful attempt"[67] to be invalid measures of the legitimacy of suppression. Rather, the relevant "evil" was the attempt itself, because of the harm inherent in even an unsuccessful attempt. But the majority simply declined to make the detailed examination—seemingly required by the terms of the clear and present danger test—of whether the speech advocated an attempt to overthrow the government in the near future.[68]

Having diluted the requirement that there be some clear danger, and having dispensed entirely with the need for imminence, the Court supported the suppression of defendants' speech by supplying an introductory course in current events. Without ever alleging or proving any link between the defendants and any foreign power, the Court found justification for suppression in "the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go of our relations with countries with whom petitioners were in the very least ideologically attuned."[69]

Even given the majority's adoption of the Hand sliding-scale test, its upholding of the convictions where the charge was not conspiracy to overthrow but merely conspiracy to advocate overthrow, and where no showing of imminence was made, was extraordinary. Perhaps the Court intended to establish the rule that the danger of harm created by an attempted overthrow is so great that there simply need not be a showing of *any* likelihood of its occurrence.[70] If so, the Court's *Dennis* test bears no relation whatsoever to the language or spirit of the test it purported to apply, and the Court's attitude becomes strikingly similar to the deferential standard applied in *Gitlow*.[71]

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66. *Id.* at 509-10.

67. *Id.* at 509.

68. The only examination, if it can be called that, of the specific words and actions of the defendants appeared early in the opinion as a description of the court of appeals' findings on the issue of whether or not defendants actually advocated violent overthrow. *Id.* at 497-98. These findings were not necessarily relevant to the issue of the probability of an attempt. In any event, many of the findings (such as that the Party used aliases and "double-meaning language") were of little help, even to establish the existence of advocacy.

69. *Id.* at 511; *see* Filvaroff, *Conspiracy and the First Amendment*, 121 U. PA. L. REV. 189, 216 (1972).

70. The Court noted that "[t]he situation with which Justices Holmes and Brandeis were concerned in *Gitlow* was a comparatively isolated event, bearing little relation in their minds to any substantial threat to the safety of the community. . . . They were not confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis." 341 U.S. at 510.

71. *Cf.* M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 65 (1966) (*Dennis* "is simply the remote bad tendency test dressed up in modern style."). *See also* McCloskey, *Free Speech, Sedition and the Constitution*, 45 AM. POL. SCI. REV. 662, 668 (1951) ("These emendations, which reject time as a determinate factor in the equation, undermine the central premise of the clear and present danger principle."). The *Dennis* test has also been re-

The Supreme Court made its next major statement on the clear and present danger test eighteen years later in *Brandenburg v. Ohio.*[72] The appellant, a leader of a Ku Klux Klan group, had arranged for a television station to cover his speech at a Klan rally. Appellant made the following statement: "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[73] He also suggested returning Blacks to Africa and Jews to Israel. The appellant was convicted under Ohio's Criminal Syndicalism statute of " 'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.' "[74]

In a per curiam opinion, the Court invalidated the conviction and declared Ohio's law unconstitutional.[75] At no point did the opinion refer to the clear and present danger test by name, but it appeared to incorporate its meaning by finding the standard to be that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing immi-

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ferred to as "a disguised balancing test which weighed the seriousness of the danger against competing interest in free speech." J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 26, at 735. If so, the Court spent precious little time and effort in looking to the speech side of the balance.

After *Dennis*, the Court was faced with the great difficulty of distinguishing unprotected actual advocacy of overthrow, no matter how remote, from protected "abstract" discussion of the philosophy of violent overthrow.

> Professor Walter Gellhorn has suggested the distinction is a relatively clear one:
>
> [O]ne can recognize a qualitative distinction between a speaker who expresses the opinion before a student audience that all law professors are scoundrels whose students should band together to beat them within an inch of their lives, and a second speaker who, taking up that theme, urges the audience to obtain baseball bats, meet behind the law faculty building at three o'clock next Thursday afternoon, and join him in attacking any professor who can then be found. The first speaker, in [the *Yates*] view, should not be prosecuted; the second has stepped over the line between advocating a belief and advocating an illegal action.

W. GELLHORN, AMERICAN RIGHTS 80-81 (1960). Far from illustrating the distinction, however, Professor Gellhorn's examples illustrate its murky nature. Why is not his first example also advocacy of action? True, it does not suggest a specific time or place. But it is at least as likely to induce relatively prompt action as the advocacy in *Dennis*. Furthermore, from a law professor's point of view, I can attest that I would far prefer a speaker to engage in the second type of advocacy described by Gellhorn, so that I could make sure that at three o'clock on Thursday afternoon I was downtown, consulting.

72. 395 U.S. 444 (1969) (per curiam).

73. As quoted in *id.* at 445-47. To the eternal question, asked by the famous Winston Cigarette commercial, "what do you want, good grammar or good taste?", Mr. Brandenburg apparently answered, "neither."

74. As quoted in *id.* at 445.

75. *Id.* at 449.

nent lawless action and is likely to incite or produce such action."[76]

If the *Brandenburg* Court meant to implement the clear and present danger test, however, it appeared to be using a test very different from the *Dennis* standard. The Court mysteriously cited *Dennis* to support its understanding of proper analysis,[77] but the difference in the two decisions' treatments of the imminence requirement rendered it doubtful that *Brandenburg* followed the *Dennis* rationale.

Brandenburg, like the decisions before it, does not give an unambiguous explanation of the clear and present danger test, nor does it substitute some other standard for evaluating suppression of unlawful advocacy. The most important question left open by *Brandenburg* is exactly what the Court meant by requiring "imminent" lawless action. Did the Court intend to incorporate the temporal immediacy that Brandeis had emphasized in his *Whitney* concurrence? Surely the language would lead one to believe so. But placed in context, the answer is not so clear. The Court relied on the analysis it used in *Yates v. United States*,[78] in which it reversed Smith Act convictions on the ground that the advocacy that the defendant Communists had engaged in was abstract in nature, as such did not threaten any violent overthrow, and therefore did not violate the Smith Act at all. *Yates* did not call into question the *Dennis* holding that the Smith Act was constitutional; the only issue was whether appellants' advocacy fell within the type prohibited by the Act.[79] If the *Brandenburg* Court followed the *Yates* reasoning and struck down the Ohio statute on the ground that it was overbroad because, unlike the Smith Act, it sought to punish abstract advocacy, it had no need to adopt the Brandeis temporal imminence standard. This, in turn, would explain the Court's failure to distinguish *Dennis*, which turned on anything but temporal imminence. Thus *Brandenburg* left unresolved the question of whether it restored the clear and present danger test to its pre-*Dennis* state; the standard to be applied in unlawful advocacy cases remained uncertain.

Hess v. Indiana,[80] a 1973 Supreme Court decision, did little to clarify the issue. An antiwar demonstrator had been arrested for stating, "We'll take the fucking street later." A majority of the Court reversed his conviction. "At best," the per curiam opinion stated, the "statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite fu-

76. *Id.* at 448-49.

77. *Id.* at 447 n. 2.

78. 354 U.S. 298 (1957).

79. *Id.* at 318-19.

80. 414 U.S. 105 (1973) (per curiam).

ture time."[81] The *Hess* Court relied on the *Brandenburg* "inciting or producing imminent lawless action" language.[82] This may indicate that in *Brandenburg* it had indeed intended to adopt a standard of temporal imminence. The defendant's statement was so clearly not "advocacy" of anything, however, that it is difficult to be sure whether the Court believed that the lack of immediacy was dispositive.

Even if the Supreme Court's recent interpretations of the standard for unlawful advocacy cases resurrect the clear and present danger test from the ashes of *Dennis*, several important ambiguities remain. First, if the Court intended to be rigorous in requiring some "imminence," did it also intend to use this highly speech-protective test in cases that did not involve advocacy of "ideological" crimes? It is difficult to imagine that the Court intended to protect solicitations to ordinary murder, but the fact remains that the Court used no language that tended to limit the requirement of imminence.

A second ambiguity concerns the relevance of the specific words chosen by the speaker. A never-resolved question, first brought out in a battle between Learned Hand and Justice Holmes, was whether the first amendment ever allowed sanctions for indirect unlawful advocacy. In *Masses Publishing Co. v Patten,*[83] Hand insisted that the only relevant inquiry was whether the speaker had directly and openly advocated unlawful conduct. Holmes, on the other hand, as *Debs* clearly shows, was more than willing to uphold convictions of those who never directly advocated unlawful conduct, so long as a finding of the requisite intent could be made. Despite the views of many to the contrary, *Brandenburg* does not seem to have resolved the question. It might be thought that the "directed to inciting or producing imminent lawless action" language represented adoption of the *Masses* requirement of direct advocacy.[84] But the Court's language should more likely be given a different interpretation. The Court's use of two words, "inciting" and "producing," seems to indicate that by the phrasing of the test itself it intended to make possible convictions for indirect ("producing") as well as direct ("inciting") advocacy. Illegal action may certainly be "produced" by indirect statements. The fallacy of equating *Brandenburg* with *Masses* lies in the confusion of the word "directly" in *Masses* with the words, "directed to" in *Brandenburg*. If a speaker so intends, advocacy which does not "directly" urge unlawful conduct may nevertheless be "directed" to bringing about such conduct. The statement before a mob, "the man in that jail tortured and killed my

81. *Id.* at 108.

82. *Id.*

83. 244 F. 535, 540 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

84. *See, e.g.*, Gunther, *supra* note 4, at 722.

mother," does not directly advocate anything, but under the circumstances it might well be "directed" at bringing about unlawful conduct. Thus, the Hand-Holmes debate remains unresolved by the Supreme Court. The Supreme Court cases[85] decided after *Brandenburg* and *Hess* fail to shed substantial light on the proper resolutions of these ambiguities; they continue to plague the application of the clear and present danger test.

B. Proposed Structure

This Article takes the position that the clear and present danger test is the most effective means of determining the level of constitutional protection to be afforded advocacy of unlawful conduct. Before I articulate and defend that position, however, I include this Section to perform the preliminary function of defining the particular version of the test I endorse. Since the process of definition involves the resolution of ambiguities, this Section also undertakes analysis of the questions left open by past applications of the clear and present danger test.

The version of the clear and present danger test endorsed here favors a generally protectionist view of the right of free speech. On the whole, it validates the stringency that the language of the test imports "[t]o modern ears:" the phrasing of the test demands "a serious evil, a substantial likelihood that speech will cause the evil, and a close temporal nexus between speech and evil."[86] Because of the test's checkered history and the unclear nature of its current application, the version of the test advocated by this Article is a product of theory, not of history or of the Supreme Court's most recent pronouncements. Therefore, my analysis of historical ambiguities is not bound by history; in general, I resolve those doubts in favor of protecting free speech. This rough formulation guides my approach to four ambiguities that should be resolved if future applications of the clear and present danger test are to rise above the confusion of past cases: first, the issue of intent as a substitute for the likelihood of harm; second, the need to distinguish direct from indirect advocacy; third, the type of threatened substantive evil that justifies suppression; and fourth, the degree of imminence required.

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85. In addition to *Hess*, *Brandenburg* was relied on by the Court in Communist Party v. Whitcomb, 414 U.S. 441 (1974). There the Court struck down a state statute requiring a party seeking access to the ballot to subscribe to a loyalty oath stating that it did not advocate overthrow of the government by force or violence. The Court cited *Brandenburg*, *Yates* and other decisions as a basis for rejecting "a broad oath embracing advocacy of abstract doctrine as well as advocacy of action." *Id.* at 447. In one sense, this use of *Brandenburg* might be taken to support the view that the decision did nothing more than reiterate the *Dennis-Yates* distinction. It is difficult to draw a definitive conclusion on the point, however.

86. Greenawalt, *supra* note 16, at 696.

1. The Role of Intent

The early proponents of the clear and present danger test appeared to be willing to substitute a finding of the speaker's intent to bring about unlawful conduct for a showing of danger that the harm would actually come about. In other words, either clear and present danger of harm *or* intent to cause it would justify suppression. Given the rationale adopted here to justify constitutional protection for at least some kinds of unlawful advocacy,[87] it makes little sense to remove that protection solely because the speaker intended the result.[88] For it is only the actual harm that justifies suppression of speech. It is a hallmark of our free society that we tolerate all viewpoints, even those of "fringe" elements, who advocate illegal conduct, so long as they present no real threat to society. Only a danger of true harm justifies curtailing the flow of free and open discourse. Continued substitution of a finding of intent for a showing of a genuine threat to society would cause people to censor their thoughts and words. Such censorship is undesirable; avoiding it facilitates attainment of the goal of the free speech clause.

2. Direct v. Indirect Incitements

The Supreme Court has never faced the question of whether a distinction should be drawn between direct and indirect advocacy of unlawful action, but it is readily apparent that suppression of indirect advocacy should be very difficult to justify. While a showing of some real threat of harm should be necessary to justify suppression of even direct advocacy, courts should uphold punishment for indirect advocacy only in the most extreme circumstances. In other words, a court should be more willing to allow suppression of a statement that on its face urges another to commit a crime ("Let's overthrow the government;" "you should kill that cop") than of statements that on their face urge no illegal act but which are assertions of fact or opinion that might lead another to commit a crime ("this government represses minorities;" "that cop harassed me yesterday"). I urge the distinction because failing to observe it, and demanding no greater justification for suppression of speech that does not advocate crime on the ground that it might lead to harm, would permit majorities to penalize unpopular minority views, ultimately for no other reason than dislike of or disagreement with those views.

Drawing a line between direct and indirect advocacy does not have the effect of totally preventing suppression of indirect advocacy.

87. *See supra* note 21 and accompanying text.

88. It seems settled after *Brandenburg* that at the very least, a showing of intent is a necessary condition for loss of first amendment protection, even if not a sufficient one. *See* Shiffrin, *supra* note 7, at 947 n.205.

It is easy to imagine circumstances in which assertions of fact or opinion that do not advocate illegal conduct are sufficiently likely to cause immediate harm that society is justified in suppressing them in order to protect itself. To shout, "the man in that jail tortured and killed my mother" in front of an unruly mob outside a jail is a classic example.[89] But only such truly exacerbating circumstances, in which listeners' reactions are easily predictable, should justify upholding suppression of a statement which does not on its face urge unlawful conduct.[90]

3. Types of Substantive Evil Threatened

As originally phrased, the clear and present danger test did not differentiate among various "evils;" the criterion was simply whether the evil threatened by some speech was one which Congress had the power to prevent.[91] If the goal of the test is protecting as much speech as possible without unduly endangering society, however, some rough demarcation is advisable.[92] Society's interest in suppressing speech is simply not as strong where the speech advocates only minor transgressions. In his *Whitney* concurrence, Justice Brandeis wrote that "even imminent danger cannot justify resort to prohibition of those functions essential to effective democracy, unless the evil apprehended is relatively serious."[93] This added consideration has the effect of making the test more protectionist in that it makes it more difficult for a government to justify suppressing the advocates of some illegal course of conduct if the threatened evil is not deemed "relatively" or "extremely" serious.

Though it is difficult to predict exactly which harms will be so labelled, common sense indicates that the more "serious" crimes are those for which society has imposed the most severe penalties. Governments should be allowed more latitude in suppressing advocacy of the serious crimes than in punishing those who incite lesser offenses. While I do not suggest a strict rank-ordering of crimes according to their seri-

89. It is primarily for this reason that the *Masses* approach of Judge Hand is unworkable. *See infra* text accompanying notes 114-122.

90. Thus, the government should not be allowed to suppress the depiction of violence in the movies because of the fear that such depiction will eventually lead to violence in society. *Cf.* Olivia N. v. National Broadcasting Co., 126 Cal. App.3d 488, 178 Cal. Rptr. 888 (1st Dist. 1981), *cert. denied*, 50 U.S.L.W. 3998.19 (U.S. June 29, 1982).

91. Indeed, it appears that Congress need not have actually outlawed the evil; the only prerequisite is that the evil was one which Cougress had a right to prevent. According to Professor Greenawalt, however, it is unclear whether in its origins the magnitude of the evil had any relevance. Greenawalt, *supra* note 16, at 698-99.

92. In Bridges v. California, 314 U.S. 252, 263 (1941), a judicial contempt case, the Court applied clear and present danger and stated that "the substantive evil must be extremely serious . . . before utterances can be punished."

93. 274 U.S. at 377-78.

ousness, I think that courts should take the seriousness of the advocated offense into account in applying the clear and present danger test.

At first blush, deciding whether to uphold some suppression of speech by balancing the imminence of the threatened harm against its seriousness makes perfect sense. After all, the clear and present danger test is really a balancing process which contrasts the need to protect expression with the danger of harm to the state. Thus, if the substantive evil involves violence to persons, it is only reasonable that society will be less willing to risk that ultimate consequence than when the "evil" in question is illegally walking on the grass. An analysis that takes the seriousness of the threatened harm into consideration is reminiscent of the "sliding scale" test invoked by Hand and Vinson in *Dennis*.[94] Ultimately, however, the *Dennis* Court's test effectively deleted the requirements that the danger be either clear or present when the potential harm was severe. If the clear and present danger test is to perform its function of assuring that speech is suppressed only when truly justified by societal need, courts must in every case require *some* showing that the danger is real. Even where the most serious substantive evils (such as murder or violent overthrow) are threatened, evidence should be required to show (1) that a specific crime has been advocated, (2) that the crime advocated is to be committed either at a specific time or within a specific range of time, (3) that the time occur within the not-too-distant future (usually within at most a period of months) and (4) that there is a clear likelihood that the advocacy would be acted upon.

4. Imminence

The Supreme Court has never explicitly laid out its understanding of the imminence required by the test. My interpretation of the "present" component of the test is very different from the Court's most recent permutations, the all-purpose "imminence" requirement used in *Brandenburg*, at least to the extent that the Court meant that danger must be "immediate."[95] In resolving this one ambiguity, I have chosen an alternative that is potentially less protective of speech interests.

My objections to the imminence requirement are both practical and theoretical. First, requiring true imminence in every case is unrealistic and unduly insensitive to society's legitimate interest in self-protection. Moreover, the theoretical underpinnings of a *Brandenburg*-style imminence requirement are weak.

The practical point is that a stringent imminence standard unduly

94. *See supra* text accompanying notes 72-77.

95. See *supra* text accompanying notes 77-79.

restricts authorities' ability to deter criminal conduct. For example, what of the individual who urges another, "when your husband returns from Europe on the 11th of the next month, you should kill him"? Unless we deny the word "imminence" its legitimate meaning, we cannot say that such advocacy will produce "imminent" illegal conduct. Yet the language may well present a threat of violence that is sufficiently serious to justify society's desire to punish it.

One might be inclined to accept suppression of non-imminent criminal solicitation, but to stand by a strict imminence requirement where advocacy of ideological crimes is involved. But to do so would be to create an indefensible double standard, for it is easy to hypothesize cases where advocacy of ideological non-imminent crimes is equally deserving of suppression. There is the example of a racist who, some time before the Bicentennial, urges other racists to select a black to execute in honor of that day when it arrives. Or what of the terrorist who convinces a comrade to plant a bomb in a public place next month to protest government policies? Both involve advocacy of purely political or ideological crimes that are not to be committed "imminently"; therefore, neither would be punishable if an imminence standard were strictly followed. Yet I have little trouble concluding that such advocacy may be punished, so long as it is clearly probable that it would be acted upon. By foreclosing such punishment, the all-purpose imminence requirement pushes first amendment protection to an impractical extreme.

My theoretical objection to the *Brandenburg*-style "imminence" requirement is that it harks back to the "marketplace of ideas" rationale for protecting unlawful advocacy. For it assumed that so long as there is sufficient time for rebuttal and reasoned consideration, we can rest assured that "truth" will best "falsity." Only when danger is so "imminent" that there is not time for response and discussion should suppression be upheld. As noted above, however, there is simply no basis for the conclusion that the opportunity for reasoned response will always defuse unlawful advocacy. Requiring imminence in every case in the belief that if it is not present the advocacy will never lead to harm is theoretically unjustifiable.

My version of the test replaces the universal requirement of imminence with a flexible method of determining the level of immediacy needed in each case. The test should depend in part on the factors outlined above: the directness of the advocacy and the seriousness of the crime threatened. Where a very serious offense is directly and forcefully advocated, a lesser showing of imminence will justify suppression; at the other end of the scale, greater evidence of imminence

would be required in the case of indirect advocacy of a less serious offense.

C. Defense and Criticisms

1. The Case for Clear and Present Danger

Having identified the test I am defending, it is appropriate here to make the general case for its use. Prior to doing battle with its attackers, then, I include this Section to explain why the clear and present danger test is the most constitutionally sound way of dealing with the right of free speech and its limits.

The first amendment prohibits the government from making any law that abridges the freedom of speech. Given its phrasing, the only possible interpretation of the free speech clause is that the right to speak freely must be accorded high value. At the same time, common sense and practicality rebel at the notion of absolute protection for all speech, regardless of the harm to which it leads.

It is apparent that what is needed in cases where speech threatens to disrupt society is a balancing process that weighs the individual's right to free speech against society's interest in protecting itself. But the scales must be weighted in order to accord speech the dignity mandated by the Constitution. The clear and present danger test is a mechanism for solving the problem in a principled manner. Instead of giving equal weight to the competing interests, it engages in the presumption that free speech should generally prevail over any attempts to silence it. In this manner, the version of the test that I have advocated partakes of the compelling interest approach that ideally guides courts in their interpretations of the first amendment. That is, because of the absolute language with which the Constitution shields free speech and the important role that free speech plays in society,[96] the test imposes a heavy burden of justification upon majoritarian branches of government that seek to suppress it. It is not enough that the majority is inconvenienced by, or has some distaste for, the views expressed; its interest in suppressing speech must be truly compelling.

A compelling interest test may at times be translated into a general rule of law that is to be applied to specific cases.[97] At other times, however, when the facts of a particular case are of special importance, it may be necessary to examine those unique facts without the benefit of a general rule, but still with use of the broad compelling interest test itself.

The clear and present danger test falls somewhere on the contin-

96. *See generally* Redish, *supra* note 22.

97. *See* New York Times Co. v. Sullivan, 376 U.S. 255 (1964).

uum between these two extremes. The test provides somewhat greater guidance than a bare-bones compelling interest test, yet it will of course call for a great deal of sifting and analyzing of the specific facts of the case.

When applied in the manner outlined above, then, the clear and present danger test gives considerable force to the language of the first amendment without neglecting society's reasonable desire to avert harm. Examination of the alternatives will demonstrate that using the weighted scale of clear and present danger is the best way to decide unlawful advocacy cases.[98]

2. *Ely's Search for a Categorical Rule: A Look at* Brandenburg *and* Masses

Dean Ely has sharply criticized the clear and present danger test, suggesting that it should be replaced by a "categorical" rule that rigidly

98. Measuring the legitimacy of unlawful advocacy regulation is perhaps the area of first amendment interpretation that is best suited to use of the clear and present danger test. The test has on occasion been criticized for its inability to resolve all issues surrounding use of the first amendment, an attack comparable to criticism of Pete Rose for an inability to play football. There exists no a priori reason why every first amendment issue must be resolved by means of the same legal formula; if clear and present danger does an adequate job of resolving the difficulties of unlawful advocacy, it will have more than justified its existence.

The Supreme Court has, in fact, employed the language of clear and present danger in a number of situations other than unlawful advocacy, without providing substantial guidance as to when the test will or will not be used. Historically, clear and present danger has been employed by the Court to measure the validity of restrictions on demonstrations and in cases in which speech has been held in judicial contempt. For a number of reasons, neither area seems ideally suited to use of the clear and present danger language. The demonstration area is a questionable object of the test, in part because the "danger" which the demonstration is likely to present will often derive more from a possibly violent reaction from opponents than from direct incitement by the demonstrators. In such a situation, a strict burden must be placed upon the state to provide protection, lest individuals be given a *de facto* veto power over speech they dislike. The would-be speakers under these circumstances are deserving of greater protection than are those who advocate unlawful conduct. Also, since the issue in regulation of demonstrations will often be a question of the appropriate time and place, rather than the substance of the demonstration, a reviewing court should have the flexibility to measure the compelling nature of the state's justification for suppression by also examining the viability of alternative avenues of expression: the greater the availability of alternative means of expression, the less justification the state will need for its suppression. The strict wording of the clear and present danger test may not afford the court the requisite flexibility.

Similarly, in the area of judicial contempt, it would seem that the words of the clear and present danger formula do not lend themselves to a thorough analysis of all the competing factors. Perhaps a standard which asks whether the speech in question was highly likely to cause severe disruption of the judicial process or to the rights of the litigants to a fair trial would more accurately focus the court's attentious.

It is important to note, however, that the exact wording used is not of overwhelming significance, as long as the court applying the test recalls that its ultimate goal is to apply a form of compelling interest test in reviewing governmental suppression of speech. Clear and present danger is merely one manifestation of that broad test, one that is probably best suited to measuring the validity of suppression of unlawful advocacy.

defines the kinds of speech that are and are not protected by the first amendment. Ely's general objection is that the clear and present danger test is insufficiently protective of free speech because it causes results to turn on the specific facts of each case. His concern is that

> where messages are proscribed because they are dangerous, balancing tests inevitably become intertwined with the ideological predispositions of those doing the balancing—or if not that, at least with the relative confidence or paranoia of the age in which they are doing it—and we must build barriers as strong as words are able to make them.[99]

In place of a balancing test, Ely prefers a form of "categorization," under which fairly rigid general guidelines are established to determine what is protected and what is not. The less a court has to examine the unique facts of a case to determine whether the speech in question is to be protected, the closer the rule applied is to being "categorical." Under such an approach, "the consideration of likely harm takes place at wholesale, in advance, outside the context of specific cases."[100]

The initial problem with Ely's analysis is that it fails to recognize that it is simply impossible to string together a group of words—with the possible exception of an unwavering absolutist approach (one that Ely obviously does not adopt)—that will remove from judges the ability to manipulate general rules when those rules are applied to specific cases. Even the classic categorical rule, *New York Times'* "actual malice" doctrine,[101] leaves a finder of fact room to maneuver in making a finding about the issue of actual malice. The same can be said of the approach to unlawful advocacy with which Ely is so enamored:[102] the "imminence" test of *Brandenburg*.

Initially, it is puzzling why Ely condemns clear and present danger as a balancing test while simultaneously lauding *Brandenburg* as an example of a categorical rule. "What distinguishes a categorization approach from 'clear and present danger,' " he argues,

> is that context is considered only to determine the message the defendant was transmitting and not to estimate the danger that the audience would react to the message by antisocial conduct . . . .[A] categorization approach, in determining the constitutionality of a given restriction of expression, asks only "What was he saying?"—though admittedly a reference to context may be needed to answer that question. A clear

99. Ely, *supra* note 5, at 1501. Ely argues:

> So long as the constitutional test is geared to the threat posed by the specific communication in issue . . . courts will tend to be swept along by the same sorts of fears that moved the legislators and the prosecutorial authorities, and the First Amendment is likely to end up a very theoretical barrier.

J. ELY, DEMOCRACY AND DISTRUST 107 (1980).

100. J. ELY, *supra* note 99, at 110.

101. *See* New York Times Co. v. Sullivan, 376 U.S. at 279-80.

102. Ely, *supra* note 5, at 1491-92.

> and present danger or ad hoc balancing approach, in contrast, would regard that question as nondispositive: a given message will be sometimes protected and sometimes not, depending on the actual or projected behavior of the audience in response to it.[103]

But certainly, the *Brandenburg* test does not ask *only*, "What was he saying?" While that is the first inquiry of the test, the second, very much like clear and present danger, looks to the impact of the words on the audience.[104] In fact, Ely's fundamentally negative reaction to clear and present danger and his positive reaction to *Brandenburg* are even more surprising in light of the fact that many have viewed *Brandenburg*—and it is a view that seems entirely correct—as simply a protectionist version of clear and present danger.[105] The difference is more a quantitative than a qualitative one.

Whether or not *Brandenburg* is nothing more than a protectionist version of clear and present danger, however, there can be little doubt that *both* halves of the *Brandenburg* test leave considerable room for flexibility, by either judge or jury, in their application to a particular case. How easy will it be to decide whether an individual's comments are "directed at inciting or producing imminent lawless action"? Certainly, Holmes in *Debs* believed that the jury had conclusively found that the defendant possessed the requisite intent, so the first part of *Brandenburg* would have been of little assistance in avoiding that travesty on the first amendment. To be sure, insertion of the word "imminent" might have provided *Debs* a somewhat greater degree of protection, but since the term is not self-defining we cannot even be sure of that, and in any event an imminence requirement is no more or less a "categorical" rule than is the requirement that the danger be "clear and present." Each employs general terms which will have to be applied to specific fact situations. Imminence may prove more protective, but certainly not because it is more of a categorical rule.

While I share Ely's concern that courts should not become immersed in the "paranoia of the age," I do not share his belief that any phrasing of words in the form of a categorical test can avoid that danger. *Dennis* demonstrates this all too clearly. There can be little doubt

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103. *Id.* at 1493 n.44.

104. The test's exact words are "where such advocacy is directed to inciting or producing imminent lawless action *and is likely to incite or produce such action*." 395 U.S. at 447 (emphasis added; footnote omitted). Ely does acknowledge that in *Brandenburg* "the Court supplements its categorization test with a reference to likely effect." *Id.* at 1491 n.35. He does not seem to believe, however, that this turns *Brandenburg* into a test concerned with effect. It is true, as he asserts, that "in *Brandenburg* the danger question never had to be reached, since the speech itself did not fit within the category described by the Court." *Id.* But in a case in which the first portion of *Brandenburg* is met, the test turns entirely upon the likely effect on the listener.

105. *See, e.g.*, J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 26, at 739-40; Greenawalt, *supra* note 16, at 724.

that if the Court had applied the clear and present danger test as Brandeis had contemplated in *Whitney*, it would not have upheld the conviction. The Court therefore chose to bastardize the test beyond all recognition, while the more candid Justices openly advocated rejection of the test because it would not produce the desired conclusion.[106] A court caught up in the nation's paranoia could just as easily have shrugged off any categorical rule developed by Ely. Ultimately, if there is to be any protection against the courts becoming imbued with a "mob" psychology in time of crisis, it is the nation's long tradition of judicial independence and widespread recognition of the role of the courts as protectors of minority rights against majoritarian oppression.[107] If that fails, no grouping of words in the form of a constitutional test will help.

Perhaps anticipating this line of criticism, Ely argues: "One doesn't have to be much of a lawyer to recognize that even the clearest verbal formula can be manipulated. But it's a very bad lawyer who supposes that manipulability and infinite manipulability are the same thing."[108] This point is, of course, correct. But it should more properly be aimed at the limitless ad hoc balancing test advocated by Justices Frankfurter and Harlan[109] than at the clear and present danger test. Unlike ad hoc balancing, which provides a court with absolutely no guidance in how to decide a particular case and ultimately degenerates into a means of condoning all legislative action, the clear and present danger test (at least once it is fleshed out)[110] provides a clear directive to the court in how to assess the various factual elements.

While no test removes all room for judicial manipulation, it is in fact possible to devise a test which will allow for less case-by-case flexibility than is permitted by either traditional clear and present danger or *Brandenburg*.[111] But there is a significant cost to any such test. For a decrease in flexibility is necessarily accompanied by an increase in the cumbersomeness of application. Because by definition an inflexible test cannot allow a court to fit its rule to the unique circumstances of a case, it is likely to become a procrustean bed that will often prove to be

106. *See* Dennis v. United States, 341 U.S. 494, 542-44 (1951) (Frankfurter, J., concurring); *id.* at 568-69 (Jackson, J., concurring). *See supra* text accompanying notes 57-71.

107. *See generally* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980).

108. J. ELY, *supra* note 99, at 112.

109. *See* Barenblatt v. United States, 360 U.S. 109, 126 (1959) (Harlan, J.); Dennis v. United States, 341 U.S. 494, 543 (1951) (Frankfurter, J., concurring). *Compare* Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962) *with* Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

110. *See supra* text accompanying notes 86-95.

111. As noted previously (*see supra* text accompanying notes 72-77), the *Brandenburg* test is often likely to turn on the individual circumstances of the case.

either overprotective or underprotective in individual instances. Given such a choice, as a practical matter a court is considerably more likely to choose a rule that will be underprotective than one that will be overprotective. The "fighting words" doctrine of *Chaplinsky v. New Hampshire*[112] provides a good illustration. There the Court established the categorical rule that "fighting words" were beneath first amendment protection. There may of course be debate as to whether specific statements are to be characterized as "fighting words"—again, no test is free of flexibility—but once that initial determination is made the court's function becomes automatic. An equally categorical rule, I suppose, would have been that "fighting words" are *always* to be protected. But given the choice between these two extremes, it comes as no great surprise that the Court opted for the less protective approach. It is debatable whether "fighting words" are ever worthy of first amendment protection.[113] But the important point for present purposes is that if the Court ever wanted to provide protection to such speech, under a strict categorical rule it simply could not take that option, for it would mean that "fighting words" would have to be protected in *all* instances. Use of a well-defined clear and present danger test, by contrast, would allow the Court the flexibility necessary to protect "fighting words" only when, in an individual instance, their use was not likely to give rise to violence. Thus, whatever one's feelings about the value of "fighting words," there can be no question that use of a categorical rule would result in far less protection than would the more flexible clear and present danger test.

In the area of unlawful advocacy the rule that is considerably more "categorical" than clear and present danger is the rule of the *Masses* case,[114] developed by Learned Hand in 1917. Interestingly, the test somehow manages to be simultaneously overprotective and underprotective. The New York Postmaster had advised the plaintiff, publisher of a revolutionary periodical, that his publication would not be sent through the mail, pursuant to the Espionage Act, since it tended to hamper the United States in its war effort. The publisher sought a preliminary injunction against the journal's exclusion, which Judge Hand granted. Hand purported to interpret the language of the Espionage Act, but there has never been much doubt that the approach developed in *Masses* was intended to define the appropriate constitutional limitations as well. "One may not counsel or advise others to violate the law as it stands," Hand wrote.[115] "While, of course, this may be accom-

112. 315 U.S. 568 (1942).

113. *See* discussion in Redish, *supra* note 22, at 626-29.

114. 244 F. 535 (S.D.N.Y.) *rev'd*, 246 F. 24 (2d Cir. 1917).

115. *Id.* at 540.

plished as well by indirection as expressly," he stated, "[i]f one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation."[116] He construed the Act to be limited to the direct advocacy of resistance to the recruiting and enlistment service,[117] which the journal in question had not done. Referring to the magazine's text, Hand said: "That such comments have a tendency to arouse emulation in others is clear enough, but that they counsel others to follow these examples is not so plain."[118] While Hand's decision was reversed on appeal,[119] his theory has withstood the test of time and has received plaudits from modern commentators as a viable, protectionist alternative to the clear and present danger test.[120]

It is true that, by requiring that the speaker have directly advocated unlawful conduct before speech is to be suppressed, the *Masses* test makes it difficult to employ the danger of speech as a guise for mere dislike. It is also true that the test seems to leave relatively little room for a judge or jury to manipulate it, a goal which Hand clearly sought.[121] For it would not seem to require the exercise of much case-by-case discretion to determine whether the speech in question directly advocated illegal action. Thus, it would appear that *Masses*, much more than *Brandenburg*, fulfills Ely's desire for a categorical rule. But as is the case with most such rules, by removing case-by-case flexibility the *Masses* test will often lead to justification of suppression of illegal advocacy that presents absolutely no danger of any harm to anyone. By definition, the test lets nothing turn on a showing of a likelihood of harm flowing from the challenged expression. Hence the test would allow authorities who dislike particular fringe or extremist groups or individuals to suppress them if they can find so much as one statement advocating illegal conduct, no matter how frivolous nor how unlikely it was to give rise to harm. Far from being the protectionist test which it has been portrayed to be,[122] then, the *Masses* test proves itself to be far inferior to a test, like a "fleshed-out" protectionist version of clear and present danger, which imposes a heavy burden on the authorities to demonstrate a real likelihood of harm, in each instance, before sup-

116. *Id.*

117. *Id.*

118. *Id* at 541-42.

119. 246 F. 24 (2d Cir. 1917).

120. *See, e.g.*, Greenawalt, *supra* note 16, at 702; Gunther, *supra* note 4, at 729.

121. In a letter to Professor Chafee, Hand criticized Holmes' clear and present danger test, because "[o]nce you admit that the matter is one of degree, while you may put it where it genuinely belongs, you so obviously make it a matter of administration, i.e. you give to Tomdickandharry, D.J., so much latitude that the jig is at once up." Letter from Hand to Chafee, Jan. 2, 1921, *quoted in* Gunther, *supra* note 4, at 749.

122. *See* Gunther, *supra* note 4, at 728.

pressing speech. We can, of course, borrow the better elements of *Masses*, so that a greater showing of likely harm should be required when a speaker does not directly advocate illegal action. But, taken as a whole, the categorical rule of *Masses* is just too clumsy a device to provide adequate protection to the interests of free speech.

At the same time, at least if taken literally, the *Masses* test is an inadequate protector of society's interest in maintaining order. For a literal reading of *Masses* would seem to protect those who urge unlawful conduct only by indirection. This is what has been labelled the problem of the Marc Antony funeral oration,[123] and has long been seen by critics as a defect in Hand's test.[124] Of course, the test could be modified to include within it an opportunity to demonstrate that in the particular context speech which did not directly call for unlawful conduct was actually so intended. But if this were done, the test would be deprived of one of its few advantages: its ease of application and limited potential for abuse. For if a court cannot be satisfied by a facial examination of the challenged speech and instead must look to the specific context to determine whether unlawful advocacy was the speaker's ulterior motive, the door is open to significant manipulation and abuse. Indeed, such a modification of *Masses*, if unaccompanied by a required demonstration of a real likelihood of harm, would produce disastrous results. For then the invitation to suppress unpopular groups would be tremendous; authorities would be free from *both* the requirement that the speech advocate unlawful conduct on its face *and* that it present a real likelihood of harm. In light of these difficulties, it is indeed surprising that the *Masses* test continues to be championed as a protectionist device.

This critique of *Masses* underscores another point in regard to Ely's desire to reduce emphasis on the effect of speech and to replace it with a detailed examination of what is actually being said. Ely believes that such a shift would reduce the danger of abuse and increase protection of first amendment interests. It should now be clear, however, that virtually the opposite is true. If we were forced to choose one or the other factor to be the sole criterion of first amendment analysis, I have no doubt that examination of effect would ultimately prove to be far more protective than examination of merely what is said. Ely's fear, and it is an understandable one, is that emphasis on effect and danger will get the court caught up in thinking about how dangerous everybody thinks the expression is. But, as already noted, no form of words will stop this if judges are so inclined, and an emphasis on danger and effect may well have the opposite effect. For if the courts are able to

123. *See* Greenawalt, *supra* note 16, at 704; Gunther, *supra* note 4, at 729.

124. *See, e.g.*, Z. CHAFEE, *supra* note 3, at 45.

stand back and in each case demand a showing of a real likelihood of serious harm, crazed majorities will not be able to get away with vague or conclusory assertions about threats. Indeed, a full and honest emphasis on danger of harm would no doubt have led to reversals of the convictions in *Schenck, Frohwerk, Debs, Gitlow*, and *Dennis*. Instead, in each of these cases the Court emphasized what was said, rather than the danger of what was said, and in so doing upheld suspect convictions. The simple realities are that unlawful advocacy by fringe political groups rarely represents a real and immediate danger of serious harm. If, on the other hand, we were to look only to what is being said, the possibility of locking into the public's wild fears is significantly increased, since wild, fringe groups often say wild, fringe things.[125]

But of course, there is no reason to have to choose between one criterion or the other. Indeed, the *Brandenburg* test endorsed by Ely considers relevant both what was said and the likely effect of what was said. While I do not agree with all of the elements of that test, I wholeheartedly agree that examination of both factors is essential to the preservation of free and open discourse. But imposition of a stringent requirement that in each case a showing be made of real danger flowing from the challenged speech will ultimately prove to be the most effective safeguard of free speech. There are, to be sure, problems with its use, since it will always be applied by human beings who are capable of misapplying it. But it is, quite frankly, the best we have.

3. Professor Emerson and the Speech-Action Dichotomy

Like Ely, Professor Emerson thinks that the clear and present danger test is insufficiently protective of free speech. Emerson has criticized the test because it "assumes that once expression immediately threatens the attainment of some valid social objective, the expression can be prohibited."[126] The approach is fallacious, he argues, because "[t]o permit the state to cut off expression as soon as it comes close to being effective is essentially to allow any abstract or innocuous expression. In short, a legal formula framed solely in terms of effectiveness of the expression in influencing action is incompatible with the existence of free expression."[127]

Emerson's attack is both overstated and unfair, however, for it to-

125. *Cf.* Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163, 1168 (1970) (footnote omitted) ("Examined simply for its content, the pyrotechnics of radical rhetoric in 1969 have escalated far beyond the dull and abstruse dialectics of the old Marxist sects. If 'advocacy of unlawful action' is the measure of illegality, it fits the content of contemporary rhetoric far more closely than it did that of the Communists against whom it has been traditionally employed.").

126. T. EMERSON, *supra* note 5, at 52.

127. *Id.* at 51.

tally disregards the portion of the clear and present danger test that emphasizes the presence of a threat of serious evil. The test's concern is not with fear that speech will become "effective" but that *certain* speech—that advocating a serious evil—will become effective. The goal of clear and present danger—at least as described in this Article—is not to protect merely innocuous speech. Rather, it is to protect as much speech as it possibly can without seriously endangering society, and it does so far better than do tests such as *Masses*.

But Professor Emerson presumably would not advocate a more categorical test such as that of *Masses*, either. To understand his approach to advocacy of unlawful conduct, it is first necessary to comprehend his broad approach to all questions of first amendment interpretation. "The central idea of a system of freedom of expression," Emerson states, "is that a fundamental distinction must be drawn between conduct which consists of 'expression' and conduct which consists of 'action'. 'Expression' must be freely allowed and encouraged. 'Action' can be controlled, subject to other constitutional requirements, but not by controlling expression."[128] The task of the judiciary under this system is not to balance free speech interests against competing social interests, but to define the words of the first amendment. Once particular activity is defined as falling within the bounds of the first amendment, it is to be fully protected.[129]

At least upon superficial inquiry, it appears that Professor Emerson has adopted a largely absolutist approach to free speech. However, Emerson never makes totally clear why his all-or-nothing interpretation of the first amendment is either necessary or appropriate. It certainly could not have been dictated by the intent of the framers, which, though shrouded in mystery, is sufficiently ascertainable to determine that absolute protection was not what they had in mind.[130]

While his definitional approach seems unwarranted by either language or history, Emerson's theory may also cause significant practical problems. One might wonder, for example, whether Emerson would provide absolute protection to such forms of "expression" as perjury or blackmail, since both may be transmitted by speech or in writing. But while he absolutely protects all that he defines to fall within the first amendment, the definitional inquiry may be a complex one. This is because it is often not easy to separate "expression" from "action." Close cases are to be decided, Emerson says, "by consideration of whether the conduct partakes of the essential qualities of expression or action, that is, whether expression or action is the dominant ele-

128. T. EMERSON, *supra* note 13, at 17.

129. *Id.*

130. *See generally* L. LEVY, *supra* note 20.

ment."[131] This should already indicate, even to the uninitiated observer, that perhaps the test is not so clear cut as it first appeared. But the approach becomes even more confused when it is recognized that Emerson is willing either to exclude wholesale categories of pure speech from first amendment protection or reduce protection to accommodate competing needs:

> For reasons peculiar to each case, certain sectors of social conduct, though involving "expression" within the definition here used, must be deemed to fall outside the system . . . . The [cases] which must be excluded embrace certain aspects of the operations of the military, of commercial activities, of the activities of children, and of communication with foreign countries.[132]

It is natural to ask why Professor Emerson is apparently willing to "balance" out these broad categories of what admittedly is "expression," when he purportedly refuses to do the same in other instances. His only explanation is that "the functions of expression and the principles needed to protect expression in such areas are different from those in the main system . . . ."[133] But this makes Emerson's exclusions no less a balance. Thus, the principled consistency which seemed the greatest advantage of Emerson's rigid definitional structure is lost.

Even for expression which does not fall within the specific categories mentioned, Emerson appears willing to come dangerously close to balancing while purporting to adhere to a definitional construct. His approach to the issue of illegal advocacy provides a good illustration. At one point, Emerson states that "[t]he issue should be resolved in terms of the usual rules for determining what is expression and what is action. Under these doctrines solicitation can be constitutionally punished only when the communication is so close, direct, effective, and instantaneous in its impact that it is part of the action."[134] This statement appears about as consistent with Emerson's speech-action dichotomy as one could get. It would seem to exclude from description as "expression" such statements as, "shoot him" said by one conspirator to another who is holding a gun on a potential victim, or "give me your money," said by a holdup person. But it would not seem to exclude from protection the statement, "when your wife returns from Europe next month you should kill her," or even, "I will pay you five hundred dollars to kill my wife when she returns from Europe next month." Certainly, these solicitations are not "so close, direct, effective, and instantaneous in [their] impact that [they are] part of the action," and

131. T. EMERSON, *supra* note 13, at 18.

132. *Id.* at 19-20.

133. *Id.* at 20.

134. *Id.* at 404.

under any common sense definition of the terms they certainly do not appear to be "action" rather than "expression."

But Emerson's analysis of illegal advocacy includes also the following:

> The more general the communication—the more it relates to general issues, is addressed to a number of persons, urges general action—the more readily it is classified as expression. On the other hand, communication that is specifically concerned with a particular law, aimed at a particular person, and urges particular action, moves closer to action. Communication also tends to become action as the speaker assumes a personal relation to the listener, deals with him on a face-to-face basis, or participates in an agency or partnership arrangement.[135]

So described, it appears that Emerson's approach *would* categorize the "wife-in-Europe" example as "action," rather than "expression." But such a conclusion destroys any credibility the dichotomy might have previously been thought to possess. For it is inconceivable that a discussion between two people about a possible action which is to occur in a month could conceptually be classified as "action." In fact, it is difficult to understand how the factors mentioned by Emerson—the specificity of the communication, the number of individuals to whom the advocacy is addressed—are in any way conceptually relevant to the dichotomy between "action" and "expression." In effect, Emerson has introduced a form of balancing test—one quite similar to clear and present danger—under the guise of a strictly definitional approach.[136] He has done so, probably because there exists no viable alternative: the simple fact is that there are occasions when conduct that is inescapably classified as "expression" presents a serious threat to society.[137] But

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135. *Id.* at 405.

136. Emerson's discussion of several state cases demonstrates that his definitional approach is, for all practical purposes, identical to clear and present danger. First, he notes that in State v. Quinlan, 86 N.J.L. 120, 91 A. 111 (1914), the defendant had said at a meeeting of silk mill strikers, "I make a motion that we go to the silk mills, parade through the streets, and club them out of the mills; no matter how we get them out, we got to get them out." The strikers had in fact entered the mill and rioted after the defendant's statement. According to Emerson, "the treatment of the communication as part of a course of action, whether or not it came to fruition, would seem entirely justified." T. EMERSON, *supra* note 13, at 330 (footnote omitted). Yet it is only under a type of clear-and-present danger analysis that the *Quinlan* defendant's statements can be denied first amendment protection. Similarly, Emerson cites Kasper v. State, 206 Tenn. 434, 326 S.W.2d 664 (1959), *cert. denied*, 361 U.S. 930 (1960), where the defendant was convicted of inciting to riot. Emerson believes that "the result reached is probably correct" because "Kasper was urging immediate, specific acts of violence in a situation where violence was likely to occur." *Id.* at 333. This statement is, in effect, a slightly different means of describing the clear and present danger standard. For a perceptive critical analysis of Emerson's approach to this area, see F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 247-50 (1981).

137. *See* Shiffrin, *supra* note 7, at 960 (footnotes omitted): "When as thoughtful a scholar as Professor Emerson slips into doctrines he denounces (*e.g.*, clear and present danger and balancing), there are grounds to conclude that a distinction between expression and action is not a workable basis upon which to base a general theory."

once this is acknowledged, there appears no longer to exist any reason to continue adherence to the definitional dichotomy. If a court is ultimately going to balance, it would seem far preferable for it to do so with the utmost candor.

4. Alexander Meiklejohn and the "Absolute" Alternative

One of the earliest of the libertarian critics of the clear and present danger test was Alexander Meiklejohn, who found that the test, by reducing public speech "to the level of 'proximity and degree' "[138] "ignored or repudiated" the concept of self-government.[139] Hohnes' test, Meiklejohn wrote, operated to nullify the most significant part of the first amendment.[140] "Congress, we are now told, is forbidden to destroy our freedom except when it finds it advisable to do so."[141] Meiklejohn further attacked the test because, he alleged, it violates the language of the first amendment (which is absolute in its terms),[142] and because he claimed that there exists no historical basis to support it.[143] Meiklejohn advocated, instead of the clear and present danger test, what he termed the "absolute" approach to free speech.[144]

The first problem with Meiklejohn's criticisms is that they mischaracterize what clear and present danger does, or, more important, what it is capable of doing. The test has been misused in the past, and in some cases it seems to invite the interpretation "Congress . . . is forbidden to destroy our freedom except when it is advisable to do so." But the protectionist version of clear and present danger I advocate here engages in a different presumption: Congress had better have an extremely good reason to justify its suppression of speech.

The second flaw in Meiklejohn's approach is that his "absolute" alternative provides no more protection for speech than the clear and present danger test does. While Meiklejohn enjoyed describing his approach as "absolute," it was far from it in any traditional sense of the term.[145] Speech that Meiklejohn found protected by the first amendment was "absolutely" protected in that society could never have a suf-

138. A. MEIKLEJOHN, *supra* note 14, at 55.

139. *Id.* at 76.

140. The test, Meiklejohn claims, "annuls the most significant purpose of the First Amendment. It destroys the intellectual basis of our plan of self-government. The court has interpreted the dictum that Congress shall not abridge the freedom of speech by defining the conditions under which such abridging is allowable." *Id.* at 30.

141. *Id.*

142. *Id.* at 20 ("no one who reads with care the text of the First Amendment can fail to be startled by its absoluteness;" "for our day and generation, the words of the First Amendment mean literally what they say").

143. *Id.* at 56.

144. *See generally* Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

145. Meiklejohn's approach is not theoretically sound, as I have demonstrated. *See* Redish,

ficiently compelling interest to control it. But Meiklejohn excluded wholesale from the first amendment all "non-political" speech.[146] Moreover, even purely political speech was not to receive total protection in every instance under Meiklejohn's scheme.[147] The meaning of "absolutism" becomes even less clear in the area of unlawful advocacy. At one point Meiklejohn suggests that "a person who successfully incites another to act must share in the legal responsibility for the consequences of the act."[148] "Words which incite men to crime," he wrote, "are themselves criminal and must be dealt with as such."[149] Perhaps Meiklejohn intended in these statements to refer only to non-political crimes, but neither the words themselves nor the context suggest such a limitation. And, if no such limitation can be read into his comments, it would seem that Meiklejohn may ultimately provide less protection to unlawful advocacy than does clear and present danger.[150]

5. *Criticisms from the Opposite Direction: the Charge that Clear and Present Danger Is Overprotective*

The attacks on clear and present danger considered to this point all stem from the conclusion that the test, either inherently or potentially, inadequately protects the first amendment right of expression. Criticism has also come, however, from those who believe the test, in its protectionist form, provides insufficient concern for competing societal interests.

The source of most of these attacks are several of the opinions written in *Dennis*. The main argument deduced there against the requirement of a close temporal link between advocacy and action (which is, after all, the main import of the test) was that, at least for such major crimes as attempted overthrow, it was simply too risky to require the authorities to wait until the last minute. In Chief Justice Vinson's words, "[o]bviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be exe-

supra note 22, at 606-07. *See also* Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 434-38 (1971).

146. Even for political speech, Meiklejohn's protection cannot be deemed "absolute." *See* A. MEIKLEJOHN, *supra* note 14, at 21. Ultimately, Meiklejohn substantially expanded his concept of the types of expression thought to further the political process. *See* Meiklejohn, *supra* note 144, at 257-63.

147. A. MEIKLEJOHN, *supra* note 14, at 21.

148. *Id.* at 40.

149. *Id.* at 21.

150. The most puzzling aspect of Meiklejohn's attack on clear and present danger is his ultimate approval, or at least acceptance, of Justice Brandeis' elaboration of clear and present danger in *Whitney*. *Id.* at 48. Meiklejohn does argue that Brandeis had departed significantly from the origins of clear and present danger, and that is certainly true. But Meiklejohn's objection, then, is merely to certain methods of interpreting clear and present danger, not to the entire concept, for what is Brandeis' approach, but an extremely libertarian version of clear and present danger?

cuted, the plans have been laid and the signal is awaited."[151] Justice Jackson, concurring, found clear and present danger woefully inadequate to deal with sophisticated revolutionary methodology.[152] While the test could be appropriately applied as a means of regulating the individualized instance of threatened violence, its use in the face of a widespread underground conspiracy plotting future overthrow would require that the Court "appraise imponderables, including international and national phenomena which baffle the best informed foreign offices and our most experienced politicians . . . . No doctrine can be sound whose application requires us to make a prophecy of that sort in the guise of a legal decision."[153]

To the extent the *Dennis* Court's criticisms are aimed at a rigidly imposed temporal "imminence" test, they are well-taken, for such an unbending formula cannot possibly provide the level of protection needed by society. But the opinions go much further in their critique. They ultimately challenge the imposition of any required temporal link between advocacy and the resulting proscribed action. In so doing, they create an impossible situation, for the opinions rightly acknowledge that if the first amendment means anything, it is that free and open philosophical discussion must be preserved.[154] Yet if such discussion is to be given the necessary freedom, it of course cannot be limited to neutral descriptions; much of philosophy's life's blood is the normative debate concerning the morality of various courses of conduct. Thus, if the Court is not to obliterate the first amendment, it must provide room for even normative discussions about competing political philosophies, even those that ultimately contemplate overthrow. It did just that in *Yates*.[155] But if no temporal relationship between advocacy and action is imposed, the distinction between protected philosophical discourse and proscribed advocacy is impossible to draw.[156] For attempting to distinguish between one who favors the ultimate overthrow of the government in the "abstract" and one who illegally advocates overthrow at some undetermined future time rivals the inquiry into the number of angels dancing on a pin's head for absurdity. More importantly, the requirement of showing a true temporal link between advocacy and harm is ultimately the only effective protection against allowing national hysteria to consume the judiciary with the public's dislike of and mistrust for different ideas. The *Dennis* Court, in other

151. 341 U.S. at 509.

152. *Id.* at 567-70 (Jackson, J., concurring).

153. *Id.* at 570.

154. Dennis v. United States, 341 U.S. at 502; Yates v. United States, 354 U.S. 298, 325 (1957).

155. Yates v. United States, 354 U.S. 298 (1957).

156. *See supra* notes 16-21.

words, allowed itself to be trapped into focusing on what was said, rather than on the possible existence of a threat of real harm flowing from what was said.

It is likely that a real but moderately flexible temporal requirement, as suggested here,[157] would provide sufficient opportunity for authorities to prevent actual violence. Even if it were thought not to do so in the extreme situation of attempted overthrow, alternative avenues of protection remain available. It is inconceivable that anything above the level of a frivolous attempt would not require significant planning and effort well before the actual event. Such planning would necessarily consist of something more than sitting around a table advocating attempted overthrow. Weapons would have to be obtained; the groundwork for specific acts of sabotage would have to be laid. In other words, a true conspiracy, complete with countless overt acts, would have to be undertaken. With the proof of such acts, first amendment protection for the speech incident to those acts could well be lost; the speech would probably have become so intertwined with the acts themselves that the speech itself could comfortably be deemed action, and in any event punishment of the acts themselves should provide sufficient protection.[158] So construed, the "speech" could be penalized without a showing of a temporal link between that speech and the ultimate attempt at overthrow.

But the prosecutors in *Dennis* made no attempt to establish the existence of any such conspiracy. For while the prosecution was for a form of conspiracy, it was conspiracy once removed. The defendants were charged only with conspiring to advocate attempted overthrow, not with conspiring actually to attempt overthrow.[159] Such a course of action may significantly ease the evidentiary burden on the prosecution, and it would quite probably increase society's ability to protect itself from such attempts, for it would allow prosecution of individuals who even hinted overthrow. But if we are to draw a balance consistent with recognition of the first amendment's existence, it is necessary to provide society only the level of protection it truly needs, not the prophylactic level that a nation caught up in a state of paranoia would desire.

In his concurring opinion, Justice Frankfurter voiced a different criticism of clear and present danger, one that runs more deeply than the others. Frankfurter assumed that in a democracy basic policy

157. *See supra* notes 95-96.

158. Many conspiracy statutes require the performance of an overt act. *See, e.g.*, ILL. REV. STAT. ch. 38, § 8.2(a) (1981). For those conspiracy statutes which do not so require, the courts could read in such a requirement when first amendment interests are threatened.

159. 341 U.S. at 561 (Jackson, J., concurring).

choices are to be made by the representative legislative bodies, rather than by the courts.[160] Hence a strong presumption of validity should be imposed on judicial review of all legislation. To the extent that the clear and present danger test undermined such a presumption or engaged in the opposite prescription, it represented improper judicial usurpation.[161] Frankfurter put forward one side of a seemingly never-ending argument about the role of the judiciary in a democratic society that goes well beyond the issues surrounding clear and present danger.[162] If one accepts Frankfurter's arguments, it is all but inconceivable that the generally protectionist version of clear and present danger urged here would be adopted. It therefore seems that the major goal of this Article is to convince those—such as Ely and Emerson—who reject Justice Frankfurter's philosophy, that a protectionist version of clear and present danger is the most effective means of fulfilling the judiciary's obligation to protect individual liberty. But having said that, I must attempt to point out what I see as Frankfurter's fundamental mistake: equating "democracy" with total majoritarian rule. If they were identical, there would be little point in imposing supra-legislative constitutional limitations in the first place. The limitations of the Bill of Rights are by nature counter-majoritarian; it therefore makes little sense to entrust to the majoritarian branches of government virtually unreviewable authority to decide whether those limitations have been outbalanced. A strict clear and present danger test is premised on the theory that the very governmental bodies challenging individual liberties are in no position to draw the requisite balance.

Whether or not one accepts Justice Frankfurter's philosophy of judicial review, however, at least a certain portion of his criticism of clear and present danger is unjustified. One of his objections to the test's use was that "[t]he complex issues presented by . . . legislation prohibiting advocacy of crime have been resolved by scrutiny of many factors besides the imminence and gravity of the evil threatened."[163] In elaborat-

160. Free speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, to be respected unless outside the pale of fair judgment.

Id. at 539-40 (Frankfurter, J., concurring). *See also* Bork, *supra* note 9, at 31.

161. It were far better that the phrase [clear and present danger] be abandoned than that it be sounded once more to hide from the believers in an absolute right of free speech the plain fact that the interest in speech, profoundly important as it is, is no more conclusive in judical review than other attributes of democracy or than a determination of the people's representatives that a measure is necessary to assure the safety of government itself.

341 U.S. at 544 (Frankfurter, J., concurring).

162. "Civil liberties draw at best only limited strength from legal guaranties. Preoccupation by our people with the constitutionality, instead of with the wisdom, of legislation or of executive action is preoccupation with a false value." *Id.* at 555 (Frankfurter, J., concurring).

163. *Id.* at 542 (Frankfurter, J., concurring).

ing on the point, he quoted Professor Freund's well-known critique of the clear and present danger concept:

> The truth is that the clear-and-present-danger test is an oversimplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of more moderate controls than those which the state has imposed; and perhaps the specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase "clear and present danger," or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle.[164]

True, use of the clear and present danger approach is not a "substitute" for the weighing of values. Rather, it is the final product of such a weighing process. It represents the conclusion that the most appropriate method of reconciling the state's interest in preserving order and the competing interest in free expression is to require the state to demonstrate the existence of a real—not imagined or speculative—threat of harm flowing from a speech to justify suppression of that speech. The test need not examine "the value of the occasion for speech or political activity," other than to determine whether the occasion is likely to give rise to danger or actual harm, for the occasion's value for speech is an issue for the individual speaker to decide. Intent of the speaker, another factor mentioned by Freund, has already been shown to be logically irrelevant. Finally, there is no reason why resort to clear and present danger may not be preceded by examination of the regulation of speech under the overbreadth doctrine, so that if the state's purpose can be achieved by the use of less drastic means or the regulation sweeps within its reach occasions where no danger exists, the regulation may be invalidated without resort to clear and present danger. Hence Professor Freund's criticisms are unfounded. The test's words do not "convey a delusion of certitude." Quite the contrary: they convey only enough "certitude" to provide sufficient general guidance to the courts, who then will have to apply those general terms to meet the unique circumstances of individual cases.

CONCLUSION

It seems to have become fashionable in modern times to attack clear and present danger on one ground or another. It is thought to be either too dependent upon individual factual circumstances and there-

164. *Id.* at 542-43 (quoting P. FREUND, ON UNDERSTANDING THE SUPREME COURT 27-28 (1949)).

fore too easily subject to manipulation, to be overly concerned with the ultimate danger of speech, or to lead illogically to the conclusion that only innocuous speech is to be protected. At the same time, it has been attacked by those who believe that it inadequately recognizes society's need to protect itself. Complicating the debate has been the ambiguity of the test's wording, which has resulted over the years in varying interpretations of the very same language.

It would be incorrect to suggest that clear and present danger is free from doubt or defect as a constitutional measure of regulation of unlawful advocacy. No matter how clearly one attempts to define the test's language, it remains inescapably subject to potential manipulation by a particular court desirous of reaching a certain result. But I have attempted to show that in a sense every constitutional test is subject to similar dangers of manipulation in individual instances, and that to the extent a test is made more automatic in its application, significant costs are incurred. For a test that is limited in its ability to deal with the unique facts of a case will invariably provide either too much or too little protection in individual instances, and courts as a practical matter are likely to choose the latter, rather than the former. Because of this, I believe that use of the clear and present danger test, once its terms are given both a common sense and generally protectionist interpretation, remains—even given its potential problems—the most appropriate means of compromising the right of society to protect itself against criminal conduct and the value of preserving free and open discourse. As our history has shown all too clearly, the first amendment could do a lot worse. More importantly, it appears that courts can do no better.