

NOTES AND COMMENT

A Study of the "Clear and Present Danger" Rule as a Limitation of Freedom of Speech and of the Press

By EMMA QUISUMBING

Freedom of Speech and of the Press in the Philippines

Indispensable to all liberty are the rights to express one's thoughts and ideas and to convey them to others through all available media of communication. Free speech and free press are of the essence of true liberty.

History bears mute testimony to the fact that repressions of civil liberties have ever been the cause of controversies and wars. The experience of Englishmen with their Kings and of the American colonists with English rule led to the adoption of written guaranties designed to protect the individual against the state. Known generally as "bills of rights," these guaranties were adopted in many states of the United States and finally were included in the federal Constitution of the United States in the form of amendments.

Civil liberties in the Philippines are of comparatively recent origin. But the Filipinos hold them with as much regard as the peoples of other countries. The Filipinos cling to

them as tenaciously as the peoples of the rest of the world.

History of the Rights in the Philippines

In the Philippines freedom of speech was unknown before 1900. Jose Rizal in "Filipinos Despues de Cien Años" (The Philippines a Century Hence, p. 62) advocated free press. The Filipino patriots in Spain, through the columns of "La Solidaridad" and by other means, demanded "liberty of the press, of cults, and of associations" (Mabini, La Revolucion Filipina). The Malolos Constitution of the Revolutionary Congress included freedom of speech and press in its Bill of Rights.

After the advent of American sovereignty in the Philippines, President McKinley in his Instructions to the Second Philippine Commission on April 7, 1900 laid down the rule "that no law shall be passed abridging the freedom of speech or of the press or the rights of the people to peaceably assemble and petition the Government for a redress of grievances." The Philippine Bill, the Act of Congress of July 1, 1902, and

the Jones Law continued these guaranties. These rights are "part and parcel of the Organic Law — of the Constitution—of the Philippine Islands" (United States v. Bustos 37 Phil. 731, 733-740).

When the opportunity was offered to the Filipinos to frame and adopt their own constitution, free speech and free press were not forgotten. Freedom of speech and of the press were embodied in the Bill of Rights. The Commonwealth Government then functioned under a constitution that guarantied these rights.

When these rights and democratic institutions were threatened during the war, the Filipinos hastened to defend them, even at the cost of lives. These rights had come to mean much to them and to relinquish them without a fight was unthinkable. These rights were unheard of during the Japanese nightmare. With the defeat of Japan came a revival of these safeguards of freedom, appreciated more than ever. After the war years the Filipino people reaffirmed their faith in the principles of freedom and democracy and their adherence to individual liberties, as guarantied by the Constitution.

Constitutional Guaranties

The Philippine Constitution in Article III, section 1 (8) explicitly provides:

"No law shall be passed abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and petition the Government for a redress of grievances."

These constitutional guaranties hold within their few well-chosen words a wealth of meaning

Their Signification

Freedom of speech and of the press imply the rights to speak freely and fearlessly and to communicate one's ideas to others. They arise from freedom of the mind, freedom of thought. They mean the rights to speak one's ideas, to print them, to seek in concert with others their translation into action. To inhibit freedom of speech and of the press is to inhibit liberty.

The freedom of speech and of the press embrace at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint and without fear of subsequent punishment (Thornhill v. Alabama, 310 U. S. 88). The freedom of the press consists in the right to print and publish any statement whatever without subjection to previous censorship. (United States v. Sotto, 38 Phil. 666). It consists in the right to publish the truth, with good motives and for justifiable ends, although said publication may be offensive to the Government, to the courts, or to individuals (United States v. Perfecto, 43 Phil. 58). Liberty of speech and of the press is the right to express one's thoughts upon any matter, including the right to do so with impunity (People v. Dava, 40 O.G. 5th Supp. 79).

No attempt to define and circumscribe freedom of speech and of the press is complete without Justice Holmes' classic exposition on the philosophical

basis of these constitutional guaranties. He said:

"Persecution for the expression of opinions seems to me to be perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent; as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may 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 in the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." (Abrams v. United States, 250 U.S. 616).

Their Importance

A bill of rights is the foundation-stone on which the whole structure of a free world rest. Without the rights to express opinions through the ballot, the press, and other mediums of distribution, a tyrant could easily retain power to be dislodged only by violence. Historically, the road to tyranny has always lain through a denial of freedom in this realm. (Harold J. Laski, *Liberty in the Modern State*).

Civil liberties are the formulas free peoples have devised as guides. They presuppose that a society is best governed with the consent of the people, that it is richest if the various capacities of those people are allowed to develop according to their own nature. Minorities must be respected because they will readily accept the decisions of the majority and so preserve the peace and because thus they can make a fruitful contribution to the universal good. Hence, divergent opinions must be listened to; if the advocates of strange doctrines are suppressed, they may turn to force rather than persuasion as a weapon. Besides, a strange doctrine sometimes turns out to be the correct doctrine (Osmond K. Fraenkel, *Our Civil Liberties*).

The right of unrestricted discussion of public affairs is important purposes of society and government is the discovery and spread of the truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for as Bagehot points out, once force is thrown into the argu-

ment, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantages in the contest (Chafetz, *Freedom of Speech in Wartime*, 2 Selected Essays on Constitutional Law, 1024, 1045).

Liberty is possible only in a society that is willing to endure

non-conformity, that recognizes the value to society of diversity of belief, expressions, and endeavor. Only in such an atmosphere can the luxury of free debate and the tolerant give-and-take upon which liberty depends exist. Liberty is the only political form compatible with peace.

THE "CLEAR AND PRESENT DANGER" RULE AS A
LIMITATION ON FREEDOM OF SPEECH
AND OF THE PRESS

Liberty means the absence of restraint. There can be no liberty without freedom of speech and of the press. But no man, of course, stands alone. He lives with others and in others. His liberty, therefore, is never absolute. There must be certain restraints on his behavior and conduct. The rights of free speech and free press are natural and inherent, but they are not absolute: they are subject to restrictions and limitations (*Gilbert v. Minnesota*, 254 U.S. 325).

A limitation to freedom of speech and of the press which has been devised is the "clear and present danger" rule. The constitutional guaranties of free speech and free press may be restricted only when there is a clear and present danger. This rule constitutes the "minimum" protection afforded by the Constitution. It is the maximum limitation, the government can be permitted.

History of the Rule

The *Schenck* case (*Schenck v. United States*, 249 U.S. 47) decided in 1919 marked the birth of the "clear and present danger" rule as an articulate

rule of constitutional law. However, an interesting forecast of this test was made years earlier. In an opinion of the New York Council of Revision in 1818 it was stated that in order to justify the imposition of a penalty in a certain case "the danger to the peace and safety of the state must be not merely speculative, remote and possible but imminent and certain" (*Street*, *The Council of Revision*, 282 quoted in 55 *Harvard Law Review* 695).

The "clear and present danger" language of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protection of freedom of expression was in issue. It has been utilized by either a majority or minority of the United States Supreme Court in passing upon the constitutionality of convictions under espionage acts, (*Schenck v. United States*, supra; *Abrams v. United States*, supra; under a criminal syndicalism act, *Whitney v. California*, 274 U.S. 357; under an "anti-insurrection" act, *Herndon v. Lawry*, 301 U.S. 242; and for breach of the peace at common law,

Cantwell v. Connecticut, 310 U.S. 296; and very recently the same court has also suggested that it is an appropriate guide in determining the constitutionality of restrictions upon expression when the substantive evil sought to be prevented by the restriction is destruction of life or property, or invasion of the right of privacy, Thornhill v. Alabama, *supra* (Bridges v. California, 314 U.S. 252).

The "Dangerous Tendency" Rule in the Philippines

In the Philippines the "clear and present danger" rule has not been applied in those few cases where freedom of speech or of the press was invoked. This test is almost unknown. The "dangerous tendency" rule has been relied upon in such cases. It is this rule which still obtains in the Philippines.

Statement of the Rule

Under this rule, if the words create a dangerous tendency which the state has a right to prevent, then such words are punishable. It is not necessary that some definite or immediate acts of force, violence, or unlawfulness was advocated. It is sufficient that such acts were advocated in general terms. It is not essential that their immediate execution should have been advocated. Nor is it necessary that the language used should have been reasonably and ordinarily calculated to incite certain persons to acts of force, violence, or unlawfulness. It is sufficient if the natural tendency and probable effect of the utterance is to bring about the substantive evil which the legislative body might prevent.

(Gitlow v. New York, 268 U.S. 652).

The Gitlow case epitomizes the "dangerous tendency" rule. This case deals with an indictment for the crime of criminal anarchy, wherein the defendant was accused of advocating the necessity and propriety of overthrowing and overturning organized government by force, violence, and unlawful means by writings in the left Wing Manifesto of the Socialist Party. It was there held that the manifesto was not the expression of philosophical abstraction nor the mere prediction of future events. It was the language of direct incitement, which was punishable under the criminal Syndicalism Act. This case, however, evoked a strong dissent from Justice Holmes.

Philippine Cases

The Philippine Supreme Court apparently chose to follow the Gitlow case and to adopt its "dangerous tendency" rule.

In the case of *People v. Perez* (45 Phil. 599) the accused unfortunately became engaged in a discussion regarding the administration of Governor-General Wood, which resulted in Perez shouting a number of times, "The Filipinos, like myself, must use bolos for cutting off Wood's head for having recommended a bad thing for the Filipinos, for he has killed our independence." The accused was convicted of sedition because there was a seditious tendency in the words used. He made a statement and performed an act which suggested and incited rebellious conspiracies, which tended to stir up the people

against the lawful authorities, which tended to disturb the peace of the community and the safety or order of the government.

In the case of *People v. Evangelista* (57 Phil. 254) the defendants circulated pamphlets containing the constitution and by-laws of the Communist Party of the Philippines and delivered speeches, advocating the ideas of the Communist Party. The defendants were adjudged guilty. The Court stated that it was not necessary that there should be any disturbance or breach of the peace in order that the act may come under the sanction of the Penal Code. It was sufficient that it incited uprisings or produced a feeling incompatible with the permanency of the government.

In another case — *People v. Feleo* (57 Phil. 451)—the Court held that the words uttered by the defendant to the effect that the hearers should imitate French soldiers in battle who, instead of pointing arms at their enemies, directed their weapons towards their own chiefs were seditious. They tended to incite the people to take up arms against the constituted authorities and to rise against the established government. They were clearly indicative of a tendency to incite the soldiers to disobey their superior officers and to revolt against them, as well as to commit acts of hate and vengeance upon other persons.

In the case of *People v. Nabong* (57 Phil. 455) the accused was heard to say the following words, “Overthrow the present government and establish

our own government, the government of the poor. Use your whip so that there may be marks on their sides.” It was held that the words used by the defendant manifestly tended to induce the people to resist and use violence against the agents of the constabulary and to instigate the poor to cabal and meet together for unlawful purposes. It was not necessary, in order to be seditious, that the words used should in fact result in a rising of the people against the constituted authorities. The law was not aimed merely at actual disturbances, and its purpose was also to punish utterances which may endanger public order.

In another case — *People v. Dava* (40 O. G. 5th Supp., 79)—the defendant, a member of the Communist Party and editor of the newspaper *Kalayaan*, in the guise of criticizing the National Defense Law encouraged its readers to disobey it. The Court held that the so-called criticism of the National Defense Act was couched in language almost subversive, since it tended to stir the hatred of the masses against the Government, by charging it with forcing the poor into an army intended to defend the capitalist and crush the proletariat.

The Philippine cases discussed above dealt with alleged seditious utterances. The “dangerous tendency” rule was the criterion for punishment. In an alleged contemptuous publication the same rule seems to have been likewise applied. The case of *In re Lozano and Quevedo* (54 Phil. 89) related to the power of the court to punish

for contempt the editor and the reporter of a newspaper for publishing an inaccurate account of the investigation of a judge of First Instance. The investigation was conducted behind closed doors. There was a resolution of the court which made such proceedings confidential in nature. It was held that in order to allow the disposition of judicial business unhampered by publications which rea-

sonably tend to impair the impartiality of verdicts or otherwise obstruct the administration of justice, the court will not hesitate to exercise its undoubted power to punish for contempt. As important as the maintenance of an unmuzzled press and the free exercise of the rights of the citizen is the maintenance of the independence of the Judiciary.

THE "CLEAR AND PRESENT DANGER" RULE

Introductory

The line which divides the area of punishable words from the realm of free speech which is constitutionally protected is difficult to draw. But this line must be defined because there comes a point at which the state's concern with words as potential cause of harm conflicts with its interest in the free expression of opinion. When that point is reached, the constitutional guaranties are called into question.

Words to be sure, are sometimes the equivalent of acts, not merely the expressions of opinion. As acts they are not within the constitutional protection; as opinions they usually are. If one man induces another to commit a crime, he may be punished though he used only words and he may be punished even if his words failed of their purpose. A man's words may be punished, too, if he used them to exert unlawful pressure: to obtain blackmail, for example, or to produce socially harmful results such as a run on a bank.

Even pure expressions of opi-

nion may be the source of great harm, both to individuals and to the state. Defamatory remarks damage individuals, advocacy of crime affects the community. The state must, therefore have some power to punish words. Then the conflict arises and the constitutional safeguards are invoked.

In considering the kinds of words that can constitutionally be punished distinctions have been made between expressions of opinions, incitement, and advocacy. Osmond Fraenkel in his book on Civil Liberties (published in 1944) explains the difference thus: Words that are merely expressions of opinion can never be punished; words that are incitements to unlawful action can be punished; whether advocacy of such action can be punished depends on the circumstances. Suppose a judge has issued an injunction in a labor dispute. A labor leader states that the decision was wrong on the facts and the law. This is merely an opinion, on the basis of which the leader cannot be punished for contempt of court. But if

he adds that the injunction should be disobeyed by all members of the union, that is an incitement to an unlawful act and can be punished. On the other hand, a general statement that the world would be a better place if union members ignored injunctions may be punished only if made under circumstances indicating a clear and present danger that it would be acted upon.

made by Justice Holmes in the aforecited celebrated Schenck case thus:

This test established a definite rule in constitutional law; it provides the criterion as to what words may be punished. The advocacy of ideas cannot constitutionally be abridged unless there is a clear and present danger that such advocacy will result in illegal action.

As Justice Murphy puts it:

Essentials of the Rule

"There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—prediction that is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason..." [Schneiderman v. United States, 320 U.S. 118 (1943).]

The "clear and present danger" rule hinges on three vital elements, all of which must concur to justify a conviction under this test. There must be a danger. The danger must be clear. And it must be present.

There Must Be a "Danger"

The former is punishable; the latter is not under the "clear and present danger" rule.

The danger referred to in the rule is the actual occurrence of some event which the legislature has declared illegal and which it has the constitutional power to punish. An extreme illustration will make clear what is invoked. A statement advocating the election of a Nacionalista Party candidate in a sharply contested election may well present clear and present danger that the election of the candidate will result. Yet that does not permit punishment of the person making the statement, since it would be unconstitutional to prohibit the election of a Nacionalista Party candidate and no legislature could make such an act a crime.

"The question in every case is whether the words used 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. It is a question of proximity and degree." (Schenck v. United States, supra)

Statement of the Rule

As previously stated, the first judicial statement of the "clear and present danger" rule was

Trivial statements are excluded. It is plain that trifling and insignificant remarks should never be prosecuted. This remains true even in time of war, since expressions of opi-

nion in private conversation or personal letters can create no danger of harmful consequences to the war, at least in the absence of proof that the remarks were systematically repeated. Even proposals for concluding the war should be immune from prosecution. Calmly considered, none of these views can produce any of the dangers against which the law seeks to guard. Clearly they can not result in the overthrow of the government or in military disaffection or even in obstruction to recruiting. All the more is this true of opinions with regard to capitalism or imperialism, or of grievances expressed by groups which believe themselves the victims of discrimination. It is evident, then, that whether a danger exists depends in part on the nature of the statement, in part on the accompanying circumstances. While remarks made in a single private conversation would create no danger, the same words spoken to a camp full of soldiers might very well do so.

It Must Be "Clear"

The test further requires that the supposed danger be clear—that is, there must be a reasonable expectation that the harmful consequence prohibited by law will ensue. It is not enough to say that the words used has the "tendency" to produce such result. The difference is one of emphasis.

It Must Be "Present"

Finally, the danger must be present. That is to say, it must be imminent in point of time. The stress is more on the circumstances of the utterance of the words and the situation of

those uttering them than on the words themselves. This aspect of the rule has particular importance when applied to prosecutions based on the advocacy of the overthrow of the government by force. In such cases the number and power of the accused persons or the group to which they belong are decisive factors in determining whether the violent revolution advocated by the accused persons was imminent and impending.

Justice Brandeis in his concurring opinion in *Whitney v. California* clarifies the meaning further:

"Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free press there must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one..."

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men with confidence in the power of free and fearless reasoning applied through the process of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If 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. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom" (Whitney v. California, *supra*).

What finally emerges then from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.

Scope of the Rule

Various kinds of words have been occasions for prosecutions: words which attack individuals and are punished as libel; words which offend the community's sensibilities and are thought obscene or blasphemous; words which attack judges and are punished as contempt of court; words which attack government and are punished as seditious; words which provoke violence. They are not cause for criminal prosecutions alone; sometimes they result in exclusion from the mails or detention in the customs of the book or pamphlet in question; sometimes in the deportation of the person who has written them or subscribed to the views expressed.

The "clear and present danger" rule has particular application to contemptuous words and seditious words. It has been used in connection with prosecution for such words. Libelous, obscene and blasphemous, and insulting or "fighting" words belong properly to the private domain of a man's

life and have been considered to be outside the constitutional protection of free expression.

Contemptuous Words

The early cases in the United States placed punishments for contempt of court outside the constitutional protection. They justified this conclusion by the statement that freedom of the press did not mean the freedom to do wrong. Since 1941 the courts have seen fit to bring them within the free speech and free press provisions of the Constitution. The social importance of a full discussion of public affairs was considered too great to permit immunity to the judiciary, particularly since judges are the final arbiters of the propriety of the comment about their own colleagues.

The champions of the judiciary advanced the argument that such words would engender two substantive evils — disregard for the judiciary and disorderly and unfair administration of justice. They urged that such words would influence the judge in deciding pending cases, that the power of the press would be used purposely to destroy without reason the reputation of judges and the competence of courts. This is the clear and present danger they fear to justice. To preserve judicial impartiality, it was necessary, under this view, for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases.

There are reasonably well-marked limits around the power of courts to punish newspa-

pers and others for comments upon or criticism of pending litigation. The essential right of the courts to be free of intimidation and coercion is consonant with a recognition that freedom of the press must be allowed the broadest scope compatible with the supremacy of order. A "theoretical determinant" of the limit for open discussion was adopted from experience with other adjustments from the conflict between freedom of expression and maintenance of order. This was the "clear and present danger" rule. Standards of permissible comment would emerge which would guaranty the courts against interference and allow fair play to the good influence of open discussion. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.

The United States Supreme Court recognized the necessity of extending to alleged contemptuous words the "clear and present danger" test. This was demonstrated in the cases of *Bridges v. California* and *Times Mirror Company v. California* (supra). These cases related to the scope of the constitutional policy safeguarding free speech and a free press. All of the petitioners were adjudged guilty and fined for contempt by the lower court. Their conviction rested upon comments pertaining to pending litigation which were published in newspapers. The United States Supreme Court held that the judgments below resulted in a curtailment of expression that cannot be dismissed as insignificant. If

they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert.

The *Bridges* case was reinforced by the present case of *Pennokamp v. State of Florida*. The petitioners were responsible for the publication of two editorials charged to be contemptuous of the Circuit Court and its judges in that they were unlawfully critical of the administration of criminal justice in certain cases pending before that court. The United States Supreme Court concluded that the publications in question were within the permissible limits of free discussion. The danger to fair judicial administration did not have the clearness and immediacy necessary to close the door of permissible public comment. When that door is closed, it closes all doors behind it.

Justice Murphy's concurring opinion is worthy of mention:

"Were we to sanction the judgment rendered by the court below we would be approving in effect an unwarranted restriction upon the freedom of the press. That freedom covers something more than the right to approve and condone insofar as the judiciary and the judicial process is concerned. It also includes the right to criticize and disparage, even though the terms be vitriolic, scurrilous, or erroneous. To talk of clear and present danger arising out of such criticism is idle unless the criticism makes it impossible in a very real sense for a court to carry on the administration of justice. That situation is not even remotely present in this case. Judges should be foremost in their reluctance to pro-

fect the freedom of others to rebuke and castigate the bench and in their refusal to be influenced by unfair or misinformed censure. Otherwise freedom may rest upon the precarious base of judicial sensitiveness and caprice." [Pennekamp v. State of Florida, 66 S. Ct. 1029 (1946)].

Seditious Words

The government is entitled to protect itself. It cannot countenance the substitution of force and violence in place of peaceful political action in order to effect changes in its institutions. The rights of free speech and free press may be abused in order to incite to violence and to crime. But the efforts of government to counteract the abuse should not go to the extent of curtailing those rights. As Chief Justice Hughes said:

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech and free assembly in order to maintain the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means." (De Jonge v. Oregon, 299 U.S. 353).

The United States Supreme Court definitely abandoned the "dangerous tendency" rule in connection with prosecutions for seditious utterances and adopted the less stringent rule of "clear and present danger." The political activity cases decided by that Court amply demonstrate this modern trend.

Thus there has been a welcome return to the Schenck case. During the First World War the Espionage Act of 1917 punished anyone who caused or attempted to cause insubordination in the armed forces or obstruction to recruiting. Numerous Socialists were prosecuted on account of speeches they had made or pamphlets they had written which protested against the war and the draft. Schenck, the secretary of the Party, was convicted. The United States Supreme Court upheld the conviction, laying down the "clear and present danger" test (Schenck v. United States, supra).

In 1925, however, the ratio decidendi of the majority opinion in the previously discussed Gitlow case was predicated not on the "clear and present danger" rule but on the "dangerous tendency" test. In the early 1930's with the ascension to the bench of Chief Justice Hughes and Justices Roberts and Cardozo, the "clear and present danger" rule was again on the ascendant. Under the appointees of President Roosevelt, Justices Black, Reed, Frankfurter, Douglas, Murphy, Jackson, and Rutledge, the primacy of the "clear and present danger" rule in political activity cases is undisputed, although Justice Frankfurter has betrayed a tendency now and then to question the soundness of the rule.

During the Second World War it was no surprise that the United States Supreme Court unanimously struck down a Mississippi war time sedition law which punished the distribution of literature circulated to encourage disloyalty. This case —

Taylor v. Mississippi (319 U.S. 357)—arose on the prosecution of several witnesses of Jehovah for distributing their literature and for making derogatory remarks about President Roosevelt. The Court concluded that

the law was unconstitutional because it penalized the communication of opinion in the absence of a sinister purpose or a clear and present danger to the government.

THE "CLEAR AND PRESENT DANGER" RULE IN WARTIME

Particularly appropriate and timely is a discussion of freedom of speech and of the press in wartime. It is true that war does result in impairment of liberty. Since modern war occasions vast alteration in civil life, it is not strange that the prosecution of war tends to restrict civil liberties. It is inevitable that this should be so since military necessities do not brook the delay characteristic of the ordinary deliberations of civil life. Consequently, persons find themselves confronted with far-reaching restrictions on freedom of action and expression.

However, all the provisions of the Constitution which protect personal freedom continue in spite of war. The rights of free speech and free press remain the same in peace and in war. As Justice Davis said:

"The Constitution is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government" (Ex parte Milligan 4 Wall 2)

In the realm of opinion the impact of war is well-felt. In certain respects freedom of speech and of the press must be subject to absolute curbs on account of war. No one would challenge the right of the government to forbid statements which might convey information of value to the enemy. While the provisions of the Constitution which guaranty freedom of speech and of the press are not suspended, their meaning depends on the circumstances in which they are applied. The "clear and present danger" test was conceived during war.

Laws which permit the punishment of people because of the opinions they express are subject to grave abuse. In times of excitement it is natural to condemn any person who opposes the view of the majority. During a war it is almost inevitable that this should be the reaction of most people. It is particularly important, therefore, that prosecutions should not be instituted except when it is clear that the words used put in jeopardy the success of the war effort. Freedom of expression must be cherished even in times of war, not primarily for the sake of the individual who wishes to express an opin-

ion but for the sake of society which might benefit even then from the exchange of ideas. Restraints of the free expression of opinion even during wartime should be at a minimum. There should be no indiscriminate suppression of criticism. As Wendell Wilkie so aptly states, "The more the government objects to criticism, the more criticism it should get."

Professor Chafee sets down the guide that should motivate judges at such period in prosecutions for the expression of opinion:

"The true boundary line of the First amendment (referring to free speech and free press) can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth. Every reasonable attempt should be made to maintain both interests unimpaired, and the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled, and not, as most men believe, when it is barely conceivable that it might be slightly affected. In war time, therefore, speech should be unrestricted by the censorship or by punishment, unless it is clearly liable to cause direct and dangerous interference with the conduct of the war" (Chafee, *Freedom of Speech*, p. 35)

Its Application in the Philippines

Heretofore the Philippine Supreme Court has not shown awareness of the importance of

the "clear and present danger" rule in freedom of speech and of the press cases. This is regrettable.

The "dangerous tendency" test is so vague in its contours as to spread a "dragnet which may enmesh anyone" who ventures to utter a few imprudent words, who dares to publish a few strong comments. To sanction such a nebulous standard as a measure of power is to effectually gag and silence men's minds and lips and to coerce men into submission. It sets up a system of intellectual tyranny which chokes and crushes truth.

The "clear and present danger" rule is the extent to which the government may, under the Constitution, interfere with free speech and free press. This is a rule of reason. Correctly applied, it will preserve the rights of free speech and free press both from suppression by tyrannous, well-meaning majorities and from abuse by irresponsible, fanatical minorities. It is the best available guaranty of decency.

Freedom of speech and of the press along with freedom of assembly and religion occupy a preferred position under our constitutional scheme. Freedom is the rule, restraint the exception. There must be no restriction then of the freedom to think one's thoughts and speak them, except possibly in those cases "where thought merges into action—and then only when the words, printed or spoken, so gravely and imminently threaten interests the state is bound to protect." There is to be no compromise here, for "thought"

freely communicated," in the words of Justice Cardozo, "is the indispensable condition of intelligent experimentation, the one test of its validity. There is no freedom without choice, and there is no choice without knowledge—or none that is not illusory." This is as it should be; this is the democratic way.

Allow the tongue to be fettered only if there is a clear and

present danger to the safety of the state when judged by a sturdy fear. There should be an attitude of widest tolerance towards views which are strange and uncongenial, lest by a premature stifling even of crude or groping ideas society might be deprived of eventual wisdom necessary for attaining a gracious civilization. Only respect for freedom can give final beauty to men's lives.



Words and the Law

HERE, as everywhere else in the law, the war is a war of words. To the legal profession, above all others, words and their meanings are a matter of supreme concern. From the time he enters the freshman class at law school, until he sits on the highest court in the land, the goods, wares and merchandise of the lawyer are words. The annual coinage of words by the profession far outstrips in number the astronomical figures of the United States Mint. The working day of the lawyer, in the office, in the court room or on the bench, is represented by the use of words. From any point of view, the final product of the law, be it contract, pleading, opinion or statute is words. *FRANK GAILOR*
Judge of the Supreme Court of Tennessee, Opinions Among Other Things. Tennessee Law Review, Vol. 19, No. 5, Dec. 1946, pp. 526-527.