A RE-EXAMINATION OF THE CLEAR AND PRESENT DANGER DOCTRINE AS A LIMITATION ON FREEDOM OF EXPRESSION *

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Two recent decisions, one in the Philippines and another in the United States, *Espuelas v. People* [1] and *Dennis v. United States*,[2] call for a re-examination of the clear and present danger principle as a limitation on freedom of expression.[3] The Constitutions of both countries in express terms prohibit the enactment of any law "abridging the freedom of speech or of the press, * * *." [4] There is constitutional protection then for the liberty to discuss publicly and truthfully all matters of public concern without previous restraint and without fear of subsequent punishment.[5]

Nonetheless, judicial decisions both in the Philippines and in the United States do not go so far as to consider the right absolute. The existence of a clear and present danger of a substantive evil

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[1] G. R. No. L-2990, prom. Dec. 17, 1951. This decision was discussed in Fernando, *One Year of Constitutional Law: 1951*, 27 Philippine Law Journal, 197.

[2] 341 U. S. 494, prom. June 4, 1951. This decision in view of its importance has been critically appraised in various articles, some of which are the following: Richardson, *Freedom of Expression and the Function of Courts*, 65 Harvard Law Review 1; Corwin, *Bowing Out "Clear and Present Danger Doctrine"* 27 Notre Dame Lawyer, 325; Boudin, *"Seditious Doctrines" and the "Clear and Present Danger" Rule*, 38 Virginia Law Review 315; and Gorfinkel and Mack, *Dennis v. United States and the Clear and Present Danger Rule*, 39 California Law Review 475.

[3] *Re-examination* is here used advisedly. Among previous articles on the subject may be mentioned Fernando and Quisumbing-Fernando, *Freedom of Expression in the Philippine and American Constitutions*, 23 Philippine Law Journal 801 and Emma Quisumbing, *A Study of the "Clear and Present Danger" Rule as a Limitation of Freedom of Speech and the Press*, 22 Philippine Law Journal 136.

[4] Sec. 1, Article III, par. 8, of the Constitution of the Philippines patterned after the First Amendment of the United States Constitution. The protection against abridgement by Federal action in the United States has been extended to State action with the inclusion of freedom of speech and of the press in the *liberty* protected against State action under the Fourteenth Amendment. See *Gitlow v. People of New York*, 268 U. S. 652 and *Near v. Minnesota*, 283 U.S. 697.

[5] *Thornhill v. Alabama*, 310 U. S. 88.

that the government may lawfully prevent justifies either censorship or punishment. In such a case, no question as to a possible infringement of the constitutional right to freedom of expression arises. Without such justification, there is an impairment of the constitutional right.[6]

In the light of the two recent decisions, is the above still a fair summary of the applicable doctrine? This article is an attempt to answer this question. Before discussing in detail the clear and present danger doctrine as a limitation on freedom of expression, it is not inappropriate to recall the views of jurists and text-writers as to the meaning and importance of the constitutional right to freedom of speech and of the press.

I MEANING AND IMPORTANCE OF FREEDOM OF EXPRESSION

A. *Views of jurists.*—Justice Malcolm identified freedom of expression with the right to "a full discussion of public affairs." [7] Justice Laurel was partial to the ringing words of John Milton, "the liberty to know, to utter, and to argue freely according to conscience, above all liberties." [8] Justice Johnson spoke of freedom of expression in terms of "a full and free discussion of all affairs of public interest." For him then, free speech includes complete liberty to "comment upon the administration of government as well as the conduct of public men." More specifically, he declared:

> "The freedom of the press 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." [9]

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[6] In the Philippines, *Primicias v. Fugoso*, 45 O. G. 3280. In the United States, *Schenck v. United States*, 249 U. S. 47; *Thornhill v. Alabama*, 310 U. S. 88; *Bridges v. California*, 314 U. S. 252; *Thomas v. Collins*, 323 U. S. 516; *Terminiello v. City of Chicago*, 337 U. S. 1.

[7] *U. S. v. Bustos*, 37 Phil. 731.

[8] *Planas v. Gil*, 67 Phil. 62.

[9] *U. S. v. Perfecto*, 43 Phil. 58. Why the guaranty of free speech and free press includes the right to criticize judicial conduct is explained by Justice Malcolm thus: "The administration of the law is a matter of vital public concern. Whether the law is wisely or badly enforced is, therefore, a fit subject for proper comment. If the people cannot criticize a justice of the peace or a judge the same as any other public officer, public opinion will be effectively muzzled. Attempted terrorization of public opinion on the part of the judiciary would be tyranny of the basest sort. The sword of Damocles in the hands of a judge does not hang suspended over the individual who dares to assert his prerogative as a citizen and to stand up bravely before any official. On the contrary, it is a duty which every one owes to society or to the State to assist in the investigation of any alleged misconduct. It is further the duty of all who know of any official dereliction on the part of a magistrate or the wrongful act of any public officer to bring the facts to the notice of those whose duty it is to inquire into and punish them. In the words of Mr. Justice Gaynor, who contributed so largely to the

Freedom of expression for Justice Carson meant "proper and open discussion of whatever concerns the public." There is thus "immunity granted the discussion of public affairs" so that "all acts and matters of public nature may be freely published with fitting comments and strictures." [10]

Justice Albert apparently would accord the widest scope to this constitutional guaranty when he declared that it is "right to express one's thought upon any matter including the right to do so with impunity." He was careful to add, however, that this liberty "turns into license when it gets out of bounds."[11]

A more precise delimitation of this constitutional guaranty is that found in an opinion by Justice Murphy, already quoted, that freedom of speech and of the press "embraces at the very least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint and without fear of subsequent punishment." [12]

While the constitutional guaranty in the Philippines speaks in absolute terms and while almost all state constitutions apparently include the right to express opinion on any subject, it cannot be denied that freedom of expression should be confined to a discussion of matters of public concern. Even Laski, for all his decided preference in favor of the utmost latitude of discussion, limited the freedom to the expression of "one's ideas on general subjects, on themes of public importance rather than on characters of particular persons." [13] Professor Chafee, probably the leading authority on the subject at present, categorically asserted that freedom of expression as found in the First Amendment to the American Constitution "is a declaration of national policy in favor of public discussion of all public questions." [14]

Another notable feature in the above statement by Justice Murphy was his insistence that freedom of expression means not only freedom from previous restraint but likewise freedom from the fear of subsequent punishment. This is to be contrasted with Blackstone's view that "liberty of the press * * * consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published." Blackstone has not es-

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law of libel: 'The people are not obliged to speak of the conduct of their officials in whispers or with bated breath in a free government, but only in a despotism." (*U. S. v. Bustos*, 37 Phil. 731).

[10] *U. S. v. Sedano*, 14 Phil. 338.

[11] *People v. Dava*, 40 O. G. 5th Sup. 79.

[12] *Thornhill v. Alabama*, 310 U. S. 88.

[13] LIBERTY IN THE MODERN STATE, p. 81.

[14] FREE SPEECH IN THE UNITED STATES, p. 10.

caped criticism for freedom from censorship alone without the assurance that one would not thereafter be held liable for his statement would in effect unduly curtail this freedom.

As Madison aptly declared:

> "This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive as in Great Britain but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licenses but from the subsequent penalty of laws." [15]

Cooley feared that the "liberty of the press"

> "might be rendered a mockery and a delusion and the phrase itself a byword if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publication." [16]

To Dean Pound:

> "* * * if liability for any sort of publication which the legislature chooses to penalize may be imposed upon the publisher after the act, the result may easily be to effectually prevent indirectly and so establish a censorship and evade the guarantee." [17]

Professor Chafee criticized the Blackstonian interpretation as not only inconsistent with eighteenth-century history but also "contrary to modern decisions, thoroughly artificial, and wholly out of accord with a common-sense view of the relations of state and citizen. In some respects this theory goes altogether too far in restricting state action." [18] Complaining that the Blackstonian theory "dies hard," he feels that "it ought to be knocked on the head once for all."

Thereafter, in a leading case, Justice Murphy's view on freedom of expression received further elucidation thus:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words,—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." [19]

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[15] Antieau, *Judicial Delimitation of the First Amendment Freedom*, 34 Marquette Law Review, p. 59.

[16] Antieau, *op. cit.*, 59.

[17] Antieau, *op. cit.*, 59

[18] CHAFEE, FREE SPEECH IN THE UNITED STATES, p. 10.

[19] *Chaplinsky v. New Hampshire*, 315 U. S. 568.

B. *Views of text-writers and legal scholars.*—Cooley's opinion on the scope of the constitutional liberty to freedom of expression was set forth thus:

> "The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals."

Watson's definition that "freedom of speech or of the press is the right to speak or publish what one pleases as long as it does not violate law or injure someone's character, reputation or business, or does not violate public morality" proceeds along similar lines.[20] Laski's definition follows in the main that of Justice Murphy. Freedom of expression for him means "freedom to express one's ideas on general subjects, on themes of public importance rather than on the character of a particular person." [21]

The discussion of this aspect of the question could well be concluded with the statement from Professor Chafee:

> "The true meaning of freedom of speech seems to be this: One of the most important purposes of society and government is the discovery and spread of truth on subject of general concern. This is possible only through absolutely unlimited discussion, for, as Bagehot points out, once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest. Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom." [22]

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[20] WATSON on THE CONSTITUTION; BURDICK in his LAW OF THE CONSTITUTION referred to Hamilton and Story in ascertaining the meaning and scope of this constitutional guaranty. From Hamilton: "The liberty of the press consists, in my idea, in publishing the truth, from good motives and for justifiable ends, though it reflects upon the government, on magistrates, or individuals. If it be not allowed, it excludes the privilege of canvassing men, and our rulers." Story, writing in 1833, had this to say: "No one can doubt the importance, in a free government, of the right to canvass the acts of public men and the tendency of public measures, to censure boldly the conduct of rulers, and to scrutinize closely the policy and plans of the government. This is the great security of a free government. If we would preserve it, public opinion must be enlightened; political vigilance must be inculcated; free, but not licentious discussion must be encouraged."

[21] LIBERTY IN THE MODERN STATE, p. 810.

[22] CHAFEE, FREE PRESS IN THE UNITED STATES, p. 31.

C. *Significance and basis of freedom of expression.*—From the above statements, the significance as well as the basis for the constitutional guaranty could well be discerned. Freedom of expression is a right valuable for the individual but even more so for society. In a democratic society a citizen as Laski clearly pointed out, "quite rightly expects from the state" that his welfare be taken into consideration. It is not unreasonable for him to hope that his experience "be counted in the making of policy, and to have it counted as he, and he only, expresses its import." For

> "If he is driven, in this realm, to silence and inactivity, he becomes a dumb and articulate creature whose personality is neglected in the making of policy. Without freedom of the mind and of association a man has no means of self-protection in our social order. He may speak wrongly or foolishly, he may associate with others for purposes that are abhorrent to the majority of men. Yet a denial of his right to do these things is a denial of his happiness. Thereby he becomes an instrument of other people's ends, not himself an end." [23]

Furthermore, if it be admitted as it should be that deference for individual persons is one mark of a democratic society, the right to freedom of expression is indispensable. An individual who is silenced against his will is likely to feel frustrated. To deny him utterance may be in effect to reduce him to a sense of futility.

If it be admitted that the right is important for the individual, it cannot be denied either that it is even more so for society. This constitutional right deserves protection then not so much for the sake of those who may have something to say but even more so for the sake of the public which is entitled to be enlightened. To quote from Laski again:

> "The case for the view that freedom of thought and speech is a good in itself is fairly easy to make. If it is the business of those who exercise authority in the state to satisfy the wants of those over whom they rule, it is plain that they should be informed of those wants; and obviously they cannot be truly informed about them unless the mass of men are free to report their experience." [24]

When it is remembered further that, as Holmes clearly stated, "time has upset many fighting faiths," then there is likely to be a more widespread acceptance for the view

> "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." [25]

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[23] LASKI, LIBERTY IN THE MODERN STATE, p. 73.

[24] LASKI, *op. cit.*, 74.

[25] *Abrams v. United States*, 250 U. S. 616. Because of the importance of this dissenting opinion, it deserves to be quoted more at length: "Persecution for the expres-

To go back to Chafee, one of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. Only through absolute and unlimited discussion may this purpose be achieved for, in the view of Bagehot whom he invoked as authority, "once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest." [26]

Is it not apparent then that society would be the loser in the long run unless there be the widest possible dissemination of opposed views from diverse and even antagonistic sources? Would not society have cause for regret if freedom of expression be allowed only those who approve all existing political beliefs or economic arrangement? Those who differ and who dissent, as long as they do not resort to unlawful means, have the right to be heard. Democracy is not so weak or so unattractive a faith as to fear that the mere propagation of opposing creeds is likely to subvert it. Justice Holmes should be remembered in this connection when he asserted that this constitu-

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sion of opinions seems to me 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 of 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 prophesy 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. * * * Of course, I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States."

[26] CHAFEE, FREE SPEECH IN THE UNITED STATES, p. 81. Laski reinforces his argument: "But this is only the beginning of the case for freedom of speech. The heresies we may suppress today may be the orthodoxies of tomorrow. New truth begins always in a minority of one; it must be someone's perception before it becomes a general perception. The world gains nothing from a refusal to entertain the possibility that a new idea may be true. Nor can we pick and choose among our suppressions with any prospect of success. It would, indeed, be hardly beyond the mark to affirm that a list of the opinions condemned in the past as wrong or dangerous would be a list of the common-places of our time." LIBERTY IN THE MODERN STATE, p. 75.

tional right exists for the thought that we hate, not only for the thought that agrees with us.

D. *What is included in the terms "press" and "speech."*—Speech includes any form of oral utterances. Peaceful picketing both under Philippine and American decisions is embraced in the term speech.[27] The American Supreme Court likewise included in the concept of speech such acts as the display of a flag[28] and salute to the flag.[29]

The press covers every sort of publication: books, periodicals, handbills, leaflets. Radio as an instrument of mass communication may come within this term.[30]

II. THE CLEAR AND PRESENT DANGER PRINCIPLE

A. *Why freedom of expression not absolute.*—From the language of the above constitutional provision as well as analogous declarations found in various state constitutions, it would appear that the

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[27] *Mortera v. Canlubang Sugar Estate*, 45 O. G. 1714; *Thornhill v. Alabama*, 310 U. S. 88. Why the movies should be considered as being embraced in the constitutional guaranty of freedom of expression is explained in the case of *Burstyn v. Wilson*, 72 Sup. Ct. Rep. thus: "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in *Winters v. People of State of New York*, 1948, 333 U. S. 507, 510, 68 S. Ct. 665, 667, 92 L. Ed. 840: 'The line between the informing and the entertaining is too elusive for the protection of that basic right (a free press). Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.'

"It is urged that motion pictures do not fall within the first Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.

"It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from the First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.

"For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free scope and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in *Mutual Film Corp. v. Industrial Comm., supra*, is out of harmony with the views here set forth, we no longer adhere to it."

[28] *Stromberg v. California*, 283 U. S. 359.

[29] *W. Va. Board of Education v. Barnette*, 319 U. S. 623.

[30] *Santiago v. Far Eastern Broadcasting Co.*, 40 O. G. 4603.

right is absolute: No law may be passed abridging the freedom of speech and of the press. As is evident from the previous discussion, however, even the most rabid partisan of the widest scope for this constitutional guaranty admits that the right cannot thus be unfettered and unrestrained. From the purpose to be subserved by the guaranty which is the spread and dissemination of ideas for the welfare of society, it would follow that as Justice Murphy pointed out, "certain well-defined and narrowly limited classes of speech" such as the lewd and obscene, the profane, the libelous, and the insulting or "fighting words" could be prevented or if given expression, be a cause for punishment without raising any constitutional problem. For "such utterances are no essential parts of any exposition of ideas and are of slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." [31]

In addition, public peace, public safety, and the administration of justice could be endangered by unrestrained utterance. Where such a clear and present danger exists, there could be previous restraint or imposition of liability.

B. *Criteria for limitation.*—One possible limitation, objective in character, is that of previous restraint as had been pointed above. This limitation would in effect unduly curtail freedom of expression. On the other hand, it may likewise have the effect of not sufficiently safeguarding public order and safety. In times of war, censorship is a valid mode of safeguarding public interest.

Another objective test for which support is found in a Supreme Court opinion is that commercial matters fall outside the scope of the protection.[32] This criterion for limitation has lost some ground since the *Valentine v. Christensen* [33] decision. Justice Rutledge in *Thomas v. Collins* [34] correctly stated:

> "The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case merely to urge * * * that an organization for which the rights of free speech and

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[31] *Chaplinsky v. New Hampshire*, 315 U. S. 568.

[32] See *Mutual Film Corp. v. Industrial Comm. of Ohio*, 236 U. S. 230, where it was held that movies are not included within the scope of the freedom of speech and freedom of the press protection on the ground that the "exhibition of moving pictures is a business, pure and simple, originated and conducted for profit."As shown a few pages back, this case is now overruled. There is the later case of *Valentine v. Chrestensen*, 316 U. S. 52, where a unanimous Supreme Court held that "purely commercial ventures did not come within the protection of the First Amendment."

[33] 316 U. S. 52.

[34] 323 U. S. 516.

> free assembly are claimed is one 'engaged in business activities' or that the individual who leads it in exercising those rights receives compensation for doing so."

Justice Reed, in the case of *Jones v. Opelika*,[35] at first went along with the view that the commercial nature of an activity deprived it of the protection to which it might otherwise be entitled under the First Amendment. However, in a later decision, *Winters v. State of New York*,[36] he had occasion to state:

> "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

Professor Antieau could rightfully conclude then that this commercial test "is not only difficult but dangerous to the cause of freedom." [37]

Another test which is subjective is that while freedom of expression is guaranteed, its abuse may be penalized. If made to prevail, the right might be rendered nugatory. Legislators and judges who do not believe in according hospitable scope to this constitutional guaranty could very well characterize as abuse what to other equally informed individuals might be nothing but an intemperate exercise of freedom at the most. It is to be noted though that Justice Albert spoke of *license* as a limitation on the freedom of expression.[38] Justice Laurel made use of the same word fortified by the adjective *unbridled*. While there may be a clear case where the test relied upon is appropriate, it is still too subjective a test to be useful in limiting this all-important right.

Another test is the *bad or dangerous tendency doctrine*. This limitation which carries undertones of the reasonable basis theory as a justification for the exercise of the police power and the curtailment of liberty, is not to be recommended either. Carried to its extreme, certain words and ideas may well become forbidden words and ideas. Evidently, that would be to set at naught what the constitutional provision guarantees, namely, freedom of expression.

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[35] 316 U. S. 584.
[36] 333 U. S. 507.
[37] Antieau, *op. cit.*, 65. The discussion owes much to Professor Antieau's article.
[38] *People v. Dava*, 40 O. G. 5th Sup., 79.

C. *The clear and present danger doctrine as a limitation on freedom of expression.*—Justice Holmes, speaking for the American Supreme Court in 1919, gave expression to a satisfactory test for limiting freedom of speech and of the press. That is the *clear and present danger test.* It was announced in the *Schenck* [39] case, which was a prosecution based on the Espionage Act, the allegation being that Schenck violated the provisions of said Act by causing and attempting to cause insubordination in the armed forces of the United States and interfering with or obstructing recruitment and enlistment in times of war. The facts constituting the offense consisted in the publication and dissemination of the various articles which the accused had written.

In sustaining the conviction, Justice Holmes speaking for a unanimous court, observed:

> "* * * the character of every act depends upon the circumstances in which it was done. * * * The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. * * * 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."

This test then as a limitation on freedom of expression is justified by the danger or evil of a substantive character that the state has a right to prevent. Unlike the *dangerous tendency* doctrine, the danger must not only be clear but also present. The term *clear* seems to point to a causal connection with the danger of the substantive evil arising from the utterance questioned. *Present* refers to the time element. It used to be identified with imminent and immediate danger. The danger must not only be probable but very likely inevitable.

Why repression is permissible only when the danger of substantive evil is present is explained by Justice Brandeis thus:

> "* * * 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 process of education the remedy to be applied is more speech, not enforced silence." [40]

What is the character of the substantive evil that amounts to a danger? In the famous dissent by Justice Holmes in the *Abrams* [41]

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[39] *Schenck v. United States,* 249 U. S. 47.
[40] *Whitney v. California,* 274 U. S. 357 (concurring opinion).
[41] *Abrams v. United States,* 250 U. S. 616.

case, the evil seems to be identified with the peril to the nation's safety for, as he pointed out, "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."

Justice Brandeis had occasion to speak of the apprehended evil as "relatively serious." For him then, "prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society." [42] Justice Black spoke of substantive evil as "being extremely serious." [43] Justice Douglas in turn stated that censorship or punishment for utterances is not allowable unless it is shown "likely to produce a clear and present danger of a serious substantive evil that rises far above public convenience, annoyance or unrest." [44]

D. *The clear and present danger doctrine in the Philippines.*— There has been no explicit adoption of the clear and present danger doctrine in the Philippines. It was in effect followed though in the leading case of *Primicias v. Fugoso.*[45]

The question involved in that case was whether or not the mandamus instituted by the petitioner Primicias as campaign manager of the Coalesced Minority Parties against the then Mayor of the City of Manila, would lie to compel the latter to issue a permit for the holding of a public meeting. In refusing to grant such permit, the mayor entertained the fear that in view of the bitterness of the speeches expected from the minority men, there might be breaches of the peace and of public order. The Supreme Court did not consider such a ground as tenable for the refusal of the permit and granted mandamus. It explained its opinion thus:

> "The reason alleged by the respondent in his defense for refusing the permit is, 'that there is a reasonable ground to believe, basing upon previous utterances and upon the fact that passions, specially on the part of the losing groups, remains bitter and high, that similar speeches will be delivered tending to undermine the faith and confidence of the people in their government, and in the duly constituted authorities, which might threaten breaches of the peace and a disruption of public order.' As the request of the petition was for a permit 'to hold a peaceful public meeting,' and there is no denial of that fact or any doubt that it was to be a lawful

[42] *Whitney v. California,* 274 U. S. 357.
[43] *Bridges v. California,* 314 U. S. 252.
[44] *Terminiello v. City of Chicago,* 337 U. S. 1.
[45] 45 O. G. 3280.

assemblage, the reason given for the refusal of the permit cannot be given any consideration."

Even more in point insofar as the adoption of the clear and present danger rule is concerned, was the citation by the majority opinion of an excerpt from Mr. Justice Brandeis concurring in the case of *Whitney v. California.*[46]

"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 speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. 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. * * *

"Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. * * * The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state. Among freemen, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly."

The concurring opinion of Justice Paras in the same case was likewise in accordance with the clear and present danger doctrine.

"The petitioner is a distinguished member of the bar and Floor Leader of the Nacionalista Party in the House of Representatives; he was the chief campaigner of the said Party in the last elections. As the petition comes from a responsible party, in contrast to Evangelista's Communist Party which was considered subversive, I believe that the fear which caused the Mayor to deny it was not well founded and his action was accordingly far from being a sound exercise of his discretion."

Previously though in the Philippines, in sedition cases, the Supreme Court had expressed preference for the *bad* or *dangerous tendency* doctrine.

Under the *clear and present danger* principle and the *bad* or *dangerous tendency* doctrine, there is a limitation on freedom of expression justified by the danger or evil that the state has the right to prevent. The difference lies in the fact that while the former requires that the danger be evident, impending, pressing and imminent,

[46] 274 U. S. 357.

the latter requires only a likelihood or indication that the substantive evil apprehended may occur in the indefinite future. The protection accorded therefore, to the freedom of expression is much more real and effective in the case of the *clear and present danger* doctrine than in the case of the *bad* or *dangerous tendency* principle.

1. *Effect on the clear and present danger rule of the case of Espuelas v. People of the Philippines.*[47]—The case of *Espuelas v. People of the Philippines* was a prosecution under Article 142 of the Revised Penal Code punishing those who write, publish or circulate scurrilous libels against the government or any of the duly-constituted authorities, or which suggest or incite rebellious conspiracies or riots or which tend to stir up the people against the lawful authorities or to disturb the peace of the community. Appellant Espuelas was convicted by the trial court of the above offense the conviction being sustained by the Court of Appeals, from which the case was elevated to the Supreme Court on appeal by certiorari.

The evidence disclosed that Espuelas had his picture taken, making it appear as if he were hanging at the end of a piece of rope suspended from a branch of a tree, when as a matter of fact he was merely standing on a barrel. Thereafter he had copies of said photographs sent to several newspapers and weeklies of general circulation, not only in Bohol but also throughout the Philippines and even abroad. With the copies of the above photographs was a note or letter wherein he made to appear that it was written by a person who committed suicide by name of Alberto Reveniera.

The letter addressed to the supposed wife of the latter purported to explain why he committed suicide. The reason he gave was that he "was not pleased with the administration of Roxas," and he would have his alleged wife tell "the whole world about this." Then the alleged suicide note continues:

> "And if they ask why I did not like the administration of Roxas, point out to them the situation in Central Luzon, the Hukbalahaps. Tell them about Julio Guillen and the banditry of Leyte.
>
> "Dear wife, write to President Truman and Churchill. Tell them that here in the Philippines our government is infested with many Hitlers and Mussolinis.
>
> "Teach our children to burn pictures of Roxas if and when they come across one.
>
> "I committed suicide because I am ashamed of our government under Roxas. I can not hold high my brows to the world with this dirty government.
>
> "I committed suicide because I have no power to put under *Juez de Cuchillo* all the Roxas people now in power. So, I sacrificed my own self."

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[47] G. R. No. L-2990, prom. Dec. 17, 1951.

In sustaining the conviction by a vote of six to three, Justice Bengzon, who penned the majority opinion, characterized the letter and its effects thus:

> "The letter is a scurrilous libel against the Government. It calls our government one of crooks and dishonest persons (dirty) infested with Nazis and Fascists, i.e. dictators.
>
> "And the communication reveals a tendency to produce dissatisfaction or a feeling incompatible with the disposition to remain loyal to the government.
>
> "Writings which tend to overthrow or undermine the security of the government or to weaken the confidence of the people in the government are against the public peace, and are criminal not only because they tend to incite to a breach of the peace but because they are conducive to the destruction of the government itself (See 19 Am. Law Rep. 1511). Regarded as seditious libels they were the subject of criminal proceedings since early times in England."

There is a recognition in the majority opinion that article 142 of the Revised Penal Code lends itself to becoming "a weapon of intolerance constraining the expression of opinion or mere agitation for reform." The opinion likewise admits that in disposing of said appeal, "careful thought had to be given to the fundamental right of freedom of speech." While statutes against sedition then, as the majority opinion points out, "have always been considered not violative of such fundamental guarantee," care is to be taken that "they should not be interpreted so as to unnecessarily curtail the citizen's freedom of expression to agitate for institutional changes."

Notwithstanding such an attitude which ostensibly seems to frown upon an unwarranted curtailment of the right of expression, the conviction was upheld as "there is sufficient safeguard by requiring intent on the part of the defendant to produce illegal action." For the majority the particular article in question which was "aimed at anarchy and radicalism presents largely a *question of policy*." The Legislature having spoken in article 142 "the law must be applied."

The majority opinion goes on to state:

> "Analysed for meaning and weighed in its consequences the article cannot fail to impress thinking persons that *it seeks to sow the seeds of sedition and strike*. The infuriating language is not a sincere effort to persuade, what with the writer's simulated suicide and false claim to martyrdom and what with its failure to particularize. When the use of irritating language centers not on persuading the readers but on creating disturbance, the rationale of free speech can not apply and the speaker or writer is removed from the protection of the constitutional guaranty."

The majority could even invoke an authority in support of their harsh view.

"In 1922 Isaac Perez of Sorsogon while discussing political matters with several persons in a public place uttered these words: 'Filipinos must use bolos for cutting off Wood's head'—referring to the then Governor-General Leonard Wood. Perez was found guilty of inciting to sedition in a judgment of this court published in the Philippine Reports. That precedent is undeniably opposite. Note that the opinion was penned by Mr. Justice Malcolm probably the member who has been most outspoken on freedom of speech. Adopting his own words we could say, 'Here the person maligned by the accused is the Chief Executive of the Philippine Islands. His official position, like the Presidency of the United States and other high offices, under a democratic form of government, instead of affording immunity from promiscuous comment, seems rather to invite abusive attacks. But in this instance, the attack on the President passes the furthest bound of free speech and common decency. More than a figure of speech was intended. There is a seditious tendency in the words used, which could easily produce disaffection among the people and a state of feeling incompatible with a disposition to remain loyal to the government and obedient to the law.' "

Even if the majority opinion be viewed with the utmost sympathy, its rationale is far from persuasive. It appears as if the majority in their distaste for the foolish and intemperate letter of the accused and perhaps in their desire to warn similarly-minded critics of the administration to use less "infuriating" language dignified as seditious libel, a matter that should have occasioned at most derisive laughter.

The dissenting opinion by Justice Tuason, concurred in by Chief Justice Paras and Justice Feria shows a better understanding of the command of the Constitution that "no law is to be passed abridging the freedom of speech and of the press."

A pertinent excerpt of the dissenting opinion follows:

"There is no inciting to sedition unless, according to Justice Holmes' theory expressed in connection with a similar topic, 'the words used are used in such circumstances and are of such a nature as to create clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.' In the very law punishing inciting to sedition there is the requirement that the words alleged to be seditious or libelous *lead* or *tend* to the consummation of the evils sought to be prevented. Even in the ordinary offenses of threat and defamation, words are not taken at face value, but their import or gravity is gauged by the circumstances surrounding each particular case.

"The terms 'lead' and 'tend' are used in Article 142 of the Revised Penal Code in their ordinary signification. Thus understood, lead as a verb means 'to draw or direct by influence' or 'to prevail on,' and tend means 'to conduce to an end.' (Webster's International Dictionary).

"Judged by these tests, and granting for the present purposes that the defendant did intend to incite others to sedition, the article was harmless as far as the safety of the Government and its officers was concerned, and should have been ignored, as many others more serious than this one have

> been * * *. If words are 'the keys of persuasion' and 'the triggers of action,' the article under consideration was far from possessing either of these qualities, taking into consideration the personality of the man who wrote it and what he 'did.' The reaction of the readers could not have been other than the whole thing was comical if it were not 'tragic.' The general reaction it is fairly safe to say, was one of regret for a man of eccentric and unbalanced mind or ridicule and curiosity for a grotesque stunt. The witnesses for the Government themselves, some of whom were constabulary officers stationed at Tagbilaran, stated that upon reading the article and seeing the author's picture they just laughed it off, 'thinking that this fellow must be crazy * * *'
>
> "Attacks more serious, virulent and inflammatory than the one at bar, by persons well known in politics and public life and having influence and large following, have frequently appeared in the press or been launched on the platforms. What the defendant did or said was very tame and mild by comparison. Nevertheless, those critics have not been brought to court; and it is to the everlasting credit of the administration and, in the long run, for the good of the Government, that the parties reviled and the prosecutors have adopted a tolerant attitude."

As previously stated, the Supreme Court in *Primicias v. Fugoso*,[48] tacitly adopted the *clear and present danger* doctrine. Tested by that doctrine, the conviction here could not have been sustained. There is no question about the right of the government to punish sedition and incitement to sedition. There should be no question either about the futility of any such letter and the fake suicide to lead people to take up arms. The Filipino masses cannot be deluded that easily. Those who may have read the letter and may have believed it might have sympathized with the bereaved family. The letter though could not have incited the people to take up arms against the administration. Where then is the danger? As noted by Boudin "the meaning of the rule is clear: the danger involved must be both clear and present. It is also clear that the rule is all-pervasive—'it applies to every case.' "[49]

It must be admitted though that with reference to seditious speeches and publications, the Supreme Court in the *Evangelista*,[50] *Feleo*,[51] and *Nabong*[52] cases did express its preference for the dangerous tendency doctrine. Under this view the danger need not be clear and present. It is sufficient that it could be envisioned, even if its occurrence is remote. The very statement of the doctrine

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[48] 45 O. G. 3280.

[49] Boudin, *Seditious Doctrines and the Clear and Present Danger Rule*, 38 Virginia Law Review, 143, 155.

[50] *People v. Evangelista*, 51 Phil. 254.

[51] *People v. Feleo*, 58 Phil. 573.

[52] *People v. Nabong*, 57 Phil. 455.

makes clear how lacking it is in its protection for the constitutional guarantee of freedom of expression.

A word about the *Perez* [53] decision. It is true as the majority in the *Espuelas* case stated that it was Justice Malcolm, "probably the member who has been most outspoken on freedom of speech," who penned the opinion in the *Perez* case. Precisely this decision does not do him justice. The principle announced in this case is at war with his often eloquently expressed views on the importance of freedom of expression. It may be explained on the ground that the accused Perez in this case threatened to cut off the head of an American Governor-General, who was at odds with the Filipino leaders. Justice Malcolm must have been aware that humane and considerate as was the policy of the Americans in the Philippines, there was no time when the feeling for Philippine independence was not deeply and intensely felt by the overwhelming majority of the Filipinos. Considering the fact that Governor General Wood incurred the ire of many leading political leaders because of his strong opposition to the early grant of Philippine independence, it was not too farfetched to believe that irresponsible statements of the sort made by Perez might be acted on by some zealous and misguided patriots. Such considerations must have occurred to Justice Malcolm in sustaining the conviction. Thus he stated: "the courts should be the first to stamp out the embers of insurrection. The fugitive flame of disloyalty, lighted by an irresponsible individual, must be dealt with firmly before it endangers the general peace." Is that the situation now?

2. *Clear and present danger doctrine in American courts.*— While the clear and present danger principle was announced as early as the *Schenck* case which was cited as controlling in six subsequent decisions [54] during the 1919-1920 term, its acceptance was not made categorical [55] for all free press and free speech cases until the case

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[53] *People v. Perez*, 45 Phil. 599.

[54] *Gilbert v. Minnesota*, 254 U. S. 325 (1920); *Pierce v. United States*, 252 U. S. 239 (1920); *Schaefer v. United States*, 251 U. S. 468 (1920); *Abrams v. United States*, 250 U. S. 616 (1919); *Debs v. United States*, 249 U. S. 211 (1919); *Frowerk v. United States*, 249 U. S. 204 (1919).

[55] When the *Bridges* case was then decided in 1942, Justice Black, speaking for the majority, could state that the clear and present danger doctrine in the *Schenck* case has afforded the American Supreme Court practical guidance in a great variety of cases in which the scope of the constitutional protection to freedom of expression was in issue. He demonstrated that either a majority or minority of the American Supreme Court has utilized the formula in passing upon the constitutionality of convictions under the espionage acts as in *Schenck v. United States, supra, Abrams v. United States* (250 U. S. 616); under a criminal syndicalism act as in *Whitney v. California* (274 U. S. 357); under an "anti-insurrection" act as in *Herndon v. Lowry* (301 U. S. 242);

of West Virginia State Board of Education v. Barnette [56] decided in 1943.

In a 1937 decision [57] though, the clear and present danger principle was used as a yardstick by the majority of the American Supreme Court in interpreting a state anti-insurrection statute. The view there announced was that the conceded power of the state to penalize incitement to violence and to crime cannot abridge freedom of speech and of assembly. Its exercise may collide against the fundamental right to freedom of speech and assembly. To justify resort to this conceded power then, there must be "reasonable apprehension of the danger to organized government." The reminder was there made that the "judgment of the legislature in some instances is not unfettered."

Subsequently, in *Thornhill v. Alabama*,[58] decided in 1940, Justice Murphy speaking for the majority of the Supreme Court, after reaching the conclusion that peaceful picketing is embraced in the constitutional guaranty of freedom of speech, declared that "abridgment of the liberty can be justified only where the clear danger of substantive evil arises under the circumstances affording no opportunity

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and for breach of the peace at common law as in *Cantwell v. Connecticut* (310 U. S. 296). Since then the clear and present danger test has been relied upon further as a test of the validity or applicability of a resolution of Board of Education ordering that salute to the flag should be a regular part of program of activities in public schools (*West Vriginia State Board of Education v. Barnette*, 319 U. S. 624); statute making it a criminal offense to indoctrinate any creed, theory, or any set of principles which reasonably tends to create an attitude of stubborn refusal to salute, honor or respect the flag of the United States (*Taylor v. Mississippi*, 319 U. S. 583); statute providing for cancellation of citizenship (*Schneiderman v. United States*, 320 U. S. 118); statute requiring a labor union leader to obtain an organizer's card before soliciting membership when applied to one who addressed a mass meeting of workers and at the end of his speech urged persons present to join a union (*Thomas v. Collins*, 323 U. S. 516); judgments for contempt as in the Bridges decision (*Pennekamp v. Florida*, 328 U. S. 331 and *Craig v. Harney*, 331 U. S. 367); an ordinance prohibiting disorderly conduct (*Terminiello v. Chicago*, 337 U. S. 17); the provision in the Taft-Hartley Act withholding its benefits to a labor organization unless its officials execute an affidavit that he is not a member of the Communist Party or affiliated with such party and that he does not believe in and is not a member of or support any organization that believes in or teaches the overthrow of the United States government by force or by any illegal or unconstitutional methods (*Am. Communications Assn. v. Douds*, 339 U. S. 382); and the provisions in the Smith Act to organize or help 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 and to knowingly or willfully advocate, abet, advise or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence (*Dennis v. United States*, 341 U. S. 494).

[56] 319 U. S. 624.

[57] *Herndon v. Lowry.*

[58] 310 U. S. 88.

to test the merits of the ideas by competition for acceptance in the market of public opinion." In 1942, in the *Bridges* [59] case, the clear and present danger doctrine was relied upon to determine when a publication may be considered in contempt of the administration of justice.

The case of *West Virginia State Board of Education v. Barnette* [60] was next. As stated earlier, in denying the school board the power to compel salute to the flag, Justice Jackson speaking for the majority, had occasion to state:

> "* * * here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger. * * * The right of a state to regulate, for example, a public utility, may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interest which the state may lawfully protect."

Professor Antieau quoting with approval an article written in the *Philippine Law Journal*,[61] accepted the view that the case of *Taylor v. Mississippi*,[62] decided the same year, erased all doubts that the clear and present danger doctrine had been adopted by the American Supreme Court in preference to the dangerous tendency doctrine as a test of criminality.

Then came *Terminiello v. City of Chicago*,[63] perhaps the most vehement in its affirmance of the clear and present danger doctrine. This was decided on May 16, 1949. The majority of the court in an opinion by Justice Douglas considered the construction of a Chicago ordinance as an infringement of the constitutional right of free speech. The ordinance provided that all persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to the breach of the peace, shall be deemed guilty of disorderly conduct and upon conviction thereof shall be severally fined not less than $1.00 nor more than $200.00 for each offense.

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[59] 314 U. S. 252.

[60] 319 U. S. 624.

[61] Emma Quisumbing, *The Clear and Present Danger Rule as a Limitation to Freedom of Speech and the Press*, 22 Philippine Law Journal, 136.

[62] 319 U. S. 383.

[63] 337 U. S. 1. Justice Jackson wrote a forceful dissenting opinion which is highly critical of the application of the clear and present danger rule to the facts of this particular case.

Terminiello was prosecuted for a violation of this ordinance and found guilty of disorderly conduct. The case grew out of an address he delivered in an auditorium in Chicago under the auspices of the Christian Veterans of America. The auditorium was filled to capacity with over 800 persons present. Some had to be turned away. Outside there was a crowd of about a thousand persons gathered to protest against the meeting. While there were policemen assigned to maintain order, they were not able to prevent several disturbances, the crowd outside being both angry and turbulent. In his speech, Terminiello not only condemned the conduct of the crowd outside but criticized vigorously various political and racial groups whose activities he denounced as inimical to the welfare of the country.

The trial court in instructing the jury which brought in a general verdict of guilty, stated that "breach of the peace" consists of any "misbehaviour which violates the public peace and decorum." Then the charge to the jury continued:

> "* * * misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."

Notwithstanding the fact that to this construction of the ordinance no objection was taken in the trial court and thereafter in the state appellate courts of Illinois, it was held in the majority opinion by Justice Douglas, as above stated, that it rendered the ordinance violative of the constitutional right of free speech. The fact that the conviction of violating the valid provisions of the ordinance might have been warranted by the evidence was held immaterial.

In expounding the reason for this conclusion of the majority, Justice Douglas made clear the continuing validity of the clear and present danger doctrine thus:

> "The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *De Jonge v. Oregon*, 299 U. S. 353, 365, 81 L. ed., 278, 284, 57 S. Ct. 255, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
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> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That

is why freedom of speech, though not absolute, (*Chaplinsky v. New Hampshire, supra* [315 U. S. pp. 571, 572], 86 L. ed. 1034, 1935, 62 S. Ct. 766), is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. * * * There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

"The ordinance as construed by the trial court seriously invaded this province. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand."

In the 1950 term of the American Supreme Court in the *Dennis* [64] case, there was a restatement made of the clear and present danger doctrine which in effect restricted its scope. This was an indictment for violation of the conspiracy provisions of the Smith Act. Petitioners were convicted in a district court and by the court of appeals. Certiorari granted by the United States Supreme Court was limited to two questions, one of which was whether either section 2 or section 3 of the Smith Act, inherently or as construed and applied in the case, violated the guaranty of freedom of expression.

Sections 2 and 3 of the Smith Act provide as follows:

"Sec. 2.

"(a) It shall be unlawful for any person—

"(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;

"(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

"(3) to organize or help 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; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

"Sec. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of * * * this title."

Petitioners were charged with wilfully and knowingly conspiring:

"(1) to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate

[64] 341 U. S. 494.

the overthrow and destruction of the Government of the United States by force and violence; and (2) knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence."

In the main opinion by Chief Justice Vinson, he declared that the court was squarely faced with the application of the clear and present danger test. According to him, it must decide then what that phrase imports. Then he continued:

"Overthrow of Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected, the literal problem which is presented is what has been meant by the use of the phrase 'clear and present danger' of the utterances bringing about the evil within the power of Congress to punish.

"Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby, they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. 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. * * *

"The 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. Such also is true of cases like *Fiske v. State of Kansas*, 1927, 274 U. S. 380 and *DeJonge v. State of Oregon*, 1937, 299 U. S. 353. * * * 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.

"Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case (courts) must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' 183 F. 2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words.

"Likewise, we are in accord with the court below, which affirmed the trial court's finding that the requisite danger existed. The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an

> attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score. And this analysis disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger * * *. If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added."

In the concurring opinion of Justice Frankfurter, while there is an acceptance of the clear and present danger concept, there is likewise a warning that it is "not a substitute for the weighing of values" and that "there is ample justification for a legislative judgment that the conspiracy now before us is a substantial threat to the national order and security." He likewise adverted to the fact that "not every type of speech occupies the same position in the scale of values." For him, advocacy of the overthrow of government by force and violence "deserves little protection." He was not in accord either with the theory that the First Amendment occupies a "preferred position."

The dissenting opinions of Justices Black and Douglas, in view of their emphasis on the "significance of the clear and present danger principle," deserve to be quoted more fully. According to Justice Black:

> "At the outset I want to emphasize what the crime involved in this case is, and what it is not. These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids. I would hold sec. 3 of the Smith Act authorizing this prior restraint unconstitutional on its face and as applied.
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> "But let us assume, contrary to all constitutional ideas of fair criminal procedure, that petitioners although not indicted for the crime of actual advocacy, may be punished for it. Even on this radical assumption, the other opinions in this case show that the only way to affirm these convictions is to repudiate directly or indirectly the established 'clear and present danger rule.' This the Court does in a way which greatly restricts

the protection afforded by the First Amendment. The opinions for affirmance indicate that the chief reason for jettisoning the rule is the expressed fear that advocacy of Communist doctrine endangers the safety of the Republic. Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. They embodied this philosophy in the First Amendment's command that Congress 'shall make no law * * * abridging the freedom of speech, or of the press * * *.' I have always believed that the First Amendment is the keystone of our Government, that the freedoms it guarantees provided the best insurance against destruction of all freedom. At least as to speech in the realm of public matters, I believe that the 'clear and present danger' test does not 'mark the furthermost constitutional boundaries of protected expression' but does 'no more than recognize a minimum compulsion of the Bill of Rights.' *Bridges v. State of California*, 314 U.S. 252, 263, 62 S. Ct. 190, 86 L. ed. 192.

"Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."

Justice Douglas explained his dissent thus:

"Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of a democracy. The airing of ideas releases pressures which otherwise might become destructive. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion keeps a society from being stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.

"Full and free discussion has indeed been the first article of our faith. We have founded our political system on it. It has been the safeguard of every religious, political, philosophical, economic, and racial group amongst us. We have counted on it to keep us from embracing what is cheap and false; we have trusted the common sense of our people to choose the doctrine true to our genius and to reject the rest. This has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality. We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen. We have above all else feared the political censor. We have wanted a land where our people can be exposed to all the diverse creeds and cultures of the world.

"There comes a time when even speech loses its constitutional immunity. Speech innocuous one year may at another time fan such destructive flames that it must be halted in the interests of the safety of the Republic. That is the meaning of the clear and present danger test. When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt. Otherwise, free speech which is the strength of the Nation will be the cause of its destruction.

"Yet free speech is the rule, not the exception. The restraint to be constitutional must be based on more than fear, on more than passionate

> opposition against the speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed."

If the main opinion of Chief Justice Vinson is an indication of what further decisions would be, then the *clear and present danger* doctrine now means only that, in the words of Learned Hand, "in each case * * * (courts) must ask whether the gravity of the evil discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." The degree of imminence and immediacy of the danger required is less than in the classic formulation of Holmes. The gravity of the evil, the overthrow of the government no less, might have led the majority to conclude that suppression of the utterance was unavoidable. It is to be hoped that such was the case. In other situations less fraught with danger to the entire nation, the traditional meaning of the *clear and present danger* doctrine should be controlling. Nothing less would suffice if freedom of expression is to be accorded full protection.