THE SUPREME COURT APPLIES "CLEAR AND PRESENT DANGER": BUT WHICH ONE?*

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Free Speech: Not Absolute, but Preferred

The Philippine Constitution provides in the Bill of Rights, Article IV:

> Sec. 9. — 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 redress of grievances.

Freedom of speech is a vital component of the Philippine legacy from Western democratic theory. The main value of free speech is thought to lie in the prevention of human error through ignorance. For example, John Milton[1] and John Stuart Mill[2] are frequently quoted as eloquent defenders of the free exchange of thought. And Justice Holmes is probably most closely associated with his classic aphorism about the "marketplace of ideas."[3]

Modern theorists of free speech variously identify the following other values of free speech: assuring individual self-fulfillment; advancing knowledge and discovering truth; providing for participation in decision-making

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1 J. MILTON, AREOPAGITICA (1644): "Though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and falsehood grapple; whoever knew truth put to the worse in a free and open encounter?"

2 J. S. MILL, ON LIBERTY, Ch. II (1859): "First, if any opinion is compelled to silence, that opinion for aught we can certainly know, be true. To deny this is to assume our own infallibility. Secondly, though this silenced opinion be in error, it may, and very commonly does, contain a portion of the truth; and since the generally prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth had any chance being supplied. Thirdly, even if the received opinion be not only true but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension of feeling of its rational grounds. And not only this, but fourthly, the meaning of the doctrine itself will be in danger of being lost or enfeebled. . . ."

3 Abrams v. U.S., 250 U.S. 616, 630 (1919) (Holmes, J., dissenting): "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."

by all members of society; achieving a more adoptable and hence a more stable community, by maintaining the precarious balance between healthy cleavage and necessary consensus[4]; aiding the political process[5]; checking official misconduct[6]; aiding individual development in liberty[7] and in autonomy[8]; and aiding individual self-realization.[9]

In any event, the Philippine Constitution, like its American archetype,[10] appears to use the language of absolute prohibition: "no law shall be passed." Yet it is not "speech" which is absolutely protected from restriction, but only "freedom of speech." Thus, the threshold issue is the definition of freedom of speech. In other words: what speech should be free?

Knowing the meaning of freedom of speech, attention could then be given to the strict constitutional language. It should be noted that while free speech language appears to be absolute, the language for other human rights is not. For instance, like the American Fourth Amendment, the Philippine Constitution prohibits only "unreasonable searches and seizures."[11]

Even so, no majority of the American Supreme Court has ever been persuaded that free speech is an absolute. This lonely position was explained by Justice Black in *Konigsberg v. State Bar of California*:

> . . . I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the man who drafted our Bill of Rights did all the 'balancing' that was to be done in this field. . . . [T]he very object of adopting the First Amendment . . . was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to 'balance' the Bill of Rights out of existence. . . .[12]

In the same case, Justice Harlan explained the opposite view — that the court should balance free speech with legitimate governmental objectives.[13] In writing for the court, Harlan laid down a rule of law that became precedent.

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4 EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970).

5 *See* MEIKLEJOHN, POLITICAL FREEDOM (1960): Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978).

6 Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR. FOUND. RESEARCH J. 526.

7 Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978).

8 Scanlon, *A Theory of Freedom of Expression*, 1 Phil. & Pub. Aff. 204 (1972).

9 Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982). *See also* Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438 (1983); McMillan, *Free Speech—Now More Than Ever*, 19 WAKE FOREST L. REV. (1983).

10 U.S. CONSTITUTION, First Amendment: "Congress shall make no law. . . abridging the freedom of speech. . . ."

11 CONST., Art. IV, Sec. 3.

12 366 U.S. 36, 61 (1961).

13 366 U.S. 49-51: "[W]e reject the view that freedom of speech and association. . . as protected by the First and Fourteenth Amendments, are 'absolutes', not only in the

But although the court does not consider that free speech is an absolute right, the court considers that it occupies a preferred position in the Bill of Rights. The "preferred position" approach was first suggested in Chief Justice Stone's famous footnote in *United States v. Carolene Products Co.*:[14] "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. . . ."

Chief Justice Stone explicitly advocated the "preferred position" in a later case.[15] Thereafter, the U.S. Supreme Court adopted his view by ruling: "Freedom of press, freedom of speech, freedom of religion are in a preferred position."[16]

The preferred position of freedom of speech appears to be established judicial dogma.[17] Criticism appears to be directed more at the words used, rather than at the substance intended. Thus, one critic warned that the use of "preferred position" terminology might imply "that any law touching communication is infected with presumptive invalidity."[18]

To sidestep this criticism, courts avoid the term "preferred position," but accord it all the same to free speech. To protect this preference, the court applies certain judicial tools, principally the clear and present danger test.[19]

To be sure, alternative judicial tools are available to ensure the free speech guarantee. The American court has laid down the doctrines of overbreadth; void-for-vagueness; and the least-restrictive-means.

Under the overbreadth doctrine, the court will strike down the overbroad statute because it might apply to others, not present litigants, engaging in protected activity which the statute apparently proscribes. An overbroad statute is defined as "one that is designed to burden or punish activities which are constitutionally protected, but the statute includes within its scope activities which are protected by the First Amendment."[20] The Philippine Supreme Court applied the overbreadth doctrine in the case of *Gonzales v. Comelec*.[21]

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undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment."

[14] 304 U.S. 144, 152 (1938).

[15] Jones v. Opelika, 316 U.S. 584, 608 (1942).

[16] Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

[17] *See* J. NOWAK, R. ROTUNDA, N. YOUNG, CONSTITUTIONAL LAW, 719 n. 3 (1978) for cases following *Murdock*.

[18] Kovacs v. Cooper, 336 U.S. 77, 90 (1949) (Frankfurter, J., concurring).

[19] McKay, *The Preference for Freedom*, 34 N.Y.U.L. Rev. 1182, 1184 (1959). The court also: applies a narrowed presumption of constitutionality; construes statutes strictly to avoid limiting free speech; restricts prior restraint and subsequent punishment; relaxes general requirements of standing to sue; and generally sets higher standards of procedural due process.

[20] NOWAK, *supra* note 17, at 722.

[21] G.R. No. 27833, April 18, 1969, 27 SCRA 835, 848.

Under the vagueness doctrine, there is "a strict prohibition of statutes which burden speech in terms that are so vague as either to allow including protected speech in the prohibition or leaving an individual without clear guidance as to the nature of speech for which he can be punished."[22] To survive judicial scrutiny, governmental regulation of free speech must be drawn with "narrow specificity."[23]

And under the doctrine of the least restrictive means, the legislative "purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more normally achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."[24]

The doctrines of overbreadth, vagueness, and the least restrictive means backstop the free speech guarantee. Vis-a-vis these doctrines, the "clear and present danger" doctrine represents a judicial standard for justifying abridgment of free speech, in the process of balancing the conflicting interests of the individual and of society.

When the speaker advocates violence or other illegal conduct, the state may curtail his speech if its presents a "clear and present danger" to society. In this area of advocacy of unlawful conduct, the "clear and present danger" doctrine evolved through three phases:[25]

1. The original Holmes-Brandeis test;

2. The restrictive "balancing test";

3. The modern protective test.

The Original Holmes-Brandeis Test

After the U.S. Congress passed the Espionage Act of 1917[26a] and the Sedition Act of 1918,[26b] two cases arose in 1919, involving free speech issues: *Schenck v. United States*[27] and *Abrams v. United States*.[28] It was in these cases that the American court first raised the "clear and present danger" test, to distinguish protected advocacy from unprotected incitement of violent or illegal conduct.

In *Schenck,* the applicable provision of the Espionage Act forbade obstruction of military recruiting. The appellants had mailed leaflets to men eligible for military service, asserting that the draft violated the Thirteenth

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22 NOWAK, *supra* note 17, at 726.
23 NAACP v. Button, 371 U.S. 415, 433 (1963).
24 Shelton v. Tucker, 364 U.S. 479, 488 (1960).
25 *See* NOWAK, *supra* note 17, at 728.
26a Espionage Act of 15 June 1917, ch. 30, 40 Stat. 217.
26b Sedition Act of 16 May 1918, ch. 75, 40 Stat. 553.
27 249 U.S. 47 (1919).
28 250 U.S. 616 (1919).

Amendment. The appellants were convicted for conspiracy to violate the Espionage Act. The Supreme Court upheld the convictions.

Justice Holmes, writing for the court, found that the provisions of the Espionage Act, although they constituted a restraint on free speech, were necessary to prevent a clear and present danger to national security. The constitutional protection was not available for:

> [T]he character of every act depends upon the circumstances in which it is done . . . 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.[29]

In *Schenck,* the court upheld the convictions. In *Abrams,* the court also affirmed the convictions. But this time, Holmes dissented, contending that the state could restrict free speech, only when there was "present danger of immediate evil or an intent to bring it about."[30]

And then followed the classic passage:

> Persecution for the expression 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 whole-heartedly 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 resolved 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.[31]

In *Abrams,* the majority did not apply Holmes' clear and present danger test. The court remained unimpressed with the test, as it decided a series of cases on other grounds[32] (Holmes and Brandeis dissenting). The majority decided to apply the Holmes test only in 1937, in the case of *Herndon v. Lowry,*[33] by a vote to 5 to 4. The court then applied the test in cases no longer involving sedition, but peaceful picketing,[34] riots,[35] flag salutes,[36] breach of the peace, and contempt of court.[37]

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[29] 249 U.S. at 52.
[30] 250 U.S. at 628.
[31] *Id.,* at 630.
[32] Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927); Fiske v. Kansas, 274 U.S. 380 (1927); Stromberg v. California, 283 U.S. 359 (1931).
[33] 301 U.S. 242 (1937).
[34] Thornhill v. Alabama, 310 U.S. 88 (1940).
[35] Cantwell v. Connecticut, 310 U.S. 296 (1940).
[36] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1941).
[37] Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 350 (1946); Craig v. Harney, 331 U.S. 367 (1947); Nebraska Press Association v. Stuart, 427 U.S. 539 (1976).

The Restrictive Balancing Test

The clear and present danger test grew more restrictive of free speech in the early 1950's, with the advent of the cold war and of McCarthyism.

During this era, the first case, *Dennis v. United States*,[38] arose under the Smith Act. The petitioners were charged with conspiring to organize the U.S. Communist Party, the alleged goal of which was to overthrow the existing government by force and violence. The court upheld the convictions.

The court quoted Chief Judge 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...."[39]

One commentator explains: "In other words, the greater the gravity of the act advocated, the less clear and present danger needed to justify governmental intrusion. So rephrased, the clear and present danger test became a disguised balancing test which weighed the seriousness of the danger against competing interest in free speech."[40]

In a subsequent case, *Scales v. United States*,[41] the court affirmed conviction for communist membership, explaining: "*Dennis* and *Yates* have definitely laid at rest any doubt that present advocacy of *future* action for violent overthrow satisfies statutory and constitutional requirements equally with advocacy of immediate action to that end...."[42]

Thus, the clear and present danger test grew unrecognizable. People were afraid of communism, and it was thought unwise to wait until the danger resulting from speech became imminent.[43] Hence, the preference for the "balancing test." One commentator could write that after the *Dennis* and *Yates* decisions, the court rejected to a great extent the clear and present danger doctrine.[44]

The Modern Protective Test

The pendulum had to swing. In the late 1960's, the court moved to protect the unpopular advocacy of ideas. "Clear and present danger" analysis insinuated itself in two cases.[45] Then the court drew up a new formula in *Brandenburg v. Ohio*.[46]

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[38] 341 U.S. 494 (1951).
[39] *Id.* at 510.
[40] NOWAK, *supra* note 17, at 735.
[41] 367 U.S. 203 (1961).
[42] *Id.* at 251.
[43] Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877 (1963).
[44] Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 8 (1965).
[45] Bind v. Floyd, 385 U.S. 116 (1966), and Watts v. United States, 394 U.S. 705 (1969).

Under Ohio's criminal syndicalism statute, the appellant was charged with advocating political reform through violence and for assembling with a group formed to teach criminal syndicalism. The appellant, a Ku Klux Klan leader, arranged for a television news crew to attend a Klan rally. The news film showed Klan members, allegedly including Brandenburg, as they discussed the group's plan to march to Congress. The court reversed the conviction.

The court defined the test for speech which advocates unlawful conduct: "[The state may not] forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to invite or produce such action."[47]

The court held that mere teaching of abstract doctrines is not like leading a group in a violent action. The court also ruled that the statute must be narrowly drawn. If the statute fails to distinguish between advocacy of a theory and advocacy of action, it abridges freedom of speech.[48]

Justices Black and Douglas concurred, but objected to the clear and present danger test. Their fear stemmed from the use of the test in *Dennis*, where it was used to deny constitutional protection to any speech critical of existing government.[49]

The American court has applied the modern protective test in later cases.[50]

The Modern Protective Test: Analysis

The clear and present danger doctrine in its third and present phase is more protective of freedom of speech. It has thus won the concurrence of commentators, such as Gunther: *"Brandenburg* is the most speech-protective standard yet evolved by the Supreme Court."[51]

His comment was typically echoed in this hornbook passage:

> The new *Brandenburg* test — a test more vigorously phrased and strictly applied than the older clear and present danger test — now probably appears to be the proper formula for determining when speech which advocates criminal conduct may constitutionally be punished. With its emphasis on incitement, imminent lawless action, and the objective words of the speaker, it would provide a strong measure of First Amendment protection.[52]

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[46] 395 U.S. 444 (1969).
[47] *Id.*, at 447.
[48] *Id.*, at 547-49.
[49] *Id.*, at 449-52.
[50] Healy v. James, 408 U.S. 169 (1972); Hess v. Indiana, 414 U.S. 105 (1973); Communist Party v. Whitcomb, 414 U.S. 441 (1974); Carey v. Population Serv. Int'l. 431 U.S. 678 (1977); National Broadcasting Co., Inc. v. Niemi, 434 U.S. 1354 (1978); *cf.* Ratchford v. Gay Lib., 434 U.S. 1080 (1978).
[51] Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975); *See also* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW (1985), and W. LOCKHART, Y. KAMISAR, J. CHOPER, CONSTITUTIONAL RIGHTS AND LIBERTIES 351-352 (1981).

In his treatise, Tribe describes the *Brandenburg* ruling as doctrinal synthesis that combines the best of Hand's views with the best of Holmes' and Brandeis'. The court implied that a criminal syndicalism statute should properly be limited to advocacy (1) "directed to inciting or producing imminent lawless action"[53] and (2) "likely to incite or produce such action."[54] The first criterion is perceived to enhance Hand's insistence on treating only words of incitement as unprotected. The second criterion adds Holmes' and Brandeis' focus on likely harm, but transforms that focus into an additional safeguard for the harmless inciter.[55]

Parenthetically, two years before *Schenck,* a case under the Espionage Act of 1917 arose before then District Judge Hand, in *Masses Publishing Co. v. Patten.*[56] Hand approached the issue of free speech without mentioning clear and present danger:

> One may not counsel or advice others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final recourse of government in a democratic state. . . . To counsel or advise a man to an act is to urge upon him either that it is his interest or his duty to do it. . . . Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. . . . If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation.[57]

Hand's incitement test differed considerably from Holmes' clear and present danger test.[58] Hand in his private correspondence wrote: "I prefer a test based upon the nature of the utterance itself. If, taken in its setting, the effect upon the hearers is only to counsel them to violate the law, it is unconditionally illegal. By 'counsel' I mean to persuade them that their interest or duty lies in violating the laws.... As to other utterances, it appears to me that regardless of their tendency they should be permitted."[59]

Evaluating the Hand letters, Gunther concluded that in *Masses* and for several years thereafter, Hand urged the adoption of a strict, "hard", "objective" test focusing on the speaker's words: "if the language used was solely that of direct incitement to illegal action, speech could be proscribed, otherwise it was protected."[60] But Hand's incitement test was never recognized as law, until the Supreme Court adopted aspects of the test in the 1969 *Brandenburg* decision.

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[52] NOWAK, *supra* note 17, at 739-40.
[53] 395 U.S. at 447.
[54] *Ibid.*
[55] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 616-17 (1978).
[56] 244 Fed. 535 (1917).
[57] *Id.*, at 540.
[58] Gunther, *supra* note 51.
[59] *Id.*, at 765.
[60] *Id.*, at 721.

Thus, the modern protective test is a coalition of the best features of two contending approaches: Hand's incitement test, and Holmes' clear and present danger test. In sum, according to Gunther:

> In one sense, *Brandenburg* combines the most protective ingredients of the *Masses* incitement emphasis with the most useful elements of the clear and present danger heritage. As the Court summarized First Amendment principles in *Brandenburg* — purporting to restate, but in fact creating —:
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> > [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.
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> The incitement emphasis is Hand's; the reference to "imminent" reflects a limited influence of Holmes, combined with later experience; and the "likely to incite or produce such action" addition in the *Brandenburg* standard is the only reference to the need to guess about future consequences of speech, so central to the *Schenck* approach. Under *Brandenburg*, probability of harm is no longer the actual criterion for speech limitations. The inciting language of the speaker — the Hand focus on "objective" words — is the major consideration. And punishment of the harmless inciter is prevented by the *Schenck* — derived requirements of a likelihood of dangerous consequences.[61]

But the modern protective test is not airtight. The component of the test drawn from Hand's incitement standard continues to suffer from a failure to deal with the indirect but purposeful incitement of Marc Anthony's oration over the body of Caesar.[62] Others question whether the modern test possesses enough flexibility to make the answers it gives depend in part in how severe a harm is threatened. For instance, the test should allow speech which merely "incites" pedestrians to walk on the grass or jaywalk across a street.[63]

Emerson has identified the following various objections[64] to the modern test:

(1) It permits government interference with expression at too early a stage, allowing officials to cut speech off as soon as it shows signs of being effective;

(2) It is an ad hoc test, applied on each occasion to the circumstances of the particular case. As such, persons exercising their constitutional right

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[61] *Id.*, at 754-55.

[62] Zechariah Chafee Jr. reaffirmed this problem. In his letter of 28 March 1921 to Learned Hand, Chafee wrote: "Your test is surely easier to apply although our old friend Marc Anthony's speech is continually thrown at me in discussion." Hand Papers, Box 15, Folder 26, Harvard Law Library, Treasure Room.

[63] TRIBE, *supra* note 51, at 617 note 58.

[64] Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 437-438 (1980).

to expression do not know in advance what the limits will be found to be, and are thereby deterred from exercising their rights fully;

(3) The test is excessively vague. It makes the result depend on an official guess as to what the future effects of the expression will be. This is a difficult undertaking for a police officer, prosecutor, or court, and is one that could usually yield a determination either way;

(4) In some ways the test is incomplete; it does not take into account the possibility of safeguarding the social interest involved by other means. Furthermore, if it were expanded to include such a factor, it would become an ad hoc balancing test.

Clear and Present Danger: An Advocacy

In a comprehensive theory of free expression, the clear and present danger test has a limited role to play. It is balancing which occupies the dominant position in free expression doctrine.[65] In the United States, the Burger Court awarded protection to conduct falling within the ambit of free expression by using as its main tool the doctrines of clear and present danger, balancing, and prior restraint.[66] It used other doctrines in the areas of commercial speech, the right of access to the media, and the public's "right to know."[67]

However, when we narrow down the general area of free expression to the more specific area of speech advocating unlawful conduct, the clear and present danger test is still "the most appropriate means of compromising the right of society to protect itself against criminal conduct and the value of preserving free and open discourse."[68]

When citizens advocate unlawful conduct, the level of constitutional protection to be afforded them should be the clear and present danger test, under a generally protectionist view of the right of free speech. In order to deny constitutional protection, the test demands "a serious evil, a substantial likelihood that speech will cause the evil, and a close temporal nexus between speech and evil."[69]

As a theoretical, not a historical model, the test should resolve four ambiguities: (1) the issue of intent as a substitute for the likelihood of harm, (2) the need to distinguish direct from indirect advocacy, (3) the type of threatened substantive evil that justifies suppression, and (4) the degree of imminence required.[70] The test would partake of the compelling interest approach:

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65 *Id.*, at 438.
66 *See Id.*, at 445-458.
67 *See Id.*, at 458-70.
68 Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159 (1982).
69 Greenwalt, *Speech and Crime*, 1980 AM. BAR FOUND. RESEARCH J. 696.
70 Redish, *supra* note 68, at 1177-82.

> That is, because of the absolute language with which the Constitution shields free speech and the important role that free speech plays in society, the test imposes a heavy burden of justification upon majoritarian members of the government that seeks to suppress it. It is not enough that the majority is inconvenienced by, or has some distaste for, the views expressed; its interest in suppressing speech must be truly compelling.[71]

As a constitutional measure of regulation of unlawful advocacy, clear and present danger is not error-free. But as a constitutional choice, it is the best available.[72] Under its present protective incarnation, the government is justified in proscribing subversive advocacy, if, and only if, such advocacy is: (1) designed to cause *imminent* lawless action, and (2) *likely* to cause such action. The questions naturally arise: How imminent? How likely? But of course, questions like these would arise under any serious standard.

Why should the standard be strict against government? For one thing, it would check legislators, police, and prosecutors, particularly those who could be provoked by ideologically charged subversive advocacy. For another, it would circumscribe the discretion of judges, particularly those who could be sensitized to political passions and prejudices.[73]

The modern clear and present danger test, by requiring that the content of language constitute incitement, and that the likelihood of illegal action be imminent, has attractive potential for the Philippine Supreme Court. The American court draws a fine distinction between general advocacy of illegal action and advocacy of abstract doctrine. Ambiguities arising from this subtle distinction might be clarified, if incitement were defined as injury-specific criminal action. The element of imminence could likewise be clarified by locating it only under circumstances which preclude rational thought, including further speech. If the speech meets the incitement and imminence standards, the penalty should be determined after weighing the seriousness of the crime advocated and threatened.[74]

Clear and Present Danger in Philippine Jurisprudence

The Philippine Supreme Court implicitly adopted the clear and present danger test in the early case of *Primicias v. Fugoso*,[75] decided in 1948.

But it was in *Cabansag v. Fernandez*[76] that the court clearly adopted the test, after rejecting the dangerous tendency test. The court in *Cabansag* defined the two tests:

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[71] *Id.*, at 1182.

[72] The dilemma of the neutral principle is illustrated in TRIBE, CONSTITUTIONAL CHOICES (1985). See *Neutral Principles and the Nazi March in Skokie* at 49 *et seq.*

[73] Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U.L. REV. 1167 (1983).

[74] Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1353-54 (1983).

[75] 80 Phil. 71 (1948).

[76] 102 Phil. 152 (1957).

> These are the "clear and present danger" rule and the "dangerous tendency" rule. The first, as interpreted in a number of cases, means that the evil consequences of the comment or utterance must be "extremely serious and the degree of imminence extremely high" before the utterance can be punished. The danger to be guarded against is the "substantive evil" sought to be prevented.
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> If the words uttered create a dangerous tendency which the state has a right to prevent, then such words are punishable. It is not necessary that the language used be reasonably calculated to incite persons to acts of force, violence, or unlawfulness. . . . It is sufficient if the natural tendency and probable effect of the utterance be to bring about the substantive evil which the legislative body seeks to prevent.[77]

The Philippine court next applied the clear and present danger test in the major case of *Gonzales v. Comelec*,[78] decided in 1969. The court treated the action as a petition for prohibition. Petitioners challenged the validity of two sections of the Election Code, as amended by Republic Act No. 4880. One prohibited the early nomination of candidates,[79] and the other limited the period of election campaigns or partisan political activity.[80]

Petitioners claimed that R.A. No. 4880 was an unconstitutional abridgment of free expression. They specifically alleged that there was no clear and present danger to the state which could serve to remove the constitutional infirmity.

Justice (later Chief Justice) Enrique M. Fernando, one of the country's most prominent constitutional scholars, wrote the opinion. His prefatory statement was an invocation of Holmes:

> [F]ree speech and free press may be identified with the liberty to discuss publicly and truthfully any matter of public interest without censorship or punishment. There is to be then no previous restraint on the communication of views or subsequent liability whether in libel suits, prosecution for sedition, or action for damages, or contempt proceedings, unless there be a clear and present danger of substantive evil that Congress has a right to prevent.[81]

But Fernando went beyond Holmes and even beyond *Brandenburg*, the landmark American decision which was promulgated that same year. His test required that the danger must be inevitable:

> 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 casual

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[77] *Id.*, at 161-163 quoting Bridges v. California, 314 U.S. 252 and Gitlow v. New York, 268 U.S. 652.

[78] G.R. No. 27833, April 18, 1969, 27 SCRA 835.

[79] Election Code, Sec. 50-A.

[80] *Id.*, Sec. 50-B.

[81] 27 SCRA at 856-57.

> 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.[82]

Fernando's test is libertarian in the extreme. Before the state can limit free expression, it must be shown that the expression represents a danger that is "very likely inevitable." But if the danger is inevitable, there will hardly be time for the state to prevent or remove the danger. Under this standard, the time lapse between the expression and the "inevitable danger" might necessarily be so swift, that the compulsory anticipation is stringent to the point of paralysis. Would not the criterion potentially immobilize the law enforcer, for he cannot act unless the danger is not only imminent, but in fact inevitable?

With a test that was so permissive for civil liberties, the court by majority vote, predictably was "unable to extend their approval to the aforesaid provisions of one of the sections of the challenged statute"[83] (on the limitation for the period of election campaign). But the majority could not muster the necessary two-thirds vote. Moreover, the court unanimously sustained the validity of the section which prohibited the too early nomination of candidates. In the end, the judgment was that R.A. No. 4880 "cannot be declared unconstitutional."[84]

In a separate opinion, Justice (later Chief Justice) Fred Ruiz Castro advocated the balancing test, which had produced a restrictive effect on civil liberties in the United States:

> In my view, the "balancing-of-interests" approach, is more appropriately used in determining the constitutionality of Section 50-A and 50-B. Both the "dangerous tendency" and "clear and present danger" criteria have minimum relevancy to our task of appraising these provisions. Under these two tests, the statute is to be analyzed by considering the degree of probability and imminence with which "prolonged election campaigns" would increase the incidence of "violence and deaths", "dominion of the rich in the political arena" and "corruption of the electorate." This kind of constitutional testing would involve both speculation and prophecy of a sort for which this Court, I am afraid, has neither the inclination nor any special competence.[85]

Castro's advocacy is persuasive. The clear and present danger test is best applied only in the specific area of speech advocating unlawful conduct. In the general area of free expression, the balancing test is better suited and is more commonly applied by the American court.

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[82] *Id.* at 860-61.
[83] *Id.* at 874.
[84] *Ibid.*
[85] *Id.* at 900-901.

Castro failed to convince his colleagues. In the next case of *Badoy v. Comelec*,[86] decided a year later in 1970, the majority opinion applied the clear and present danger test, to legislation seeking to regulate free expression in election campaigns. A candidate for delegate to the constitutional convention brought suit to question the constitutionality of Republic Act No. 6132, Sec. 12(F), which provides:

> The Commission on Elections shall endeavor to obtain free space from newspapers, magazines and periodicals which shall be known as Comelec space, and shall allocate this space equally and impartially among all candidates within the areas in which the newspapers are circulated. Outside of said Comelec space, it shall be unlawful to print or publish, or cause to be printed or published, any advertisement, paid comment or paid article in furtherance of or in opposition to the candidacy of any person for delegate, or mentioning the name of any candidate and the fact of his candidacy, unless the names of all other candidates in the district in which the candidate is running are also mentioned with equal prominence.

Justice (later Chief Justice) Felix Makasiar wrote the opinion for a divided court. He concurrently applied the clear and present danger test, and the balancing test: "The validity of the abridgement is gauged by the extent of its inroad into the domain of the liberty of speech and of the press, when subjected to the applicable clear-and-present danger rule or the balancing-of-interests-test." His conclusion: "Gauged by the more liberal 'balancing-of-interests-test', We must exercise judicial restraint in passing upon the statute challenged...."[88]

Justice Fernando dissented: "All that this dissent seeks to stress is that even if properly subject to limitation under the clear and present danger test, the challenged provision, to my mind, cannot free itself of what for me is the constitutional infirmity apparent on its face."[89]

Justice Teehankee also dissented. He did not agree that the clear and present danger test should have been applied:

> I do not believe that the main opinion's anchoring of its ruling on the "clear and present danger" criterion is tenable under the circumstances. The trouble is, as Professor Freund well put it, "that the clear-and-present danger test is an over-simplified judgment unless it takes into account also a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of more moderate control than those which the state has imposed; and perhaps the specific intent with which the speech or activity is launched.[90]

Instead, invoking Castro, Teehankee sought to apply the balancing test.

Despite Castro's and Teehankee's warnings, the court felt more comfortable with the concurrent application of the clear and present danger

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[86] G.R. No. 32546, October 17, 1970, 35 SCRA 285.
[87] *Id.*, at 289.
[88] *Id.*, at 299.
[89] *Id.*, at 307-308.
[90] *Id.*, at 329.

test together with the balancing test. In *Lagunzad v. Gonzales*,[91] decided about a decade later, Justice Ameurfina Melencio-Herrera made clear that both tests are prevailing doctrines in the Philippine court:

> The prevailing doctrine is that the clear and present danger rule is such a limitation. Another criterion for permissible limitation on freedom of speech and of the press, which includes such vehicles of the mass media as radio, television, and the movies, is the "balancing-of-interests test." The principle "requires a court to take consciousness and detailed consideration of the interplay of interests observable in a given situation or type of situation."[92]

Four years later, Chief Justice Fernando applied the clear and present danger test in *Reyes v. Bagatsing*,[93] an action for mandamus to compel the Manila city mayor to issue a permit for a march to and rally at the gates of the U.S. Embassy. The court granted the mandatory injunction, on the ground that there was no showing of the existence of a clear and present danger of a substantive evil that would justify the denial of a permit. On this point, the court was unanimous.

Fernando did not find it necessary to explain the criterion of inevitability that he had formulated in *Gonzales*. This time, he was content to apply the original Holmes test, and to quote an old American case:[94] "[t]he justification for a limitation on the exercise of this right, so fundamental to the maintenance of democratic institutions, is the danger of a character both grave and imminent, of a serious evil to public safety, public morals, public health, or any other legitimite public interest."[95]

A month later, Fernando also wrote for the court the opinion in *Ruiz v. Gordon*.[96] Like the immediate predecessor case, this was an action for mandamus to compel the Olongapo city mayor to grant a permit for a prayer rally. The mayor informed the court that he already had, and the court dismissed the action. Teehankee issued a concurring opinion, emphasizing: "[t]he burden to show the existence of such grave and imminent danger that would justify an adverse action lies on the mayor as the licensing authority. There must be objective and convincing, not subjective or conjectural proof of the existence of such clear and present danger."[97]

Finally, shortly before his retirement, Fernando applied the clear and present danger test in *Gonzales v. Katigbak*.[98] The president of a movie production outfit filed a petition for certiorari to question the classification

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91 G.R. No. 32066, August 6, 1979, 92 SCRA 476.
92 *Id.*, at 488.
93 G.R. No. 65366, November 9, 1983, 125 SCRA 553.
94 Schneider v. Irvington, 308 U.S. 147 (1939).
95 125 SCRA at 562.
96 G.R. No. 65695, December 19, 1983, 126 SCRA 233.
97 *Id.*, at 242.
98 G.R. No. 69500, July 22, 1985.

by the Board of Review for Motion Pictures and Television of the movie *Kapit Sa Patalim* as "For Adults only." The court dismissed the petition because there were not enough votes for a ruling that there was grave abuse of discretion in the classification.

In the 1985 *Gonzales* case, Fernando returned to the criterion of inevitability that he had earlier announced in the 1969 *Gonzales* case. In the 1985 case, Fernando emphasized:

> The test, to repeat, to determine whether freedom of expression may be limited is the clear and present danger of an evil of a substantive character that the State has a right to prevent. Such danger must not only be clear but also present. There should be no doubt that what is feared may be traced to the expression complained of. The causal connection must be evident. Also, there must be reasonable apprehension about its imminence. The time element cannot be ignored. Nor does it suffice if such danger be only probable. There is the requirement of its being well-nigh inevitable. The basic postulate, therefore, as noted earlier, is that where the movies, theatrical productions, radio scripts, television programs, and other such media of expression are concerned censorship, especially so if an entire production is banned, is allowable only under the clearest proof of a clear and present danger of a substantive evil to public safety, public morals, public health or any other legitimate public interest.[99]

Conclusion

In resume, the American Supreme Court has applied the clear and present danger test in three stages: the original Holmes-Brandeis test; the restrictive balancing test; and the modern protective test. The Philippine Supreme Court has applied the test in its first two stages, but not the last stage.

The present stage of the clear and present danger test in American jurisprudence was formulated in the landmark 1969 case of *Brandenburg v. Ohio*: "[The state may not] forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[100] The two key criteria of the test are incitement and imminence.

The *Brandenburg* criterion of imminence approaches Fernando's criterion of inevitability, which is extremely strict against the government. Possibly, the Fernando criterion could be interpreted to mean that the element of imminence requires circumstances which preclude rational thought.

In any event, the Philippine court has not indicated any clear hospitality to *Brandenburg*, and its can only be hoped that it will do so in the future.

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[99] *Id.*, at 6.

[100] *See* note 46 *et seq.* and accompanying text.

The Philippine court has applied the clear and present danger test in evaluating restrictions on free assembly,[101] religion,[102] election campaigns,[103] and films.[104] In other words, it has applied the test to the broad spectrum of free expression cases, sometimes with difficulty. As Justices Castro and Teehankee have pointed out, for free expression cases, the most suitable standard is the balancing test. It bears emphasis that *the clear and present danger test is most suitable only when the state seeks to curtail speech that advocates unlawful conduct, as in sedition cases.* In such cases, the burden of proof is on the state to show that it has a compelling interest in restricting free speech.

In any case, when the Philippine Supreme Court next applies the clear and present danger doctrine, it would do well to apply the *Brandenburg* test, with its key criteria of incitement and imminence.

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[101] Primicias v. Fugoso, 80 Phil. 71 (1948); Cabansag v. Fernandez, 102 Phil. 152 (1957); Navarro v. Villegas, G.R. No. 31687, February 26, 1970, 31 SCRA 731; Reyes v. Bagatsing, G.R. No. 65366, November 9, 1983, 125 SCRA 553; and Ruiz v. Gordon, G.R. No. 65695, December 19, 1983, 126 SCRA 233.

[102] American Bible Society v. City of Manila, 101 Phil. 386 (1957).

[103] Imbong v. Ferrer, G.R. No. 32432, September 11, 1970, 38 SCRA 28; Gonzales v. Comelec, G.R. No. 27833, April 18, 1969, 27 SCRA 835; and Badoy v. Comelec, G.R. No. 32546, October 17, 1970, 35 SCRA 285.

[104] Lagunzad v. Gonzales, G.R. No. 32066, August 6, 1979, 92 SCRA 476; and Gonzalez v. Katigbak, G.R. No. 69500, July 22, 1985.