THE CLEAR AND PRESENT DANGER RULE AS A LIMITATION ON FREEDOM OF SPEECH IN THE PHILIPPINES

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Among the various freedoms upon which the vitality of a democracy rests, that of free speech is thought to occupy an exalted position as "the instrument, and the guaranty, and the bright consummate flower of all liberty."[1]

Sharp divisions of opinion, however, exist on the question of the limits of the right of free speech, the divisions stemming from conceptual differences on where to draw the line between order and liberty.[2] Certainly, the problem of balancing and reconciliation becomes even more acute in those Third World "democracies" whose economic development goals appear to be accompanied by corresponding suppressions in various degrees of political and civil rights.[3] Thus, for example, granting that the ruling regime in the Philippines is not a tyranny, it is concededly an authoritarian government[4] which finds it necessary to plan and to intervene in economic affairs[5] as well as to consolidate and centralize the allocation of scarce resources for the provision of basic amenities[6] in the pursuit of the elusive goal of development.

The establishment of an ultra-powerful presidency[7] exercising both executive and legislative powers in the country's scheme of government is clearly a deviation from the traditional notion of a Republican govern-

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1 MALCOLM, PHILIPPINE CONSTITUTIONAL LAW 413 (1926).

2 Levine, *Should Civil Disobedience be Legalized? Reflections on Coercive Protest and the Democratic Regime of Law*, 31 SW. L.J. 617 (1977).

3 Developing countries undergoing political changes have been called "regimes of development" where political means are utilized to catch up with the technology, economy and cultural development of modern societies. This has been attributed to the emergence in these countries of an intelligentsia which assigns the creative revolutionary function of modernization to state power or to political action. *See* Baviera, *Politics and the Recent Constitutional Changes in the Philippines*, 57 PHIL. L.J. 227 (1981), citing Lowenthal, *Government in Developing Countries*, in DEMOCRACY IN A CHANGING SOCIETY 190-197 (1964).

4 MARCOS, IN SEARCH OF ALTERNATIVES: THE THIRD WORLD IN AN AGE OF CRISIS 21 (1978).

5 *Id.*, at 20.

6 MARCOS, AN INTRODUCTION TO THE POLITICS OF TRANSITION 68 (1978).

7 Caballe, *A Re-assessment of the Presidency in the Light of the 1981 Amendments*, 50 PHIL. L.J. 274 (1981).

ment intended to operate and function as a harmonious whole, under a system of checks and balances.[8] This development has rendered the power and exercise of judicial review even more important in the task of preventing an arbitrary and despotic rule and of assuring instead the primacy of constitutionally protected rights and freedoms.

That practically no executive or legislative act has been declared unconstitutional by the Supreme Court especially during the period when martial law was imposed and subsequently lifted does not constitute conclusive evidence of judicial incompetence or abdication of duty. After all, legislative enactments are accorded a presumption of constitutionality not only because the legislature is ventured to be cognizant of and to abide by the Constitution but also because "the judiciary in the determination of actual cases and controversies must reflect the wisdom and justice of the people as expressed through their representatives in the executive and legislative departments of government."[9] In addition, Philippine jurisprudence and respected commentators affirm the apparent preferred position of freedom of speech in the hierarchy of constitutional values. Indeed, on the accepted premise that only the gravest abuses endangering paramount interests give occasion of permissible limitation,[10] highly stringent evidentiary standards have been established and required in relation thereto.

In the Philippines, one of these standards takes the form of the clear and present danger rule. The scope of the rule, however, has not been definitely ascertained. Neither has a rational framework for the effective, principled and consistent application of the rule been developed. Indeed, the demands of a truly democratic regime of law continue to raise some issues on the continuing validity of the rule. It is to these problem areas and to the task of updating works on the clear and present danger rule in the Philippines that this paper proposes to address itself on the hope and expectation that objective analysis of relevant Philippine cases will yield options and alternative approaches in the area of speech limitation.

II. PROTECTING SPEECH: SCOPE, BASIS AND IMPORTANCE

Freedom of expression has been described to be "the liberty to know and to argue freely according to conscience, above all liberties."[11] In particular, freedom of speech 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] The freedom entails more than the right of ratifying existing political beliefs, approving economic arrangements and applauding public officials for if so atrophied, the

8 Angara v. Electoral Commission, 63 Phil. 139, 156 (1936).
9 *Id.*, at 158-157.
10 Thomas v. Collins, 323 U.S. 516, 530 (1943).
11 MILTON, AEROPAGITICA (1644), quoted in Planas v. Gil, 67 Phil. 62, 81 (1939).
12 Thornhill v. Alabama, 310 U.S. 88 (1940).

right becomes meaningless.[13] The significance and basis for the constitutional guaranty is seen to lie in its utility for maximizing the values of respect, power and enlightenment in a democratic society.[14]

Certainly, society would be the loser in the long run unless the dissemination of "opposed views from diverse and even antagonistic sources is encouraged."[15] Those who differ and who dissent, as long as they do not resort to unlawful means have the right to be heard, for 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.[16] Indeed, in a democracy, where self-government requires enlightened citizens, the "ultimate good desired is better reached by a free trade in ideas . . . 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."[17]

Speech is though to include any form of oral utterances as well as such acts as peaceful picketing, display of a flag and saluting the flag.[18] Though freedom of speech is phrased in absolute terms implying the right to express opinion on any subject, the freedom is undeniably confined to a discussion on matters of public concern and on themes of public importance.[19] Intertwined and inseparable from the right of free speech are the cognate rights of the people peaceably to petition the government for redress of grievances.[20] Assembly means a right on the part of the citizens to meet peaceably for consultation in respect of public affairs.[21] Petition means that any person can apply without fear of penalty to the appropriate branch of the government for a redress of grievances.[22]

III. THE RULE OF CLEAR AND PRESENT DANGER

Freedom of Speech is not absolute

The constitutional guaranty that no law may be passed abridging the freedom of speech[23] appears to imply that the freedom is well-nigh absolute. The realities of life in a complex society, however, preclude a literal interpretation. There are other societal values that press for recognition.[24] As man lives with others, his liberty is never absolute and there must be certain

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13 FERNANDO, THE BILL OF RIGHTS 125 (1972).

14 Fernando and Fernando, *Freedom of Expression in the Philippines and American Constitution,* 23 PHIL. L. J. 801 (1947).

15 Associated Press v. United States, 326 U.S. 1 (1944).

16 Tañada and Fernando, *A Re-examination of the Clear and Present Danger Doctrine as a Limitation on Freedom of Expression,* 22 PHIL. L. J. 841, 847 (1947).

17 Abrams v. United States, 250 U.S. 616 (1919).

18 Tañada and Fernando, *supra* at 848.

19 *Id.,* at 843.

20 TAÑADA AND FERNANDO, CONSTITUTION OF THE PHILIPPINES 295 (1949).

21 U.S. v. Bustos, 37 Phil. 731, 732 (1918).

22 *Id.,* at 743.

23 CONST. art. IV, sec. 9.

24 FERNANDO, THE BILL OF RIGHTS 137 (1972).

restraints in his behavior and conduct.[25] That freedom of speech is not an unrestricted and unbridled license has long become established and accepted as a fundamental principle.[26]

The continuing problem remains, however, of defining the scope of permissible speech and of determining at what point provocative discussion becomes sanctionable incitement to action.

Through the years, the judiciary, tasked with the responsibility of striking a comfortable compromise between the demands of free speech and the preservation of order has concurrently: a) proscribed governmental intervention — whether prior, continuing or subsequent — in the area of free speech, and) allowed punitive measures to be applied against those who would abuse the freedom. And because law responds to underlying social circumstances and "men (for judges are still fallible, susceptible human beings) are moved to think and act differently, even under identical stimuli, court decisions are in an intermittent state of ebb and flow, a condition not necessarily to be decried, for it has been said that law must be stable and yet it cannot stand still."[27] Among these standards, it is currently thought that the problem of reconciliating and balancing is most satisfactorily resolved through the employment of the clear and present danger rule which, unlike the "bad tendency" test that favors legislative action, appears to express preferential treatment towards the right of free speech.[28]

The Clear and Present Danger Rule: Concept and Development

The rule was first enunciated by Mr. Justice Hilmes as *ponente* in *Schenck v. United States*.[29] The formulation therein has become classic and it is that ordinarily alluded to in Philippine free speech cases where the danger test was held to apply, thus:

> 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.*[30]

Under the rule, therefore, words and mere advocacy of ideas cannot be punished unless there is a clear and present danger that the advocacy

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[25] Quisumbing, *A Study of the Clear and Present Danger Rule as a Limitation of Freedom of Speech and of the Press*, 22 PHIL. L. J. 1 36 (1947).

[26] *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

[27] Romero, *Law on Media and Freedom of Expression*, in U.P. LAW ALUMNI YEARBOOK 104-107.

[28] MASON & BEANY, AMERICAN CONSTITUTIONAL LAW 498 (1968).

[29] 240 U.S. 47, 52 (1919).

[30] *Id.*, at 52 (emphasis supplied).

will result in illegal action. Certain elements must concur for free speech to be constitutionally abridged and in the view of one respected author, these essential elements would include the following:[31]

First, there must be a danger which is the actual occurrence of some event which the legislature has declared illegal and which it has the constitutional power to punish.

Second, the danger must be clear, that is, the words must not only have a tendency to produce the feared result but there must be a reasonable expectation that harmful consequences prohibited by law will ensue.

Thirdly, the danger must be present, or imminent in point of time. The stress it seems would be more on the circumstances surrounding the utterance of the words and the situation of those uttering them rather than the words themselves. It is believed that this aspect of the rule has particular significance with respect to prosecutions based on the advocacy of the overthrow of government by force in which cases the number and power of the accused persons and the group to which they claim membership are key factors in determining whether the violent revolution advocated by them are, indeed, imminent and impending.[32]

Reservations to the Rule

The clear and present danger rule has not been free of its share of criticism. It is claimed, for example, that the rule is faulty in its central formulation.[33] Thus, it is argued that the Holmes formulation which insists that a gap in time between expression and the resulting action be so remote as not to constitute "present" danger is inconsistent if not hypocritical because dissenting speech is tolerated only up to the point at which it becomes efficacious.[34] Stated otherwise, free speech is permitted by liberals only where it does not really matter.

The test, Professor Meiklejohn argues, is also unfair in its effects and illogical in its formulation. It is unfair because the courts would not consider it lawful or legitimate to silence a legislative member who disputed, for example, the justifiability of a war; and yet the same court would be willing to penalize a private citizen expressing the same challenging views. Also, Meiklejohn asks, how can the imminence of danger be validly isolated for consideration? "If the justification of expression is as Holmes says, that Congress is required and empowered to guard against dangers to the public safety, why should not that justification apply to clear and remote evils as well as those which are clear and present?"[35]

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31 Quisumbing, *op. cit.*, note 27 at 143-145.

32 *Id.*, at 145.

33 Leader, *Free Speech and the Advocacy of Illegal Action in Law and Political Theory*, 82 COL. L. REV. 412, 416 (1982).

34 *Id.*, at 418.

35 MEIKLEJOHN, POLITICAL FREEDOM, 45, 47 (1960).

The idea that a clear and present danger may justify a government in acting to protect its citizens by curbing the expression of political ideas inimical to it is thought to be violative of the rights of those it claims to protect. The absolute protection to be accorded to such "political speech" stems from the right of citizens in a democracy to be informed as an essential ingredient in the discharge of their political responsibilities. In other words, under this view, the test should be abandoned and the freedom of speakers instead made to depend upon the nature of the speech uttered, that is, whether the speech is concerned with matters affecting public interest or those issues which voters have to deal with or, on the other hand, whether the speech affects matters of private interest only.[36] It is urged that speech relating to political issues should admit of no exceptions while speech involving mere private interests may be the subject of such restrictions as the general welfare of the community may require.[37] This cannot, of course, resolve the problem posed by the "mixed speech" nor pinpoint the standard applicable to purely "private" speech.

Similar arguments are founded on objections to restrictions on speech per se. The rule, it is said, should be limited to its original function as a test of the conditions under which speech may be subjected to some legal restraint directed in terms against something other than speech. Thus, the rule is of no value in judging the constitutionality of legislation the terms of which restrict the permissible content of speech, such restrictive legislation being void on its face.[38]

It is furthermore stressed that the circumstances accompanying expression can have no bearing on the validity of legislative restrictions directed in terms against specified kinds of categories of speech. The danger test "makes sense only on the premise that it may justify suppression of speech which in the absence of the particular exigent circumstances would indeed be privileged under the first amendment."[39]

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[36] MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 94-95.

[37] In contrast, there is a view that the clear and present danger test should be applied to all speech cases and categories thereof as an important step in eliminating ideological censorship by government. Thus: "the basic premise of the categorization technique — that certain kinds of speech deserve less first amendment protection than others — rests upon an appraisal of the merits if the speech. Such appraisal is directly contrary to the first amendment principle that the merit of speech is to be evaluated not by the government but by the public in a free marketplace of ideas." Shaman, *Revitalizing the Clear and Present Danger Test: Toward the Principled Interpretation of the First Amendment*, 22 VILL. L. REV. 60, 63, 72 (1976-1977).

[38] Linde, *"Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163, 1174 (1970).

[39] *Id.*, at 1169. The same idea is phrased just a little bit differently thus: "Clear and present danger makes sense on the premise that it may justify *protection* of speech that, in the absence of the particular exigent circumstances, would indeed *not* be privileged under the first amendment." [emphasis supplied] Be Vier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. R. 299, 339 (1978).

The use of the test is also seen to involve some difficulties. As well as satisfying all the elements of the test, an author theorizes,[40] the problem remains of determining just how much responsibility should be pinned on the speaker for the action of the crowd he addresses. If the speaker is guilty of a breach of the peace because his words provoke someone to action against him or his party, the speaker can be effectively throttled. On the other hand, if the speaker, even without directly urging action incites the crowd to massacre members of a minority group or to the riotous destruction of property, then it would seem he should be prohibited from claiming protection under the Constitution. Clearly, the author concludes, some responsibility must be put upon the crowd. He continues:

> "Freedom of speech should not be abridged merely to shelter the public from exposure to ideas they may detest and which may provoke them to some action. Nor should it be restricted merely to suit the convenience of law enforcement officials. The problem is one of balancing the fundamental freedom of unimpaired speech against the danger to society that is sometimes likely to result from unbridled oratory. In using the clear and present danger test, the Court must take all the circumstances into consideration. These include the content of the speech, the attitude and reaction of the crowd, the nature of the action urged, and what action resulted from giving the speech."[41]

Rejection of the clear and present danger rule has also been based on observations about likely bias in the institutions applying such a test especially in the struggle between religious or political views. An author explains:

> "I still think that it is legitimate for the government to promote our personal safety by restricting information about how to make your own gas, but not legitimate for it to promote our safety by stopping political situations which could, if unchecked, lead to widespread social conflict. The difference is really that where political issues are involved, governments are notoriously partisan and unreliable. Therefore, giving government the authority to make policy by balancing interest in such cases presents a serious threat to particularly important audience interests."[42]

Another author would surmise that the test is an oversimplified judgment unless a number of factors — such as the relative seriousness of the danger, the availability of more moderate controls, and the speaker's specific intent — are taken into account. "No matter how rapidly we utter the phrase "clear and present danger," he says, "or how clearly we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the

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[40] Ashford, *Comments*, 48 MICH. L. REV. 345 (1950).

[41] *Id.*, at 345-46.

[42] Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 534 (1979).

complexity of the strands in the web of freedom which the judgment must disentangle."[43]

Conceding that Justice Holmes was a great contributor to liberal jurisprudence, an author would assert that the former's origination of the clear and present danger test was a mistake. In its stead he would propose that the "Government has the right to curb freedom of expression when the language used constitutes a clear, direct and wilful incitement to the present commission of dangerous violence or some other serious and overt criminal act."[44]

All the reservations about the danger test notwithstanding, it cannot be denied that it is a "rule of reason" which calmly applied "will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities and from abuse by irresponsible fanatical minorities."[45] It remains a potent and workable barrier against arbitrary intrusions on freedom of speech and presents at the very least a helpful guide to the judiciary in proper cases.

The Danger Rule as a Limitation on Freedom of Speech in American Courts

A discussion of the concept, development and application of the danger rule in the Philippines necessarily involves reference to American cases relating thereto.

Without delving too much into the intricacies of the rule as it evolved in American jurisprudence, it is, however, important to deal with certain developments in the conceptualization of the rule as well as the varying nuances thereof that appear to have been indiscriminately employed by our courts. As will be seen from the following representative cases, the danger test has not remained static and has been interpreted and re-formulated in various ways through time.

The rule, as previously pointed out, first found expression in the *Schenck** case. Under the facts therein, the documents circulated by the defendants and which resulted in their conviction did not in express terms advocate insubordination or obstruction to the recruitment of soldiers and neither was the result proved. While no evidence was in fact presented to show the possible or probable inimical effect of the documents to the war effort apart from their contents and the fact of publication, the effect was assumed by the Court on the premise that the documents would not have been sent unless it had been intended to result in that effect. Thus, "if the act (speaking or circulating a paper), its tendency and the intent with which it is done are the same, we perceive no ground for saying that success

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43 FREUND, THE SUPREME COURT OF THE UNITED STATES 44 (1961) cited in FERNANDO, THE BILL OF RIGHTS 142 (1972).

44 LAMOUNT, FREEDOM IS AS FREEDOM DOES 86 (1956).

45 Ashford, *supra* at 346, citing the dissenting opinion of Justice Brandeis in Scaeer v. United States, 251 U.S. 466, 482 (1920).

alone warrants making the act a crime."[46] The plain implication of the ruling appears to be that incitement or encouragement to crime is sufficient, without reference to its actual consequences.[47]

Two subsequent cases[48] upholding convictions under the Espionage Act appear to sustain this view working to dispel impressions that a requirement of "clear and present danger" of some substantive evil must be proved where intent to incite a crime is found to exist.[49]

Indeed, the phrase was omitted and apparently forgotten in the resolution of these two cases.

The phrase "clear and present danger", however, was revived in the dissenting opinion of Justice Holmes for himself and Justice Brandeis in *Abrams v. United States*.[50] In this case, the defendants were Bolshevik sympathizers who showered leaflets in the streets of New York calling upon workers to stop producing munitions which they alleged were being used not only against Germany but Russia as well. The defendants were convicted, the majority holding that even though their primary purpose was not to obstruct the war effort against Germany, their utterances had the easily foreseeable effect of doing so. In dissenting, Justice Holmes observed that intent means knowledge at the time of the act that consequences intended will ensue such that "when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed."[51] There being no proof of the intent, the defendants could not and should not have been convicted. The requirement of clear and present danger was stressed through the famous "fighting faith" dictum thus:

> Persecution for the expression of opinion seems to me perfectly logical. . But when men have realized that time has upset many fighting faiths, they may come and believe even more than they believe the very foundation 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 the truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of New Constitution. It is an experiment as all life is an experiment.[52]

Six years later, in the case of *Gitlow v. New York*,[53] the defendant was convicted for distributing a radical manifesto in violation of a New

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[46] Schenck v. United States, 249 U.S. 47, 52 (1919).
[47] Corwin, *Bowing Out "Clear and Present Danger,"* 27 NOTRE DAME LAW 325, 327 (1952).
[48] Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919).
[49] Corwin, *supra* at 329.
[50] 250 U.S. 616 (1919).
[51] *Id.*, at 626-627.
[52] *Id.*, at 630.
[53] 268 U.S. 652 (1925).

York statute prohibiting advocacy of "criminal anarchy." While admitting that there was no evidence of any effect resulting from the publication and circulation of the document,[54] the Supreme Court sustained the conviction, the basis thereof being the fact that the law itself defined the prohibited speech, "without regard either to the circumstances of its utterance or to the likelihood sequences..."

Justice Sanford speaking for the majority noted that the State by enacting the law had determined that speech advocating the violent overthrow of government was highly inimical to the general welfare and provoked such danger of substantive evil that it may be penalized in the exercise of the State's police power. "Freedom of speech, after all," he remarked, "does not deprive a state of the primary and essential right of self-preservation, which so long as human governments endure they cannot be denied."[55] The immediate danger was no less real and substantial because the effect of a given utterance could not be accurately foreseen.

The majority thus simply chose the course of accepting and deferring to the legislative judgement of the harmful potential of the prescribed words and the validity of the statute being settled:

> . . . it may be applied to every utterance . . . which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute . . . In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterance of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.[56]

The rule of clear and present danger, the majority thus clarified, only applied to cases where the law simply prohibited certain acts involving danger of substantive evil without any reference to the language itself.[57] It did not apply in cases such as the one at hand where the state through the legislature had previously made a determination that substantive evil arose from the utterances of a specified character.

In these cases, the Court noted, the ruling has been that the provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its normal tendency and probable effect was to bring about the substantive evil which the legislative body migh prevent. The dangerous tendency test and not the clear and present danger test was thus applied.

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54 *Ibid.*
55 *Id.*, at 668
56 *Id.*, at 670.
57 Corwin, *op. cit., supra,* note 47 at 339.

A dissenting opinion was expressed by Justice Holmes speaking for himself and Justice Brandeis. Applying the clear and present danger rule even in this case, he observed that "there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared in defendant's view."[58] On the argument that the manifesto was not only a theory but an incitement, he responded:

> Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure or energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result.[59]

A showing of more imminent danger of revolutionary action was thus thought to be a requirement which had not been met, the defendant's utterances having shown no capacity for starting a present conflagration. The dissent was, however, qualified in the end such that "if the publication had been laid as an attempt to induce an uprising against the government at once and not at some indefinite time in the future" a different question would have arisen. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was too futile and too remote from possible consequences. "But the indictment alleges the publication and nothing more."[60]

The *Gitlow* case is pivotal in its restriction of the scope of application of the rule only to those cases where the statute involved is designed in general terms to protect political institutions.[61]

In the case of *Whitney v. California*[62] decided two years later, a unanimous court sustained the conviction of defendant Charlotte Whitney for having assisted in organizing the Communist Labor Party in violation of the Criminal Syndicalism Act. The defendant argued that the conviction was invalid for lack of showing that she intended to join the party's forbidden purpose of advocating, teaching and abetting criminal syndicalism. In sustaining her conviction, the Court echoed the *Gitlow* ruling which deferred to the legislative determination of danger thus: "By enacting the provision of the Syndicalism Act the State has declared through its legislative body, that to knowingly be or become a member of or assist in organizing an association, to advocate, teach or aid and abet the commission of crime or unlawful acts of force, violence or terrorism . . . involves such danger to the public peace and security of the state, that these acts should

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[58] Gitlow v. New York, 268 U.S. 652, 673 (1925).
[59] *Ibid.*
[60] *Ibid.*
[61] Antieau, *The Rule of Clear and Present Danger: Scope of Its Applicability*, 48 MICH. L. REV. 811, 812, 813 (1950).
[62] 274 U.S. 357 (1927).

be penalized in the exercise of its police power. That determination must be given great weight."[63]

The concurring opinion of Justice Brandeis in which Justice Holmes joined observed that the advocacy of violation of existing law, however morally reprehensible, could not be a justification for denying the exercise of free speech where the advocacy falls short of incitement and there is no indication that the advocacy would be immediately acted upon. He expounded:

> The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy must be borne in mind. In order to support a finding of clear and present danger, it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conducted furnished reason to believe that such advocacy was then somewhat contemplated.[64]

Speech could be restricted only where it would produce or is intended to produce a clear and imminent danger of substantive evil, the latter term being defined to mean the destruction of or serious injury — whether political, economic or moral — to the state.[65]

Observing that the legislature could not by itself establish facts essential to the validity of the law, Justice Brandeis suggested that the court do so by using the clear and present danger rule. In this connection, he opined that "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education the remedy to be applied is more speech and not enforced silence."[66]

The clear and present danger rule underwent a subtle change of scope in *Dennis v. United States*.[67] In this case, eleven National board members of the Communist party was reorganized with one of the objectives being to advocate the overthrow of the government. There were five opinions in the Supreme Court, none of which mustered a majority. Three justices joined the opinion of Chief Justice Vinson who adopted Judge Learned Hand's formula which reinterpreted the danger rule to require a court to "ask whether the gravity of the "evil" discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[68]

The key element was thus the "gravity of the evil" replacing the requirement of immediacy and allowing for limitations on mere advocacy

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[63] *Id.*, at 368.
[64] *Id.*, at 376.
[65] *Id.*, at 373
[66] *Id.*, at 377.
[67] 341 U.S. 494 (1951)
[68] *Id.*, at 510.

as distinguished from incitement. "In other words, the probability of the advocated danger occurring at some indefinite future time may be low; but if the gravity of the danger is great — and what could be more grave than the overthrow of government — then the speech may be curtailed."[69] The *Dennis* version of the clear and present danger thus allowed broad restrictions on speech.

The dangerous implications of the *Dennis* case on the right of free speech did not go unnoticed and was subsequently reversed in *Yates v. United tates*;[70] the court ruling expressly that mere advocacy could not be made a crime. The court held that the advocacy of the principle of violent overthrow was constitutionally protected even where there was specific intent and hope to accomplish violent overthrow. What was not protected was advocacy of action for the accomplishment of forcible overthrow "even if the action advocated was to take place at an indefinite future time."[71]

The distinction established by the case still failed, however, to clearly delineate the difference between advocacy of abstract doctrine from advocacy of action. The effect was that a would-be speaker had no way of determining at the outset whether the court would classify his radical speech as criminal or protected. "His or her speech was chilled."[72]

In *Brandenburg v. Ohio*,[73] the Supreme Court attempted to summarize the developments that had molded the constitutional position of revolutionary advocacy. The case involved a Ku Klux Klan organizer convicted on charges under an Ohio Act of, among others, unlawfully advocating the necessity of propriety of crime, violence or unlawful methods of terrorism as a means of accomplishing political reform. Observing that it had upheld a similar statute in the *Whitney* case, the Supreme Court noted that its decision therein had, however, already been discredited by later decisions culminating in the principle that advocacy of lawlessness cannot be prohibited except when such advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[74]

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[69] Lynd, *Brandenburg v. Ohio: A Speech Test or all Seasons?*, 43 U. CHI. L. REV. 151, 155 (1975). In Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 34 CALIF. L. REV. 115 (1960), the author comments: "What history tells us about [the Dennis opinion] is that by their assertion of the "ultimacy of national self-preservation they deny the constitution in its most essential intentions." Attacking the "balancing theory which appeared to come into play in the decision, he scathingly continues: "it is a fiction which serves to cover the fact that with respect to the issue of political freedom, the court has reinstated as "controlling"' the clear and present danger test" of 1919 but with the words "clear" and "present" left out."

[70] 3 54 U.S. 298 (1957).

[71] *Id.*, at 325.

[72] Lynd, *supra* at 156.

[73] 395 U.S. 444 (1969).

[74] Lynd, *supra* at 156-157.

The decision implicitly repudiated the temporally remote incitement aspect of the *Dennis* and *Yates* decisions and emphasized imminence. By doing so, *Brandenburg* had the novel result of mixing the Holmes-Brandeis insistence on present danger with the *Dennis-Yates* protection for abstract advocacy. In other words, both incitement and the element of present or imminent dangers were requisite components of any speech restriction legislations.

Whether or not, *Brandenburg* has revitalized the clear and present danger rule, however, has been the subject of some speculation. The decision does not mention the "clear and present danger" test and the concurring opinions of Justice Black and Douglas appear to reject the doctrine.[75]

That the *Brandenburg* decision embodies both the "incitement and imminent" requirements has been affirmed in *Hess v. Indiana*[76] where the Supreme Court held that the statements of the defendant were constitutionally protected because it was just "advocacy of illegal action and that there was no evidence, or rational inference from the import of the language that he used that such were intended to produce imminent disorder . . ."[77]

As the above representative American cases show, the law governing freedom of speech in the United States has undergone change, responding with "imperfect sensitivity to modification in underlying social circumstances."[78]

The *Schenck* case posited the principle that the State had the power to restrict speeches constituting both abstract advocacy and incitement which created a clear and present danger of evils that the government has a right to prevent. The *Gitlow* case adopted the original formulation of the rule that restricted its application only to those cases where the statute itself did not specify or define the forbidden speech. Under *Dennis*, the rule was restated to permit broad limitations on speech, the essential element for application of the rule being the existence of danger — whether present or at some future time — of sufficient gravity. The opinion, however, conceded that the rule could apply even where the law in question directly restricted speech. The unfavorable implications for free speech in *Dennis* was offset by the *Yates* case to permit restrictions where present or future danger of sufficient gravity exists but only on speech that was an "incitement". In Brandenburg, the rule was clarified and made stringent

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[75] On the other hand, the importance of *Brandenburg* has also been seen to lie precisely on the fact that "it is neither an incitement test, nor a clear and present danger test, but a combination of the two, requiring both elements before speech may be forbidden or proscribed." *See* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Judgments of History*, 27 STAN. L. REV. 719 (1975).

[76] 414 U.S. 105 (1973).

[77] *Id.*, at 108-109.

[78] Levine, *op. cit., supra*, note 2 at 617.

to allow restrictions on speech only where (1) the speech constitutes an incitement or that it advocates imminent lawless action, and (2) it is likely to produce imminent lawless action.

The developments support the observation that the law of free expression in the United States exhibits "cycles of progression and retrogression, periods of indulgence and restrictiveness, as it has emerged within the ongoing life of a nation."[79] Thus, concern for the "effect of speech" which led to uniform convictions in the *Schenck* and *Abram* cases could be attributed to the fact that the speeches made therein were "war time utterances," and that the consequent "conventional wisdom of the day" was to penalize speech that had reasonable tendency to bring about the forbidden effect.[80]

The broad speech restrictions which the *Gitlow* and *Whitney* cases sanctioned, on the other hand, were probably influenced by the domestic tensions brought about by the existence and rapid growth of "anarchist movements" in the 1950's. The "inflammable nature of world conditions" in the 1950's underlie the *Dennis* and *Yates* cases. *Brandenburg,* on the other hand, represents "the state of the debate at the end of a judicial era that is widely presumed to have been more libertarian, by virtue of its members and its inclinations than the one expected to follow it."[81]

The acceptance of the clear and present danger rule was only made categorical[82] in the 1943 case of *West Virginia State Board of Education v. Barnette.*[83]The case of *Taylor v. Mississippi*[84] marked the ascendancy of the rule over the dangerous tendency doctrine as a criminal law standard.[85] Thereafter, it expanded in scope to apply even where no criminal liability was involved and in all other cases relating to free expression and association.[86]

The "dangers" of substantive evil to which the rule referred also expanded to include, aside from danger to the existence of the state from an overt revolution, practically all its "public interests, such as the risk to privacy (in libel cases), public morals (in obscenity cases), allegiance to the country (in the flag salute cases), economic interests (in commercial advertising and labor picketing) and the like, which stood the danger of being severely affected by the free exercise of speech."[87]

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[79] *Id.,* at 618.
[80] TRIBE, AMERICAN CONSTITUTIONAL LAW 608 (1978).
[81] Linde, *op. cit., supra,* note 40 at 1163.
[82] Tañada and Fernando, *op. cit., supra,* note 18 at 858.
[83] 319 U.S. 624 (1943).
[84] 319 U.S. 383 (1943).
[85] Quisumbing, *op. cit., supra,* note 27 at 136.
[86] Antieu, *op. cit., supra,* note 61 at 811.
[87] Gorgonia and Goyena, *Political Speech and the Clear and Present Danger Rule,* unpublished paper in Legal Research (1985).

A distinction must be made at this point, however, between "restrictions on the mind and regulations of modes of expression."[88] It is to the idea expressed and not the form of expression that enjoys constitutional protection.[89] The goal being to give ideas complete freedom to seek acceptance in the democratic forum, the danger rule could not apply to government action merely calculated to regulate the time, place and manner of expression in which case the less stringent reasonable basis rule applies.[90] But this distinction must be qualified. As observed by Justice Murphy: "It does not follow that the state in dealing with the evils arising from industrial disputes may impair the effective exercise of the right."[91] The important word is "effective" for if a prohibited mode of expression effects a substantial restraint "the distinction between form and content is bridged, the prohibition is subject to constitutional inquiry, and the danger rule becomes relevant."[92] Indeed, the right to the exercise of the freedom in appropriate places cannot be abridged on the mere plea that it may be exercised in some other place.[93]

Another observation may be made. As the scope and nature of the danger rule changed, so did the burden of proving that the speech in question was punishable. The American Supreme Court began to make its own examination of the underlying circumstances and to strike down legislation which did not meet the danger test. Recognition of the freedom of speech guaranteed by the Constitution certainly demanded no less.[94]

The Clear and Present Danger Rule in the Philippines

The concept of the clear and present danger rule obtaining in the Philippines traces its origin and prevailing form to the classic Holmes formulation in the *Schenck* case.

Noting that Justice Laurel as a delegate to the Constitutional Convention of 1934 in his sponsorship speech of his Draft on the Bill of Rights had quoted the Holmes formulation as well as Holmes' famous dissent[95] in the *Abrams* case, former Chief Justice Fernando concluded: "It would thus appear undeniable that such a principle received the approval of the

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[88] Mendelson, *Clear and Present Danger — From Schenck to Dennis*, 52 COLUM. L. REV. 313, 316 (1952).

[89] Shaman, *op. cit., supra*, note 39 at 67.

[90] *Ibid.*

[91] Thornhill v. Alabama, 310 U.S. 88, 104 (1940).

[92] Mendelson, *supra*, at 318.

[93] Austine, *Time, Place and Manner Regulations of Expressive Activities in the Public Forum*, 61 NEB. L. REV. 167, 185 (1982).

[94] *Notes*, (discussing Terminiello v. New York decision) 24 N.Y. U. L. Q. REV. 888 (1946).

[95] The dissent quoted is as follows: "While the experiment is part of our system, I think we should be eternally vigilant against attempts to check the expression of opinions that we loath 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." [3 Proceedings of the Philippine Constitutional Convention, 671 (Laurel *ed.*, 1965)].

framers of our Constitution and of our people who voted overwhelmingly for its adoption."[96]

The clear and present danger rule has not, of course, always been applied in the Philippines and as late as 1947, an author could surmise that the test is almost unknown, the dangerous tendency test being the one applied in freedom of speech cases.[97]

Thus, for example, in *U.S. v. Perfecto*[98] the Supreme Court in reversing the conviction of the defendant for sedition noted that a careful examination of the evidence did not show that the defendant in the publication in question intended to disturb or obstruct any law officer nor that it tended instigate others to meet together for unlawful purposes or to suggest or incite rebellious conspiracies or disturb the peace of the community or the safety and good order of the government. The Court emphasized the right and importance of free speech, thus:

> "It is the particular duty of the people of the state to zealously maintain the right to expose freely, either verbally or by publication, their honest conviction regarding the acts of public officials; the governing class. If the people of a free state should give up the right of free speech, if they are daunted by fear and threats and abdicate their convictions, if the governing body the state could silence all the voices except those that extol their acts, if nothing relating to the conduct of the governing class can reach the people except that which will held the men in power, then we may well say "Good-by" to our liberties forever."[99]

Subsequently, in *People v. Perez*,[100] the accused apparently disillusioned with the administration of Governor General Wood was convicted of sedition for shouting that "the Filipino, like myself, should get a bolo and cut off the head of Governor-General Wood because he has recommended a bad administration in these islands . . . he has assassinated the independence of the Philippines." In sustaining his conviction, the Court noted that the defendant's statement had a seditious tendency, inciting rebellious conspiracies and tending to stir up the people against the lawful authorities and thus disturb the peace of the community and the safety and good order of the people.

In 1932, a series of cases dealing with allegedly seditious speeches arose.

Echoing the U.S. case of *Gitlow* decided 7 years earlier, the Supreme Court in *People v. Evangelista*[101] sustained the conviction of the defend-

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[96] FERNANDO, THE BILL OF RIGHTS, 142 (1974).
[97] Quisumbing, *op. cit., supra,* note 27 at 138.
[98] 43 Phil. 38 (1922).
[99] *Id.,* at 63.
[100] 45 Phil. 599-602 (1923).
[101] 57 Phil. 354 (1932).

ants for violating Act No. 292 which like the two previous cases penalized, among others, the utterance of seditious words or speeches or of statements which tended to instigate others to cabal together for unlawful purposes or to stir up the people against the lawful authorities and disturb the peace of the community and the safety or order of the government. It appeared that the defendants spoke in a large meeting held in Manila to celebrate the 13th Anniversary of the Union of Socialist Republics of the Soviets. The accused read the Constitution of the Communist Party of the Philippines, another explained the advantages of the Russian government while, on another occasion, the third accused delivered a speech challenging any other person to a discussion as to what form of government is good, wherein he would defend the Soviet Government of the Bolsheviks.

In answer to the defense that no disturbance or disorder had taken place as a result of the defendant's actuations, the Supreme Court alluded to the doctrine laid down in the *Perez* case and held:

> "It is not necessary that there shall be any disturbance or breach of the peace in order that the act may come under the sanctions of the Penal Code. It is sufficient that it incites uprising or produces a feeling incompatible with the permanency of the government. Nor can the acts charged be considered as mere expositions of doctrines in abstracto, coming within the exemption set out in Gitlow v. People of New York (268 U S. 652)..."[102]

The accused Evangelista was subsequently held guilty in another case[103] where it appears that a parade to be held by the Communists was stopped by the Constabulary. Permitted to say a few words to inform the people that the parade could not be held, the defendant instead raised his fists and said: "Comrades and brethren, the municipal president Mr. Aquino has allowed us to hold the parade but for reasons unknown to me, the permit has been revoked. This shows that the big ones are persecuting and oppressing us, who are small, which they have no right to do." Shouts were then heard from the audience saying "let us fight them" whereupon the accused Ramos who was among the audience called out, "Let us fight them until death." Evangelista proceeded to say, "my heart bleeds" when he was stopped by an officer and placed under arrest. The Supreme Court in sustaining their convictions simply reiterated the previous *Evangelista* ruling.

The result in these cases was already foreshadowed in *Evangelista v. Earnshaw*[104] where the Supreme Court sustained the mayor's right to deny a written request forewarded by the defendant as President of the Communst Party to hold a popular meeting at Plaza Moriones in Manila on the ground that several public meetings had been held with permit under the auspices of the association in different parts of Manila in which sedi-

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[102] *Ibid.*
[103] People v. Evangelista, 57 Phil. 372 (1932).
[104] 57 Phil. 255 (1932).

tious speeches had been made. The Supreme Court observed that instead of being condemned or criticized, the respondent mayor should be praised and commended for having taken a prompt and courageous stand against the party. In any case, the Court held, the right of peaceful assemblage is not an absolute one. Citing the *Perez* case, the Court affirmed:

> "When the intention and effect of the act is seditious, the constitutional guarantees of freedom of speech and press and of assembly and petition must yield to punitive measures designed to maintain the prestige of constituted authority, the supremacy of the Constitution and the laws and the existence of the State."[105]

In *People v. Capadocia*,[106] the accused members of the Communist Party of the Philippines for the purpose of carrying out the objects thereof met at various public meetings and made speeches urging the laboring class to unite by affiliating with the Party and overthrowing the present government. The Supreme Court in sustaining their conviction simply applied the ruling in the previous *Evangelista* cases.

In *People v. Feleo*[107] the Court again ruled as seditious the words uttered by the defendant to the effect that those who heard them should imitate French soldiers in battle and point their weapons at their own leaders instead of their enemies. The words had the effect, the Court held, of inciting the people to take up arms and rebel against their constituted authorities. In other words, they tended to incite the soldiers to disobey their officers and revolt against them, and to sow hatred among persons.[108]

The Court similarly held as seditious the words uttered by the accused in *People v. Nabong*[109] where, as the attorney retained in defending Feleo against a charge of sedition, he delivered the following speech: "The members of the Constabulary are bad because they shoot even innocent women, as it happened in Tayug. In view of this, we ought to be united to suppress that abuse. Overthrow the present government and establish our own government, the government of the poor. Use your whip so that there may be marks on their sides." Again, the words were held seditious for having the tendency to induce the people to use violence against lawful authorities and to incite the poor people to resist and use violence against the agents of the Constabulary and to instigate them to cabal and meet together for unlawful purposes. As in previous cases, the Court deemed it unnecessary that the words used in fact resulted in a rising of the people against the constituted authorities, the law not being aimed at actual disturbance but rather directed towards the punishment of utterances endangering public order.

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105 *Id.*, at 262.
106 57 Phil. 364 (1932).
107 57 Phil. 451 (1932).
108 *Id.*, at 454-455.
109 57 Phil. 455 (1932).

Some observations may be made about the above Philippine free speech cases. All of them involved alleged seditious utterances. The Supreme Court in weighing their import and meaning and in permitting the imposition of criminal liability upon the utterers thereof employed the "dangerous tendency rule" as the criterion. In this way, freedom of speech could be curtailed or limited by reason of a "tendency", that is, a likelihood or indication, that some substantive danger or evil could occur sometime in the future. The proximity between the act and the danger involved in these cases may be indefinite. Even this early, however, an apparent distinction was already laid down by the Court between incitement — which is punishable — and exploitation of doctrine — *in abstracto* — which is not, and alluded to the American *Gitlow* case for this purpose. In addition, the question of the validity of the law limiting the utterance of specific words did not even arise. There is then deference to the legislative determination that certain speech can and must be prohibited, the authority emanating from its recognized police powers and in the pursuance of its task of, among others, maintaining the prestige of constituted authority and the existence of the State. To the argument that law involved infringement of the freedom of speech, the Court uniformly ruled that the acts contemplated in the provisions of the law relating to sedition were not protected by the Constitution being abuses in the exercise of the freedom.

The rule of clear and present danger was adopted, though not explicitly, in the Philippines, overriding the bad or dangerous tendency rule, in the case of *Primicias v. Fugoso*.[110] As the campaign manager of the Coalesced Minority Parties, Primicias requested for a permit to hold a "peaceful public meeting" from Manila Mayor Fugoso. The request was denied because the mayor entertained fears that breaches of the peace and public order might ensue as a result of the bitterness of the speeches that could be expected from members of the losing minority party. The Supreme Court in granting the petition for mandamus explained:

> "The reason alleged by the government 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, especially on the part of the losing groups, remains (sic) 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 lawful assemblage, the reason for the refusal of the permit cannot be given any consideration.[111]

The majority opinion in citing the following concurring opinion of Mr. Justice Brandeis in the *Whitney* case obviously adopted the clear and present danger standard:

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[110] 80 Phil. 71 (1948).
[111] *Id.*, at 86-87.

> 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 evil to be prevented is a serious one. . . . Even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. . . . 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 danger to the state.[112]

Three years later, in *Espuelas v. People,*[113] the defendant was accused of violating Article 142 of the Penal Code for inciting to sedition. He had circulated a picture of himself which purported to show that he had committed suicide by hanging under the fictitious name of Alberto Reveniera. Together with the picture was a letter addressed to the supposed wife of Alberto explaining that he had committed suicide because he "was not pleased with the administration of Roxas" and wanted his wife to tell the whole world about this. The letter amplified:

> And if they ask why I did not like the administration of Roxas, point out to them the situation in Central Luzon, the Hukbalahaps. . . . 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 cannot hold high my brows to the world with this dirty government. . . .[114]

The Supreme Court in sustaining the conviction of the defendant noted that freedom of speech while guaranteed by the Constitution does not give an absolute right to speak or publish without responsibility whatever one may choose. The defendant's utterance could not be said to be embraced within the guaranty because "analyzed for meaning and verified in its consequences the article cannot fail to impress thinking persons that it seeks to sow the seeds of edition and strife. The infuriating language is not a sincere effort to persuade . . ."[115]

The majority opinion recognized that Article 142 of the Penal Code could become "a weapon of intolerance constraining expression of opinion or mere agitation for reform but that there is "sufficient safeguard by requiring intent on the part of the defendant to produce legal action."[116] On the question of the law's validity as a limitation on expression, the majority opined that it was a matter of policy, and being a statement of the legislature against anarchy and radicalism, the law had to be applied.

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[112] *Ibid.*
[113] 90 Phil. 524 (1951).
[114] *Id.*, at 526.
[115] *Id.*, at 529.
[116] *Id.*, at 528.

The above decision has been met with some criticism. "It appears," former Chief Justice Fernando commented, "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."[117] Justice Tuason penned a decision concurred in by Chief Justice Paras and Justice Feria which sustained this view as they observed: "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 such nature as to create clear and present danger that they will bring about the substantive evil 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.... Words are not taken at face value, but their import or gravity is gauged by the circumstances surrounding each particular case."[118] The dissenting opinion then noted that granting that the defendants intended to incite others to sedition, the article being harmless should have been ignored. The words used certainly did not possess "keys of persuasion" and "triggers of action." Some witnesses of the Government even conceded that their general reaction was to laugh off the article as the work of a crazy man. The opinion continued, "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...."[119]

The decision has been explained to be a result perhaps of the opinion of the Court that the criticism in the article did not conform with the notion of "free trade of ideas" and was nothing less than an invitation to disloyalty to the government."[120] In any event, the case is a reversion to the earlier standard of dangerous tendency rather than the clear and present danger rule which had been employed by the Court in the previous *Primicias* case.

The approach utilized in the above case was repudiated and the clear and present danger rule explicitly employed six years later in *American Bible Society v. City of Manila.*[121] The issue in this case did not directly deal with freedom of speech but in holding that the constitutional guaranty of the free exercise of religious profession and worship carries with it the right to disseminate religious information, the Supreme Court made the

[117] Tañada and Fernando, *op. cit., supra,* note 18 at 856.
[118] People v. Espuelas, 90 Phil. 524, 536 (1951).
[119] *Id.,* at 538.
[120] FERNANDO, *op. cit.,* note 26 at 152, citing Justice Bengzon's opinion in People v. Espuelas, *supra* at 529.
[121] 101 Phil. 384 (1957).

following important pronouncement: "Any restraint of such right can only be justified like other restraint of freedom of expression on the grounds that there is a clear and present danger of any substantive evil which the State has the right to prevent."[122]

There was casual and indirect reference to the danger test in the case of *LVN Pictures v. National Labor Union*.[123] The Court, through Justice Padilla ponente, cited with favour the trial Court's finding thus: "The acts of the defendants... which consisted only in walking slowly and peacefully back and forth on the public sidewalks in front of the premises of the Dalisay Theatre and displaying placards publicizing the dispute between theater management and the picketers was not such as to disturb the public peace at the place. There was no clear and present danger of destruction to life or property."[124]

Cabansag v. Fernandez[125] decided the same year similarly employed the clear and present danger rule albeit in a curious manner in that the Supreme Court appeared to apply the danger rule in conjunction or simultaneously with the dangerous tendency rule. Significantly, the Supreme Court announced that the danger test constituted and established a definite rule in Constitutional law, providing the standard or criterion for determining when and what words may be prohibited and penalized.[126] The Court ruled that the advocacy of ideas could not constitutionally be abridged absent proof that the advocacy would result in a clear and present danger (in this case of harm to the administration of justice).

It appears in this case that Cabansag was found guilty of contempt of court for sending a letter to the Presidential Complaints and Action Committee that expressed his deep frustrations about the interminably long time it took to decide his ejection case. In reversing the judgment, the court noted that the case involved a conflict between the fundamental rights of independence of the judiciary and the right to petition the government for redress of grievances. The Court announced that two theories had been devised in the determination of conflicting rights of similar import — the "clear and present danger rule" and the "dangerous tendency" rule. It then proceeded to discuss the concepts citing the *Schenck* case for the former and the *Gitlow* case for the latter.

The question to be determined, the Court ruled, was whether Cabansag's letter created a sufficient danger to a fair administration of justice. Did its remittance to the PCAC create a danger sufficiently imminent to come under the two rules mentioned above? The answer was clearly in the negative. The Court explained:

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[122] *Id.*, at 378.
[123] G.R. No. L-7586, January 20, 1957, 53 O.G. 2151 (April, 1957).
[124] *Id.*, at 2152.
[125] 102 Phil. 152 (1957).
[126] *Id.*, at 161-163.

> The only disturbing effect of the letter which perhaps has been the motivating factor of the lodging of the contempt charge by the trial judge is the fact the letter was sent to the Office . . . while the course of action he had taken may not be a wise one . . . such act alone would not be contemptuous. To be so, the danger must cause a serious imminent threat to the administration of justice. Nor can we infer that such act has a dangerous tendency."[127]

The *Cabansag* case is seen to be notable for definitely repudiating the dangerous tendency doctrine as a basis for the guaranties of free speech.[128] This view does not appear to be totally accurate. Indeed, the case seems to be ambivalent on the question of whether the danger test has become a preferred standard. Both the danger and the dangerous tendency tests it must be noted, were cited in assessing the nature of the expression under the circumstances.[129]

The clear and present danger rule again appeared in "muted" form in the 1964 case of *People v. Hernandez*[130] where the Supreme Court reversed the conviction for rebellion of defendant member of the Communist Party. The Court distinguished between advocacy of communist theory and principle which by itself was thought insufficient to give rise to liability and advocacy of action which, being an immediate and positive act of starting an uprising to overthrow the government, was punishable. The mere fact that Hernandez had given and rendered speeches favoring Communism, the Court ruled through an opinion penned by Justice Labrador, did not make him guilty of conspiracy because there was no evidence that the hearers of his speeches of propaganda then and there agreed to rise up in arms for the purpose of obtaining the overthrow of the democratic government as envisaged by the principles of Communism. The Court concluded that mere membership in the Communist Party or Congress of Labor Organizations did not render the member liable either of rebellion or of conspiracy to commit rebellion because mere membership and nothing more only

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127 *Id.*, at 165.

128 FERNANDO, *supra* at 144-145. The former Chief Justice explains: "Why there should be no sympathetic consideration accorded to such a restriction if these constitutional rights are to be assured full vitality is made obvious in the opinion by its mere restatement." Thus: "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 some definite or immediate acts of force, violence, or unlawfulness be advocated. It is sufficient that such acts be advocated in general terms. Nor is it necessary that the language used be reasonable calculated to incite persons to acts of force, violence or unlawfulness. It is sufficient if the natural tendency and probable effect of the utterances is to bring about the substantive evil which the legislative body seeks to prevent."

129 There are other cases which deal with the same conflict between freedom of expression and administration of justice. The rule appears to be that for authors to be subjected to contempt of court, the articles they write must be about a pending case and there must be a clear showing that such articles really impede, interfere with, and embarrass the administration of justice. *Cf.* People v. Castelo, 4 SCRA 947 (1962); People v. Alarcon, 69 Phil. 265 (1939).

130 G.R. No. L-6025, 11 SCRA 223 (1964).

implies advocacy of abstract theory. Thus, advocacy becomes criminal only if it is coupled with action or advocacy of action.

While not explicitly stated, the clear and present danger rule was obviously utilized as the standard for speech limitation in this case.

Not only did the case of *Gonzales v. COMELEC*[131] explicitly adopt the danger test, it also expanded its coverage to include the overbreadth doctrine in American law within the scope of its operation.[132] Certain provisions of Republic Act 6880 limiting the period of election campaign or partisan political activities was assailed for infringing upon the constitutional freedom of belief and expression. On the other hand, the law was supported by respondent as a valid exercise of police power to safeguard the right of suffrage by insuring free, honest and orderly elections.

It is a well settled principle, the Court held speaking through former Chief Justice Fernando that stricter standards of permissible statutory vagueness may be applied to a statute having inhibiting effects on speech. Threat of sanction may deter exercise of freedom almost as potently as the actual application of sanction. The majority of the Supreme Court[133] held that the law itself was not unwarranted or arbitrary, there being a clear and present danger that the electoral process would be debased by unrestricted campaigning, excessive partisanship, corruption of the electorate and the like. However, the Court emphasized, a proper situation did not imply unlimited limitations on constitutional rights such that the danger test "rightly viewed requires that not only should there be an occasion for the imposition of such restrictions but also that they be limited in scope."[134] Legitimate and substantial government purposes are not allowed to be pursued by means that "broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[135] The dissenting opinion of Justice Sanchez likewise stressed the applicability of the danger test. Remarking that neither individual rights nor state authority were absolute concepts, he reasoned that fixed formulas could be utilized to balance them. One such formula is the principle that "the relation between remedy and evil should be of such proximity that unless prohibited, conduct affecting these rights would create a clear and present danger that will bring about substantive evils that Congress has a right to prevent."[136]

Another interesting aspect of the case is its presentation of another possible standard for limiting free speech. As expressed through the separate opinion of Justice Castro, the balancing of interest test involves a conscious and detailed consideration by the Court of the interplay of interests observ-

131 G.R. No. 27833, 27 SCRA 835 (1969).
132 FERNANDO, *supra* at 146.
133 The majority vote of 7 members lacked one more affirmative vote to call for a declaration of unconstitutionality of the assailed provision.
134 Gonzalez v. Commission on Elections, *supra* at 867.
135 *Id.*, at 871.
136 *Id.*, at 877.

able in a given situation or type of situation. He enumerated a number of factors that should be considered in determining the propriety of speech restrictions, to wit: "a) the social value and importance of the specific aspect of the particular freedom restricted by the legislation; b) the specific thrust of the restriction, that is, whether the restriction is direct or indirect, whether or not the persons affected are few; c) the value and importance of the public interest sought to be secured by the legislation — the reference here is the nature and gravity of the evil which Congress seeks to prevent; d) whether the specific restriction decreed by Congress is reasonably appropriate and necessary for the protection of such public interest; and e) whether the necessary safeguarding of the public interest involved may be achieved by some other measure less restrictive of the protected freedom."[137]

That the preferred position of free speech in a democratic institution has often been recognized by the Courts has not been sufficient to stem the tide of criticisms directed against the balancing of interest test.[138] The test has nevertheless been cited with favor in a number of Philippine cases.[139]

The case of *Vera v. Arca*[140] decided a month later showed reliance on the danger test. The enforcement of the Tax Census Act was assailed for violating the constitutional right to liberty, to the guarantee against self-incrimination and the protection against unreasonable searches and seizures. In sustaining its validity, the Supreme Court through former Chief Justice Fernando *ponente* agreed that the Bill of Rights does raise barriers to unwanted intrusions but that the Constitution does not totally prohibit in appropriate cases legislative deprivation of liberty as long as due process is observed. In the process, the Court had occasion to pronounce: "While courts should not relax in its vigilance in assuring that no undue curtailment of liberty exists, still it is to be admitted that except in cases where

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137 *Id.*, at 899-900.

138 An eloquent disclaimer of the balancing test proceeds thus: "(T)he balancing test does not permit the 1st Amendment to perform its functions as a constitutional limitation. It virtually converts that amendment into its opposite — a prohibition against abridgement has become a license to abridge. And, notwithstanding that on its face this purports to be a limited license, the limitation is so narrow and, on analysis, so largely illusory, that it comes close to being an unlimited license." Frantz, *The First Amendment in the Balance*, 71 YALE L. J. 1424, 1449 (1962).

139 The test is said to have had the approval of 3 justices in the Supreme Court — Teehankee, Zaldivar and Castro (see FERNANDO, *op. cit.*, note 26 at 157). The test was also unabashedly used in People v. Ferrer, G.R. No. L-32613-14, 45 SCRA 382 (1972) where the court through Justice Castro, *ponente*, in sustaining the constitutionality of the Anti-Subversion Act outlawing the Communist Party held: "Whatever interest in freedom of speech and freedom of association is infringed by this prohibition . . . is so indirect and so insubstantial as to be clearly and heavily outweighed by the overriding considerations of national security and the preservation of democratic institutions in this country." Previously, the test also made its appearance in *Re*: Kay Villegas Kami, Inc., G.R. No. L-32485, 35 SCRA 429 (1970), where the court through former Chief Justice Makasiar stated: "Under the balancing of interest test, the cleansing of the electoral process, the guarantee of equal chance for all candidates and the independence of the delegates who must be "beholden to no one but to God, country, and conscience" are interests that should be accorded primacy."

140 G.R. Ni. L-25721, 28 SCRA 355 (1969).

specific freedom of belief, whether religious or secular, of expression, of assembly and of association are concerned, a domain where Congress is forbidden to trespass except under the clear and present danger doctrine, the need for introducing evidence to counteract the assumption that a statute is valid may be unavoidable.[141]

Reliance upon the danger test was again made evident in *Imbong v. Ferrer*[142] where the Supreme Court sustained the validity of a certain provision in Republic Act No. 6132 prohibiting any political party, group, committee or other organization in intervening in the nomination of a candiate, the filing of his candidacy or giving aid or support favorable to his election campaign. The Court speaking through the ponencia of Justice Makasiar expounded:

> The debasement of the electoral process as a substantive evil exists today and is one of the major compelling interests that moved Congress into prescribing the total ban contained in par. 1 of Sec. 8(a) of R.A. No. 6132, to justify such ban. In the said Gonzales v. Comelec case, this Court gave due recognition to the legislative concern to cleanse, and if possible, render spotless, the electoral process," impressed as it was by the explanation made by the author of R.A. So. 4880, Sen. Lorenzo Tañada, who appeared as amicus curiae, "that such provisions were deemed by the legislative body to be part and parcel of the necessary and appropriate response not merely to a clear and present danger but to the actual existence of a grave and substantive evil of excessive partisanship, dishonesty and corruption as well as violence that of late has marred election campaigns and partisan political activities in this country. He did not invite our attention likewise to the well-settled doctrine that in the choice of remedies for an admitted malady requiring governmental action, on the legislature primarily rests the responsibility. Nor should the cure prescribed by it, unless clearly repugnant to fundamental rights, be ignored or disregarded."[143]

In addition, the Court noted that the provision sought to assure the candidate's equal protection of the laws by according them equality of chances. The Court thus concluded: "The primary purpose of the prohibition then is also to avert the clear and present danger of another substantive evil, the denial of the equal protection of the laws."[149]

The dissenting opinion of former Chief Justice Fernando placed equal reliance on the danger test but he parted ways with the majority in the assessment of the restrictive force and application of the test. The opinion stressed that the danger feared was neither clear nor present. The apprehension that the substantive evil of partisanship running riot unless political parties are restrained was belied by the fact that the opposition candidates had often been victorious in the political arena.[145]

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141 *Id.*, at 363.
142 G.R. No. L-32332, 35 SCRA 28 (1970).
143 *Id.*, at 42.
144 *Ibid.*
145 *Id.*, at 51.

The next series of cases employing the clear and present danger rule relate more particularly to the right of the people to peaceably assemble to petition the government for redress of grievances. This right, as earlier observed, are inextricably linked with and are seen as a complement of free speech that work to fortify and strengthen our republic institutions.[146]

In the 1970 case of *Navarro v. Villegas*,[147] the respondent mayor stated his willingness to grant permits for peaceful assemblies at Plaza Miranda during Saturdays, Sundays and holidays when they would not cause unnecessarily great disruption of the normal activities of the community and offered Sunken Gardens as an alternative site for the demonstration sought to be held that afternoon. The Supreme Court denied the petition to compel the mayor to unconditionally grant the application for permit. It observed that current experience relating to the conduct of assemblies did not warrant the Court's disbelieving the mayor's appraisal that a public rally at Plaza Miranda would constitute "a clear and more imminent danger of public disorders, breaches of the peace, criminal acts and even bloodshed as an aftermath of such assemblies.[148]

On the other hand, the dissenting opinions penned by former Chief Justice Fernando and Justice Castro were premised upon the belief that the mayor's refusal constituted a prior restraint of a constitutional right which could not be allowed.[149]

The danger test resurfaced twelve years later in the 1982 case of *Pagkakaisa ng Manggagawang Pilipino v. Bagatsing*[150] where the Court found that a clear and present danger to the public safety and order was presented by a proposed Labor Day rally on May 1, 1982 at the Liwasang Bonifacio in Manila. The finding was based solely on the Solicitor General's "factual representations" to that effect. Chief Justice Fernando, who strongly dissented in the *Villegas* case, concurred on the basis of his dissent therein. Justice Teehankee in his dissent voted to grant the union the right to hold an assembly at the Liwasang Bonifacio on the latter's assurance that their members would no longer march to the site of the rally in groups but would proceed individually so as not to disrupt traffic, and that they would take care of policing their ranks to keep infiltrators away and thereafter disperse peacefully at 4:30 p.m.

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146 FERNANDO, *op. cit.*, note 26 at 147.

147 G.R. No. L-31657, 31 SCRA 731 (1970).

148 *Ibid.*

149 The grounds for the mayor's refusal were framed thus: "In the greater interest of the general public, and in order not to unduly disturb the life of the community, this Office... has temporarily adopted the policy of not issuing any permit for the use of Plaza Miranda for rallies or demonstrations during week days." The 2 justices felt that this did not meet the standard of the *Primicias* ruling that the mayor possessed *reasonable discretion* (emphasis supplied) to determine or specify the streets or public places to be used for the assembly in order to secure convenient use thereof by others and provide adequate and proper policing to minimizing the risks of disorder and maintain public safety and order. *Cf. Id.*, at 733.

150 G.R. No. 60294, April 20, 1982.

In *Reyes v. Bagatsing*,[151] petitioner retired Justice J.B.L. Reyes, on behalf of the Anti-Bases Coalition, sought a permit from the City of Manila to hold a peaceful march and rally on October 26, 1983 from 2–5 in the afternoon starting from the Luneta, a public park, to the gate of the U.S. Embassy two block away where a short program would be held. The petitioner had given an assurance to take all the necessary steps to ensure a peaceful march and rally. It appeared that 6 days before the march, the petitioner had not been informed of any action on his request. On October 25, the mayor answered whereby it turned out that the permit had been denied because of "police intelligence reports which strongly militate against the advisability of issuing such permit at this time and at the place applied for." More specifically, there were "intelligence reports affirming the plans of subversives/criminal elements to infiltrate and/or disrupt any assembly or congregation where a large number of people is expected to attend."[152] The mayor answered that a permit could be issued if the rally were to be held at the Rizal Coliseum or any other enclosed area where the safety of the participants themselves and the general public may be heard.

The Court granted the mandatory injunction prayed for on the ground that there was no showing of the existence of a clear and present danger of a substantive evil that could justify the denial of a permit. The Court subsequently expounded:

> "It is thus clear that the Court is called upon to protect the exercise of the cognate rights to free speech and peaceful assembly, arising from a denial of a permit. The Constitution is quite explicit. . . 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 a substantive evil that the state has a right to prevent,". . . It was not by accident or coincidence that the rights to freedom of speech and of the press were coupled in a single guarantee with the rights of the people peaceably to assemble and to petition the government for redress of grievances. All these rights while not identical, are inseparable. In every case, therefore, where there is a limitation placed on the exercise of this right, the judiciary is called upon to examine the effects of the challenged governmental actuation. The sole 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 legitimate public interest."[153]

The Court observed that there could be no legal objection absent the existence of a clear and present danger of a substantive evil, on the choice of Luneta as the place where the peace rally would start. Indeed, the use

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151 G.R. No. L-65366, 125 SCRA 553 (1983).
152 *Id.*, at 559.
153 *Id.*, at 568.

of streets and public places had from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.

The good faith of the mayor was, however, conceded since he could have acted on the belief that the *Navarro* and *Pagkakaisa ng Manggagawang Pilipino* cases called for application. Indeed, while the general rule is that a permit should recognize the right of the applicants to hold their assembly at a public place of their choice, another place may be designated by the licensing authority if it be shown that there is a clear and present danger of a substantive evil if no such change were made.

The same ruling was observed by the Court in the subsequent case of *Ruiz v. Gordon.*[154] Justice Teehankee in a separate opinion concurred thus: "The Chief Justice's opinion for the Court reaffirms and reproduces the guidelines in the *Reyes v. Bagatsing* case for the guidance of applicants to hold peaceful assemblies in public places.... It stresses that the right to peacefully assemble, speak out freely and petition the government for redress of grievances should be accorded the utmost deference and respect and is not to be limited, much less denied except under the clear and present danger standard, i.e., there must be clear showing of "danger, of a character both grave and imminent, of a serious evil to public safety, public morals, public health, or any other legitimate public interest — a substantive evil that the state has a right to prevent.[155]

The case of *Salonga v. Paño*[156] is quite significant for its unique and precedent-setting reference to the Brandenburg interpretation of the clear and present danger rule. The petitioner herein invoked his constitutionally protected right to life and liberty guaranteed by the due process clause, alleging that no prima facie case had been established to warrant the filing of an information for subversion against him. The Supreme Court sustained the petitioner's contention and held the evidence offered by the prosecution utterly insufficient. One of the evidence preferred by the prosecution to bolster its claim and to link the petitioner to proscribed activities of the Movement for Free Philippines or any other subversive organization mentioned in the complaint was an alleged opinion of the petitioner about the likelihood of a violent struggle here in the Philippines if reforms were not instituted. The Supreme Court held that the opinion constituted at the most a legitimate expression of freedom of thought and expression.[157] Noting that the primacy, the high estate accorded freedom of expression is a fundamental postulate of our constitutional system, the Supreme Court ruled:

> "In the case before us, there is no teaching of the moral propriety of a resort to violence, much less an advocacy of force or a conspiracy to organize the use of force against the duly constituted authorities. The

[154] G.R. No. L-65695, 126 SCRA 233 (1983).
[155] *Id.*, at 240-241.
[156] G.R. No. L-59524, 134 SCRA 438 (1985).
[157] *Id.*, at 458.

> alleged remark about the likelihood of violence unless reforms are instituted is not a threat against the government. Nor is it even the uninhibited, robust, caustic or unpleasantly sharp attack which is protected by the guarantee of free speech. Parenthetically, the American case of *Brandenburg v. Ohio* (395 U.S. 444) states that the constitutional guarantee 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. The words which petitioner allegedly used according to the best recollection of Mr. Lovely are light years away from such proscribed advocacy.[158]

In the case of *Malabanan v. Ramento,*[159] the Supreme Court reduced the penalty imposed by the school administration on some students who had held a rally in a different place and for a longer period than that specified in the permit issued them. Ruling that respect for constitutional rights of peaceable assembly and free speech are guaranteed students of educational institutions, the Supreme Court interposed: "Necessarily, their exercise to discuss matters affecting their welfare or involving public interest is not to be subjected to a previous restraint or subsequent punishment unless there be a showing of a clear and present danger of a substantive evil that the state has a right to prevent."[160] The Court conceded, however, that if the assembly is to be held in the school premises, permit must be sought from the administration who are, however, devoid of power to deny such request arbitrarily or unreasonably. The grant of such permits may contain conditions as to the time and place of the assembly in order to prevent disruption of classes or stoppage of work of the non-academic personnel. But "even if, however, there be violations of its terms, the penalty imposed should not be disproportionate to the offense."[161]

In the recent case of *Gonzalez v. Katigbak,*[162] the producers and director of the film "Kapit sa Patalim" objected to the classification thereof as "For Adults Only" for being without any legal and actual basis and for constituting an impermissible restraint of artistic expression.[163]

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158 *Id.,* at 458.

158 *Ibid.*

159 G.R. No. 62270, 129 SCRA 359 (1984). The following observation, however, is quite relevant: "Protesting within the confines of the school takes on a different dimension from protesting in the streets. Whereas in street protests, the conflict is between the right of the individual against the interest of the state, in school demonstrations it is between the right of the individual as student and the interests of the school administration and that of the state. Furthermore, the venue for protests is of a different nature. Streets and parks are public property while school premises, as is usually the case in the Philippines, may be private property. Another point to consider is the relationship between the student and the school which undoubtedly takes on a more structured and restrictive character than that between the individual and the state." Muyot, *Malabanan v. Ramento: Permissible Limitations on Student Demonstrations within School Premises,* 59 PHIL. L.J. 324 (1984).

160 *Id.,* at 372.

161 *Ibid.*

162 G.R. No. 6950, 137 SCRA 717 (1985).

163 Why the movies should be deemed part of the freedom of expression has been explained in Tañada and Fernando, *op. cit.,* note 18 at 848, thus: "That books,

In resolving the issue, the Court cited the importance of motion pictures as a medium for the communication of ideas and the expression of artistic impulse and applied the ruling in *Reyes v. Bagatsing* thus: Press freedom as stated in the opinion of the court "may be identified with the liberty to discuss publicly and truthfully any matter of public concern without censorship or punishment." This not to say that such freedom, as is the freedom of speech, is absolute. It can be limited if "there be a clear and present danger of a substantive evil that the State has a right to prevent."[164]

The Court opined that to avoid an unconstitutional taint on its creation, the power of the Board was to be limited to the classification of film. The power to exercise prior restraint is not to be presumed, it cautioned, rather the presumption is against its validity.[165]

The test, the Court emphasized, 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."[166]

ANALYSIS

The Danger Test — a Constitutional Standard

The danger test has become an accepted constitutional standard, and a preferred one it appears, in the resolution of freedom of speech controversies. It is favored over the dangerous tendency rule which has been criticized for being less than zealously protective of the constitutionally guaranteed freedom of speech. The danger test is perceived to best supply the criterion for determining permissible restriction of speech. Necessarily, such restriction must be narrowly drawn to allow for the most minimum of possible intrusions in the exercise thereof.

The Court has not been averse to the other test of balancing of interests which it has employed in a number of occasions. This test which is quite vulnerable to the charge of encouraging judicial abdication by sustaining

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newspapers, and magazines are published and sold for profit do 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."

[164] The Court found that there was abuse of discretion but that that since there were not enough votes to maintain that the abuse was grave, the petition for certiorari had to be dismissed.

[165] Gonzales v. Katigbak, *supra* at 724.

[166] *Id.*, at 725.

and rationalizing legislative determinations of policy and has not been as widely employed as the danger test.

The copycat reputation of the Philippines in American concepts and practices notwithstanding, our Supreme Court failed to apply the test until 1947 in *Primicias* or 28 years after it was first enunciated in the 1919 *Schenck* case. Of course, as earlier noted, the acceptance of the Holmes formula had been foreshadowed when Justice Laurel cited it in his sponsorship speech of his Draft on the Bill of Rights during the 1934 Constitutional Convention.

Recourse to the danger test has since then been made to sustain the right of free speech and the cognate right of peaceful assembly as against claims of dangers of a character both grave and imminent and of a serious evil to legitimate public interests. These claims of wide-ranging dangers have included those pertaining to public safety, the faith and confidence of the people in the government, the impartial administration of justice, independence of the electoral process and public morals.

Drawing the Line: Is Any Kind of Speech Absolutely Protected?

The absolute language of the Constitution notwithstanding, it is conceded that the demands of society must allow intrusions on speech. There is an emerging view, however, that with respect to the freedom as a means of making effective political participation in the democratic processes of government, they are well-nigh absolute. This kind of speech called "political speech" covers utterances having to do with the electoral process and activities of government or expression that concerns political issues or constributes to the understanding of political issues.[167] It covers "speech concerned with government behavior, policy or personnel, whether the governmental unit involved is executive, legislative, judicial or administrative, ... speech about how we are governed ... including a wide range of evaluation, criticism, electioneering and propaganda."[168] It may also be defined either as: 1) expression intended to contribute to the resolution of issues through political processes, 2) expression bearing on important public issues,[169] or 3) in short, speech that participates in and "serves to make the political process work."[170]

The view that political speech cannot be restricted has received strong support from some quarters in the United States notably Alexander Meikelejohn who insisted that the first amendment "does not forbid the abridging of speech" but that "it does not forbid the abridging of the freedom of speech."[171] An even stricter view is adapted by Professor Rork who pro-

[167] Scanlon, *op. cit., supra,* note 44 at 537.
[168] Be Vier, *op. cit., supra,* note 41 at 309.
[169] Buchanan, *Autonomy and Categories of Expression,* 40 U. PITT. L. REV. 551, 552 (1979).
[170] Be Vier, *supra* at 311.
[171] MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 19 (1948).

tested as attenuated analogies Meikelejohn's inclusion of education, philosophy, science, literature, art and public discussions of public issues among protected political speech. These speeches were to be his view within the outer limits of political speech and are not within the ambit of first amendment protection.[172] Justice Black's opinion is more to the point: "My view is, without deviation, without exception, without any ifs, buts or whereases, that freedom of speech means that government shall not do anything to people, or in the words of the Magna Carta, move against people, either for views they have or the views they express or the words they speak or write."[173]

In the Philippines, the above views have been thought to be "impressed with considerable merit." But aside from the dissenting view expressed by Justice Barredo in *Gonzales v. COMELEC,* Philippine jurisprudence does not make a stand one way or another. Even as Justice Barredo is committed to the view that the freedom of speech, of the press and of peaceful assembly and redress of grievances are absolute when exercised in relation to the right to choose and express belief regarding the qualifications of candidates for office, he makes a qualification thus: "If in the process, there should be in any manner any baseless attacks on the character and private life of any candidate or party or some form of inciting to public disorder or sedition, the offender can be rightfully held to court for libel or the violation of the penal provision on public order and national security, as the facts may warrant, but never can anyone, much less the state, have the power to priorly forbid him to say his piece."[174] This qualification, of course, dilutes much of the force in the opinion. The quality of absoluteness, after all, essentially means freedom from subsequent liability. It is conceded that prior restraint of any speech is *per se* objectionable and particularly so when imposed on speech involving sensitive issues of political wrong-doing or incompetence.[175]

There does not appear to be, therefore, a gradation of preference in the kinds of speech which are to be accorded constitutional protection.[176] This appears consistent with another view that would accord protection of free expression because it is an end in itself, an expression of the sort of society we wish to become and the sort of person we wish to be.[177] Freedom of speech is prized, in this way, for its social value, for its con-

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172 Scanlon, *supra* at 316.

173 FERNANDO, *op. cit.*, note 26 at 139, quoting Justice Black, A CONSTITUTIONAL FAITH 45-46 (1968).

174 Gonzalez v. Commission on Elections, G.R. No. L-27833, 27 SCRA 835, 924 (1970).

175 Franck and Bisen, *Balancing National Secrurity and Free Speech,* 14 N.Y. U. J. INT'L. L. & POL. 339, 345 (1982).

176 In Quisumbing, *op. cit., supra,* note 27 at 145, the author remarks: "Libelous, obscene, blasphemous and fighting words do not play an essential role in the exposition of ideas and properly belong to the private domain of a man's life. "They are thus not accorded any constitutional protection.

177 TRIBE, *op. cit.*, note 80 at 576.

tribution to the attainment of education, happiness and fulfillment.[178] This "self-determination/realization" school of thought is to be supported by former Chief Justice Fernando[179] who observes: "A clarification of the value furthered by freedom of expression may result in a greater consistency of decisions favorable to it.... Freedom of speech and of the press may be utilized to maximize the values of respect, of power and of enlightenment.[180]

Problem of Specific Characterization

The danger test is thought to require 3 essential elements as a prerequisite to a justifiable curtailment of speech, to wit: there must be danger declared illegal by the legislature and which it has the power to prescribe and penalize; the danger must be clear in that a reasonable expectation of the harmful consequence prohibited by law will occur; and the danger must be present or imminent in point of time. In the words of the Court in the recent case of *Gonzalez v. Kalaw*: "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-night inevitable."[181]

The above, of course, remains true to the classic wording of the test in the *Schenck* case. But the substance and underlying meaning of the test has not remained static, developing in an admittedly liberal fashion, culminating in the *Brandenburg* interpretation.

Reference to the rule in free speech cases has become almost automatic. The standard approach has been for the Court to simply assert that utmost deference must be accorded to the constitutional right of speech, that only a clear and present danger of a substantive evil serves to restrict it, and that in the presence or absence of proof thereof, then the freedom may or may not be restricted.

The application of the rule by the Court has sometimes been indirect (as in the *Hernandez* case), casual (as in the *LVN* case) and tangential (as in the *Vera* case). One wonders though whether the interpretation of the rule in these cases has kept in pace with the changing characterization or conceptualization of the rule. The *Brandenburg* ruling, it must be noted, combined the element of present danger with protection for abstract advocacy. Concern for this reinterpretation is not merely academic but bears great importance in the practical

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178 Richard, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1, 4 (1951); BECKER, MODERN DEMOCRACY 26-27 (1941).

179 Gorgonia and Goyena, *op. cit.*, note 87 at 29.

180 Fernando and Fernando, *op. cit.*, note 87 at 29.

181 Gonzalez v. Commission on Elections, *op. cit., supra*, note 169 at 924.

application of the rule. Under *Schenck,* which the Philippine Supreme Court has frequently cited, any speech whether incitement or abstract advocacy which posed a present danger or evil that Government has a right to prevent could be restricted.[182] In *Yates,* only incitement could be proscribed. The incitement, however, could refer to both a present or imminent danger and even danger at some future time. In *Brandenburg,* only incitement posing a present and imminent danger may constitutionally be limited.

There is clearly a need for the Supreme Court to enunciate a definitive statement of the character and substance of the clear and present danger rule, that is, to clarify and specify its elements in the light of conceptual developments. Mere automatic application of the phrase "clear and present danger" cannot suffice if a principled interpretation of the constitutionally protected freedom of speech is to be secured. Indeed, it is not certain whether Philippine jurisprudence has veered away from the traditional *Schenck* or *Gitlow* formulation of the rule. The casual, even cursory, reference of the *Brandenburg* ruling in the *Salonga* case does not warrant an inference to that effect. Significantly, the Court took note that the words used by the petitioner therein were *"light years away* from such type of proscribed advocacy." One is wont to speculate that the Supreme Court would have ruled differently if the utterance in controversy had not been categorized as mere political discussion but rather had bordered on such type of proscribed advocacy. In any event, it is submitted that an interpretation of the rule akin to the *Brandenburg* formulation would best serve the purpose of sustaining the primacy of freedom of speech in our constitutional system and would be consistent with the unswerving attitude adopted by the Court of according utmost deference and protection to the freedom.

The Danger Test and "Subversive/Seditious Speech"

The above discussion assumes greater significance in the context of the problem of "subversive" or "seditious" speech.

The Court has been slow in adopting the test especially in cases involving seditious words where it is said the test has particular application.[183]

Thus, in the series of 1932 cases involving prosecution for sedition, the test utilized, although not explicitly in some cases, was the dangerous tendency test. The rationale for the decisions was culled from the *Gitlow* ruling which had excepted from the purview of the danger test those cases involving laws proscribing language of a specific character. There would be deference in this situation of a previous legislative determination that danger of a substantive evil would result from the speech.

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182 Lynd, *op. cit., supra,* note 69 at 159-160.

183 Quisumbing, *op. cit., supra,* note 27 at 145.

184 For example, in the *Evangelista* case, the conviction of the defendant was premised on a violation of section 8 of Act 292 reading: "Every person who shall utter seditious words or speeches. . . ."

Thus, the Supreme Court consistently upheld the validity of the law that directly proscribed the utterance of certain speeches.[184]

Significantly, after using the danger test in the *Primicias* case, it reverted to the dangerous tendency rule in *Espuelas* where the Court sustained the conviction of the defendant for inciting to sedition.

A clear exception to this trend was the *Hernandez* decision where mere active advocacy of Communistic principles (as opposed to advocacy of action) was held not to be punishable. Of course, the danger test was not exactly mentioned in this case, its employment being deducible only by implication. The *Ferrer* case decided 8 years later, however, appears to have overriden this case, the Court in upholding the conviction of the defendant observing that whatever interest in freedom of speech is infringed by the prohibition against having membership in the Communist Party is so indirect and so insubstantial as to be clearly and heavily outweighed by the overriding consideration of national security and the preservation of democratic institutions in this country. This appears to be the last case principally dealing with a law that purports to proscribe specific utterances and it does not augur well for future cases dealing with laws restricting specific utterances. Whether the Court will in the future resort to the danger test in these cases or avoid use thereof by invoking the *Gitlow* exception remains to be seen. Of course, former Chief Justice Fernando, in reaction to the *Espuelas* decision would comment: "Only adherence to the dangerous tendency rule would explain the outcome. It is a cause for rejoicing that six years later in the Anti-Subversion Act (Rep. Act No. 1700 (1957), the punitive measure was justified by the "continued existence and activities of the Philippines constituting a clear, present and grave danger to the security of the Philippines." The *Espuelas* decision, he concluded, is thus no longer possessed of any authoritative force, and it would likewise follow that the earlier cases of *Evangelista, Nabong* and *Feleo* cannot survive."[185] The optimism thus expressed does not appear justified considering the manner by which the cases dealing with the problem of seditious speech have been resolved. Neither has the fact that the law invoked a clear and present danger serve to justify the Anti-Subversion Act such invocation being after all, ony a prior determination by the legislature that the acts and utterances prescribed therein have passed the standards of the test. It remains for the judiciary, and it is its duty to so determine, in proper cases, whether the test has indeed been met.

As it is, it would be accurate to say that Philippine jurisprudence does not support a proposition that the clear and present danger rule holds sway in this area of speech.

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185 FERNANDO, *op. cit.*, note 26 at 152.

The problem of characterization becomes even more pertinent in view of the language employed in present laws[186] on sedition and subversion which would allow content-restrictions of speech and punishment on the basis of the dangerous tendency thereof to create a danger to the case. The observation that the Supreme Court in its "avowed abhorrence" for radical doctrines in politics and economics is likely to condemn such doctrines irrespective of the likelihood that the exposition and advocacy of such doctrines would create a clear and present danger,"[187] bears continuing significance in so far as seditious/subversive utterances are concerned. In addition, since Philippine cases which have favored the *Gitlow* approach have not been expressly overruled, it would not be presumptuous to expect continuing use of the dangerous tendency rule in future cases.

The Danger Test and Regulating Time, Place, and Manner of Speech

The underlying rationale for the way cases dealing with peaceful assembly have been resolved appears to be general abhorrence for previous restraint by requiring that a license first be secured before exercising the right.

It has been observed that the cases exemplified by *Primicias, Villegas* and *Bagatsing,* "involved the clear and present danger to include events or circumstances thoroughly extraneous from the speech itself and from the probable effects of such speech."[188] The dangers of public order being disrupted, the opinion continues, were considered to be brought about by the sole fact of assembly in a public place. "Now if the dangers feared could not come from the speech itself, the Court could have arrived at the same conclusions without resort to the clear and present danger test." The older doctrine of disallowing prior restraint or the balancing test could have been used instead. The opinion concludes: "Under Philippine jurisprudence, therefore, the clear and present danger rule may be said to have been cited only as a mere obiter dictum, not part of binding jurisprudential law. Or even if the rule was indeed applied, it was applied to the wrong set of circumstances."[189]

The opinion raises some valid points but is not entirely accurate. Thus, for example, the danger test has been applied where, as in the *Primicias* case, the nature of the speech to be uttered was such as would engender breaches of the peace and public order. The latter part of the opinion also appears to make a too sweeping generalization that is not borne by jurisprudence. It is true, however, that in the later cases of *Villegas* and *Bagatsing,* what was given importance was not so much the kind and nature of the speech to be uttered and the import thereof but the sole act of assembly.

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186 Pres. Decree No. 1834, sec. 6 (1981); Pres. Decree No. 1835, sec. 4 (1981); See also Pres. Decree No. 1974 and Pres. Decree No. 1975.

187 Fernando and Fernando, *op. cit., supra,* note 15 at 812.

188 Gorgonia and Goyena, *op. cit., supra,* note 87 at 17.

189 *Ibid.*

Moreover, as previously noted, the danger rule has not been applied in cases where the exercise of free speech has been priorly restricted by legislation the terms of which specifically restrict the permissible content of speech and attach penalties as well as criminal liability for violations thereof. On the other hand, the application of the danger test to the right of peaceable assembly has become well-settled. It has been rightly observed that this difference in treatment can lead to confusion if not anomalous situations where "a rally may be allowed under conditions where no danger is present or imminent yet the moment the speakers open their mouths to speak, they can be arrested because of the dangerous tendency of the words used."[190]

That prior restraint of a constitutional right is objectionable and cannot be allowed is a cardinal postulate.[191] Thus, in the *Primicias* case, the power of the mayor to grant permits for holding assemblies was held not to be discretionary. The applicant has a right to a permit subject only to the latter's discretion to determine or specify the streets or public places to be used for the purpose. Concededly, this conforms with the accepted view that government action simply directed to the regulation of the place and manner of expression is acceptable and that the reasonable basis rule can constitutionally apply as a standard thereto.[192] Narrowly tailored regulations of speech activities in public forum cannot be seriously objected to."[193]

Indeed, protection for speech activity in public places has received the full approval of the Supreme Court in *Reyes v. Bagatsing*. At the same time, the Supreme Court has affirmed the right to regulate the time, manner and place of speech activities and the use of the public forum with the qualification that such regulation must not amount to abridgement or denial of the freedom of speech and assembly. This conforms to the traditional distinction between "restrictions of the mind" and "regulations of modes of expression." The latter is presumed constitutional as long as it does not unduly obstruct the flow of ideas such that when it is keyed to the content or subject matter of the speech, it must be evaluated by the same criteria

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190 Gorgonia and Goyena, *supra*, at 20.

191 This was in fact the approach adopted in the joint opinion of Justices Castro and Fernando in the *Navarro* case, to wit: (T)he many decisions of this court over the last 30 years, (hold) that a law subjecting the exercise of the First Amendment Freedom to the prior restraint of a license with no narrow, objective, and definitive standards to guide the licensing authority is unconstitutional.

192 TRIBE, *op. cit.*, note 80 at 608; FOX, FREEDOM OF EXPRESSION 5 (1981); But see Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981), where the author points out the difference between content-based and content-neutral regulations, the former being subject to a strict form of judicial review and the latter to a more limited examination. He theorized that the distinction is based on a misconception that 1) the interests and value of free expression are necessarily more seriously threatened by governmental regulations based on content; and 2) it is always possible to draw a conceptual difference between the 2 kinds of regulations. He concludes that the distinction must be abandoned.

193 Reyes v. Bagatsing, *op. cit., supra*, note 152 at 563.

thought to apply to the former. In other words, in the case of content-based restrictions, the clear and present danger rule applies.[194] Curiously, however, a reverse situation appears to exist in the Philippines. It is to the second type of restriction — "regulation of modes of expression" where the dangerous tendency rule may as a general rule apply — that the danger test has been consistently invoked. Parenthetically, where the restriction addresses itself to the mind being content-based, the less stringent dangerous tendency rule has been applied by our Supreme Court.

Philippine jurisprudence has always treated freedom of speech and peaceable assembly as cognate rights. Verily, to the extent that freedom of speech is diluted by content-based restrictions and those regulating modes of expression, so does the efficacy to the right of assembly suffer. There is no constitutional basis it would appear for the artificial difference in treatment between the 2 kinds if restrictions thus presented. In both, the clear and present danger rule should logically hold way.

Indeed, within the realm of possible abridgements of free expression, restrictions based upon content are seen to be particularly disturbing: 1) because they distort the ordinary workings of the "market place of ideas" leaving the public an incomplete and inaccurate perception of the social and political universe and undermining the two principal purposes of free speech: the search for truth and the process essential to the effective operation of a self-governing society, by which the citizen makes for himself critical decisions on matters of public policy; 2) because it is per se impermissible for government to restrict speech because it disapproves of the message conveyed; and 3) because it has long been recognized that the system of free expression by enabling the individual person to make his own decisions — whether political, social or moral — serves in a significant way to further personal growth, self-realization and the development of individual autonomy.[195]

The Danger Rule and the Role of the Judiciary

For a principled application of the danger rule, it is essential that clear standards exist for delineating the boundaries between dissent which is legal and incitement to disorder which is not.

The determination must certainly not be left to the legislature's sole discretion if the right to free speech is not to be unduly curtailed. This is to say that it remains for the judiciary to ultimately make that determination. This would necessarily entail repudiation of the traditional *Gitlow* approach. Indeed, "to permit temporal majorities to abridge freedom at will by refinement of legislative craftmanship ... is judicial

194 Antieau, *op. cit., supra,* note 61 at 816.
195 Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions,* 46 U. CHI. L. REV. 81, 101-104 (1978).
196 Antieau, *op. cit., supra,* note at 811, 816.

abdication utterly inconsistent with the role and responsibility of the judiciary to our constitutional society."[196]

Since the legislative process does not demand a link between the lawmaker's decision and the factual premises[197] and the political incentive to initiate and carry out an effort to repeal repressive laws against unpopular and annoying forms of speech as a rare and quixotic undertaking,[198] it remains for the court to review and determine the existence of danger, the concept of which shifts through time.

"History", it is said, "teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and either assumes primary responsibility in choosing between competing political, economic and social pressures"[199] or simply defers or holds as conclusive the executive/legislative determination thereof. The judiciary must in consonance with our democratic tradition hold fast to its task of safeguarding the rights and freedoms embodied in the Constitution. The task is concededly difficult for well has it been said that the Court is the "ultimate locus of the nation's political self-consciousness and self-justification,"[200] holding itself open to continuing intrusions as it inevitably responds to changes and developments in society itself. After all, the Supreme Court even as it performs the role of being the final interpreter of the Constitution, is only made up of mere mortals prey to the ordinary prejudices and prevailing philosophies of the day.

The development of rules and standards by which the judiciary may consistently be guided thus assummes great importance. "Categorical rules," one author comments, "by drawing clear lines are usually less open to manipulation because they leave less room for the prejudice of the fact-finder to insinuate themselves into a decision" and "tend to protect the system of free expression better because they are more likely to work in spite of the defects in the human machinery on which we must rely to preserve fundamental liberties."[201]

The clear and present danger rule is one such categorical rule that the judiciary can and should employ in all cases involving challenges to the constitutionally protected freedom of speech as a principled, enlightened and consistent standard for determining the boundaries and limits to restrictions thereon.

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[197] Linde, *op. cit., supra,* note 40 at 1180.
[198] *Id.,* at 1181.
[199] Corwin, *op. cit., supra,* note 47 at 359.
[200] Nagel, *The Supreme Court and Political Philosophy,* 56 N.Y. U. L. REV. 519 (1981).
[201] TRIBE, *op. cit., supra,* note 80 at 583-584.

Concluding Remarks

The current status of the clear and present danger rule as a preferred constitutional standard for limitation on freedom of speech would appear to be well settled with the qualification that its application with respect to specific utterances that the legislative body has itself proscribed appears of doubt. The question of whether it is intrinsic content or extrinsic circumstances that determine application of the test remains for future resolution.

It is admitted however, that the danger test should be applied to all prosecutions for expression, any automatic deference to legislative determination being inconsistent with "historical purpose, the structure, our constitution, successful functioning of a democratic-representative government and the natural rights of our people."[202]

It is unfortunate but a fact of political reality nonetheless that incumbent governments are particularly sensitive to criticism and even the slightest deviations from its established ideology. Free exchange of ideas, after all, is seen to be necessary for the existence of a free society; the only way to accomplish any sort of social change without resorting to violence is by recourse to the power of persuasion.[203]

Permitting criticism increases the legitimacy of government by affording justification for policies and minimizing the risk of misunderstanding by citizens. While it is in the nature of a political right such as freedom of expression that no government can be forced to recognize it merely by logic of the need for the right, in most cases free discussion is essential to the legitimacy of modern governments.[204] Neither can a government harness its force to forceably maintain and perpetuate an ideological prespective for this would clearly constitute an invasion upon the sphere of intellect and spirit[205] which it is the purpose of the freedom of speech guaranteed by our constitution to reserve from all official control.

The repudiation of a dogmatic attitude and the nurturing of a questioning, inquisitive and even demandingly idealistic disposition are prominent hallmarks of a democracy. Indeed, true democracy is characterized by its tolerance for challenges to even its most fundamental tenets. It is the rudimentary right of the people in a democracy upon whom all sovereignty resides to change their government. It is their legal and moral prerogative to argue, if they so desire, that democracy give way to authoritarian rule or political

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202 Antieau, *op. cit., supra,* note 61 at 816.

203 Berry, *The First Amendment and Law Enforcement Infiltration of Political Groups,* 56 SN CALIF. L. REV. 207, 212 (1982).

204 Martin, *On a New Argument for Freedom of Speech,* 57 N.Y.U. L. REV. 930 (1982).

205 Bloom, *Unconstitutional Government Speech,* 15 SAN DIEGO L. REV. 815, 816 (1978).

dictatorship. They may even try to win over, if they can, "a majority of the electorate to one or the other of those anti-democratic theses."[206]

Apprehension that the incursion of foreign and communistic-oriented ideologies will overrun our so-called "democratic tradition" cannot warrant a muzzling of freedom to speech which is at the very core of the tradition. For "if in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant force of the community, the only meaning of free speech is that they should be given their chance and have their way."[207]

[207] Dissenting opinion of Justice Holmes in *Gitlow v. New York*, 268 U.S. 652, 673 (1925).

[206] LAMONT, FREEDOM IS AS FREEDOM DOES, 87 (1956).