

HOW CLEAR IS THE “CLEAR AND PRESENT DANGER” TEST

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Punishing someone for falsely shouting “Fire!” in a crowded movie theater is not a complicated restriction of the right to freedom of speech. However, the “clear and present danger” test, which employs this example, has proved to be anything but simple. Established in the landmark case *Schenck v. United States* (1919) by Justice Oliver Wendell Holmes, the clear and present danger rule was the earliest freedom of speech doctrine established by the Supreme Court.² Until then, judicial rulings on freedom of speech were rare; the doctrine of *laissez faire* was dominant when it came to speech.³ With the passage of the Espionage Act of 1917, the U.S. entry into World War II, and the institution of the draft in June 1917, the stage was set for a First Amendment confrontation.

In *Schenck v. United States*, the Supreme Court upheld Charles Schenck’s conviction. Mr. Schenck sent pamphlets urging men who had been drafted to oppose the draft, thereby violating the Espionage Act and obstructing the armed force-

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2 Martin Shapiro, *Clear and Present Danger*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, 426 (Leonard W. Levy and Kenneth L. Karst ed., 2000).

3 Bernard A. Petrie, *Constitutional Law: Civil Rights: First Amendment Freedoms: Reformulation of the Clear and Present Danger Doctrine*, 50 Mich. L. Rev. 451, 453 (1952).

es' recruiting service. This conviction did not violate his free speech rights because his words in this specific circumstance were "of such a nature as to create a clear and present danger [and would]bring about the substantive evils that Congress has a right to protect."⁴ Only eight months later, the interpretation of the clear and present danger test was called into question in *Abrams v. United States*, when the Court, citing Holmes' test, upheld the convictions of Abrams and four other Russian immigrants, while Justice Holmes himself, joined by Justice Louis D. Brandeis, dissented.⁵ In fact, throughout the twentieth century, the clear and present danger doctrine has failed to serve as an objective test for determining when free speech should be restricted due to judicial disagreement over how to define the clear and present danger doctrine, questions concerning its use as a universal test, and the question as to whether freedom of speech is fundamentally individualistic or society-focused.

The first obstacle to crafting an objective test to determine the appropriateness of restricting free speech was the Court's failure to adequately define and implement the clear and present danger test. In *Whitney vs. California* (1927), Justice Brandeis stated in his concurring opinion, "This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech."⁶ In general, the clear and present danger test, and the idea behind it, was accepted by the courts and judicial scholars, some judges using it actively as an actual test. Others used it to justify their decisions, as "a peg onto which Court decisions [can be] hung after a decision [has] been reached by other avenues."⁷ Most justices acknowledged

4 Schenck v. United States, 249 U.S. 47 (1919).

5 CLEAR AND PRESENT DANGER, IN WEST'S ENCYCLOPEDIA OF AMERICAN LAW, 431 (Jeffrey Lehman and Shirelle Phelps ed., 2005).

6 Whitney v. California, 274 U.S. 357 (1927), in 9 CONSTITUTIONAL INTERPRETATION 787, (Craig R. Ducat, 2009).

7 CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION 789 (9th ed. 2009).

that if an utterance could be classified as a clear and present danger, whatever the reasoning that led to the classification, then it should be restricted. Some judges, however, attacked the rule for allowing too broad an exception to First Amendment rights (as in the case of the “absolutists” led by Alexander Meiklejohn) or for being too rigid in protecting speech that could be opposed to the state’s interests (argued by Justice Felix Frankfurter and others who favored judicial self-restraint).⁸ This spectrum of opinion served as the context for the subsequent debate over the danger test.

In order to examine the difficulty of establishing a well defined test, it is necessary to study the evolution of Holmes’s original test as the courts have applied it to either restrict or allow speech in diverse circumstances. As a result of *Schenck v. U.S.*, the Court upheld more convictions under the Espionage Act of 1917 based on the clear and present danger doctrine. Starting with *Abrams v. U.S.*, however, Holmes and Brandeis began to almost always take dissenting opinions in free speech cases. Holmes disagreed with the ways in which the Court was applying the test he had crafted.⁹

The *Abrams* case is significant because the dissenting justices provide a much more detailed explanation of their views of the clear and present danger test than they did in *Schenck*. As David M. Rabban points out, “Many scholars have also observed that Holmes’ dissent in *Abrams v. United States*, and not his majority opinion in *Schenck*, marked the first time he advocated meaningful judicial protection of speech.”¹⁰ For example, in an attempt to clarify the rule that he believed was being wrongly interpreted, Holmes emphasized that intent must be present.¹¹ Holmes also sought to correct what he believed was an overly broad application of the test. He stressed that the seriousness and imminence of the threat

8 SHAPIRO, *supra* note 1, at 426-427.

9 *Abrams v. United States*, 250 U.S. 616 (1919), in 9 CONSTITUTIONAL INTERPRETATION 785, (Craig R. Ducat, 2009).

10 David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 Yale L.J. 514 (1981).

11 DUCAT, *supra* note 6, at 785.

were twin prerequisites that must be present before the court should restrict free speech. Holmes also wanted to apply the absolutist perspective. He wrote, "We should be eternally vigilant against attempts to check the expression of opinions that we loath . . . 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."¹²

Disputes arise as to whether Holmes himself always held this plain definition of the danger rule. Rabban argues that some of Holmes' letters to other judges and intellectuals reveal otherwise. He also maintains that Holmes and Brandeis were influenced by Zechariah Chafee, a Harvard law professor with whom Holmes exchanged letters and who published a work strongly advocating the protection of free speech between the Court's ruling on *Schenck* and its ruling on *Abrams*.¹³ From this point on, "Holmes and Brandeis elevated 'clear and present danger' to constitutional significance and clung to it as the doctrinal peg for libertarian values it did not express when Holmes first used the phrase."¹⁴ A majority of the Court never officially adopted Holmes and Brandeis's definition of the test.

In the next landmark free speech case, *Gitlow v. New York* (1925), the Court's prevailing definition of the danger test shifted even further away from the Holmes/Brandeis view articulated in the *Abrams* dissent. With the two justices again dissenting, the Court upheld the conviction of Benjamin Gitlow on the basis of a New York law; they were convicted for distributing leaflets advocating the overthrow of the government.¹⁵ Justice Edward Sanford, representing the Court, agreed with Holmes and Brandeis that the leaflets had not yet incited any criminal action, but he argued that "a single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration."¹⁶ This

12 *Id.* at 787.

13 Rabban, *supra* note 9, at 591.

14 *Id.* at 594.

15 SHAPIRO, *supra* note 1, at 426.

16 *Gitlow v. New York*, 268 U.S. 652 (1925), *in* 9 CONSTITUTIONAL INTERPRETATION 791, (Craig R.

ruling broadened the clear and present danger test to restrict utterances that violated statutes that prohibited a specific type of *utterance*, in addition to utterances that violated statutes prohibiting a particular type of *conduct*, as the test had previously done in *Schenck* and *Abrams*.¹⁷ The question now became whether particular statements or publications were “abstract doctrine[s] or academic discussion[s] having no quality of incitement to any concrete action” as these were protected speech, or whether those statements or publications had “language advocating, advising or teaching the overthrow of organized government by unlawful means.”¹⁸ Holmes strongly disagreed, again emphasizing that words not associated with actions could not be punished, no matter how offensive the words were.¹⁹

It was also in this case that the imminence requirement was removed from the Court’s application of the clear and present danger test. Introducing an idea that would be developed more fully in *Dennis et al. v. U.S.* (1951), Justice Edward Sanford wrote in his *Gitlow* opinion:

It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency.²⁰

Ducat, 2009).

17 *Clear and Present Danger Re-Examined*, 51 COLUM. L. REV. 102 (1951).

18 DUCAT, *supra* note 6, at 790.

19 SHAPIRO, *supra* note 1, at 426.

20 DUCAT, *supra* note 6, at 791.

Rather than operating under the premise that free speech was an undeniable civil right, the justices were more inclined to give priority to public peace and safety. This “bad tendency” test included the “clear danger” criteria but left out the “present danger” requirement.²¹ This shifting definition of the rule made it difficult for the danger test to be used as an objective standard.

During the 1930s and 1940s, however, the Court provided a temporary shift towards the more absolutist view of Holmes and Brandeis, which came to be called the “preferred freedoms” approach, since First Amendment freedoms were accorded a “preferred position” during this time.²² One significant development during this period was a type of form-content distinction with regard to what utterances the law could restrict. A *Columbia Law Review* article published in 1951 observed that in the period between the late 1930s and 1951 (the next major shift in the Court’s understanding of the danger test), the Supreme Court struck down every piece of legislation specifically directed against the content of an utterance. On the other hand, legislation that restricted the form of an utterance and only indirectly suppressed its content, met with a more positive reception.²³ This shift in when and how speech might be curtailed further complicated the objectivity of the clear and present danger test.

The nation’s political and social environment changed again after World War II. The fear of communism revived Justice Sanford’s reasoning in *Gitlow*. Embodying this new period of judicial free speech interpretation, the Court’s 1951 decision in *Dennis et al v. United States* established what has been called the “clear and probable danger” test.²⁴ In the late 1940s and early 1950s, the main actor in the free speech debate became a group, namely the American Communist Party,

21 SHAPIRO, *supra* note 1, at 426.

22 *Clear and Present Danger Re-Examined*, *supra* note 16, at 103.

23 *Id.* at 99-100.

24 Petrie, *supra* note 2, at 456.

rather than an individual and the speech in question was secret conspiracy rather than overt, street-corner speeches that could be easily monitored.²⁵ Holmes's clear and present danger test seemed, for many, to be insufficient to protect against this new danger. The Supreme Court adopted Circuit Court Judge Learned Hand's solution—to first get rid of the imminence requirement, as *Gitlow* had done to some extent. As Martin Shapiro explains, "The probable danger test held that if the anticipated evil were serious enough the imminence requirement might be greatly relaxed."²⁶

In justifying his decision, Justice Fred Vinson wrote in the *Dennis* opinion that Justices Holmes and Brandeis "were not confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government."²⁷ Holmes believed that any interval of time between the advocacy of dangerous ideas and resulting action allowed for free speech and public discussion to counter them.²⁸ This was why imminence—the lack of time for reasoned counter arguments—was so important to his test. The problem with the *Dennis* case, which convicted eleven communist leaders for advocating the overthrow of the government by force and violence, was that since the speech was secret and not public, there was not an opportunity for public discussion.²⁹ Following similar reasoning to *Gitlow*, Shapiro said that "it is one thing to wait until the arsonist has struck the match [at which point he can still be prevented] and quite another to wait until the revolution is ready to attack the police stations" when the imminent danger is too advanced to stop.³⁰

The Court, however, went slightly further than the *Gitlow* Court by establishing a sort of "balancing test" between the benefits of allowing free speech in

25 DUCAT, *supra* note 6, at 800.

26 SHAPIRO, *supra* note 1, at 427.

27 Petrie, *supra* note 2, at 457. (citing *Dennis, et al. v. United States*, 341 U.S. 494 (1951).

28 *Clear and Present Danger Re-Examined*, *supra* note 16, at 105.

29 SHAPIRO, *supra* note 1, at 427.

30 SHAPIRO, *supra* note 1, at 428.

a given situation and the potential consequences of that speech to governmental interest, national security, and societal interest. Judge Hand described this balancing test: "In each case, [the courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."³¹ Again, the Court's reinterpretation of the clear and present danger test revealed a more utilitarian judicial philosophy. It sought to curb the greater evil while recognizing that neither limited speech nor security threats are desirable, rather than holding to an objective standard that would determine if and when speech should be restricted.

However, even this judicial construct of a danger test was not a permanent standard. In 1969, eighteen years after *Dennis*, the Court returned to an almost Holmesian danger test, although the "clear and present" language was absent. The ruling to overturn the conviction of a local Ku Klux Klan leader in *Brandenburg v. Ohio* (1969) brought back the prerequisite of imminence of danger as well as the direct connection between speech and action before speech could be punished. According to the Court, "The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."³² Under this decision, it was not enough for a communist party leader to covertly encourage people to revolt against the government, but the Court must find his words to be "likely to produce" unrest or revolt before his free speech can be restricted. For all practical purposes, this case revealed a shift in the Court to the more absolutist view of Holmes and Brandeis expressed in their *Abrams* dissent.

Although the clear and present danger test had been reestablished in spirit, the *Brandenburg* opinion did not seek to revive Holmes's explicit danger rule. Jus-

31 Petrie, *supra* note 2, at 456. (citing *Dennis, et al. v. United States*, 341 U.S. 494 (1951)).

32 *Brandenburg v. Ohio*, 395 U.S. 444, (1969), in 9 CONSTITUTIONAL INTERPRETATION 804, (Craig R. Ducat, 2009).

tices Hugo Black and William Douglas, the greatest proponents of Holmes's clear and present danger test, ironically abandoned it in their concurring opinions. Black wrote, "The clear and present danger doctrine should have no place in the interpretation of the First Amendment."³³ Justice Douglas agreed and added, "When one reads the opinions closely and sees when and how the clear and present danger test has been applied, great misgivings are aroused."³⁴ This statement was a complete reversal of Justice Douglas's opinion when he dissented in *Dennis*, immediately after which the *Michigan Law Review* reported that "Justice Douglas would retain the clear and present danger test intact even for a great evil."³⁵ Shapiro argues that both Black and Douglas reasoned that the test had been so corrupted and misused that it no longer retained any power to protect speech.³⁶ Whether or not Shapiro was correct, this final abandonment of the test itself by those who most firmly held to its ideals was perhaps the most compelling evidence for its apparent past failures and unlikely future ability to serve as an objective test for identifying restricted speech.

The judicial disagreement over the definition and implementation of the test finally ended with the abandonment of the test itself in the late 1960s as a viable method of discerning what types of speech to limit; some have argued that the danger doctrine failed to serve as an objective standard because the test was never meant to be universally applied. Wallace Mendelson proposed that, "inspired by the brilliant rhetoric in which Holmes and Brandeis expressed their thoughts, we have tried to make a universal rule out of a test designed for very limited application."³⁷ The danger test, he added, was not universal in the sense of being equally applicable to all freedom of speech cases. It was not relevant to requiring

33 *Id.* at 805.

34 *Id.*

35 Petrie, *supra* note 2, at 459.

36 SHAPIRO, *supra* note 1, at 427.

37 Wallace Mendelson, *The Degradation of the Clear and Present Danger Rule*, 15 J. POL. 349, 349-350 (1953).

children to salute the flag or teachers to teach in English.³⁸ The clear and present danger test, according to Mendelson, only applied to cases of political subversives, like *Schenck v. U.S.*, and the courts had generally applied it as such.

Is the clear and present danger test meant to be universally applied to all political subversion free speech cases? Fred Ragan argued that Zechariah Chafee was displeased with the fact Justice Holmes did not apply the test universally even within this more narrow context, specifically in *Debs v. U.S.*³⁹ Many Justices who decided cases such as *Gitlow* and *Dennis* applied their own slightly altered standards not because they disagreed with the basic principles of the clear and present danger test, but because they believed the danger doctrine failed to cover all the circumstances of the case. Justice Robert Jackson, for example, accepting the decision in *Dennis*, wrote concerning the danger test, "I would save it unmodified, for application as a 'rule of reason' in the kind of case for which it was devised."⁴⁰ But after discussing the foresight, speculation, and "prophesy" necessary for determining if communist propaganda presented a clear and present danger, he concluded, "The authors of the clear and present danger test never applied it to a case like this, nor would I."⁴¹

Mendelson argues further that the clear and present danger test is too narrow and impractical to be applied universally; this is why the Court never accepted it as a universal standard for all politically subversive speech. To have done so would often have led to results too indiscriminating even for the most libertarian members of the bench. To insist that imminent danger is the sole basis for restricting utterance is to hold that incitement to crime is the only abuse of free expression.⁴² It is interesting that Mendelson attributes the fifty years of confusion over

38 *Id.* at 350.

39 Fred D. Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. Amer. Hist. 42 (1971).

40 DUCAT, *supra* note 6, at 802.

41 *Id.*

42 Mendelson, *supra* note 36, at 351.

free speech cases to the lack of an objective standard; the clear and present danger doctrine was not and cannot be applied as a universal test.

The divergence of views over the nature of free speech itself has also contributed to the failure of the clear and present danger test to act as an objective judicial standard. Since the adoption of the First Amendment, freedom of speech has been considered both an individual right and a societal benefit. Seemingly, most contemporary Americans fail to consider this distinction, for as Mendelson argues, "We have tended to emphasize the individual, at the expense of the social, interests which the First Amendment must have been designed to protect."⁴³ Freedom of speech is not simply an individual civil right; it is crucial to the essence of democratic self-governance. It enables citizens to choose from all available ideas and for truth to prevail.⁴⁴ As the *Columbia Law Review* explains, "Freedom of expression is designed to provide the framework for an unfettered interchange of ideas, so that 'vigorous enlightenment' may bring about peacefully those political and social changes responsive to the desires of the people."⁴⁵

This social dimension of free speech significantly increased the difficulty in defining and applying any judicial test on this subject in an objective way, especially one as simple and straightforward as the danger test. Discretion has therefore been left to the courts to protect free speech in such a way as to both uphold an individual's civil rights and to defend its role as a foundation of democratic society. In *Schneider v. State* (1939), the Court described this balance well: "As cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of rights."⁴⁶ Justice Frankfurter agreed when he wrote in *Denis*:

43 *Id.* at 350.

44 *Id.* at 352.

45 *Clear and Present Danger Re-Examined*, *supra* note 16, at 98.

46 *Clear and Present Danger Re-Examined*, *supra* note 16, at 102. (citing *Schneider v. State of New Jersey*, 308 U.S. 147, (1939).)

The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.⁴⁷

It is not surprising that the history of the clear and present danger test is so convoluted; the courts have more to consider in free speech and politically subversive cases than the individual's right to say what he or she wants and the security of the nation. Courts must also take into account the social benefits of free speech, striving to find a middle ground between restricting free speech too much and allowing potentially dangerous speech, both of which can harm society. With maintaining this delicate balance as their goal, the Supreme Court has failed to find the danger test to be an objective and universal standard for describing the full extent of dangerous speech.

Differing judicial opinions over how to define the danger test, general agreement that the test cannot be applied universally, and the societal aspects of freedom of speech all reveal that Holmes's clear and present danger test is not and was not intended to be an objective standard with which to judge what speech should be restricted. The test has proved too malleable, and the justices concluded that the doctrine does not adequately protect against First Amendment violations.⁴⁸ Holmes' test has provided the foundation for many doctrines and rulings that have sought to uphold freedom of speech while protecting the nation from political subversives. It is impossible to capture the complexity of this concept by simply using the example of a false fire alarm; Justice Holmes sought to construct a situational test to govern an issue for which no objective standard can be established.

47 Petrie, *supra* note 2, at 457. (citing *Dennis, et al. v. United States*, 341 U.S. 494 (1951)).

48 DUCAT, *supra* note 6, at 803.